

Challenging the Binary of Custom and Law: A consideration of legal change in the Kingdom of
Tonga

by

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LLB, University of Victoria, 1986
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Supervisory Committee

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Traditions in the Kingdom of Tonga

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Abstract

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The starting point for a consideration of law in former colonies is often a law/custom binary whereby law is the formal legal system imposed during the colonial occupation and retained at independence, and custom the local law disrupted by colonialism. In most South Pacific small island countries, this dichotomy of law and custom has been formalized by the protection of custom by constitutional or statutory provisions. The protection of custom was carried out as a celebration of local culture at Independence, but the effect has been to stymie the development of local custom and to reinforce custom's post-colonial subsidiary position relative to the formalized legal system.

The Kingdom of Tonga avoided the indirect rule of late colonialism and as a result Tonga's legal system was never dichotomized into law and custom. There was no constitutional protection of custom because custom was never characterized as something other than law. Although it is undeniable that the direction of the development of law in Tonga was impacted by the presence of the Imperial project in the region, the legal change that occurred was led by Tongans. The starting point for legal change in Tonga was, and continues to be Tongan legal traditions even though local custom has not been formally protected.

This project considers the two human concepts of apology and the protection of reputation. In Tonga's hierarchical society both concepts already represented important legal traditions when the formal British-style legal system was adopted. However, these legal traditions were not relegated to something 'other' than law. The former continued as an informal legal tradition that addressed legal harms not recognized by adopted legal traditions, while the latter was incorporated into the adopted formal legal system with provisions that continued to reflect the distinctive Tongan society.

Both legal traditions have faced challenges recently. Apology was no longer recognized as an efficacious remedy for women in the case of domestic abuse. The protection of the inviolable reputations of the monarch and nobility was limited by the exercise of the constitutional right of the freedom of the press. In both cases Tongans chose to exercise adopted constitutional rights in order to limit what was perceived to be an abuse of the exercise of power in the hierarchical society. Because local legal traditions had not been preserved as something apart from Tongan law, this development did not signal the end of Tongan legal traditions. Rather, it demonstrated the continuing development of Tongan law.

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Glossary

angafakatokilalo state of being humble; humility

fakamolemole please; pardon; *kuo fakamolemole* connotes forgiveness

fono village or town meeting

fonua nation; land

hou'eiki chiefs

hū lou-ifi traditional ceremony of apology; literally 'enter with chestnut leaves' where the wearing of chestnut leaves signaled humility

ifoga Samoan ceremonial apology

faka'apa'apa respect

fakafekoviaki Wesleyan backbiting

fakatapu formal speech acknowledging ranked persons

fatongia obligation

fe'ofa'aki mutual loving

fetokoni'aki fulfilment of mutual obligations

feveitokai'ake cooperation; consensus

kataki sorry; beg pardon; patience

kie kie woman's dress mat

kainga extended family; kin

lau'i talk against someone

lototoo humility

lohiaki'i deceive or slander

mamahi'l me'a loyalty; commitment

matapules talking chief; chiefly attendant

mateaki loyalty

mehikitanga father's sister

me'avale slave

mu'a minor chiefs

ngatu [gnatoo] tapa cloth made from bark of the mulberry tree

papalangies Europeans

talanoa talk; casual chat

ta'ovala dress mat worn around the waist to show respect

tapu taboo

taula priestly class

toutai navigators

tu'a untitled man; commoner

tufunga skilled tradesman

tu'i ruler or king

tulou excuse me

'ulumotu'a oldest male in extended family on father's side

umu earth oven

vehenga centre of front row reserved for dancer with highest status

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Introduction

The development of law and the process of legal change was disrupted by European colonialism. In the cases of settler colonialism existing local legal systems were increasingly marginalized by the settlers who overtook the land and sought to replace local culture with their own. In Canada, scholar Val Napoleon, along with John Borrows and Hadley Friedland are leading the way to rediscover indigenous law through the retrieval of the stories that underlie indigenous legal traditions in order to resurrect and revitalize these legal systems.¹

In those colonized regions where the settlers never outnumbered the indigenous populations existing indigenous legal systems were maintained, but relegated to an inferior position in relation to imported European law by colonial administrations. Indigenous law was designated as 'custom', something different from the 'real' European law. Local legal traditions survived because the imported legal systems permitted a niche as custom to the local law. In Vanuatu, Australian scholar Miranda Forsyth has provided a portrait of how local legal traditions have survived as an adjunct to a modern state legal system which continues to largely reflect the European legal system imposed during the colonial occupation.²

The loss of indigenous legal traditions was much greater in settler colonialism where colonial governments expressly sought to annihilate local law along with the local culture.

¹ For example, see Val Napoleon, "Thinking About Indigenous Legal Orders" in *Dialogues on Human Rights and Legal Pluralism* (Netherlands: Springer, 2013) 229; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); and Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61(4) McGill LJ 725.

² Miranda Forsyth, *A Bird that Flies with Two Wings: Kastom and State Justice Systems in Vanuatu* (Canberra: ANU Press, 2009).

However, where local law was actively saved as 'custom' by colonial administrations, indigenous legal traditions became frozen in time, and limited in application. Custom applied only to those living a so-called traditional (non-European) lifestyle, and custom could never be 'law' because it was designated as something other than law by colonial powers.

The Kingdom of Tonga is the only island country in the region of Oceania to largely escape a colonial administration.³ As a result, Tonga's legal system evolved in a different manner from that of countries such as Vanuatu where local legal traditions were designated as custom, and separated from imported legal traditions. This project follows the development of two legal traditions in Tonga in order to show how Tongan legal traditions evolved in the face of massive changes brought to the region by European colonial powers. Importantly, due to the absence of a colonial administration, legal traditions in Tonga were never designated as something other than law. Therefore, Tongan legal change was rooted in Tongan legal traditions and culture which had never been characterized and frozen as unchanging 'custom'.

There are three interrelated theses that are addressed through this examination of the legal change in Tonga. First, the designation of custom as something different from law is a colonial legacy that has limited the capacity of indigenous legal systems to develop in response to new ideas. Second, informal legal traditions do not have to be protected by formal law in order to survive if those legal traditions are still important to the local populations. Third, the

³ Tonga reluctantly signed a Treaty of Friendship with Britain in 1905 but Britain's interference in Tonga's affairs was mainly limited to control of Tongan foreign affairs. Full independence from Britain was gained in 1970.

maintenance of a dichotomous legal system of custom and law limits the agency of local populations to critically embrace change to local legal traditions. Local law can respond more effectively to change if a choice does not have to be made between law and custom.

Tonga, lying near the centre of 70,000,000 square miles of the Pacific Ocean, is the world's smallest kingdom. It consists of more than 150 small islands, and is divided into three main island groups, Tongatapu, Ha'apai and Vava'u. The total area of the entire group of islands is 269 square miles. Only thirty-six of the islands are inhabited, and the population measured just over 105,000 in a 2013 census.

I first visited Tonga in 2009 and was struck by its difference to the other small island countries in the Oceania region. Since 1986 I had spent almost ten years⁴ living in the region and had become familiar with a divide between custom⁵ and law which mirrored a similar cultural distinction between tradition and modernity. The discussion of custom versus law was a constant refrain inside and out of legal circles. Conversely, in Tonga the state law was codified, and both imported and local law was found in this Code. Unofficial law existed but this

⁴ That time included six years in Vanuatu, two years in Cook Islands and visits of shorter duration to other island countries.

⁵ See New Zealand Law Commission, *Converging Currents: Custom and Human Rights in the Pacific* (Wellington New Zealand: Study Paper 17, 2006) at 47: custom is defined as "the values, principles and norms that members of a cultural community accept as establishing standards for appropriate conduct, and the practices and processes that give effect to community values"; See also Jean G. Zorn, "Custom then and now: the changing Melanesian family" in Anita Jowitt and Tess Newton Cain, eds, *Passage of Change: Law Society and Governance in the Pacific* (Canberra: Pandanus Books, 2003) 95 at 101: "[P]ractices become custom when they are fairly regularly practised by a large segment of the community".

was not viewed in opposition to the state law, but rather as part of the overall Tongan legal system.

It is difficult to say whether the Tongan legal system has always been different from the others in the region. In fact, while the cultures of the small island countries of Oceania⁶ were diverse, they shared much in common.⁷ The populations were largely settled on the coastal areas. The natural environment was tropical, and they shared similar material possessions and exploited their islands' natural resources in similar fashion. Subsistence crops could not be stored due to the climate so that surpluses were shared through ceremonial feasting. Prestige was gained not through accumulation of wealth but through the provision of the best crops. In these small land masses kinship relationships were the basis of social relationships. Living by the ocean made life vulnerable to extreme weather and to invasion which led to group activities that centred on security and survival.

It is my contention the different legal development seen today stems directly from the fact that Tonga is the only country in the region not to have been formally colonized. As a result, Tonga's present legal system was not shaped by a colonial political system of indirect rule which separated local law (named 'custom' by the colonial powers) from the imported European legal systems. This is not to say that the development of Tonga's legal system was not influenced by the Imperial project in the South Pacific region. Tāufa'āhau, the first monarch of a

⁶ The small island countries of Oceania include Papua New Guinea, Fiji, Solomon Islands, Vanuatu, Samoa, Kiribati, Tonga Cook Islands, Tuvalu, Nauru, Tonga, Kiribati and Federated States of Micronesia.

⁷ Sione Lātūkefu, "The Definition of Authentic Oceanic Cultures with Particular Reference to Tongan Culture" (1980) 4(1) Pacific Studies 60 at 62.

unified Tongan state, imported a British-style legal system with a written constitution in order to achieve the status of a 'civilized nation' in the eyes of the colonizing powers⁸ to prevent annexation by those powers in the late nineteenth century. Thus the style of the legal system adopted at that time was influenced by the presence of a colonial threat.

However, the specific form that the adopted legal system took was influenced by both the Tongan monarch's desire to maintain Tongan independence as well as his own political ambitions. From the very beginning, the imported legal system was reshaped to reflect a particular Tongan society both as it existed, and as it was imagined by Tāufa'āhau. The imported law was remade as Tongan law, a law that was culturally understood by, and acceptable to the Tongan peoples.

The other countries in the region developed a different legal model. These countries were largely subjected to a colonial administration based on indirect rule. This model was adopted in the late colonial era. At that time, the colonial plan was no longer to 'civilize the natives', but to reap the local resources, while the local population was left to rule themselves.⁹ Under this system, the local population was discouraged from incorporating elements of modernity even if they wished to do so. Local populations were ruled by local law¹⁰ and chiefs who were often appointed by colonial administrations, while the colonial settlers were ruled by a separate imported legal system which they brought with them.

⁸ United States, Britain, Germany, France and Spain.

⁹ Lord Frederick Lugard, *The Dual Mandate in British Tropical Africa* 5th ed. (London: Frank Cass & Co, Ltd, [1922] 1965).

¹⁰ Often referred to as custom or customary law.

At constitutional independence, a binary model comprised of a liberal legal system operating alongside and apart from the local law was retained in those countries that had experienced indirect rule. The colonial notion of local legal systems as ‘traditional’ or ‘customary’ was institutionalized when custom was constitutionally protected. The result was a binary and oppositional legal system of state law and ‘custom’. This has resulted in ongoing difficulties of ‘proving’ custom in court.¹¹ In this model custom is viewed as unable to accommodate modernity because it has been frozen in a colonial characterization as non-western and traditional. Tonga is alone in the region in not having any statutory or constitutional protection of ‘custom’ or ‘tradition’. This has been an important factor in Tonga’s different legal development because once custom is protected in the formalized legal system, change is difficult as so-called custom must remain as something different from formal law. Otherwise custom’s protection apart from ‘law’ becomes meaningless. If custom is challenged in court, and the state court upholds a changing legal tradition, has the custom become law?

The colonial legacy of the binary of imported law and the existing local legal traditions (characterized and named as ‘custom’) comes to the fore when the two legal systems clash in court. The court must make a choice between the application of custom or law as both are recognized legal systems. This scenario is particularly problematic when custom is challenged by an assertion of constitutional rights. Then the courts are faced with the dilemma of a choice between custom and rights which are both expressly provided for in the constitution. This

¹¹ See Jean Zorn & Jennifer Corrin Care, “*Barava Tru*—Judicial Approaches to the Pleading and Proof of Custom in the South Pacific” (2002) 51(3) ICLQ 611.

dilemma has been coined a 'constitutional conundrum'.¹² The result is often that those who are deemed 'traditional' and living a life according to custom are denied the agency to exercise constitutional rights.

The oppositional binary has created an all or nothing approach to custom and rights. The New Zealand Law Commission suggested that Constitutions and court judgments contributed to a "polarization" of custom and human rights¹³ because the implication of having both is that a choice must be made between the two. A choice must be made to be modern and have access to rights, or to live according to 'tradition' and be unable to exercise 'modern' rights.

As the outlier in the region that did not experience indirect rule, the Tongan legal system provides an opportunity to observe what might have happened to the development of law in an Oceanic small island country in the absence of indirect rule, and thus in the absence of the colonial legacy of a rarefied local law preserved as something separate and different from imported European legal systems. There is no oppositional binary of local law and state law in Tonga. The introduction of western or different legal concepts has resulted in change, but the incorporation of change into the legal system has been accomplished from a Tongan perspective.

¹² Jennifer Corrin Care, "Negotiating the Constitutional Conundrum: Balancing cultural identity with principles of gender equality in post-colonial South Pacific societies" (2006) 5 *Indigenous LJ* 51.

¹³ *Supra* note 5 at 2.

The Tongan approach to change was well illustrated by the 2013 winning entry in the Speaker of Parliament's Art Choice Award. The winner stated that his art piece was a portrayal of Tongan culture in three eras, the past, present and future. The piece was a woven mat, the basic seating for any Tongan meeting. The artist explained his choice of medium: "The decision to use weaving came from the idea that weaving reflects mats, it brings a sense of exchanged conversations '*talanoa*' as it represents a place where meetings whether by a family, community or a large gathering is held, like the Legislative Assembly '*Fale Alea 'o Tonga*'." The artist explained that the piece was read from bottom to top: "The weaving starts at the bottom with brown fibres which represent pure native culture. The centre of maroon fibres represent Tonga's present and shows western culture combined with the native culture in brown fibres. The top of the piece shows the future of Tongan culture which is made of a fusion of native and western culture."¹⁴

This mat, made of fibre from the local pandanus tree, provides a good metaphor for the development of Tongan culture and the Tongan legal system. It is important to note that western culture is represented as a different colour but it is still woven in pandanus fibre. This illustrates the point which I wish to make in this project: the introduced legal system was remade in a Tongan way. It wove in adopted ideas, but the underlying social fabric remained

¹⁴ "Unitech student wins Speaker's Art Choice Award" *Matangi Tonga* (14 November 2013), online: <<http://matangitonga.to/>>.

Tongan- like the Tongan mat. Local legal traditions were not lost or forgotten, but provided the starting point for legal change.

It was never necessary to protect custom from the formalized legal system in Tonga because custom was never considered apart from the 'law', or in opposition to it. Tonga's constitution was not adopted on the eve of independence as was the case in the other island countries in the region, but was integrated into an existing local legal system that had not been marginalized by colonial rule.

The Tongan legal system has avoided the constitutional conundrum because 'custom' has never been 'legally' protected by state law. There is no formalized two tiered legal system enshrined by constitutional or statutory provisions. However, in spite of no protection, the legal system of Tonga has not been overrun by imported western law. Tongan culture has strongly influenced the continuing development of the imported system. Tongan legal traditions have survived as an integral part of the legal system. The local legal traditions cannot be defined as 'traditional' in the sense that they form part of a legal system unchanged from centuries before, operating separate and apart from an imported formal legal system. Rather, all law in Tonga is considered "Tongan".

What is considered to be 'traditional' in former colonies has been shaped by a colonial legacy. Tonga is not different from the other small island countries because it has a culture that has remained unchanged and untouched by colonialism. Rather, it is different because change has evolved in response to local demands for change. Noted Tongan historian Sione Lātūkefu explained:

The allegation often made by observers that Tonga is the most traditional of all the societies in Oceania needs closer examination. If it implies that little or no change has occurred in the society and its culture, then these observers are definitely mistaken. But if, on the other hand, it means that the Tongan culture has developed in its own distinctive way, then the observation seems correct...¹⁵

On a similar note, anthropologist Adrienne Kaeppler concluded that although the dances of modern Tonga were different than those first recorded by early European travelers they were not *new* dances, “but simply evolved forms of indigenous dance types to new words and new music”.¹⁶

The important point is that Tongan culture has definitely seen changes which were the result of the introduction of new ideas, but those changes were the result of local responses to that change. Change to local non-western cultures is often characterized as westernization, and this stance inhibits the local choices that may be made around the introduction of new ideas. Away from the colonial dichotomy of western (modern) and non-western (traditional), change can happen in a culturally distinct way when change is locally led. The idea is that the adoption of good ideas which can lead to a better life may trump a fear of, or antipathy to so-called westernization.

