TURNING BACK THE CLOCK: THE COOK ISLANDS AMENDMENT ACT

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The law of the Cook Islands is made up not only of law made by the parliament and courts within the country and law from New Zealand with which it is in free association, but also by laws inherited from England. The application of foreign law is a relic of the colonial era when the Cook Islands was successively a British Protectorate (from 1888 to 1990) and then a part of the colony of New Zealand (1901 to 1962). The main governing statute during the latter period was the Cook Islands Act 1915 (NZ). That Act included a provision applying, subject to certain conditions, the law of England to the Cook Islands. Surprisingly, that provision remained in force until 2019. Even more surprisingly, in 2020, this provision was re-enacted, meaning that certain parts of the law of England are once again in force in the Cook Islands. Section 615 is a vague provision raising a number of questions for those who are obliged to apply it. Commencing with some brief background on the Cook Islands and its legal system, this article looks at a selection of these issues, and considers whether there is a role for the law of England in the Cook Islands today.

Le droit des îles Cook se caractérise par une pluralité de sources: il est composé tout à la fois des lois votées par le Parlement des Cook, de la jurisprudence locale mais aussi de celles émanant des tribunaux de la Nouvelle-Zélande (État associé aux Cook), auxquelles s'ajoutent les lois héritées de l'Angleterre.

Ce particularisme est une survivance de l'époque coloniale, les îles Cook ayant été successivement placées sous le statut de Protectorat britannique pour ensuite une partie de ce qui formait la colonie de Nouvelle-Zélande et ce jusqu'en 1962.

Durant cette dernière période, alors que le Cook Islands Act 1915 (NZ) formait la pierre angulaire du droit applicable aux îles Cook, une disposition particulière prévoyait l'application sous certaines conditions, du droit anglais.

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De manière surprenante, cette disposition devait rester en vigueur jusqu'en 2019, date à laquelle elle fut abrogée.

Mais plus surprenant encore, cette disposition devait être rétablie en 2020, de telle sorte qu'aujourd'hui certaines parties du droit anglais trouvent de nouveau à s'appliquer aux îles Cook.

La section 615 du Cook Islands Amendment Act 2020, No. 13 qui prévoit cette possibilité se présente sous la forme d'une disposition de portée générale, qui dans la pratique est une source d'incertitudes pour ceux qui sont tenus de l'appliquer.

Après avoir brossé un bref historique des îles Cook et de son système juridique, l'auteur porte son attention sur l'analyse de quelques difficultés soulevées par ce texte et s'interroge si le bienfondé et l'opportunité de continuer à mettre en oeuvre aujourd'hui le droit anglais aux les îles Cook.

1 INTRODUCTION

The Cook Islands is made up of 15 islands, spread out over 2.2 million square kilometres in the South Pacific Ocean between American Samoa and French Polynesia. The capital, Avarua is situated on the main island of Rarotonga. The population is about 17,500, approximately 78% of whom identify as Cook Islands Māori.[1] They are far outnumbered by the 80,500 Cook Island Māoris who live in New Zealand.[2] The two official languages of the Cook Islands are English and Māori.[3]

The Southern part of the Cook Islands became a British Protectorate in 1888.[4] In 1901 it became a colony annexed to the colony of New Zealand, which took over its administration.[5] The structure of government and the basic rules of law were provided by the Cook Islands Act 1915.

The legal system of Cook Islands is a complex one. From 1893 until 1901 it was subject to Queen's Regulations made by the High Commissioner of the Western

1 Cook Islands Statistics Office, *Census of Population and Dwellings 2019, Report 2018*, 15.

2 *2018 Census ethnic group summaries,* Stats NZ <https://www.stats.govt.nz/tools/2018-census-ethnic-group-summaries/cook-islands-maori> accessed 6 December 2022.

3 Cook Islands Statistics Office, *Census of Population and Dwellings 2019, Report 2018*, 19.

4 Proclamation of Captain Bourke, 27 October 1888, Rarotonga.

5 Order in Council 1901 SRO and SI Rev XVI, 862-863, made under the Colonial Boundaries Act 1895 (UK).

Pacific.[6] For example, the Small Islands Native Lands Regulation 1896, which expressly extended to the northern part of the Cook Islands, prohibited the alienation of native lands.[7] From 1901 to 1946, after it became a colony, Ordinances were made by Island Councils,[8] and from 1947 to 1965 by the Legislative Council, in both cases with the assent of the Resident Commissioner. During its time as a dependency, the New Zealand Parliament was also authorised to enact laws for the Cook Islands. The structure of government and the basic rules of law were provided by the Cook Islands Act 1915, which repealed the Queen's Regulations.[9] This Act included the provision applying the English Acts in force in England and New Zealand which is the main focus of this article. In addition to the general application of English Acts, the 1915 Act specifically applied the Wills Act Amendment Act 1852 (UK) to the Cook Islands.[10] It also specifically applied a number of New Zealand Acts.[11] However, there was no general application of New Zealand Acts to the Cook Islands; to the contrary, this was prohibited by the 1915 Act.[12]