Lātūkefu explained how Tongan change has been Tongan led:

Although at times strong pressures have been applied by outsiders such as missionaries on the people to accept change, in the final analysis it was the Tongans themselves who ultimately decided to either accept or reject changes.¹⁷

¹⁵ *Supra* note 7 at 63.

¹⁶ Adrienne Kaeppler, “Tongan Dance: A Study in Cultural Change” (1970) 14(2) *Ethnomusicology* 266 at 267.

¹⁷ *Supra* note 7 at 78.

This is the notion of change that informs this project. It is not the imposition of new ideas that leads to change, but the acceptance or rejection of those ideas by the local inhabitants. The exercise of local agency in those decisions as to whether to accept or reject change maintains local cultural and legal sensibilities, and at the same time allows for change that most people think will improve their lives.

An examination of Tongan legal traditions allows a legal researcher to move beyond the binary of imported and local law and the seemingly intractable conundrum that may result. The change in perspective illustrates that non-western legal systems are every bit as adaptable as western systems. Further, modernity is not always an antithetical choice. It is better to allow local legal actors to respond and adapt to change rather than to formalize a “recognition of diversity”,¹⁸ where tradition is always subordinate to modernity if it is saved by provisions in the formal and modern legal system.

The pervasive binary of western and non-western goes well beyond the small island countries of Oceania. It is a post-colonial phenomenon which Homi Bhabha recognized in Article 27 of the *Universal Declaration of Human Rights*. Bhabha approved of the support of the rights of minorities in Article 27, but took issue with the emphasis to ‘preserve’ their cultural identities.¹⁹ Bhabha dismissed these attempts to define non-western nations and former colonies by means of historically continuous traditions and maintained that these

¹⁸ Homi Bhabha “DessemiNation: Time, narrative and the margins of the modern nation” in *Location of Culture* (London & New York: (1994) at 50.

¹⁹ *Ibid* at xi.

characterizations were both false and served to ensure the nations' subordinate status. He argued that nations and cultures must be understood as "narrative" constructions that evolve through the meeting and negotiation of difference, rather than a preservation of diversity.²⁰

And so too must legal traditions. There is an absence of human agency when there is a preconceived notion of what must constitute a local tradition. The exercise of human agency is challenged if choices are pre-ordered –either western or non-western; tradition or modernity. The designation of local as non-modern in the post-colony has limited the choices for change. Olúfémi Táíwò charged that indirect rule denied African colonized peoples the opportunity to "critically embrace modernity".²¹ He defined indirect rule as "a euphemism for an orchestrated effort to stop Africans from choosing modern forms of life and, by doing so give the lie to the preconceived British idea that Africans were too primitive to appreciate those modern forms."²²

This project challenges that colonial designation through an examination of how a Tongan monarch and later, the Tongans themselves were able to embrace modernity on their terms precisely because they escaped colonial indirect rule. It is an examination not only of how legal traditions are transplanted, but how introduced legal traditions are embraced and locally translated so that they may become part of an evolving local legal system. It can also mean rejecting custom or local legal traditions, but in the absence of an oppositional local law/ state

²⁰ *Ibid* at 2.

²¹ Olúfémi Táíwò, *How Colonialism Preempted Modernity in Africa* (Bloomington: Indiana University Press, 2010).

²² *Ibid* at 42.

law binary this does not signal westernization, but a different way to be Tongan as determined by Tongans.

Theory

This project examines the dynamic legal pluralism that has shaped Tongan legal traditions. However, the project eschews a typical legal pluralism approach. Certainly a legal pluralist social arena is described. In Tonga there is local law and imported law, and state law and non-state law; some or all of these categories of law overlap, clash with or complement each other at times. However, this project grounds the idea of law in the theoretical construct of legal tradition. This approach goes beyond that legal pluralism approach where legal pluralism is viewed only as an analytical tool utilized in order to describe resulting legal systems,²³ and as such there is no need for an a priori knowledge of a legal theory.

Brian Tamanaha lamented that the reason legal pluralists had so much difficulty defining the concept of law was because the concept was so “thoroughly cultural” so that “[w]hat law is, is determined by the people in the social arena through their own common usages, not in advance by the social scientist or theorist.”²⁴ Thus, in this legal pluralism approach, law is what people think law is.

This approach becomes problematic in the face of the constitutional conundrum discussed above. This realization came to me when I was discussing the challenges faced in the

²³ Ihsan Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralisms in England, Turkey and Pakistan* (England and USA: Ashgate Publishing Ltd, 2005) at 10.

²⁴ Brian Tamanaha, “A Non-Essential Version of Legal Pluralism” (2000) 27 JL & Soc’y 296 at 313.

interpretation of local customary law and imported state law with a law professor at the University of the South Pacific in Vanuatu. Professor Yoli Tomtavala remarked: “No one in Vanuatu knows what the law is anymore”.²⁵ The confusion stemmed from the dual nature of legal orders provided for in the constitution. Thus, it seems that the theory of legal pluralism may be stymied by the conundrum because there is no definition of law if people in the social arena are no longer able to provide that definition. Legal pluralism cannot offer any suggestions to resolve the conundrum if there is no theory of law outside of what people think law is. More importantly, this thesis is concerned with peoples’ changing conceptions of law.

In fact, the legal pluralism theory often employed in the post-colonial setting enforces the confusion of the conundrum. The basic tenet of legal pluralism is that state law is only one of many levels of law. The theory of legal pluralism provides a descriptive tool to illustrate how unofficial law may be reconstructed and redefined in order to undermine the claim of official law as the “unique regulator in any given social field”.²⁶ The theory is suited to descriptions of post-colonial legal systems where adopted western-style state law and existing ‘custom’ collide; where western-style legal systems are imposed on indigenous inhabitants by settler populations; or where the laws of minority cultural groups clash with state laws.

However, this legal pluralist approach often coincides with a planned ‘diversity’ approach which views the local traditional law as a ‘given’ and as ‘not western law’. As Jeremy Webber has suggested, much legal pluralism scholarship treats non-state law “as though it

²⁵ Private conversation, University of the South Pacific, Emalus, Vanuatu, 2009.

²⁶ *Supra* note 23 at 3.

were inherent in social interaction, emerging spontaneously, without conscious human decision.”²⁷ Webber proposed that human agency must be included “as an essential part of all law and must be incorporated into legal pluralism.”²⁸ Law is not a given, stated Webber, but rather “is made against a background of disagreement.”²⁹ Webber recognized the problematic absence of human agency in a legal pluralism approach where the nature of the normative traditions are presumed. I suggest that this presumption of normative traditions echoes the designation of local law as non-western (and always non-western) by colonial powers. It perpetuates the planned diversity of indirect rule.

Webber recognized that there must be some process which allows people to live together in spite of continuing disagreement. Change and accommodation are inevitable with the introduction of new ideas and new normative traditions. Therefore a purely descriptive legal pluralism approach that does not look for the particular process of decision making misses that legal process that must lead to “some settled order among the contending positions”.³⁰

It is in this search for settlement in the face of difference that Laura Nader situated the “life of the law”. Laura Nader maintained that the search for justice is universal: “Notions of justice are implicit in every culture and usually operate at the unconscious and semi-conscious levels becoming explicit only when an injustice is confronted.”³¹ She differentiated between

²⁷ Jeremy Webber, “Legal Pluralism and Human Agency” (2006) 44 Osgoode Hall LJ 167 at 167.

²⁸ *Ibid* at 195.

²⁹ *Ibid*.

³⁰ *Ibid* at 171.

³¹ Laura Nader, “The Life of the Law—A moving story” (2002) 36(3) Val U L Rev 655 at 660.

contemplative justice and dynamic injustice.³² It is the latter that Nader characterized as the “life of the law” because change in the law comes from “the experience of total injustice rather than from the demand for total justice and the rise of expectations”.³³

This project examines the development of two Tongan legal traditions and how these traditions changed as a result of newly introduced legal traditions. For the majority of the time the change was contemplative—the introduced legal traditions were transformed as they were reconceived through a Tongan cultural lens. A British style legal process was transformed into a Tongan legal tradition by the application of the existing Tongan traditions of apology and forgiveness to that process. British defamation law was adopted into the Tongan Code of Law, but rewritten to reflect Tonga’s hierarchical social and political systems. Further written laws provided for the Tongan tradition of respect for reputation that were not addressed by the imported defamation law.

The legal traditions were challenged when, as Nader stated, injustice was confronted. This project examines the limits of existing legal traditions, and the time when an injustice is confronted and legal traditions may undergo major change. In the case of apology and forgiveness, women no longer found justice in a legal remedy of apology and forgiveness in the case of domestic violence. It neither addressed the seriousness of the crime, nor did it stop the behaviour. A no-drop policy was adopted which effectively negated apology and forgiveness as

³² *Ibid* at 665.

³³ *Ibid*.

a legal remedy in the case of domestic violence. State law enforcement was called upon to address the abuse when the traditional remedy had lost its efficacy.

Likewise, the Tongan legal tradition of respect for reputation and rank was challenged when Tongans suspected that the monarch and family were financially benefitting unfairly from their positions. Tongans began to challenge the vast decision-making power of the monarch and nobility in Parliament. Tongans fought for the once forbidden right to publicly criticize their leaders, and to have an increased say in the governance of their country.

The central point of this thesis is that in the absence of a codification of custom as something other than law the process of legal change is opened up to more possibilities. The search for the best legal solution can transcend the labels of custom and law, and any legal solution adopted, no matter what its origins, will become a Tongan legal tradition.

The approach of this project is not to show how centralized official law may be undermined by the retention of local practices or vice versa, but rather how legal traditions evolve over time in reaction to changing ideas. Positing legal tradition as a theory of law adds a new dimension to the discussion of law in the post-colony. Both adopted law (usually the basis of state law) and local law as well as their processes are considered as legal traditions. The starting point is not the clash between two legal orders but the development of legal traditions in social arenas, and the choices that ensue when different legal traditions combine or collide to form new legal traditions, or traditions evolve in response to new ideas and new challenges. This project attempts to show who makes those choices, and why those choices are made. As

Nader has shown, legal change is an active response to perceived injustice. It is not just a pursuit of harmony.

Guy Powles has commented extensively on the amalgam of the Tongan legal system. Powles maintained that the ordering of Tongan society evolved from the adoption and application of compatible concepts selected from two legal cultures beginning from 1875 when Tāufa'āhau promulgated the first constitution. The authoritative elements of Tongan chiefly law were successfully combined with a command theory of English jurisprudence along with a notion of individual responsibility from Christianity.³⁴ However, Powles noted that there were certain mitigating characteristics from both cultures which were not reflected in the Constitution. The reciprocity of duties and obligations between groups within the social hierarchy was blunted by changing legal traditions. Selected hereditary chiefs formed a new class of nobility, and these chiefs could rely on their constitutional status and newly adopted rules of land tenure to ensure compliance from their people. At the same time, the parliamentary process in the adopted system of Constitutional monarchy lacked any meaningful participation by the commoner class, and law-making was in control of the Monarch and nobility.³⁵

However, the human rights provisions included in the Constitution by Tāufa'āhau have provided for a check on those abuses of power that may have arisen because the absence of

³⁴ Guy Powles, "The Early Accommodation of Traditional and English Law in Tonga" in Phyllis Herda, Jennifer Terrell & Niel Gunson (eds) *Tongan Culture and History: papers from the 1st Tongan History Conference held in Canberra 14-17 January 1987* (Canberra: Australian National University, 1990) 145 at 146.

³⁵ *Ibid* at 145.

the former mitigating factors as recognized by Powles. The agency of Tongans to choose to exercise rights when existing legal traditions no longer support a quality of life and security that they have come to expect is not limited by their having to make a choice between law and custom. Human rights are already part of the Tongan amalgam, not something set aside from custom.

Methodology

The research for this project was accomplished during two years spent living in Nuku'alofa, Tonga.³⁶ I had the good fortune to work in the office of the Attorney General in 2013. This provided access to case law and other legislative documents. It also gave me an opportunity to meet and talk about the law in Tonga with Crown lawyers, the Solicitor General, the Attorney General, Law Lords, and Magistrates. With the exception of the Attorney General every one of these individuals was Tongan. These discussions gave me a good insight into the distinctive Tongan legal system and society. A particularly illuminating moment came during an informal chat with Lord David Tupou³⁷ during my early days in Tonga. I was still under the impression that it was important to formally save custom³⁸ in post-colonial legal systems. I asked Lord Tupou how the Tongan legal system worked if custom was not protected. He replied: "But there is custom everywhere in Tonga". I looked around and it was true. There is custom everywhere in Tonga, and it is not restricted to the rural population, or to those living a

³⁶ I visited Tonga for a month in 2010 and was intrigued by Tongan law and culture. I returned to live in Tonga from April 2013 until February 2014 and again from December 2014 until January 2016.

³⁷ Lord David Tupou, appointed by the King to the Privy Council of Tonga which is empowered to advise the King on legal matters. I spoke with Lord Tupou on November 3, 2013.

³⁸ Here I am using the term custom to mean local legal traditions. This is term normally used when local legal traditions are legally protected, and is the language I used when speaking with Lord Tupou.

so-called traditional life. There is no divide between those living according to custom and those living a modern life as is the case in the other Oceania island countries. Living a traditional life is living a Tongan life. This revelation caused me to look more closely at the legal system. I saw that although the legal system has a British veneer, it is Tongan beneath the surface.

In order to see Tongan law in action I attended Magistrate's Court regularly over two years. The great majority of cases are heard in Magistrate's Court, the proceedings are conducted in Tongan, and the blend of informal and state law, and local and imported law is most evident there. Not only is the law itself an interesting amalgam of local and imported legal traditions, but the legal process also reflects both British and Tongan elements.

A historical contextualization of the broader social and legal framework of the studied concepts was undertaken through secondary histories, and archival research conducted at the Western Pacific Archives at the University of Auckland and the Palace Office in Nuku'alofa, Tonga.

The project is comprised of a case study of two legal traditions—apology and the protection of reputation. The two legal traditions were selected for study because they exemplify the two ways local and adopted law combine in Tonga. The former is a local legal tradition that was never incorporated into the formal legal system but remained a very important element in the settlement of disputes in Tonga. The latter is reflected in codified laws which govern the law of defamation and contempt. The existing local legal tradition easily adopted language and a legal process from the imported legal tradition because conceptual foundations of the laws coincided, but the new law is considered a Tongan legal tradition.

Further, these particular legal traditions were selected because both concepts have been recently challenged by the exercise of constitutional rights, without an ensuing constitutional conundrum. This development serves to exemplify the discontinuity of a particular tradition in certain circumstances, where the legal efficacy of that tradition has been lost. In both cases resort to constitutional rights ensued as a result of an abuse of the power held by those in the socio-political hierarchy.

Outline

This project consists of six chapters. Following this introduction the first chapter presents the development of the binary of custom and law as a colonial legacy. When discussing legal traditions in former colonies where there is a demarcation between the so-called traditional and modern it is necessary to recall that the genesis of this division was the result of a conscious English colonial policy to separate existing local legal systems from introduced English legal systems. It is important to include this chapter because it seems that the colonial origins of the idea of 'custom' as something other than law has been largely forgotten. This chapter serves as a prelude to the discussion of Tongan legal traditions, because in Tonga we see the possibilities of legal development in the absence of this colonial divide of custom and law.

In effect this chapter exposes the erroneous basis for the protection of custom or tradition in the former colonies in Oceania. It reveals the post-colonial condition that Tonga avoided when it dodged annexation by imperial powers in the region. The remainder of the project discusses how the Tongan legal system has evolved and changed outside of this colonial binary.

Chapter 2 discusses the theoretical underpinning of the project. This approach takes the project beyond a descriptive approach of law. My discussion of specific Tongan legal concepts is grounded in the theory of tradition as espoused by Edward Shils³⁹, and in Martin Krygier's notion of law as tradition.⁴⁰ This is a good fit for a discussion of legal change as Shils characterized tradition as "the persistent in the midst of innovation".⁴¹ Krygier added that change incorporated into traditions is then interpreted in traditional ways⁴² so that tradition remained a constant even in the face of change. Even though Tongan legal traditions were codified and adjudicated in a new imported legal process, the application of the legal traditions was interpreted and applied in a manner that reflected Tongan traditions. Importantly, Krygier suggested that traditionality is a central feature of all legal systems, and this idea of traditionality underpinning *all* legal systems evens the playing field so that the dichotomy of custom and law, or the traditional and the modern in former colonies can be finally dispensed with. Tradition does not come preloaded with content, but rather connotes the traditionality of a concept. Traditionality imbues law with a pastness that has value.⁴³

Chapter 3 introduces the concept of apology and how it can work to heal relationships and restore harmony. The continuing importance of apology in Tonga as a legal tradition can be traced back to its moderating effect on the power of chiefs who held absolute power over the commoners, but had to humble themselves before their gods. The concept sits uneasily with

³⁹ Edward Shils, *Tradition* (Chicago: University of Chicago Press, 1981).

⁴⁰ Martin Krygier, "Law as Tradition" (1986)5(2) Law & Phil 237.

⁴¹ *Supra* note 40 at 45.

⁴² *Supra* note 41 at 252.