The Cook Islands ceased to be a colony in 1965, when New Zealand passed the Constitution of Cook Islands. It is now self-governing in free association with New Zealand. Its constitution established a parliamentary democracy. The Head of State is expressed to be 'Her Majesty the Queen in right of New Zealand' represented by the Queen's Representative.[13] With the accession of King Charles III, this raises the interesting question of whether he is the head of state of the Cook Islands. The fact that the Constitution refers expressly to 'Her Majesty the Queen' suggests that this would require a constitutional amendment. However, the oath of office is worded to apply whether a Queen or King is on the throne.[14] Moreover, Charles III is clearly the King of the Realm of New Zealand, of which the Cook Islands is a part. It is also arguable that he is the King of the Cook Islands, as the Bill of Rights 1688 has been

6 Queen's Regulations made pursuant to the Pacific Order Council 1893 (UK). The Order empowering the High Commissioner to make regulations was superseded when the Cook Islands became part of the Colony of New Zealand: see note (a) to the Pacific Order in Council 1893.

7 See also, eg Native Contracts Regulation 1896 which rendered contracts unenforceable against natives: R 2.

8 See *Alphabetical Table of Ordinances and Bylaws of Island Councils of Cook Islands in 1965*.

9 Cook Islands Act 1915 (NZ), s 658.

10 Cook Islands Act 1915 (NZ), s 640.

11 Cook Islands Act 1915 (NZ), ss 622 to 639.

12 Section 618.

13 Constitution of the Cook Islands, arts 2 and 3.

14 Constitution of the Cook Islands, art 4.

held to apply in the Cook Islands[15] and the Act of Settlement 1701 may similarly apply by virtue of s 615.

The 1965 Constitution gave the power to legislate, including extraterritorially, to the Parliament of the Cook Islands.[16] However, rather than starting with a blank slate, the Constitution provided that the existing law was to continue in force, leaving a complex web of historical legislation to be navigated, together with the English common law, frozen in time at 14 January 1840. Since 1994, some assistance may be gained from the compilation of laws in *Laws of the Cook Islands 1994: Constitution, Statutes, and Subsidiary Legislation*.[17] but as discussed below, this would not reveal the complete picture. In 1995, the constitution was amended to add customary law to the sources recognised by the State.[18] Prior to this its recognition had been restricted to determining title and interests in customary land.[19]

Originally, the Constitution permitted the New Zealand Parliament to enact laws for the Cook Islands at the request and with the consent of the Cook Islands Government.[20] However, in 1981, the Constitution was amended to provide that New Zealand legislation would not apply unless an Act of the Cook Islands Parliament provided for this.[21] The Cook Islands Parliament has chosen to adopt approximately sixty New Zealand Acts. As both New Zealand and the Cook Islands have extensively amended the Cook Islands Act 1915, there are now two versions of the Act, one as it is in force in New Zealand and one as it is in force in the Cook Islands.

II SECTION 615: THE PAST

Section 615 of the Cook Islands Act 1915 has been in force in the Cook Islands since 1 April 1916.[22] It states as follows:

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15 *Pokoati v Tetava* [1978] CKHC 2; Story v Cook Islands Broadcasting and Newspaper Corporation [1979] CKHC 6; Advocate-General of the Cook Islands v Story [1980] CKHC 2.

16 Articles 27 and 39.

17 Alex Frame, *Laws of the Cook Islands 1994: Constitution, Statutes, and Subsidiary Legislation*, 1994, Legislative Service of the Cook Islands, Rarotonga, New Zealand.