⁴³ Hizky Shoham, "Rethinking Tradition" (2011) 52(2) European Journal of Sociology 313.

western legal traditions where an apology may be construed as a confession or admission of liability. However, apologies remain important in Tonga where apologies continue to remedy damages not recognized by the imported legal system.

Chapter 4 explains how the retention of apology as an important Tongan legal tradition has had the effect of making the imported legal system workable in the Tongan context. Unlike many existing Tongan legal traditions, apology has not been codified. However, the concept plays an important role both inside and outside of the formal legal system. Whether an apology is made and accepted may determine if the formal legal system is accessed at all, the extent of damages may be influenced by the presence of an accepted apology, and even if no formalized law has been transgressed, an apology may be expected in order to restore harmony in the community.

This chapter also examines the limits of apology and forgiveness. In answer to calls to address domestic violence in Tonga, the police instituted a no-drop policy whereby a complaint of domestic violence must proceed to prosecution. The legal tradition of apology was no longer an efficacious remedy in these instances. This is the other side of legal change. The retention of the legal tradition of apology has effectively maintained the Tonganess of the legal system, but in the domestic violence scenarios apologies were not controlling the abuse of the power of a Tongan man over his wife and children. Tongan women chose to exercise those rights introduced by Tāufa'āhau to address the abuse, and in doing so rejected the legal tradition of apology.

Chapter 5 introduces the legal traditions that surround the protection of reputation. Unlike apology and forgiveness, this legal tradition was found in both the Tongan and imported legal systems. Respect for reputation, particularly ascribed reputation, is paramount in Tonga's ranked hierarchical society. In the imported legal system, reputations may have been valued somewhat differently, but the rules of an imported regime of defamation law provided a template for Tonga's codified legal tradition to protect reputation.

Chapter 6 analyses the development of Tonga's defamation law regime. The codification of defamation law as well as other specific enactments to ensure respect of rank formalized an already existing legal tradition in Tonga. Respect for rank politically, socially and even within the family is the basis for Tonga's hierarchical society. This was not lost when the law was formalized. From the beginning, the formalization and interpretation of the law was brought about by Tongans to reflect their particular society.

In recent decades the inviolability of the reputations of the monarch and nobility has been challenged as local newspapers published articles which openly questioned the activities of this most highly ranked group. Again the limits to the local legal traditions were challenged when people sought to exercise their freedom of expression guaranteed by the constitution. Once again Tongans chose to exercise the constitutional rights adopted by a Tongan monarch in order to address an abuse of a traditional power—in this case the power of the King and Nobility over the commoners.

The project concludes with the observation that local legal traditions in Tonga were not lost to westernization even though they were never 'protected' by the formal legal system. In

fact, Tongan legal traditions have evolved as a result of the agency of Tongan people deciding how to solve the disagreements that arise. The legal system is considered Tongan even though it is made up of both Tongan and adopted legal traditions because received legal traditions are always translated through a Tongan lens.

Importantly, no constitutional conundrum ensued when local legal traditions were challenged by the assertion of constitutional rights precisely because local legal traditions were not protected as something different from law. In the absence of protected custom, exercising constitutional rights was not seen as a choice between custom and law, or tradition and modernity but as a way to settle disagreement, a new way to solve legal problems.

Chapter 1: The Colonial Legacy of the Custom/Law Binary in Former Colonies

1.1 Introduction

This chapter is a prelude to the project. It is a discussion of what the Tongan legal system is not, and therein provides a counterpoint for the chapters about the dynamic role of Tongan legal traditions which follow.

In most small island countries of Oceania the legal system is characterized by a binary of law and custom. I suggest that this is a lasting legacy of indirect colonial rule. Further, the post-independence constitutional protection of custom has served to institutionalize this binary and perpetuated a colonial notion of custom as something different from, and subsidiary to law.

Tonga is an exception in the region as it is the only small island country to have escaped colonial indirect rule. As a result, Tongan legal traditions have developed as Tongan law, and not as part of a bifurcated system of imported law and local custom. Local legal traditions renamed as custom or customary law have not been expressly protected in the Tongan constitution so that local law does not have to be considered apart from, and often in opposition to introduced law. As a result, Tongan law which may be either a formal or an informal component of the legal system, is better positioned to respond to societal change.

First, this chapter introduces the different development of Tongan law compared to that of the other island countries in the region. Second, the chapter explains how the binary of custom and law was conceived as part of the late Imperial project that set out to preserve indigenous cultures which were considered too primitive to survive exposure to modernity. Next, the treatment of law and custom by anthropologists and legal pluralists is considered in order to draw out the similarities of their approach to that of colonial authorities who treated

local legal systems as something different from law. The dichotomy was institutionalized when custom was protected by constitutional and statutory provisions perpetuating local law's subsidiary position to the imported legal system. Local laws became frozen as pre-contact custom and could not become 'law'. Lastly, court cases which deal with the legal binary of law and custom are discussed in order to exemplify the problems, and show the paralysis engendered by this legal binary.

1.2 Binary of Law and Custom in the Post-Colony

Dichotomous legal systems made up of imported law and local law named as custom by colonizers predominate in the post-colonies. The colonial project defined local law as something different from 'law', and with the importation of European legal systems, local law was designated as law's 'other'. This colonial legacy of a binary of law and custom was perpetuated when custom or customary law was protected by constitutional provisions at the time of constitutional independence.

The legal traditions of Tonga developed in the absence of colonial indirect rule. As a result, there was no binary of local law and introduced state law created by a colonial administration. Rather, the basis of the Tongan law continued to be Tongan legal traditions even as Tonga grappled with the introduction of introduced legal concepts. This project serves to counter the continuing conceptual analysis of custom¹ as something which is different from law, a view which I regard as the perpetuation of a colonial legacy.

¹ See New Zealand Law Commission, *Converging Currents: Custom and Human Rights in the Pacific* (Wellington New Zealand: Study Paper 17,2006) at 47 where custom is defined as "the values, principles

Tonga has adopted a British-style, liberal constitution and legal system as have the other former protectorates and colonies in the South Pacific island countries.² However, Tonga is the only country not to have provided for the formal protection of custom or tradition by constitutional provision or statute. Therefore, there is no notion of custom or customary law in Tonga that has been reified or frozen apart from state law, and it is my contention that this has allowed the development of a Tongan legal system which has been able to continue to accommodate legal change in a culturally relevant way.

The other small island countries in the South Pacific expressly protected custom or tradition by constitutional or statutory provisions,³ and often custom (or customary law) is designated as a source of law alongside common law and statute.⁴ As a result, the issue of legal

and norms that members of a cultural community accept as establishing standards for appropriate conduct, and the practices and processes that give effect to community values"; See also Jean G. Zorn, "Custom then and now: the changing Melanesian family" in Anita Jowitt and Tess Newton Cain, eds, *Passage of Change: Law Society and Governance in the Pacific* (Canberra: Pandanus Books, 2003) 95 at 101: "[P]ractices become custom when they are fairly regularly practised by a large segment of the community".

² The small island countries in the South Pacific which I refer to are those designated as Small Island Developing States (SIDS) by the United Nations: Cook Islands, Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu.

³ Nauru and Tokelau do not expressly provide for the recognition of customs and traditions in the constitution, but both countries have legislation recognising custom's legal role. In Nauru the *Custom and Adopted Laws Act 1971* directs the courts of Nauru to "give effect to customs and usages of Naurians to the extent that these are not limited by legislation"; and in Tokelau legislation often refers to custom including the *Tokelau Village Incorporation Regulations 1986*, *Tokelau Divorce Regulations 1987* and the *Tokelau Amendment Act 1967*. For a comprehensive survey of the sources of law in the countries of the region see Michael A Ntumu, *South Pacific islands Legal Systems* (Honolulu: University of Hawaii Press, 1993).

⁴ There are few exceptions. In Niue custom is not a direct source of law, but s. 296 of the *Niue Act 1966* provides that "judicial notice is to be taken of Niue custom so far as it has the force of law." Custom is not recognized as a source of law in Fiji in the recent 2013 constitution, although it had been in previous constitutions.

change which concerns customary practices revolves around proving the existence of those practices and setting them against the 'law'. In village life throughout the island countries of the South Pacific, custom *is* the law where law is understood to be the rules ordering social life and the provision of a means of dispute settlement. An issue arises when custom is challenged as a result of change—either because new ideas have changed some aspect of how life is lived or have presented opportunities for social change, or because those subject to local authority opt to exercise their constitutional rights or to rely on state law in order to challenge that local authority.

Challenging custom or local legal traditions moves the consideration of custom from the village to the courthouse. This is the scenario where custom and state law often collide. The protection of custom apart from law in the constitution reifies custom and makes it something other than law, and this inhibits the ability of local legal traditions to adapt to change. In effect, the particular legal pluralism model engendered by the separation of custom from state law tends to harbour an “essentialist and culturalist” perspective.⁵ Baudouin Dupret suggested that the promotion of differentiated concepts of law such as state law or indigenous law “assumes that there is something like a ‘true’ law, which is the reflection of an ‘authentic’ society whose main cultural characters are translated into rules of conduct.”⁶ The post-colonial state model

⁵ Baudouin Dupret, “Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, critiques, and praxiological re-specification” (2007) 1 (1) *European Journal of Legal Studies* 1 at 13.

⁶ *Ibid* at 14.

where custom is protected by the formalized legal system necessarily promotes this essentialist perspective.

The custom or local legal traditions which existed at the time of contact with colonial interlopers were frozen by colonial administrators in order to preserve the local culture as the colonizing powers found it. This decision was made without the input of the local populations. It was designated as the true law for the local populations by colonial administrations. The limitation that arose once the colonizers were gone and this model was institutionalized within the state legal system was that there was no bridge between the two concepts of law provided for in that constitution. Clashes were certain to arise where two different legal traditions governed the same social interaction. There was the lasting assumption that custom, as the true representative of local culture could not change to be law-like. Otherwise, why was it saved and protected by law but to be different from law?

The Tongan legal system is not constrained by this constructed binary because custom is not constitutionally or otherwise formally protected. Tonga has been able to respond to modernity in a *Tongan* manner, because the essence of a colonial notion of a traditional legal system unable to respond to modernity never arose in Tonga. It was possible for Tonga to critically adopt modernity without the loss of a local worldview contrary to the colonial doctrine of modernity collapsing local culture.

1.3 Indirect Rule and the Colonial Creation of the Binary of Law and Custom

The particular legal binary of western and non-western law (or custom and law), was constructed late in the colonial era as a result of the adoption of indirect rule. Before the advent of indirect rule in the late nineteenth century, law in the colonies was developing very

differently. In the earlier colonial forays law was considered to be an important element of the 'civilizing mission'. In the late eighteenth century Lord Kames, Scottish jurist and a leader of the Scottish Enlightenment (and mentor to Adam Smith and David Hume) developed a socio-cultural model of civilization and progress that postulated four stages savagery to civilization.⁷

The evolutionary stages were grounded in patterns of subsistence: savage life based on hunting; nomadic herding stage where animals were domesticated; agricultural stage and the cultivation of fields; and ultimately a commercial stage which arose through the buying and selling of goods and services. Lord Kames further suggested that no laws were needed in the first two stages because the first avoided other human beings except for his own family, and the second had only local connections among clans and tribes. The third stage was more complex as the occupation of land and construction of permanent communities required tradespeople and the annual harvest required cooperation, all necessitating government and law. Commercial society was more complex and required new laws governing buying and selling, and the transportation and distribution of commodities. One could argue that this looks like the history of Scotland, but it became the Enlightenment model for the history of the human community.

⁷ Henry Home Kames, *Historical law-tracts* 4th ed (Edinburgh, 1792) online: *Eighteenth Century Collections*
<http://find.galegroup.com.ezproxy.library.uvic.ca/ecco/infomark.do?&source=gale&prodId=ECCO&userGroupName=uvictoria&tabID=T001&docId=CW3323708578&type=multipage&contentSet=ECCOArticles&version=1.0&docLev.>

The Imperial project followed this model. The governance was paternalistic, and focused on civilization and progress. This was a colonial era characterized by direct rule.⁸ The District Officer ruled the district directly and any local leaders were designated as his subordinates. If the local leaders exercised any statutory powers as village leaders they held that position as Government Officers. The single legal order was defined by the 'civilized' laws of Europe, and no local institutions were officially recognized.

The "civilizing mission" of British Imperialism was rocked by several rebellions in the late nineteenth century. In 1857 the Bengal army mutinied against their British commanders, and within the next decade the British battled colonial uprisings in New Zealand, Jamaica and Ireland. Sir Henry Maine was appointed to the Governor General Council in Calcutta in 1862, shortly after the Indian rebellions. He did not lay the blame for the colonial unrest on the political or economic effects of colonial domination but rather described the revolt as an "epistemic failure".⁹ Maine reasoned that although the British had taken local custom, history and knowledge into account when formulating colonial policy, those customs had been misunderstood. He offered a new anthropological understanding of the colonized in order to 'explain' why the civilizing mission of colonial project appeared to be unsuccessful. Maine presented a scientific-style study of law tracking the progressive development of law through

⁸ Sir Anton Bertram, *The Colonial Service* (Cambridge: Cambridge University Press, 1930) at 69.

⁹ Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton NJ: Princeton University Press, 2010) at 154.

time,¹⁰ a point of view which reflected the Victorian preoccupation with evolution.¹¹ He proposed a unilineal evolutionary model with a set of stages through which all societies would pass.¹²

Maine's book was published in 1861, and it became a legal best seller.¹³ The book broached topics that were 'fashionable' in Victorian England.¹⁴ The topics of the day were evolution, progress and the development of society. The gist of Maine's argument was that primitive societies were not ready for modern law. In fact, if applied too soon the result was the breakdown of the culture, and this is what he saw as the root of the uprisings against Imperial rule. His argument rested upon an anthropological functional view of non-western law. Whereas earlier histories of legal thought had considered custom to be one among many sources of substantive law, Maine's work took a more anthropological approach to custom. He designated custom as a complete legal and moral order arising from the social order which was at odds with a modern legal system.¹⁵

Maine conceived a binary of status and contract to contrast modern and primitive society. According to Maine, pre modern societies were characterized by status—"a condition of society in which all relations of Persons are summed in the relations of Family."¹⁶ Progressive

¹⁰ Henry Sumner Maine, *Ancient Law: Its connection with the early history of society and its relation to modern ideas*. (London: John Murray, Albemarle Street, 1861) at c. 5.

¹¹ RCJ Cocks, *Sir Henry Maine: A study in Victorian Jurisprudence*. (Cambridge, UK: Cambridge University Press, 1988) at 52.

¹² *Supra* note 10 at c. 1.

¹³ AWB Simpson, "Contract: 'The twitching corpse'" (1981) 1 Oxford J Legal Stud 265 at 268.

¹⁴ *Supra* note 11 at 1.

¹⁵ *Supra* note 9 at 160.

¹⁶ *Supra* note 10 at 99.

societies were characterized by contract— individual obligation arising from the “free agreement of individuals.” Maine’s work was less evolutionary than binary¹⁷ with the result that anthropology was no longer the study of contrast between ignorance and knowledge as it had been during the era of Enlightenment, but took on the form of a comparison between the past and present.¹⁸

According to Maine, law was conceptually different in non-European, non-progressive societies. In progressive societies, characterized by contractual relations between individuals, lawmaking was a formal rational activity that was undertaken in response to progressive changes in society. In primitive societies there could be no law making as long as custom was part of, and integral to a societal whole. Primitive ‘law’ could not be disentangled from society without causing the collapse of that society. Thus, Maine constructed a model of native society which was ‘traditional’ in opposition to modern society.¹⁹

This new theory of law and custom followed Britain’s next Imperial foray. Up until the late nineteenth century Britain simply imported its own political and legal institutions to the colonies, and its reception was sometimes influenced by local culture. India had presented a complicated problem with its diverse governing systems throughout the continent. There, administrators attempted to create a hybrid system which recognized Indian institutional forms. Hindu and Muslim law officers were instrumental in this reform. In West Africa returning

¹⁷ *Supra* note 9 at 82.

¹⁸ Bernard McGrane, *Beyond Anthropology: Society and the other* (New York: Columbia University Press, 1989) at 78.

¹⁹ *Supra* note 9 at 3.

slaves had settled in the area since 1807. This group were believers in Christianity and western-style civilizations. Many became well educated doctors, lawyers, and educators and held leading positions in the colonial administration. However, the advent of indirect rule in the last wave of the colonial project put an end to these alliances between colonized and colonizer.²⁰

The colonial uprisings had convinced the British that a new policy was needed in order to address the 'native question'.²¹ Maine's theory of the binary nature of civilized and uncivilized provided the rationale for a new colonial administration based on indirect rule. This approach meant that the reliance on educated local people was dropped for more "culturally legitimate allies".²² The 'ideal native' was now seen as "the traditional chief or elder who (provided, of course, that he was co-operative with the administration and conformed to its standards of efficiency) dispensed fair but firm justice to his people."²³

Indirect rule was instrumental to Britain's new colonial 'dual mandate'. Pursuant to this mandate Lord Lugard²⁴ defined the overall role for England in colonial Africa as the "task as

²⁰ Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of late colonialism* (Princeton, NJ: Princeton University Press, 1996) at 75.