18 Article 66A(3) inserted by Constitution Amendment (No 17) Act 1994-95, s 7.

19 Cook Islands Act 1915 (NZ), ss 421, 422, 426; Constitution of Cook Islands 1915 (NZ), art 77 (prior to amendment).

20 Article 46. See also New Zealand Laws Act 1966 (Cook Islands). See further *Re Vaiokura 191B, Avarau* [2013] CKLC 3.

21 Constitution Amendment (No 9) Act 1980-81 (CI), s 46.

22 The date of its proclamation in the *New Zealand Gazette*: Cook Islands Act 1915 (NZ) s 1(2).

615 Law of England as in the year 1840 to be in force in the Cook Islands

The law of England as existing on the 14th of January in the year 1840 (being the year in which the Colony of New Zealand was established) shall be in force in the Cook Islands, save so far as inconsistent with this Act or inapplicable to the circumstances of those islands:

Provided that no Act of Parliament if England or of Great Britain or of the United Kingdom passed before the said 14th day of January in the year 1840 shall be in force in the Cook Islands unless and except so far as it is in force in New Zealand at the commencement of this Act.

The first thing to notice about the provision is its vagueness. The section subjects the application of the law of England a number of conditions; in order to be in force the law must:

- have existed in England on 14 January 1840;
- have been in force in New Zealand on 1 April 1916;
- not be inconsistent with the Cook Islands Act;
- not be inapplicable to the circumstances of the Cook Islands.

At the time of enactment, the law of England of 14 January 1840 as the default law for the Cook Islands would have had some relevance. The legislation made specifically for the Cook Islands at the time was limited. Identification of the relevant law to fill the void would not have been too problematic as there was a relatively strong knowledge of the Common Law of England among the lawyers and judges of New Zealand. Notwithstanding that, the provision necessitated finding out what legislation passed the twofold test of existence in England and enforceability in New Zealand on the relevant dates. In a pre-internet age that would have been, in some instances, a complex research exercise. The difficulty would have been exacerbated by the fact that, as reflected in the proviso, the legislation to be applied included not only 'English', but also British or United Kingdom Acts passed before 14 January 1840.

III SECTION 615: TODAY

Section 615 was in force until 17 June 2019, when it was repealed by a broad repealing provision which covered ss 606-615 inclusive of the Cook Islands Act. This repeal was effected by the Infrastructure Act 2019, s 70 and the Schedule. The purpose of this Act is said to be to:

(a) provide for the planning, delivery, and management of those classes of infrastructure with which this Act deals; and

(b) set out the rights of the infrastructure managers, and owners and occupiers of land, in relation to access to land for the purposes of the construction, installation, and maintenance of infrastructure; and
(c) set out the rights of owners and occupiers of land whose land is affected by the construction, installation, operation, or maintenance of infrastructure.

The repeal of s 615 by this legislation is fairly obviously an error as the subject matter of the Infrastructure Act is otherwise unrelated to the sources of law or the Cook Islands Act 1915 more generally. It seems most likely that a mistake was made simply in the drafting of the numbers of the sections to be repealed or perhaps by indicating inclusive rather than exclusive section numbers.

The suggestion that this was an error is confirmed by the admission made in 2020, when s 615 was re-enacted by the Cook Islands Amendment Act, an Act designed purely "to reinstate a provision in the Cook Islands Act 1915 that was repealed in error". The re-enactment expresses s 615 in more elegant terms, replacing words such as 'the said', 'save' and 'provided' with plain English, but the substance is unchanged. It is divided into subsections and sub-paragraphs as follows:

615 Law of England as in year 1840 to be in force in Cook Islands

(1) The law of England as existing on 14 January 1840 (being the year in which the Colony of New Zealand was established) is in force in the Cook Islands, except to the extent that—

(a) it is inconsistent with this Act or any other enactment; or
(b) it is inapplicable because of the circumstances of the Cook Islands.

(2) However, no Act of the Parliament of England or of Great Britain or of the United Kingdom passed before 14 January 1840 is in force in the Cook Islands unless and except so far as it was in force in New Zealand at the commencement of this Act.

(3) For the purpose of determining any question about the application or interpretation of this section or for any other purpose, this section must be treated as having come into force on the repeal of section 615 of the principal Act (as it then read) by the Schedule of the Infrastructure Act 2019.

Subsection (3) makes the re-enactment retrospective, validating any decision reached on the basis of s 615 between 17 June 2019 and the 2020 Act coming into force, for which the assent of the Queen's Representative was required.[23]

23 Section 2.

Moreover, the reinstatement raises the question of the value and purport of s 615 today. Is it a colonial relic or does it serve a purpose in the legal system of the Cook Islands today? Returning to the conditions subject to which the foreign law is to apply, their fulfilment is far more difficult in the 21st century. The Common Law of England is in many subject areas now of historical interest only. Where it has not been superseded by modern legislation, it may be uncertain because it has continued to develop over the years through judicial decisions. The textbooks discussing that law are now difficult to access. A first or second edition of *Halsbury* may be helpful but the tendency of libraries since the mid-late 20th century has been to carry only the most recent textbooks. Therefore, to find the law of 14 January 1840 in the Cook Islands would be a task of extreme difficulty.