²¹ That is the perpetual problem of colonialism: the control of so many by so few.

²² *Supra* note 20 at 74.

²³ H F Morris & James Read, *Indirect Rule and the Search for Justice: Essays in East African Legal History* (Oxford: Clarendon Press, 1972) at 15.

²⁴ Lord Frederick Lugard is well known for his exposition on indirect rule in Africa. It is clear that his direction to save indigenous culture was not so much to protect it for its own sake, but because he truly thought that the African peoples were not capable of managing modern change. He described the "typical African" as "a happy, thriftless, excitable person, lacking in self-control, discipline, and foresight, naturally courageous and naturally courteous and polite, full personal vanity, with little sense of veracity, fond of music" and "loving weapons as an oriental loves jewelry." Then Lugard continues with a quote from Sir C. Eliot's: "His mind is far nearer to the animal world than that of the European or Asiatic and exhibits something of the animal's placidity and want of desire to rise beyond the state he has

trustee on the one hand, for the development of the subject races, and on the other hand, for the development of its material resources for the benefit of mankind".²⁵ Lugard further elaborated on the functioning of that 'trusteeship' which underpinned the introduction of a system of indirect rule in the colonies: "The object of substituting for the British rule, in which the chiefs are mere agents of the Government, a system of native rule under the guidance and control of the British staff...is primarily educative...[T]he endeavour is to prevent denationalisation, to develop along indigenous lines, to inculcate the principle that the function of the ruler is to promote the welfare of his people and not to exploit them for his own pleasure, and to afford both rulers and people the stimulus and interest in life."²⁶ The 'civilizing mission' was reversed. The new agenda was to protect and reinvigorate native society. In fact, "imperial rule was often construed as a necessity for curtailing the tendency of native societies toward dissolution born of endemic internecine conflict or from contact with modern civilization."²⁷

The policy was racist and it segregated Europeans from non-Europeans. The dual mandate which prescribed indirect rule allowed a rationalization for Europe's continued domination of subject peoples. It permitted the proliferation of capitalism which materially benefitted only the modern, while the non-modern societies were sidelined spatially,

reached." *The Dual Mandate in British Tropical Africa* 5th ed (London: Frank Cass & Co, Ltd, [1922] 1965) at 65.

²⁵ Lord Frederick Lugard, *The Dual Mandate in British Tropical Africa* 5th ed. (London: Frank Cass & Co, Ltd, [1922] 1965) at 66.

²⁶ *Ibid* at 228-229.

²⁷ *Supra* note 9 at 11.

economically and socially. The law of non-modern societies could not be transferred to modern societies because it could not be untangled from primitive society, and modern law could not be transferred to non-modern societies until local peoples could be educated in modern ways. It was a sort of deferred assimilation process. In the meantime, English commercial interests could pursue “the development of its material resources for the benefit of mankind” unimpeded. In effect, non-European society was segregated from modernity, but now it was for the natives’ own good, and was explained as positive attribute of the colonial project.

Indirect rule was important in the last phase of colonial expansion in the late nineteenth and early twentieth centuries. British colonial expansion had slowed in the second half of the nineteenth century, and a resolution was passed in the House of Commons which discouraged any further colonial expansion in Africa.²⁸ However, this policy was reversed when the race for political control of territories and trade routes by European powers resulted in rapid colonial expansion in the late nineteenth century. Subsequently the continent of Africa was partitioned between Britain, France, Germany, Portugal and Belgium,²⁹ and the Pacific countries came under control of Britain, France, Germany and the United States.

Indirect rule allowed British administrators to govern through the medium of tribal or other local authorities. Existing local authorities were preserved, and if local society was not

²⁸ See *Report from the Select Committee on Africa (Western Coast)*, *Parliamentary Papers*, V (1865), iii which provided “that all further extension of territory or responsibilities of Government, or new treaties offering any protection to native tribes, would be inexpedient, and that the object of our policy should be to encourage in the natives the exercise of those qualities, which may render it possible for us more and more to transfer to them the administration of all the Government with a view to our ultimate withdrawal from all, except probably Sierra Leone.”

²⁹ Liberia was alone in avoiding colonization in Africa.

organized in tribes or villages with a central leader, those conditions were created.³⁰ Payment of taxes was directed by the local chief who was allowed to retain a fixed proportion. As to the law, the Native Authority was authorized by the British Resident to make rules for the local population under his leadership, and to enforce those rules.

1.4 Indirect Rule in the South Pacific

Eminent historian, Sir Stephen Roberts remarked that in the South Pacific countries indirect rule was necessary because “it was evident that the natives were clearly incapable either of maintaining kingdoms of their own, or of developing along the line of Western constitutionalism.”³¹ This line of reasoning exposed the prejudice of the colonizers who were blind to the functioning systems of law and governance that existed in the region. The British did not recognize or chose not to recognize existing systems of governance that did not resemble their own.

The form of indirect rule undertaken in the South Pacific was described as:

“a stepping stone, ... not to direct rule, but to that stage in which the native organisations, after a long training and after the inculcation of generations of discipline, may have as many functions as their nature permits, with the European officer supervising these and managing the remainder himself. ... It gives a limited but practical scope to the natives, and may be termed the theory of indirect rule brought down from the clouds of generalization to the earth of what is practically possible.”³²

The educative policies of indirect rule worked to keep the ‘natives’ in their place in their villages. In the century before the establishment of indirect rule missionaries had introduced

³⁰ *Supra* note 8 at 74.

³¹ Stephen H Roberts, *Population Problems of the Pacific* (London: George Routledge & Sons, 1927) at 151.

³² *Ibid* at 184.

schools and European style education to the South Pacific region.³³ In addition to Bible training, these schools also instructed the students in reading and writing and provided a basic education.

During the era of direct rule, British colonizers in India and Africa had provided those same educational opportunities. However, colonial uprisings had put an end to this approach. The British had learned that from their ‘mistakes’ in Africa and India. They complained that European-style education turned “good Kano farmers into lawyers, and in India result[ed] in the emergence of an educated native whose glib memory often enables him to dispense with the need of assimilation.”³⁴

As a result, educational opportunities in the late colonial era in the South Pacific protectorates were “linked to the native’s past” and of “definite use in the native’s life”.³⁵ This translated to vocational training especially in agricultural pursuits. The policy was directed at preparing the local population for change which often meant the provision of labour for commercial agricultural projects. Evidence given before an Australian Commission on trade with the Pacific Islands in 1918 promoted this approach: “[W]hat we ought to aim at is some method of ‘projected efficiency’, or some means of treating and developing these people so that they themselves in the future will become producers, and will swell the volume of trade. It

³³ See Charles W Forman, “Theological education in the South Pacific Islands: a quiet revolution” (1969) 25 *Journal de la Societe des oceanistes* 151.

³⁴ *Supra* note 31 at 192. Here, Roberts explained why the ‘natives’ in the South Pacific should not be taught to read.

³⁵ *Supra* note 31 at 193.

seems to me imperative that we should carry out the industrialization of the natives.”³⁶ The aims of education were to provide labour for tropical agricultural production for trade, and the narrow vocational training shaped the role of the local population during the colonial period and beyond.

Táíwò suggested that the new educative direction under an indirect rule regime ensured a “pattern of exclusion.”³⁷ The British colonizers were loath to repeat mistakes made in India and Africa under direct rule, so that under the new regime “colonial education sought to rein in the natives’ enthusiasm for heterodoxy, their ability to question the basis of legitimacy of any rule...”³⁸ Lugard, the great proponent of indirect rule urged that the best result was achieved in education in the colonies by “placing the formation of the character before the training of the intellect.”³⁹

The pattern of the separation of traditional and modern was established and reinforced by educational and vocational opportunities. One could not be both traditional and modern. In fact, the policies of indirect rule denied colonized peoples the agency to decide how they would lead their lives in the face of change. Olúfémi Táíwò explained the situation in Africa:

“Not only was African subjectivity prevented from determining its relation to its own indigenous heritage, it was precluded from deciding to embrace and obtain some practice with the new forms of social living presupposed by the new, especially in the political sphere. ... By their *prima facie* exclusion from decisions regarding what to do

³⁶ Australia, Interstate Commission, *British and Australian Trade in the South Pacific: Report* (Melbourne: H J Green, Acting Govt. Printer, 1918) at 128.

³⁷ Olúfémi Táíwò, *How Colonialism Preempted Modernity in Africa* (Bloomington: Indiana University Press, 2010) at 95.

³⁸ *Ibid.*

³⁹ *Supra* note 25 at 460.

with such modern institutions as liberal democracy, the rule of law, private enterprise and individualism as a principle of social ordering, Africans were disabled from building their agency to meet the challenges of these new modes of social living and make peace with them.”⁴⁰

Táíwò concluded that the policies of indirect rule denied Africans a “critical embrace of modernity”.⁴¹

The situation in Oceania was the same. In the legal systems the separation of local law from imported law reinforced the modern and traditional, or western and non-western dichotomy and prevented local legal traditions from change. Indigenous populations were relegated to unchanging tradition and could not opt for change even if they wished to do so. The traditional was viewed as what was not modern, so the traditional could never choose to be modern without losing its status of difference.

1.5 Preserving the Colonial Legacy

The notion of unchanging custom was a self-serving colonial fabrication. It is not possible that custom remained unchanged since time began. In the South Pacific region there was movement between the islands long before the arrival of the Europeans.⁴² There has been a European presence in the area since Magellan’s voyage in the sixteenth century. Well before the establishment of protectorates and colonies by European powers the inhabitants of the

⁴⁰ *Supra* note 37 at 13.

⁴¹ *Ibid* at 16.

⁴² For examples of evidence of movement and cultural exchange throughout the South Pacific which predates the arrival of the Europeans, see: Stuart Bedford, Christophe Sand & Sean Connaughton, eds, *Oceanic explorations: Lapita and western settlement* (Canberra: Australian National University Press, 2007); Patrick V Kirch, “Long-distance exchange and Island colonization: The Lapita case” (1988) 21 (2) *Norwegian Archaeological Review* 103; Malama Meleisea, *The Cambridge History of the Pacific Islanders* (UK: Cambridge University Press, 1997).

area were influenced by the presence of whalers, traders and missionaries.⁴³ However, the advent of indirect rule put an end to local decisions to embrace or reject change. Indirect rule set custom as something apart from law. The Imperial project decided that custom could not modernize without destroying the underlying culture that it was part of.

The predominant idea of protecting custom apart from modern state law has tended to direct the discussion of legal change in the post-colony. The legal recognition and protection of custom by state law has institutionalized a legal pluralism model comprised of a modern/traditional binary. The result is that a consideration of legal change is always within this constructed binary. Custom cannot adapt to modernity as it is locked in opposition to state law which is representative of modernity and has a monopoly on the use of modern legal traditions.

Legal pluralism⁴⁴ is the hallmark of all legal systems. As John Griffiths pointed out, whereas legal centralism may be an ideal or ideology, legal pluralism is a fact.⁴⁵ However, in the post-colony the fact of legal pluralism is typically found in a duality which was originally created by the imposition of the colonizer's legal system on to an already existing legal system in the colony.⁴⁶ This duality has some unique features that reflect their colonial legacy, and it is

⁴³ Ernest S Dodge, *Islands and Empires: Western Impact on the Pacific and East Asia* (Minneapolis: University of Minnesota Press, 1976).

⁴⁴ Legal pluralism is defined as the presence in a social field of more than one legal order.

⁴⁵ John Griffiths, "What is Legal Pluralism" (1986) 24 J Legal Pluralism 1 at 8.

⁴⁶ Sally Engle Merry, "Law and Colonialism" (1991) 25(4) Law & Soc'y Rev 889.

suggested that this colonial legacy is revealed in a framework for legal pluralism developed by Brian Tamanaha.⁴⁷

Tamanaha identified six systems of normative ordering which may make up a plural legal system. His first normative order is the official or positive legal system. The other five categories include customary/cultural, religious/cultural, economic/capitalist, functional and community/cultural, all of which are characterized as normative orders which are distinct from the official legal system.

It is his treatment of customary/cultural that is of interest to this project. Tamanaha described this category as including 'indigenous law' or 'traditional law' which he described as "labels invoked in post-colonial societies, and hav[ing] limited applications to other contexts."⁴⁸ He continued, stating that "the very notion of 'customary' or 'traditional' or 'indigenous' were creations of and reactions to colonization and post-colonisation, in which the norms and institutions of indigenous societies were marked (for various purposes) as distinct from the transplanted norms and systems of the colonisers."⁴⁹

Tamanaha also observed that the social-political heterogeneity which usually accompanied legal pluralism takes either a group based or individual based form.⁵⁰ A group-based form occurs when a social arena consists of a number of discrete groups often

⁴⁷ Brian Z Tamanaha, "Understanding Legal Pluralism: Past to present, local to global" (2008) 30 Sydney L Rev 375.

⁴⁸ *Ibid* at 397.

⁴⁹ *Ibid*.

⁵⁰ *Ibid* at 403.

differentiated by language, religion, ethnicity and culture or sometimes by clans. In the post-colonial social arena Tamanaha identified an individual based heterogeneity where individuals oriented to western liberal norms coexist with individuals oriented to non-western customary normative systems.

It is notable that Tamanaha's customary/cultural normative ordering has two characteristics not held by any other of the normative orders listed. First, this particular normative order was marked as 'traditional' or 'indigenous' *by the colonizers* or in reaction to colonization. That is, it is a not self-defining ordering as are the different religious or ethnic orders. It is defined by what it is not. Second, this normative ordering was characterized as individual based heterogeneity described as a binary situation where co-existing individuals were oriented to western or non-western normative systems. In other words, custom is law's 'other' in this characterization. It was defined and named as such by the colonizers in the first instance, and later is defined in terms of its being non-western, something other than the west. This is problematic, and especially so when custom is protected in a liberal constitution. It cannot be treated simply as a category of constitutionally protected multiculturalism. For example, when a particular language or ethnicity is expressly provided for in a constitution there is something substantively present in that category. It is expressly Islamic law or the French language for example. This is not so in the case of a category of 'customary law' or 'custom'. It is defined by negative qualities—it is not western and it is not modern.

Custom was essentialized as a non-western, non-modern concept by the colonial project when the grand scheme of universal modernization and assimilation gave way to a rigid

distinction between traditional and modern societies.⁵¹ This binary carried a normativity that held western cultures in a superior position *vis-a-vis* the local culture. At constitutional independence Pacific Islanders sought to reassert their suppressed cultural identities, and they did so by protecting custom and tradition in their newly acquired liberal constitutions.⁵² The celebration of difference was an understandable reaction to the release from a dominant imposed regime that had belittled the local way of life,⁵³ but it also reified the colonial discourse that separated law and custom.

The result was that custom was fixed and given a protected position apart from state law. This created a continuation of the binary created during the colonial era. But the new inclination was to give custom the positional superiority. In a discussion about how images of women in other societies can be prejudicial to women in one's own society, Laura Nader noted that: "Critique of the other may be an instrument of control when the comparison asserts a positional superiority."⁵⁴ The colonizers' once maintained an image of superiority of western legal systems by denigrating custom as embedded in primitive culture and not amenable to modern change. At the time of independence from colonialism local culture was celebrated as something to be saved, but the idea of custom as something non-western and non-modern was

⁵¹ *Supra* note 9 at 11.

⁵² Asesela Ravuvu, "Culture and Traditions: Implications for Modern Nation Building" in Ron Crocombe, Uentaba Neemia, Asesela Ravuvu & Werner Vom Busch, eds, *Culture and Democracy in the South Pacific* (Suva: Institute of the Pacific Studies, 1992) 57.

⁵³ Stephanie Lawson, *Tradition versus Democracy in the South Pacific* (Melbourne: Cambridge University Press, 1996) 1.

⁵⁴ Laura Nader, "Orientalism, Occidentalism and the Control of Women" (1989) 2 *Cultural Dynamics* 323 at 323.

preserved. Any nuanced consideration of what might be a good or bad feature of western or non-western law was lost to the simplified dichotomy of western and non-western, or modern and traditional.

After independence custom and state law were positioned in a dialectical framework of western and non-western. Whereas in the colonial era custom was deplored by the West as the law of the uncivilized; in the post-colony the aim of custom was glorified as the pursuit of group harmony, as opposed to western law's pursuit of individual advancement. Within the dialectical framework custom is what law is not. However, a problem arises when custom and modern law are taken out of the dialectical context, and the dialectical origin of the construction of difference is forgotten.⁵⁵ Then law and custom may become "reified in positive, rather than dialectical, definitions."⁵⁶ In other words, custom comes to be treated as a substantive concept in its own right, and characteristics which distinguished custom from western law become defining characteristics.⁵⁷

But what is custom? Within the dialectical framework it suffers from a comparative substantive vacuum. Recently the New Zealand Law Commission considered the possible harmonization of the concepts of custom and human rights in the South Pacific countries and stated: "From one perspective, human rights are seen as a threat to custom and the Pacific way of life, while from another perspective custom is seen as a threat to individual freedom and

⁵⁵ James Carrier, "Occidentalism: the world turned upside down" (1992) 19(2) *American Ethnologist* 195 at 203.

⁵⁶ *Ibid* at 204.

⁵⁷ *Ibid*.

justice.”⁵⁸ Here the binary pits broadly stated ‘custom and the Pacific way of life’ against the legal concepts of ‘individual freedom and justice’. The dialectic definitions are reified: custom has become the essence of Pacificness, while the West is seen to be representative of individual freedom and justice. One is characterized as a way of life, the other as a legal concept. The fundamental differences of the two legal systems become the focus of the argument rather than a consideration of the substantive issue at hand. In other words, the issue becomes how to harmonize or reconcile the two systems.

For example, Farran asks whether the concept of legal pluralism may be an obstacle to human rights in the South Pacific.⁵⁹ She posits that there is a fundamental difference between custom and constitutional rights because the former are retrospective while the latter provide aspirational models which are prospective. As such, she sees little chance of a convergence between the two any time soon.

In a similar vein, Jennifer Corrin has labelled the reconciliation of human rights and customary laws in the South Pacific a “constitutional conundrum” faced by South Pacific nations “with a constitutional mandate to preserve a unique cultural identity, which involves a conservative manifesto, whilst upholding human rights agendas developed in a very different context.”⁶⁰

⁵⁸ New Zealand Law Commission, *supra* note 2 at 11.

⁵⁹ Sue Farran, “Is Legal Pluralism an Obstacle to Human Rights? Considerations from the South Pacific” (2006) 38(52) J Legal Pluralism 77.

⁶⁰ Jennifer Corrin, “A Constitutional Conundrum: Reconciling Human Rights and Customary Laws in the South Pacific” (12 March 2014) 21st Pacific Judicial Conference.

The language echoes the colonial rationale for the separation of custom from law. Mamdani has characterized this binary approach to custom and rights as a “paralysis of perspective.”⁶¹ The components of the binary have a life of their own now. Western and non-western law have been removed from the dialectical framework so that their former comparative properties have become their definitive properties. Further, the analysis of the development of custom and rights has become ahistorical and therefore ignores the effects of colonialism.⁶² In fact, the colonial origins of the idea that custom cannot survive exposure to modernity without a subsequent collapse of society seems to have been forgotten.

1.6 Custom/Law Binary in Court

The dissonance that exists between the adopted western-style legal system and the existing local law in the post-colony is readily visible when custom is challenged in court. These court challenges provide good illustrations of the pervasive binary reasoning where constitutionally protected custom and human rights legislation clash in the face of modern problems. The courts of law cannot modernize custom or treat it as law, but rather must make a choice between custom and law.

Owen Jessep suggested that in Papua New Guinea the National Court have made use of the Constitution “as a weapon” to invalidate some elements of customary law.⁶³ However, it

⁶¹ *Supra* note 20 at 1.

⁶² Simone Durutalo, “Anthropology and Authoritarianism” in Lenora Foerstel & Angela Gilliam, eds, *Confronting the Margaret Mead Legacy: Scholarship, Empire, and the South Pacific* (Philadelphia: Temple University Press, 1992) 205 at 208.

⁶³ Owen Jessep, “The Constitutional Dimension of Customary Family Law in Papua New Guinea” in John Dewar & Stephen Parker, eds, *Family Law: Processes, practices, pressures* (Portland, Oregon: Hart Publishing, 2003) at 452.

seems that the courts are put in a difficult position where they do not really have the jurisdiction to alter custom, and so must instead make a choice between an application of law or custom. An example of this approach is found in *Re Willingal*.⁶⁴ In this case, Willingal, an eighteen year old high school student was an unwilling participant in a compensation settlement between two kin groups. She was being pressured into a marriage as part of a settlement between clans which arose due to the death of her father. The legal proceedings were instituted by the Individual and Community Rights Advocacy Forum (ICRAF)⁶⁵ which claimed that the proposed settlement infringed Willingal's constitutional rights. The Court found that the woman's constitutional rights would be infringed if the settlement were allowed to proceed.⁶⁶ In reaching this decision, the Court had a difficult time reconciling custom with state law. Injia J. acknowledged that the Constitution provided for the recognition and enforcement of customary law which required the "the fostering of a respect for, and appreciation of, traditional ways of life and culture"⁶⁷, but he also pointed out that the role of custom and custom law was limited by national laws. He concluded:

The traditional customs of the people of [this locality] like the rest of PNG have existed from time immemorial and they serve complex value systems which only they themselves best know. It is not easy for any outsider to fully understand the customs and the underlying values purposes they serve...It seems ironic that traditional customs

⁶⁴ *Application by ICRAF Re Willingal* [1997] PGNC 174; [1997] PNGLR 119 (10 February 1997).

⁶⁵ The ICRAF is a Port Moresby-based human non-governmental organization (NGO) with a long history of working within the justice system to promote the recognition of the human rights in Papua New Guinea's Constitution.

⁶⁶ The Court found that the enforcement of the custom settlement would infringe constitutional provisions section 55 which prohibits discrimination on the basis of gender, and section 32 which guarantees basic freedoms in accordance with the law.

⁶⁷ *Constitution of Papua New Guinea 1975*, National Goals and Directive Principles and Basic Social Obligations, No. 5(3).

and customary practices of some ethnic societies should be struck down by the courts as being inconsistent with our national laws. They are inconsistent with a constitutional law or a statute or repugnant to general principles of humanity, when those very customs and customary practices have their own values in their respective ethnic societies. But it is clear to me that the framers of our Constitution and modern day legislators were thinking about a modern PNG based on ethnic societies whose welfare and advancement was based on the maintenance and promotion of good traditional customs and the discouragement and elimination of bad customs as seen from the eyes of an ordinary modern Papua New Guinean. No matter how painful it may be to the small ethnic society concerned, such bad custom must give way to the dictates of our modern national laws.⁶⁸

Injia J. saw the irony of the situation where the state Court struck down local laws which reflected the very foundations of some societies in Papua New Guinea. The matter of the exchange of women was a longstanding custom utilized to restore and maintain harmonious relationships between clans in that locale.

However, it was not the fact that arranged marriages formed part of a reconciliation with neighboring communities that should have been the issue in this case. Rather, it is the fact that Willingal did not consent to the arranged marriage at that time. In fact Willingal stated that she was not opposed to the marriage itself, but rather opposed the fact that it was to occur before she finished school. Therefore the custom was not a 'bad' custom as the Court stated, but rather had to be practiced differently to reflect a changing society where women had opportunities to receive an education if they wished to do so. Here, the woman did not wish to exercise her constitutional rights in order to oppose the marriage. Arranged marriages are not unusual throughout the world, and it is arguable that they can be consistent with equality rights where there are consenting parties. In this case the woman wanted to pursue educational

⁶⁸ *Supra*, note 64 at 158.

opportunities which would not be available to her once she married. However, the courts could not reshape the local legal tradition allowing modernity to remake custom. Could a woman be both educated and ‘traditional’? The framing of customary law in the Constitution as a concept different and apart from the formal law compelled the Court to approach the issue from a custom *or* rights perspective.

In *Teonea v Pule o Kaupule of Nanumaga*⁶⁹ the Tuvaluan High Court was also faced with the issue of constitutional rights versus custom. The Applicant in this case established a new church on the island of Nanumaga. The Applicant’s new church attracted several members of the community who stopped making contributions to the local church. The *Falekaupule*⁷⁰ adopted a resolution expressly ordering the Applicant to “stop advocating his religion”. When he failed to comply, the new church was stoned and the Applicant felt forced to leave the community for his personal safety. The Applicant challenged the prohibition of his church as a violation of his rights. The Court recognized that there had been gross violations of the Applicant’s rights to freedom of belief and freedom of expression and association. However, the Court found that the *Falekaupule* was entitled to impose a restriction on the Applicant’s rights pursuant to s 29 (4) and (5) of the Constitution⁷¹ which allowed for restrictions on the exercise of the freedom of belief if “the exercise may be divisive, unsettling or offensive to the

⁶⁹ [2005] TVHC 2; HC CC no 23 of 2003 (October 2005); See case comment: Dejo Olowu. “When Unwritten Customary Authority Overrides the Legal Effect of Constitutional Rights: A critical review of the Tuvaluan Decision in *Mase Teonea v Pule O Kaupule & Another*” (2005) 9 J S Pac L 18.

⁷⁰ The *Falekaupule* is a council of elders who act as a local government council for the Nanumaga atoll. Their traditional leadership role and function is codified in the *Falekaupule Act of 1997*.

⁷¹ *The Constitution of Tuvalu* (1990) Rev Ed, Cap 1.

people; or may directly threaten Tuvaluan values or culture". This provision effectively stymied challenge to 'values or culture', but in doing so it failed to set out what these terms could mean.

This decision was reversed in a rare sitting of the Tuvalu Court of Appeal (made up of judges brought in from New Zealand). In overturning the lower court's decision Fisher JA stated:

This is not a choice between pre-European Tuvaluan traditions and the modern world. It is a choice between having a Tuvaluan island with four foreign-sourced religions and having a Tuvaluan island with five or more foreign-sourced religions.⁷²

The legacy of the colonial binary prevailed when the Court prefaced its decision with an interpretation of section 29 (4) and (5) as a choice between "pre-European Tuvaluan traditions and the modern world". Thus, the Court interpreted "Tuvaluan values and culture" as pre-European Tuvaluan traditions. Then the Court went on to recognize that a choice did *not* have to be made between "pre-European Tuvaluan traditions and the modern world". Instead the Court found that the foreign-sourced church complained of was merely joining other 'foreign-sourced religions' on the island. In effect, this statement untied the hands of the Appeal Court as it moved the issue out from the custom/law binary. The challenge to the authority of the local leader was allowed not because the Court recognized that Tuvaluans had chosen to exercise their constitutional rights in order to place a limit on their local leader's authority in this instance, but because the issue was outside the purview of 'tradition'.

In both of these cases custom was challenged because of changes in the community. In the first case, the plaintiff had access to education which she chose to pursue. In the next case,

⁷² *Teonea v Pule o Kaupule of Nanumaga* [2009] TVCA 2; Court of Appeal Civil Appeal No. 1 of 2005 (4 November 2009) rev'g [2005] TVHC 2; HC CC no 23 of 2003 (October 2005) at 158.

a new church arrived in a community and attracted new members away from existing churches. Although one case concerned equality rights and the other religious freedom, both cases represented challenges to the authority of local leadership. Because local culture and traditions were protected by state law, state courts then had to choose between law and custom when coming to a decision unless the issues could be characterized as something other than custom or tradition. The result was that those who were living a so-called traditional life could not exercise their constitutional rights guaranteed to those who lived a modern life. In *Willingal*, the woman who challenged her arranged marriage was pursuing an education which she hoped to complete before she married. In *Teonea* a new church disrupted the existing power structure on a small island. The courts could not allow tradition to accommodate modern change because of the colonial binary of custom and law that preserved custom as a pre-European concept that resisted modern change. A choice between the two had to be made.

There is another line of cases which do not fit the binary so neatly, but also illustrate the difficulty for the courts faced with a notion of unchanging tradition. In these cases it is not the exercise of local traditional authority that is challenged by changing society, but rather custom or legal traditions themselves impacted by change. The issues in the cases considered below arose when plaintiffs sought a share of new economic wealth basing their claim on constitutional rights, and defendants fell back on custom to protect their new access to the money economy. Again the courts were constrained by the binary of law and custom so that any development of local legal traditions to reflect new economic realities was stymied.

In *Assal Vatu v Council of Chiefs of Santo*⁷³ the Applicant sought an order of *Mandamus* ordering the chiefs of Santo/Malo to give them authority to perform a ceremonial jump outside of the area where the jump originated, or alternatively an injunction preventing the chiefs from interfering with their constitutional rights to perform their custom ceremony anywhere in Vanuatu. The jump in question was the Nagol Jump⁷⁴ which is an old and sacred custom associated with the Southern region on the island of Pentecost. It had become a major international tourist attraction and boatloads of tourists arrive to pay to view the spectacle.

The court found that there were two villages that had customary rights to the jump and that these jumps were reserved to, and performed only in those two villages by their custom owners. The Applicants were one of these two custom owners and they sought the order from the other custom owners, the Santo/Malo chiefs. The Applicants believed that the other custom owners were being given more access to tour groups by tour operators to the island, and sought to move their jump from the island of Pentecost to the island of Santo so that they could arrange tour groups there. The Santo/Malo chiefs replied that they would consider allowing the jump to be performed elsewhere, but a decision had not been made as yet by the National Conference of Chiefs of Vanuatu. Section 30(1) of the Constitution⁷⁵ provides that “[t]he National Council of Chiefs has a general competence to discuss all matters relating to

⁷³ [1992] VUSC 5; [1980-1994] Van LR 545 (10 July 1992).

⁷⁴ Between April and June every year men in southern Pentecost Island in the country of Vanuatu jump from tall towers (20 to 30 metres) with vines tied to their lower legs. It is a ritual associated with a good yam harvest and also acceptance into manhood. The jump is referred to as land diving, and has become a major tourist attraction. Apparently it inspired the development of the spectacle of bungee jumping.

⁷⁵ *Constitution of the Republic of Vanuatu*, (1988) Laws of the Republic of Vanuatu rev ed, c 1.

customs and traditions and may make recommendations for the preservation and production of Ni-Vanuatu culture and languages”.

In the decision, D’Imecourt CJ focused on the custom jump. He reasoned that Pentecost may have the best climate for the jump, or perhaps it was a *Tabu* custom and that the spirits that guide and protect it are from South Pentecost so that it could not be exported. He stated: “I don’t know—this is not a custom court but a court of law. This application comes before me under the Supreme law of Vanuatu, namely the constitution and I will give my judgment according to law.”

The Chief Justice considered the constitutional rights of the Applicants and concluded that the National Council of Chiefs must be given a fair chance of reaching an agreement under custom adding that “[t]here can be nothing more “Custom” than the *nagol* jump.” However, he stated in the following paragraph that it was clear that an injustice was being created towards the Applicants and their clan as they “must be given a chance to earn a fair share of the reward from the Tourist industry.”

The Chief Justice grounded his decision on section 47(1) of the Constitution which provided that “[i]f there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom.” He directed that the *Nagol* jumping should return to Pentecost, but did not confine its performance to the two traditional villages remarking that that may cause hardship to those who did not have access to tourism. He further ordered that the money earned from the jumps performed elsewhere was to be shared among the custom owners, and the jump could not be

performed outside of the island of Pentecost without permission obtained from the National Council of Chiefs. As to the Applicants they were told to return to Pentecost to exhaust all custom channels for negotiating the export of the jump.

In this case, the Court was clearly trying to compartmentalize the issues into law and custom. However, it was a difficult job to separate one from the other here. The custom jump considerations in the case were less about a successful yam harvest as they had traditionally been and more about tourism income. The Court spoke about 'ownership' of the custom jump which is more a legal concept than custom, but the changing nature of custom as exemplified by this case left the court in a difficult position to decide what was 'law' and what was 'custom'. The Chief Justice set up another binary when he concluded that the Applicants were preventing the National Council of Chiefs from exercising *their* constitutional right to reach an agreement under custom pursuant to section 30(1) rather than the Applicant being prevented from exercising its own constitutional rights. In fact, the function of the Chiefs under section 30(1) is actually an advisory role rather than a right but the Court was valiantly trying to construe parallel arguments for law and custom. This approach taken by the Court as a 'court of law' as specified by the Chief Justice raises the question as to when custom actually becomes a legal

issue.⁷⁶ However, the binary reasoning allowed the Court to focus on custom, and thereby marginalize the rights issue in the case.⁷⁷

Another case⁷⁸ from Vanuatu shows the court taking a different approach to the consideration of custom that has been impacted by economic change. The issues in this case revolved around the ownership of custom land that included a beach which generated income from visiting tourist ships. The issues included the clarification of the owner of custom land, women's rights to custom land, and also how financial benefits from custom land should be distributed. First Justice Kent relied upon Article 74 of the Constitution to decide that the rules of custom determined the basis of ownership and land use in Vanuatu. As such, the land was not held by an individual owner, but by a person in a representative capacity. As to women's custom rights to lands he held that the equality provision (Article 5) set out in the Constitution effectively trumped the rules of custom in Article 74.⁷⁹

⁷⁶ The exportation of the Nagol Jump from Pentecost is now a legal issue as it is subject to the Intellectual Property regime in Vanuatu. Further, one custom owner is considering asking the trademark holder for bungee jumping for a share of the royalties as it is presumed that the idea for bungee jumping was premised on the Nagol Jump. For a comment on this issue see Ian Lloyd Neubauer, "Vanuatu, Cradle of Bungee Jumping, May Finally Get Just Recognition" (2013) August Time, <http://world.time.com/2013/08/01/after-decades-vanuatus-original-bungee-jumpers-may-get-financial-recognition/>

⁷⁷ Sue Farran, "Is Legal Pluralism an Obstacle to Human Rights? Considerations from the South Pacific" (2006) 38(52) J Legal Pluralism 77 at 95.

⁷⁸ *Noel v Toto* [1995] VUSC 3; Civil Case 018 of 1994 (19 April 1995).