In addition, the following questions arise from this provision, which are not unique to the Cook Islands but crop up in other former dependencies:

A How is Appropriateness to be Determined?

As stated above, the foreign law is only to apply so far as it is applicable to the circumstances of the Cook Islands. The process for examining this question is unclear: Is it a question for judicial notice or is evidence required. The question does not appear to have been expressly considered in the Cook Islands or in any other Pacific island country. Further, is appropriateness to be judged by the circumstances today or those that prevailed in 1915 or in 2020 when it was re-enacted?

B What is the Effect of English Decisions made After 14 January 1840?

The express provision of a cut-off date would appear to mean that any subsequent changes made to the common law and equity in England after that date are not binding in the Cook Islands, though, no doubt, highly persuasive. However, in Solomon Islands[24] and Papua New Guinea[25] it has been held that if a decision made after a cut-off date corrects a common law error it will be binding. If on the other hand the later decision overrules a decision made before the cut-off date as part of a process of developing or changing the law, in effect making new law, that decision is not binding. The distinction between decisions which correct an error in the earlier decision and decisions which make new law may not always be easy to discern. The courts in the Cook Islands do not appear to have addressed this point, but the distinction seems to fly in the face of the express provision, and also of the principle of common law that court decisions do not operate retrospectively. As with the

24 *Cheung v Tanda* [1984] SILR 108.

25 *The State v Pokia* [1980] PNGLR 97; *Wahgi Savings and Loans Society Limited v Bank of South Pacific Limited* [1980] PGSC 4.

continued application of s 615, it also perpetuates the continuing influence of foreign colonial law.

C Is it only the 'Common Law and Equity' of England that has been Introduced?

As s 615 uses the qualifying word 'England', it would seem to mean that it is only the rules of the common law and equity as evolved in England that have been introduced. However, the Supreme Court of Samoa has held in respect of a similar provision that these qualifying words are 'descriptive of a system and body of law which originated in England', and not of the law currently applied in England,[26] a statement later approved by Samoa's Court of Appeal.[27] In Papua New Guinea, however, the courts have expressly held that the use of 'England' is a limitation.[28]

IV SECTION 615: THE FUTURE

Section 615 would appear to have passed its "use by date". The Cook Islands has a written, entrenched constitution with a Part protecting human rights.[29] This immediately raises questions about the suitability of the Common Law of England of the early 19th century – one has to think simply of the status of women, the status of ex-nuptial children, domicile and property rights. Whilst some tensions have been addressed by recent Cook Islands enactments such as the Family Protection and Support Act 2017, there are still areas for concern.

Further, where the common law or a foreign statute applicable under s 615 has not already been identified and applied in the Cook Islands' courts decisions, it may be safe to assume that that rule is not very important. Examples of English legislation which has been held to apply in the Cook Islands are the Bill of Rights 1688;[30] the Fraudulent Conveyances Act 1571;[31] Colonial Courts of Admiralty Act 1890.[32]

There is a further objection to the perpetuation of s 615; given its vagueness, decision-making on the basis of this section is heavily dependent on its interpretation by the courts which in one sense amounts to judicial legislating. For these reasons

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26 *Olo v Police* [1992] WSSC 1.

27 *L v L* [1994] WSCA 3. See also *Malifa v Sapolu* [1999] WSSC 47.

28 See *State v Woila* [1978] PNGLR 99, per Kearney J, 111, and *Brown v Motor Vehicle Insurance (PNG) Trust* [1980] PNGLR 409, per Bredmeyer J, 412, 413.

29 Part IVA.

30 *Pokoati v Tetava* [1978] CKHC 2; *Story v Cook Islands Broadcasting and Newspaper Corporation* [1979] CKHC 6; *Advocate-General of the Cook Islands v Story* [1980] CKHC 2.

31 *515 South Orange Grove Owners Association v Orange Grove Partners* [1995] CKHC 1.