⁷⁹ There is a new land law regime in Vanuatu which came into force February 30, 2014. It includes a change to Article 30 of the Constitution requiring Parliament to consult with the National Council of Chiefs about any changes to land law. Additionally, newly drafted Article 78 provides that custom rather than state courts can resolve customary land ownership effectively putting the rules of custom over law and will undermine the effect of this ruling.

The real issue in this case arose because the representative of the family owners of the custom land was retaining all of the financial profits from the cruise ship visits, and the other family members who had custom rights in the land sought a share of these earnings. The Court found this to be a perplexing problem as custom law was silent on how profits which derived from the nature of the land and not from an individual's labour from the land could be distributed among custom owners. Justice Kent did not follow the route taken by the Chief Justice in the Nagol jump case cited above, and decide the case "according to substantial justice and whenever possible in conformity with custom", although the issues in the cases were similar. Rather, he decided that the provisions of Article 5⁸⁰ of the Constitution were applicable. Justice Kent reasoned that custom rights differed from legal rights. The custom owner who currently controlled the land stated that the action of his family in bringing this issue to be decided by the court had jeopardized their custom claims and that this dispute (that is, the issue of bringing the court action) would have to be settled with him before they gained any rights to the land. Justice Kent stated:

The Court is I think, required to recognise custom insofar as it is not in conflict with the law. Here, the very rights to which persons are entitled arise as a consequence of custom. This cannot mean however, that a person can be prevented from seeking to establish or enforce their rights by recourse to law in the courts. Any requirement of custom which was regarded as unreasonable, would not present a barrier to the courts making an order as to use and occupation of custom land.

Again the Court was forced to resort to legal contortions in order to retain the custom/ rights binary even when modern economic issues challenged the reified description of custom

⁸⁰ Right to the protection of the law and to protection from unjust deprivation of property without discrimination on the grounds of sex, and to equal treatment under the law.

as something apart from modernity. The court of law could and did adjudge custom as unreasonable. The binary legal framework established during the colonial era, and reinscribed at constitutional independence stymied the accommodation of change by local or customary legal systems. The courts cannot consider custom apart from its dialectical relationship to state law. Courts are forced to make a choice between law and custom, rather than to allow local legal traditions to adapt to change in a locally appropriate manner. Further, it is clear from these cases that custom has taken a subordinate position to state law. This is inevitable where not only because custom or tradition is saved by state law provisions, but also because it is the state courts must decide what actually constitutes that tradition or custom which is saved.

1.7 Conclusion

The ability of non-western legal systems in post-colonies to adapt to change has been stymied by a binary of law and custom constructed during the colonial era. The binary was reified at independence as newly independent post-colonies celebrated their release from colonial dominance by enshrining the essence of custom and tradition in national constitutions. As a result, the consideration of rights in South Pacific courts is framed by a custom/law dichotomy. In fact, the starting point for a consideration of rights and custom in the courts is the constitutional framework which puts custom in a subordinate position from the start.

The reality is that there is no 'naturally occurring' dichotomy between custom and rights. As Sally Engle Merry notes, the contemporary situation is better described by "considering cultures as changing and interconnected, and rights as historically created and

transnationally redefined by national and local actors.”⁸¹ Given this contemporary reality, I suggest that the starting point for a discussion of legal change should be the local legal traditions based on the local worldview, and then a consideration of how local legal traditions, may critically accommodate change. Local legal concepts must be given substantive content, and be defined as something more than ‘non-western’ or pre-European. By jettisoning the colonial baggage that separated law and custom, local culture can again predominate to lend a local lens to the accommodation of legal change.

⁸¹ Sally Engle Merry, “Changing Rights, Changing Culture” in Jane K Cowan, Marie-Benedicte Dembour and Richard A Wilson, eds, *Culture and Rights: Anthropological Perspectives* (Cambridge, UK; New York: Cambridge University Press, 2001) 31 at 39.

Chapter 2: The Traditionality of Law

2.1 Introduction

The purpose of this chapter is to move the consideration of legal change outside of a colonial dichotomy of tradition and modernity. This is made possible because Tonga escaped the indirect rule of colonialism that designated local law as something different from the imported law of the colonists with the result that custom was never protected as something other than law. Legal change in Tonga occurred and continues to occur outside of this binary in a complicated interaction of local and imported influences. As Tongan historian F O Kolo explained:

“A Tongan history from a purely local perspective, if there is such a thing, is only a different version of mythology. On the other hand, a scholarly history of Tonga without consideration of local values and applying Christian value judgements is a sterile academic exercise.”¹

Likewise Tongan legal change over time must be considered in its totality. The origins are important, but so are the forces that made contemporary Tongan law what it is today. An examination of the development of law in Tonga not only illustrates how local law maintained its dynamism in the face of the importation of a new legal system, but also reveals that it was Tongans who were able to critically accommodate modern change. Tonga was spared “sociocryonics”² a term Taiwo coined to refer to indirect rule whereby colonial administrators denied colonized populations the option of adopting modernity, or any part of it. When Taiwo

¹ F O Kolo, “Histography: The Myth of Indigenous Authenticity” in Phyllis Herda, Jennifer Terrell & Niel Gunson, eds, *Tongan Culture and History* (Canberra: Journal of Pacific History, 1990) 1 at 1.

² Olufemi Taiwo, *How Colonialism Preempted Modernity in Africa* (Bloomington: Indiana University Press, 2010) at 11.

developed his theory he was writing about colonialism in Africa. By reference to his work I do not mean to imply that the Pacific islanders responded to colonialism just as the Africans did. However, I do surmise that the British style of colonial indirect rule was practiced by the colonizers in much the same way in every colony, and everywhere indirect rule denied the recognition of the subjectivity of the colonized.³ Not only were the colonized denied the right to grant consent to the entry of the colonizers, they were excluded from participation in the development of political and legal systems once the colonizers arrived. Change at the state level was at the prerogative of the colonizers, while the 'traditional' population was relegated to an unchanging traditional legal system as defined by the colonizers.

There has been a tendency to maintain this binary of dynamic modern law alongside an existing static so-called traditional law (named custom or customary law) when studying the legal systems of former colonies for a number of reasons. As noted in the preceding chapter, Tamanaha's legal pluralism approach categorized people's orientation as either western or non-western. The non-western orientation connoted a position removed from 'western' legal change. Second, the preservation of custom by state legal provisions re-enforced the inability of those ruled by custom to effect local legal change even after the colonial powers had left the region because custom had to remain something other than law. Third, the court cases revealed that it is difficult for courts to rule outside of a consideration of the binary. The

³ *Ibid* at 23-24.

protection of custom as something other than law has limited the courts' choices to one of tradition *or* modernity.

However, local law does not have to be frozen in pre-colonial forms. Jeremy Webber noted that while the theory of legal pluralism rightly emphasized that legal norms are grounded in the lived reality of social interaction, the reality that those norms are the result of conscious and deliberate action is largely ignored.⁴ Webber pointed out that law does not spontaneously emerge from social interactions, but rather a collective set of norms becomes established through disagreement and conscious human decision. It is suggested that the disagreement and discussion that once established local legal norms in the colonies was largely silenced by the reign of indirect rule.

There is no reason, outside of a colonial mentality, to think that custom, or local legal traditions did not emerge out of discussion and disagreement as did European law. An example from Fiji illustrates this point. Sir Arthur Gordon was the first Governor of the British crown colony of Fiji.⁵ Gordon was a great proponent of indirect rule and the preservation of local customs.⁶ He organized an annual 'Council of Chiefs'⁷ in order to uncover the nature of Fijian customary law. At the Council Gordon was frustrated by the chiefs' lack of clarity as to what constituted the 'immemorial traditions' which governed the distribution and exercise of land

⁴ Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44(1) Osgoode Hall LJ 167 at 169.

⁵ Sir Gordon held this position from 1875 until 1880.

⁶ Peter France, "The founding of an orthodoxy: Sir Arthur Gordon and the doctrine of the Fijian way of life" (1968) 77(1) Journal of the Polynesian Society 6 at 11.

⁷ See Peter France, *The Charter of the Land: Custom and Colonization in Fiji* (Melbourne: Oxford University Press: 1969) at 109. (The high chiefs rarely met in council until they were required by the colonial administration required them to do so.)

rights in Fiji. It was reported that one chief, “when asked to explain the custom of his tribe in the matter of chiefly succession, replied that the custom was to fight about it.”⁸ In fact, Gordon was very frustrated to find that there was little settled custom but rather ongoing discussion and disagreements. The unsettled position as to the ownership of land was only resolved when Gordon threatened to give the Fijians’ land to Europeans if the chiefs could not come to an agreement. The tradition of *mataqali* as the universal Fijian land owning unit was devised by the chiefs as a result of Gordon’s pressing for an answer.⁹

Land use rules must have existed before the tradition of *mataqali* was established because there were Fijian settlements prior to the pronouncement of this ‘land law’. Indeed Gordon’s line of questioning implied that there was evidence of some sort of land-owning unit, as he sought clarification of that. Further, the chiefs’ statements to Governor Gordon implied that those rules were open to challenge. There were no immemorial traditions as Gordon thought. Rather, it is suggested that there were longstanding rules, but these were open to discussion. If there were new ideas, or the rules no longer worked successfully, then there was a process of change. Gordon’s challenge to the chiefs resulted in new land law, and that became colonial Fiji’s “immemorial tradition” that Gordon sought. It did save the land for the Fijians, but also relegated the Fijians to the villages to live a life away from modern change according to a British vision of what constituted native culture.¹⁰ The preservation of local

⁸ *Ibid* at xiv.

⁹ Rory Ewins, *Changing their Minds: Tradition and politics in Contemporary Fiji and Tonga* (Christchurch: Macmillan Brown Centre for Pacific Studies: 1998) at 13.

¹⁰ Stephanie Lawson, *Tradition versus Democracy in the South Pacific* (Cambridge; New York & Melbourne: Cambridge University Press, 1996) at 46.

culture by colonial administrations within the structure of indirect rule made local law subsidiary to the imported legal system. Local chiefs were retained, but law passed from the colonial government through the chiefs to the local people. Local law which did not conflict with the imported law could be retained, but indirect rule signaled the end of local law-making and legal change which dealt with modern issues as that was the exclusive purview of the colonial administration.

On the contrary, local discussion about modern legal change was not completely shut down in Tonga. Although Tonga did not escape the indignities of colonialism altogether, it did manage to stave off annexation and indirect rule. The effect was that its legal traditions were not frozen as they existed at the end of the nineteenth century. Legal change certainly took a different trajectory than it would have done had it not been for the colonial administration in the region, but Tongan legal traditions were not rarefied as unchanging custom, and set in opposition to a system of law as was the case in neighboring countries. As a result, Tongan traditions remained dynamic and amenable to the reception of new ideas.

Tonga's critical embrace of new ideas was not a new phenomenon, as is obvious from the example from Fiji cited above. All of the island countries showed that they had formerly been capable of change, and traded new ideas with different cultures throughout the sea of islands prior to the arrival of European colonialism. The notion of inward looking cultures which could not manage change arose from the change of perspective that accompanied colonial rule. It was not that colonialism created custom, because there were existing local legal systems before the advent of colonial rule. What colonialism did was effectively truncate custom's dynamism.

The marginalization of the local law in colonies reflected an overall change of perspective wrought by colonialism. Colonialism literally shrank the social, political and economic lives of indigenous populations. The South Pacific region was no exception. Prior to the advent of colonialism inhabitants of the island countries sailed throughout the maritime region to trade, marry, visit, settle and fight wars. High chiefs of Fiji, Samoa, and Tonga still maintain kin connections made centuries prior to the arrival of Europeans to the region.¹¹

Tongan anthropologist Epeli Hau'ofa eloquently described the change of perspective that accompanied European colonialism in the region. He suggested that whereas islanders once considered their vast ocean region as a "sea of islands", the Europeans re-characterized the region as "islands in the far sea".¹² Islanders who were once confident explorers and exploiters of their vast ocean world were diminished by European colonialism when they were confined to tiny land masses, isolated from each other. Relegating dynamic legal traditions to a stagnant custom was part of this colonial pattern to belittle local culture. Like the view of the islanders themselves, the perspective was turned from an outward exchange of ideas, people and wealth to an inward perspective bounded not only by European territorial boundaries, but also by a European designation of local culture as primitive and inferior.

This project follows Tonga's outward look and adoption of new legal concepts introduced to the region. It demonstrates how Tongan and British legal concepts were mixed as equals, not as local custom acting as a subsidiary to the adopted European system. In order to

¹¹ Epeli Hau'ofa, "Our Sea of Islands" (1994) 6(1) *The Contemporary Pacific* 147 at 154.

¹² *Ibid* at 153.

retreat from the usual approach which separates custom and law and which I suggest reflects a colonial legacy, this study of the development of Tongan law begins from a Tongan perspective and looks outward at incoming change. This would generally be the case when considering the incorporation of new ideas in a legal system, but as discussed above, that approach was skewed by colonialism.

The traditionality of law takes a prominent place in this project. Alisdair MacIntyre characterized tradition as “arguments that continue from generation to generation”¹³ and this seems a particularly apt description of legal traditions that develop over time. The aim is to consider local law and imported law in Tonga as rooted in the same notions of traditionality. In a sense this approach serves to even the playing field somewhat so that legal change is considered as the adoption or rejection of different legal traditions by Tongans, rather than in terms of local law ‘saved’ or ‘lost’ in the face of modernity. This gives Tongans the central place in an analysis of how Tongans managed the importation of a new legal system. Second, it is a story of legal development that has spanned more than two centuries and six reigning monarchs. Focusing on the traditionality of law not only avoids the custom/law dichotomy that permeates the literature, but also captures the temporality of law. Traditions always change over time, but that change is built upon the existing substantive traditions, and the nature of change itself is traditional when it originates locally.

¹³ Alisdair MacIntyre, *Whose Justice, Which Rationality?* (Notre Dame: University of Notre Dame Press, 1988) at 12.

The remainder of this chapter considers the traditionality of law in order to provide a theoretical framework for the consideration of legal change in Tonga. Understanding all law as tradition returns the dynamism to law which was lost to colonial rule. First a short outline of the two spectrums of legal theory is presented in order to show how tradition can provide a grounding for a consideration of legal change whether the law emanates from the state, or from within the ambit of social interaction. Next, the theory of tradition is considered, and the traditionality of law is made clear. Lastly, the temporality of tradition is discussed as an appropriate framework of analysis.

2.2 Approaches to Legal Theory

There are two general approaches to the study of law—philosophical and sociological.¹⁴ At one end of the spectrum are lawyers and philosophers who consider law a coherent doctrine constructed on the basis of legal enactments emanating from legislatures and courts. At the other end of the spectrum are those who understand law as a practice occurring within the ambit of social interaction. The former usually associates law with the state, while the latter accepts that there are other legal orders occurring outside of the state system.

The different approaches appear to yield two different types of law, but in reality, they are not different *types* of law, but rather different answers to different questions. The philosophical approach queries “what is law?” which elicits a static solution. Indeed, the aim of

¹⁴ HS Taekema & W van der Burg, “Towards a Fruitful Cooperation between Legal Philosophy, Legal Sociology and Doctrinal Research: How legal interactionism may bridge unproductive oppositions” in R Nobles & D Schiff, eds, *Law, Society and Community: Socio-Legal Essays in Honour of Roger Cotterrell* (Farnham: Ashgate Publishing, 2014) 129 at 130.

lawyers and legal scholars who prescribe to this approach is to provide the “best picture of law as it currently is”. Exemplary of this approach is Nicola Lacey description of Hart’s momentary legal system:

“[T]he content of the momentary legal system of legal positivism—that is, all the rules of a system valid at any moment of time—can, other than in exceptional cases such as revolutionary situations, be identified independently of any reference to the non-momentary legal system—an entity subsisting over time and identified in terms of a complex and shifting combination of values and institutional arrangements.”¹⁵

The momentary legal system is a snapshot of the law in time. A review of these singular snapshots over time may be illuminating, or it may raise more questions. The snapshots reveal the law as it is, but the changing picture from one snapshot to the next suggests the powerful forces of legal change.

The sociological approach to law illuminates the process of change. The sociological approach wonders *why* law is obeyed. In other words, why does ‘law’ have obligatory force?¹⁶ Here it is suggested that legal rules are obeyed because the vertical order of law from ruler to subject, or legislature to citizen is embedded in a horizontal order.¹⁷ That horizontal order is defined as “a reciprocal pattern of interactions between citizens, legislators and other officials.”¹⁸

¹⁵ Nicola Lacey, “Analytical Jurisprudence Versus Descriptive Sociology Revisited” (2006) 84(4) Tex L Rev 945 at 962.

¹⁶ *Supra* note 14 at 133 in a consideration of Lon Fuller’s approach to law.

¹⁷ Lon Fuller, *The Morality of Law*, rev ed (New Haven: Yale University Press, 1969) at 233.

¹⁸ *Ibid.*

In a consideration of legal change, the two approaches complement each other. The following example from the United States Supreme Court's consideration of the Fourteenth Amendment¹⁹ provides a dramatic illustration of this point.

The concept of legal equality is expressed as a fundamental value of western democracy. It has been legally enshrined in the Fourteenth Amendment, but the reality and implementation of legal equality in the United States appears to be an elusive legal goal. The statement of the law as it is reflects over time reflects social change, and what is considered the law. The Thirteenth Amendment²⁰ freed the slaves in 1865. The Fourteenth Amendment was passed three years later in order to give full citizenship to those freed slaves, and importantly forbade states from denying anyone "equal protection of the laws". The written rule of "equal protection" did not change over the next century, but it was re-interpreted by the Court on numerous occasions.

In 1896 the United States Supreme Court held that the Fourteenth Amendment guarantee of equal protection under the law could not have been intended to abolish a distinction based on colour where the distinction was made for the promotion of the public good.²¹ A Louisiana statute requiring equal but separate railway cars for blacks and whites was upheld because the Court found that the racial classification was reasonable in light of custom and tradition in that state.

¹⁹ *US Const* amend XIV, sect 3.5.

²⁰ *US Const* amend XIII.

²¹ *Plessy v Ferguson* (1896), 163 US 537.

In the 1954 landmark case of *Brown v Board of Education*²² the Supreme Court, in a unanimous decision, overturned the “separate but equal” doctrine. Chief Justice Warren wrote: “To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”²³

Fifty years later the Supreme Court upheld an affirmative action admissions policy which allowed the University of Michigan’s Law School to consider race in its admission process.²⁴ The Court found that although discriminatory on the grounds of race, the school’s interest in the promotion of student diversity was compelling, and the process was narrow enough so as not to violate equality rights guaranteed by the Fourteenth Amendment.

Only in the *Brown* decision was the term ‘equal’ given an ordinary meaning. Otherwise there were other factors at work which caused the courts to interpret ‘equal’ as ‘unequal’. The Fourteenth Amendment set out a lofty goal in the aftermath of slavery. However, the Court had to recognize that equal was not really equal in some states. Equality was not acceptable to a society which had so recently considered the enslavement of members of the African race an acceptable practice. In *Brown* it appeared that the Court was applying the equality clause as it was written albeit with social reasoning attached. The Court implied that racial equality was the

²² *Brown v Board of Education of Topeka, Kansas* (1954), 347 US 483.

²³ *Ibid* at 494.

²⁴ *Grutter v Bollinger* (2003), 539 US 306.

law because it should be the law. However, in the third ruling it was clear that the original ideal remained elusive as the Court permitted inequality in order to promote that original ideal.

The Fourteenth Amendment cases illustrated the shifting image of what constituted the law of the equality clause at any given time. The Court's decisions came about as a result of a challenge to the law as it stood. This series of cases dramatically illustrate the very sociality and traditionality of law. It is important that there are pronouncements of what the law is from time to time. The pronouncement may come from the courts, the legislature or an authoritative leader in society. The pronouncement may announce change, or act as a reminder that that is the law at that given time. The snapshot of law is informed by that which is acceptable to society at a given time.

Thus, even though equality is a desirable quality of society it cannot be enforced as the law where the legal enactment does not concur with social expectations at that time. Likewise, the legal system cannot be brought into being solely by rational pronouncement removed from social and moral considerations. Lon Fuller explained:

"A legal system cannot lift itself into being legal by fiat. Its security and efficacy must rest on opinions formed outside of it which create an attitude of deference towards its human author (say a royal law-giver) or a constitutional procedure prescribing the rules for enacting valid law. To say that this acceptance is 'moral' means merely that it is antecedent to law."²⁵

²⁵ Untitled and undated document paginated in hand as p 25, *The Papers of Lon L Fuller*, Harvard Law School Library, Box 12, Folder 4 cited in Kristen Rundle, *Forms Liberate: Reclaiming the jurisprudence of Lon L Fuller* (Oxford & Portland: Hart Publishing, 2012) at 13.

The pattern of interaction between citizens, legislators and other officials gives rise to the rules which in turn makes for a predictable pattern of interactions. Postema added that social interaction required “relatively stable mutual expectations of behaviour”²⁶ and that these expectations “emerge over time from a process of mutual accommodation and adjustment of expectations and actions of interacting agents.”²⁷ For Fuller, it was not so much the validity of law that mattered, but the efficacy of law.²⁸ His focus was the “social processes from which rules can emerge and become effective as law without the imprimatur of any explicitly legislative organ of government”.²⁹

Kristen Rundle articulated the connection between legal form and human agency found in Fuller’s legal theory.³⁰ According to Fuller, a legal subject cannot be merely a member of a “subservient populace” doing what they are told to do. If law is to function, it must presuppose the legal subject’s status as a responsible agent. Thus, a legal subject may withdraw fidelity if the respect for her status as an agent is not respected.

A notion of activeness permeates a consideration of law beyond the positivist snapshot. Not only must the legal system respond to social opinion in order to remain relevant, but the legal rules themselves emerge over time through a process of mutual accommodations and

²⁶ GJ Postema, “Implicit Law” in W van der Burg & WJ Witteveen (eds), *Rediscovering Fuller: Essays on Implicit and Institutional Design* (Amsterdam: Amsterdam University Press, 1999) 255 at 257.

²⁷ *Ibid.*

²⁸ Maksymilian Del Mar, “Clio Unbound: Theories of Law between discourse and tradition”, online: (2008) <http://ssrn.com/abstract=1305582> at 42.

²⁹ Lon Fuller, “Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction” (1975) *BYUL Rev* 89 at 95.

³⁰ Kristen Rundle. *Forms Liberate: Reclaiming the jurisprudence of Lon L Fuller* (Oxford and Portland, Oregon: Hart Publishing, 2012).

adjustment of expectations amongst responsible agents. However, an acknowledgment of the importance of articulated rules is not abandoned. Articulated rules are the representation of “stabilized interactional capacities between lawgiver and subject”.³¹

From a positivist perspective, where the rules are posited as reasons for action, there is still a requirement for social foundations as the ultimate rules that set the criteria for validity.³² In either case there is the problem of regression.³³ The origin of the social foundations is not identified in the case of the rules emanating from above, but neither is the source of the social foundations identified in the “spontaneous ordering of social relations”³⁴, as espoused by Eugen Ehrlich an early proponent of the sociological approach to law. As suggested above, non-state normative orders are not natural and non-contentious. Emerging rules are subject to conflict and resistance and that must be grounded in prevailing social and political norms.

The consideration of law as tradition offers a way to understand why law arises from social interaction, but also why legal enactments may be regarded as valid law. Where it is supposed that law arises from social interaction, then the traditionality of law is more obvious because traditions emerge from the past and they are retained for as long as they are efficacious, or perhaps until something better comes along. Those rules that emanate from authority must also possess an element of traditionality so that they reflect current traditional

³¹ Lon Fuller, “Human Interaction and the Law” (1969) 14 American Journal of Jurisprudence 14 at 24.

³² *Supra* note 17 at 41.

³³ *Ibid* at 8.

³⁴ Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, translated by Alex Ziegert (London: Transaction Publishers, 2002) at 442 (Ehrlich described his concept of “the living law” as “the law which dominates life even though it has not been posited in legal propositions”).

beliefs. The law giver and the subject must be on the same page traditionally. The enacted law may represent ideals that the authority aspires to but if the law does not resonate with current traditional beliefs then the law may not be efficacious. Positing all law as tradition in this project allows a concurrent consideration of Tonga's unwritten and codified laws along with imported legal rules. In a consideration of Tonga's legal history, the articulated rules act as signposts of change. However, those are considered within the social and political forces acting upon them over time.

2.3 Tradition

The first part of this section outlines the problematic tradition/modernity binary which has limited the use of tradition as a framework of analysis. Next Edward Shil's better articulation of the concept of tradition is presented in order to lay the groundwork for the discussion of the traditionality of law which moves the analysis outside of the restrictive binary.

The Age of Enlightenment ushered in a modern world informed by ideals of freedom and equality professedly founded upon principles of human reason. Rationality was made the antithesis of tradition. European colonizers characterized societies more traditional³⁵ than themselves as saturated with tradition, and therefore lost to the progress promised by "the scientific, the rational, empirical, secular, [and] progressive features" of European society.³⁶ The colonized indigenous populations were thus proclaimed to be traditional or non-modern, unable to progress, and forever rooted in tradition.

³⁵ Edward Shils, *Tradition* (Chicago: University of Chicago Press, 1981) at 21.

³⁶ *Ibid* at 20.

Just as tradition continued to be erroneously partnered as the antithesis of change, it was also paired in opposition with the 'modern'. 'Modern' in this sense was not meant to refer to something new or trendsetting. If that were so, then the ongoing conflict between preservation and change would simply be an anthropological constant.³⁷ Colonialism brought the modernity project with it, and in this case, 'modern' referred to a consciousness cut off from its association with unique socio-historical circumstances.³⁸ In the case of science, this search for universal truths, unencumbered by local beliefs and sacred bonds met with some success.³⁹ Modern consciousness aimed to be ahistorical and thus unattached to time and place, and modern change aimed to be rational and progressive. By contrast, 'traditional' was seen as grounded in unchanging local practices.

The dichotomy has continued into the present. In the first half of the twentieth century the idea of a 'traditional society' as more peaceful and ordered prevailed⁴⁰ as rationality was posited as the antitheses of tradition. The demise of traditional societies was seen as a necessary corollary of the advance of modernization. Max Weber defined three main types of social action with 'traditional' and 'modern' as two ultimately opposed ideal-types for social action; traditional action being fixed by tradition or custom and occurring without thought.⁴¹

³⁷ Nico Stehr & Jason L Mast, "Modernity and Postmodernity" in Samir Dasgupta & Peter Kivisto, eds, *Postmodernism in a Global Perspective* (Los Angeles: Sage, 2014) 116 at 125.

³⁸ *Ibid.*

³⁹ See Bruno Latour, *We Have Never Been Modern*, translated by Catherine Porter (Cambridge: Harvard University Press, 1993).

⁴⁰ For examples see Oswald Spengler & Charles Francis Atkinson, *The Decline of the West* (New York: AA Knopf, 1926-28) and Georg Simmel, *The Metropolis and Mental Life* (Chicago: University of Chicago Press, [1903] 1961).

⁴¹ See Max Weber, *The Theory of Social and Economic Organization*, translated by AM Henderson and Talcott Parsons (London: Free Press, 1964).

Weber's negative concept of tradition and the dichotomy between modernity and tradition was reflected later in Eric Hobsbawm's work. Hobsbawm contrasted tradition as a socio-cultural practice that relied on the past as a source for authority, with practices created by routinization which were characteristic of modern societies. He distinguished "invented tradition" from genuine tradition, with the implication that the rise of reflectivity in the development of new traditions indicated the demise of the unreflective traditional society.⁴²

Authentic tradition had to be original, unchanged 'tradition', and any reflectivity indicated inauthenticity or a "contamination by modernity".⁴³ Jolly explained how this dichotomous characterization of tradition skewed an understanding of the process of change in the Pacific region:

"The difference about the colonial context, so aptly represented in much anthropological analysis, is in the degree of reification and idealization of culture and its prescriptive attachment to the "natives". If they are no longer doing "it" they are no longer themselves, whereas if colonizers are no longer doing what they were doing two decades ago, this is a comforting instance of Western progress. Diversity and change in one case connote inauthenticity, in the other the hallmarks of true Western civilization."⁴⁴

The problem cited here is that the concept of 'traditional' connotes a sort of stagnation in the former colonies, so that even if traditionalism is sometimes admired in the 'natives', it is not a good fit for a progressive, modern society. Edward Shils wrote the definitive book on tradition⁴⁵ and he disagreed with this approach. Shils not only provided a comprehensive

⁴² See E J Hobsbawm & T O Ranger, *The Invention of Tradition* (Cambridge; New York: Cambridge University Press, 1983).

⁴³ Hizky Shoham, "Rethinking Tradition" (2011) 52(2) *European Journal of Sociology* 313 at 319.

⁴⁴ Margaret Jolly, "Specters of Inauthenticity" (1992) 4(1) *The Contemporary Pacific* 49 at 57.

⁴⁵ *Supra* note 35.

exploration of the concept, but he addressed the antitraditionalist impulse in modern society.

He concluded that tradition is and has always been, present in every society but that

“[t]radition is a dimension of social structure which is lost or hidden by the atemporal

conceptions which now prevail in the social sciences.”⁴⁶ Shils elaborated:

“A mistake of great historical significance has been made in modern times in the construction of a doctrine which treated traditions as the detritus of the forward movement of society. It was a distortion of the truth to assert this and to think that mankind could live without tradition and simply in the light of immediately perceived interest or immediately experienced impulse or immediately excogitated reason and the latest stage of scientific knowledge or some combination of them.”⁴⁷

Shils observed there is no society so rational, so atraditional that it can build a knowledge base afresh with every generation. The fact is that traditions are not discarded to make way for the new, but new traditions are built on the old. Tradition, according to Shils, is not the idea, physical action or sentiment that actually constitute the tradition; rather the tradition is “the pattern which guides the re-enactment.”⁴⁸ Therefore, the adoption of new ideas, actions or sentiments in order to deal with new situations does not signal the death of the former tradition. The tradition is the known pattern of thought or reasoning that has been passed on from previous generations, and it gives normative guidance to the adoption of new ideas. It is the starting point of consideration of the new. What may be lost are substantive traditions, but if these traditions are discarded or changed, that change is human led. Thus,

⁴⁶ *Ibid* at 7.

⁴⁷ *Ibid* at 330.

⁴⁸ *Ibid* at 31.

unless there is coercion to discard or change existing traditions those changes are made from a starting point of tradition.

Tradition has a normativity that acts as a social guide, and that is what makes one society's traditions different from another. Traditions make life predictable, but that is not to say that tradition does not change. Traditions change over time as they are re-interpreted, and molded to fit changing ideas. Traditions are not necessarily discarded because they are no longer agreeable, but because the performance of those traditions becomes unfeasible in new circumstances. Further, although the performance of the substantive tradition may have changed, the former traditions are the "point of departure for the new actions and a constituent elements in these new actions."⁴⁹

Shils offered a complex view of tradition. He defined tradition as "sets of beliefs held or espoused over some generations having in common certain themes or interpretation, certain conceptions, certain assessments."⁵⁰ Shils posited that traditions are recognized not only by their substantive content, but also by their body of adherents. That is, adherents define themselves "in terms of their traditions of belief, which they regard as constitutive of themselves."⁵¹ A community of adherents acquire their common traditional outlook through common education, by membership in families that pass on the same understandings, and by living in societies made up of such families. Through generations it is easy to see that

⁴⁹ *Ibid* at 46.

⁵⁰ *Ibid* at 263.

⁵¹ *Ibid*.

compromises must be made as different ideas come from within or without the society, but those compromises are made by the self-identified traditional communities; and change is viewed through a particular cultural lens. Traditions are dynamic. They depend on reinterpretation through generations but they remain culturally and socially relevant. All societies are traditional in the sense that Hizky Shoham noted: “There is no ‘traditional society’, only concrete traditions with various statuses in society”.⁵²

It is that sense of tradition that grounds the legal systems considered in this project. The notion of tradition as unchanging traditional practices and artifacts reflects a colonial view which sanctioned and at times celebrated material culture or substantive traditions of the ‘natives’, but at the same time neglected to honor the dynamism of those traditions.⁵³ Saving local law as custom apart from ‘law’ is part of this continuation of colonial thinking.

As stated above, the notion of the preservation of an unchanging tradition as the antithesis of modern progress rooted is based on an erroneous understanding of tradition. Embracing change does not necessarily mean giving up traditions, legal or non-legal. In fact, it is imperative that there is some continuation, remembrance or remnant of former traditions in the new. It is in this infusion of continuing tradition that can transform adopted law into efficacious local law.

⁵² *Supra* note 43 at 324.

⁵³ Tejumola Olaniyan, “Africa: Varied Colonial Legacies” in Henry Schwartz & Sangeeta Ray, eds, *A Companion to Post Colonial Studies* (Victoria, Australia: Blackwell Publishers 2000) at 269.

2.4 Law as Tradition

Krygier described law as a “profoundly traditional social practice” and addressed the traditionality of law as a central feature of all legal systems.⁵⁴ Characterizing law as tradition lends the positivist school of law the temporal character that it is missing. The concept of law as tradition also dovetails with the process of social interactions through which rules emerge *over time*. Therefore, law as tradition may connote both a “momentary legal system” as well as a legal process of accommodation and change.

Krygier’s useful analysis posited three characteristics of traditions. First, there is the *pastness* of a tradition. Traditions must be drawn from the past, and a tradition cannot be made all at once. One may originate a tradition but whether one has done so can only be decided after time has passed. In an established legal system, “the legal past is central to the legal present”.⁵⁵ A composite of beliefs, opinions, values, decisions, myths, rituals deposited over generations comprises the legal record. Institutionalized legal systems rely on traditionalized procedures and interpretations. The past is also preserved and transmitted in less institutionalized systems so that “residues of this past would still mould what can be done, indeed thought in the present.”⁵⁶ For example, the Tongan legal tradition of apology and forgiveness continues to mould the application of the imported legal traditions. The maintenance of this significant pastness in the imported tradition offers an explanation as to how the local legal traditions are maintained in the face of change.