32 *Hawaii Production Credit Association v Davies* [1985] CKHC 6.

the repeal of s 615, whilst accidental, was worthy. With its reinstatement an opportunity to decolonise the law was missed. The repeal of s 615 could be part of a broader repatriation exercise, following a process devised by Professor Tony Angelo. Basically, this involves listing all foreign laws applying in the Cook Islands and categorising them as to their relevance and applicability to local circumstances. Those of utility which are a good fit with local circumstance would be re-enacted or deemed to be promulgated as an Act of the Cook Islands. Those of current relevance, but maladapted would be replaced by an Act of the Cook Islands parliament. In the case of legislative schemes which are still desirable, but incapable of being administered in the Cook Islands, the foreign law would be replaced by a local Act providing, for example, that a right conferred by a specified overseas country would be enforced in the Cook Islands. Acts of no current relevance would be repealed, together with the provision applying or adopting that law.[33]

A more immediate solution would be to repeal s 615 and accompany this with supporting legislation. This would include an amendment to s 616, which provides that, for the purposes of s 615, rules of common law and equity relating to the jurisdiction of the superior courts of common law and equity in England relate also to the High Court of Cook Islands. To the extent that a default provision is needed, the Common Law of the Cook Islands could simply be enacted as the default rule.[34] The courts of the Cook Islands have been developing a local jurisprudence – a Cook Islands common law – for some time.[35] What that would do is present the default rule in a more direct form and enable the courts, when faced with a difficulty in identifying the relevant rule, to draw on precedent from wherever they see appropriate.

It should be noted that discarding s 615 would not completely sever colonial ties with Britain. In addition to the assent of the Queen's (and presumably now King's) representative being required for Bills to become law, an appeal still lies from the Cook Islands' Court of Appeal to the Judicial Committee of the Privy Council.[36] Jurisdiction lies not only in cases which the court considers involve a substantial question of law relating to the Constitution or to be of great general or public

33 See further, Jennifer Corrin "Discarding Relics of the Past: Patriation of Laws in the South Pacific" (2009) 39(4) Victoria University of Wellington Law Review 635, 637, which describes Professor Angelo's methodology in more detail.

34 Interpretation Act 2004 (Niue).

35 See, eg *Henry v Attorney-General* [1985] LRC (Const) 1149 (Cook Islands CA); *Hunt v De Miguel* [2016] CKCA 2; *George v Attorney-General* [2013] CKHC 65; *Browne v Munukoa* [2018] UKPC 18.

36 See further Alex Frame "The Cook Islands and the Privy Council" (1984) 14 Victoria University Wellington Law Review 311.

importance, but also as of right in civil cases involving more than NZ$5,000.[37] Appeal is more than a theoretical avenue, there having been six cases heard over the last ten years, one in 2022, one in 2020, one in 2018, one in 2016, and two in 2012.[38]

V CONCLUSION

The clear intention of the Constitution of Cook Islands, particularly as amended in 1981 and 1995, is that new laws would be made locally by the Parliament of Cook Islands, the courts of the Cook Islands (albeit with appeal to the Privy Council), and the Aronga Mana or vaka.[39] The cut-off date in s 615 makes it clear that foreign laws were only saved as a transitional step, to avoid a vacuum, while the Cook Islands Parliament had the opportunity to make new laws, 'for the peace, order and good government of the Cook Islands'[40] which were consistent with the Constitution and applicable to the circumstances of the Cook Islands. The Cook Islands Parliament has already passed legislation repealing colonial relics in many areas of law, such as company law,[41] divorce and family protection,[42] intellectual property and cultural protection,[43] banking,[44] and environmental protection.[45] However, colonial relics remain and, as observed by Sir Kenneth Roberts-Wray, the "qualifications, referable to local circumstances, subject to which English law is applied generally, leave a wide field for litigation."[46] Whilst the original repeal of s 615 was in error, now is the time for deliberate action.

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37 Privy Council (Judicial Committee) Act 1984, extending the British Order in Council 10th January 1910 to the Cook Islands, with amendments to jurisdiction: s 2.

38 Judicial Committee of the Privy Council, Decided Cases, https://www.jcpc.uk/decided-cases/index.html accessed 8 December 2022.

39 Constitution of the Cook Islands 1965, s 66A(4).

40 Constitution of the Cook Islands 1965, s 39(1).

41 Companies Act 2017.

42 Family Protection and Support Act 2017.

43 Copyright Act 2013; Cultural and Historic Places Act 1994-6; Traditional Knowledge Act 2013.

44 Banking Act 2011.

45 Environment Act 2013; Marae Moana Act 2017.

46 *Commonwealth and Colonial Law* (Stevens, London, 1966) 138, fn 27.