⁵⁴ Martin Krygier, “Law as Tradition” (1986) 5(2) Law & Phil 237 at 239.

⁵⁵ *Ibid* at 240.

⁵⁶ *Ibid* at 241.

Second, it is not only its *pastness* that makes law traditional. The past of law is not simply a historical fact, but “is an authoritative significant part of its present.”⁵⁷ As such, “the real or imagined past plays a present normative or authoritative role in one’s values or beliefs.”⁵⁸ It is the “presence of the past”.⁵⁹ The presence of the past lends legitimacy to adopted legal traditions. Thus, the efficacy of the adopted legal regime of libel and contempt law in Tonga was assured by the inclusion of existing legal traditions which observed different levels of respect for different levels of ascribed rank. The existing Tongan legal tradition lent its ‘authoritative presence’ to the imported law.

The third element of tradition is the transmission or the handing-over. “Traditions depend on real or imagined *continuities* between past and present.”⁶⁰ The mode of transmission may or may not be formalized and institutionalized, but in any case, those entrusted with the record keeping, interpretation and transmission of traditions hold a certain power. However, that power is rarely absolute as it must “conform to canons of coherence and plausibility known to and accepted by participants.”⁶¹ The last element is reminiscent of Fuller’s comment cited above whereby the security and efficacy of a legal system rests upon opinions formed external to it.

In Tonga, changing legal traditions were acceptable because it was a widely respected monarch who initiated legal change. Further, it was traditional in Tonga for the commoners to

⁵⁷ *Ibid* at 245.

⁵⁸ *Ibid* at 246.

⁵⁹ *Ibid* at 248.

⁶⁰ *Ibid* at 251.

⁶¹ *Ibid*.

acquiesce in the exercise of authority by chiefs in the hierarchical system. When the Tongan ruling monarch adopted a British-style legal system, he did so in order to stave off annexation. This was an extension of the chiefly duty in Tonga to protect their commoners from external attack.

Like Shils, Krygier maintained that it is inevitable that traditions will change over time.⁶² Sometimes there is deliberate change such as legislative changes, but it is argued that it is very difficult to remake society:

“One of the main reasons why what is given by the past is so widely accepted is that it permits life to move along lines set and anticipated from past experience and thus subtly converts the anticipated into the inevitable and the inevitable into the acceptable.”⁶³

New ideas impact tradition whether the change occurs in the oral transmission of tradition, or the reinterpretation of written records. Shils differentiated between endogenous and exogenous factors of change. Endogenous change originates within the tradition and is carried out by persons who have accepted that change.⁶⁴ It is always seen as an improvement by those advocating for change and may consist of a rationalization and correction of a tradition.⁶⁵ There may be changes to the content of a tradition which may come about as a result of the adoption of new ideas, or the growth of a moral sensibility. An example of the latter change is reflected in the American Fourteenth Amendment cases discussed above.

⁶² *Ibid* at 252.

⁶³ *Supra* note 35 at 198.

⁶⁴ *Ibid* at 213.

⁶⁵ *Ibid*.

This project does not directly address endogenous change in Tongan traditions as the focus is on the process of change as a result of outside forces. However, it is important to acknowledge that Tongan traditions were not static entities until the influence of European traditions. Abel Tasman visited Tonga in 1643 and reported the country was peaceful, the people carried no weapons and the land was well cultivated.⁶⁶ Lātūkefu surmised that the stability at that time was due to the proper functioning of the reciprocal relations and balance of interests existing between the various classes in the hierarchical Tongan society.⁶⁷ The commoners carried out their responsibilities to their chiefs in return for security of their person and property. By the eighteenth century Tonga entered a period of instability and civil war. Lātūkefu explained that with an expanding population local chiefs began to consolidate their power over their own areas. The authority of the highest chiefs, who once ruled the local chiefs, became nominal and ceremonial. With the loss of that traditional control, the ambitions of the local chiefs threatened the political unity of Tonga and civil war and misery ensued.⁶⁸ The traditional authority of the kings at the top of the pyramid was never restored. Peace was not restored to Tonga until the early nineteenth century when the country was unified under King George Tāufa'āhau. The history of Tonga belies the notion of unreflective, unchanging tradition discussed above as it appears that endogenous-led change of traditions was both deliberate and profound.

⁶⁶ G H Kenihan, ed, *The Journal of Abel Jansz Tasman 1642: with documents relating to his exploration of Australia in 1644* (Adelaide: Australian Heritage Press, 1964) at 50.

⁶⁷ Sione Lātūkefu, *Church and State in Tonga* (Honolulu: The University Press of Hawaii, 1974) at 9.

⁶⁸ *Ibid* at 10.

Shils also postulated that traditions change because of exogenous factors. “Traditions change when their adherents are brought or enter into the presence of other traditions”,⁶⁹ often as a result of colonization, migration or conquest. Tongans traveled widely and their traditions were impacted by the adoption of different traditions in the region. Later legal change in Tonga was the result of colonial forces in the region. Later still, Tongans returning from business and educative opportunities abroad brought new traditions with them.

Shils postulated four transformative possibilities of the affected traditions including addition, amalgamation, absorption and fusion,⁷⁰ three⁷¹ of which are particularly relevant to Tonga. First, new legal traditions were added to the Tongan legal traditions when a British style legal system was established. In the case of Tongan tradition of apology and forgiveness, it continued as an informal local legal tradition even after a formal codification of the other existing and imported legal traditions. In the case of the protection of reputation, a new regime of defamation law was adopted, but the Tongan traditional approach to the protection of reputation was retained in the new legal process.

There was also an amalgamation of traditions in Tonga. The Christian tradition broadly affected Tongan traditions, including legal traditions, with the result that today the line is unclear between Tongan and Christian traditions. In a recent review of religious diversity in the region, Tonga was described as a “very Christian country”.⁷² Rory Ewins observed that “Tongans

⁶⁹ *Supra* note 35 at 240.

⁷⁰ *Ibid* at 275-79.

⁷¹ The fourth, fusion is relevant to larger communities and implies the fusion of several traditions.

⁷² Gary D Bouma, Rodney Ling & Douglas Pratt, *Religious Diversity in Southeast Asia and the Pacific: National Case Studies* (New York: Springer, 2010) at 194.

know that Christianity came from the West. Yet they practise Christianity far more fervently than today's secular Westerners. They have made a Christian tradition of their own."⁷³

Recent challenges to Tongan legal traditions illustrate that there is also some absorption of new traditions as well. A recent no-drop policy aimed at stemming the rising rates of domestic violence in Tonga replaced the traditional Tongan legal tradition of apology and forgiveness in domestic disputes. The local legal tradition was no longer considered to be efficacious in these circumstances, and was relinquished in favour of resort to the court system, an added tradition. The legal tradition of the utmost sanctity of the reputations of the king and nobility has also been forgone as members of the Tongan press opted to exercise their right to freedom of expression, and expose abuses of power in high places in Tonga.

The consideration of law as tradition offers new insights as to the process of legal change. The traditionality of law makes change inevitable. There is a recognition of the importance and power of the past both as a source of legal traditions, and as a normative authority. The maintenance of that pastness can serve to retain the local traditionality in the face of change. Importantly, the consideration of law as tradition refutes the rationale for colonial indirect rule that did not allow local legal traditions to change for fear that imported law would overtake the local traditions and there would be a collapse of the entire culture.

Patrick Glenn suggested that the examination of the traditions that form the foundations of particular legal systems allows a fuller understanding of the laws of the world

⁷³ *Supra* note 9 at 64.

and makes it possible “to move beyond the theoretical constraints of traditional legal positivism.”⁷⁴ Glenn posited that the nature of tradition is “essentially normative”.⁷⁵ Why would a tradition be adopted or maintained if there was not value in that information? Here Glenn introduced the important temporal aspect of tradition as the duration of the existence of a tradition which speaks to its importance and efficacy, and this will be expanded on below.

However, Glenn’s analysis of legal tradition is somewhat limited by his total dependence on law as a tradition.⁷⁶ In contrast, Krygier acknowledged that tradition offered only a partial understanding of law. Law exhibited traditionality, and while this helped to explain it, law was also shaped by considerations other than legal traditions (including non-legal traditions).⁷⁷ Glenn’s all-encompassing notion of legal tradition as the law is obvious in his publication on comparative law⁷⁸ wherein he sought out shared concerns in coherent categories of legal traditions throughout the world.⁷⁹ This resulted in a rather unfortunate chapter devoted to “chthonic law”.⁸⁰ Chthonic peoples are defined as “peoples subjected to European domination in recent centuries”.⁸¹ Chthonic legal traditions are described as the law of chthonic

⁷⁴ H Patrick Glenn, “Doin’ the Transsystemic: Legal Systems and Legal Traditions” (2005) 50 McGill 863 at 863.

⁷⁵ *Ibid* at 881.

⁷⁶ Andrew Halpin, “Glenn’s *Legal Traditions of the World*: Some Broader Philosophical Issues” in Nicholas HD Foster, ed, “A Fresh Start for Comparative Legal Studies? A Collective Review of Patrick Glenn’s *Legal Traditions of the World*, 2nd Edition” (2006) 1 Journal of Comparative Law 116 at 117.

⁷⁷ *Supra* note 54 at 251 (“For whatever else leads to change in law, and there are, of course, many sources both internal and external, the very traditionality of law ensures that it *must* change.”).

⁷⁸ H Patrick Glenn, *Legal Traditions of the World*, 2nd ed (Oxford: Oxford University Press, 2004).

⁷⁹ Each chapter is devoted to a legal tradition including a chthonic legal tradition, a Talmudic legal tradition, a civil legal tradition, a common law tradition, a Hindu legal tradition, and a Confucian legal tradition.

⁸⁰ Chapter 3.

⁸¹ *Supra* note 78 at 59.

populations, and in particular those parts of laws not brought by European dominators.⁸² Glenn stated that it is a characteristic of these legal traditions not to be separated from the morals or beliefs of the people,⁸³ and the 'constant' of chthonic law is said to be "the sacred character of the cosmos."⁸⁴ After making sweeping generalizations about the legal traditions of chthonic peoples, Glenn concluded: "Since all people of the earth are descended from people who were chthonic, all other traditions have emerged in contrast to chthonic tradition."⁸⁵ A reviewer commented that this statement implied that in this chapter Glenn was looking for a common factor in the legal traditions of those peoples who do not belong to any other legal tradition.⁸⁶

Glenn's approach to legal tradition serves as a cautionary tale. A framework for analysis that considers law as a legal tradition in and of itself must categorize legal traditions by some commonality. Once those categories are established the analysis can only proceed as a comparison between categories citing sameness or difference, or describing an evolution from one category of legal tradition to another. Change must involve the shift the legal tradition from one category to another.

On the other hand, a consideration of similar legal traditions from different socio-legal orders recognizes that traditionality is only one of the factors that makes law what it is in that

⁸² *Ibid.*

⁸³ *Ibid* at 70.

⁸⁴ *Ibid* at 125.

⁸⁵ *Ibid* at 61.

⁸⁶ Gordon Woodman, "The Chthonic Legal Tradition—or Everything that is not Something Else" in Nicholas HD Foster, ed, "A Fresh Start for Comparative Legal Studies? A Collective Review of Patrick Glenn's *Legal Traditions of the World*, 2nd Edition" (2006) 1 *Journal of Comparative Law* 123 at 129.

society. In this more nuanced approach to tradition, discrete legal traditions are analysed and change is considered within the socio-legal order. The framework that traditionality affords is the temporality of the legal tradition. As discussed above, tradition is a temporal concept. Its value is found in its pastness, and its pastness authoritatively acting on the presence. In this analysis, traditionality has no content, so that the past is not necessarily 'more traditional'. The Weberian dichotomy can be left behind and a more meaningful analysis of legal change in former colonies may be undertaken.

2.5 Tradition as a Framework for Analysis

Building on Shils' analysis and rejecting atemporal constructions of tradition, Hizky Shoham proposed a working tool for sociological studies of traditions. Shoham rejected those sociological approaches that propounded a dichotomy between tradition and modernity because such an approach "diminished the relevance and explanatory power of tradition"⁸⁷ precisely because tradition was eventually discarded in favour of modernization. In such an analysis, tradition became a useless relic of modern society. The other approach was to ontologize tradition so that it became the "essence of society".⁸⁸ Shoham concluded that these contradictory approaches limited the explanatory power of the concept of tradition, even as tradition played a pervasive role in modern life.

Shoham suggested the temporality of tradition as an analytical concept in order to understand the importance and role of tradition. He cited Jocelyn Linnekin who understood

⁸⁷ *Supra* note 43 at 313.

⁸⁸ *Ibid* at 314.

tradition not as an objective property of phenomena but as an assigned meaning. “Tradition is not a coherent body of customs, lying “out there” to be discovered, but an *a priori* model that shapes individual and group experience and is, in turn, shaped by it.”⁸⁹ Following from this, Shoham proposed a new definition for tradition which is particularly relevant when considering legal change. “Tradition is a socio-cultural practice that assigns temporal meaning”.⁹⁰

This approach provides a working tool for the study of tradition over time where change and continuity can co-exist. The history of a given law reveals not only its inception in story, myth or ideal but also its present day manifestation. Thus the law is more than what can be recognized as the law in the present. It is also its past, and perhaps some indication as to how it will continue into the future. The tradition is not analysed as an ontological entity, but rather tradition, as described by Shoham, is articulated as a symbolic activity which introduces a temporal comparison to the segments that make up the tradition. It is not that traditions do not exist in Shoham’s theory but that the analysis is not all-encompassing. Importantly, this mode of analysis allows various temporal modes so that the dichotomy of the traditional and the modern is negated.⁹¹ The colonial notion of the tradition being lost to modernity is dispelled. Rather, the focus of analysis is on changes and continuities over time.

Legal traditions with value endure. The same tradition may be differently valued at different times and in different places depending upon social, political and other legal factors or

⁸⁹ Jocelyn S Linnekin, “Defining Tradition: Variations on the Hawaiian Identity” (1983) 10(2) *American Ethnologist* 241 at 241.

⁹⁰ *Supra* note 43 at 315.

⁹¹ *Ibid* at 317.

traditions. However, longstanding legal traditions are important and reveal much about the other factors. The analysis of the disruption or truncation of legal traditions also revealing, as is the adoption of a new legal tradition.

2.6 Conclusion

The aim of this project is to describe how Tongans have retained their culture and avoided so-called westernization in spite of the adoption of legal concepts that look much different from earlier legal concepts. It is an application of Jolly's process of change whereby indigenous groups are able to adapt, adopt and change their laws but still remain "authentically" Tongan. It is about Tongan agency, political and social, that has been exercised by Tongans in various capacities in a continuing process of legal change. The traditions of Tonga were impacted by the European presence in the South Pacific. However, as much as the Tongans admired the iron tools and weapons of the invaders, they were not easily beguiled by European traditions. From very early contact with the Europeans the Tongans were clear that they did not want to fashion themselves after the visitors.

William Mariner was a British ship's clerk who lived in Tonga from 1806-1810. Most of the crew on his ship was killed, but Mariner's life was spared by a high chief in Tonga. Chief Finau became Mariner's protector and mentor. Mariner wrote an account of his sojourn in Tonga when he returned to England and it provides an authentic portrayal of Tongan life at that time with details of a Tongan perspective of the Europeans. I include the following quotes in order to illustrate the Tongan view of western traditions. Mariner reported:

"...they readily own the superiority of the *Papalangies* [Europeans], not only in knowledge, but disposition to do good; but, on the other hand, they do not as readily confess themselves to lie under a malediction: on the contrary, they maintain that they

are far superior to us in personal beauty, and though we have more instruments and riches, they think that they could make a better use of them if they only had them in their possession.”⁹²

In an exchange with Chief Finau Mariner explained the European concept of money as a medium of exchange. Finau replied that:

“If...it were made of iron, and could be converted into knives, axes, and chisels, there would be some sense in placing a value on it; but as it is, I see none. If a man ...has more yams than he wants, let him exchange some of them away for pork or *gnatoo*. [fine cloth made from mulberry bark] Certainly money is much handier, and more convenient, but then, as it will not spoil by being kept, people will store it up instead of sharing it out, as a chief ought to do, and thus become selfish; whereas, if provisions were the principal property of a man, and it ought to be, as being both the most useful and the most necessary, he could not store it up, for it would spoil, and so he would be obliged either to exchange it away for something else useful, or share it out to his neighbours, and inferior chiefs and dependents, for nothing.” ...I understand now very well what it is that makes the Papalangis so selfish—it is this money!”⁹³

These Tongan critiques of western traditions reveal that the Tongan chiefs were certainly not impressed by the traditions of the westerners. It is notable that while the Tongans were interested in what the westerners brought with them, the Tongans considered their traditions superior. They thought that they could do better given the same resources. They had a particular view of the European traditions, and how European traditions were adopted, adapted or discarded later by the Tongans was accomplished through this particular Tongan lens.

⁹² John Martin, *An Account of the Natives of the Tonga Islands, in the Pacific Ocean, compiled and arranged from the extensive communications of Mr. William Mariner, several years resident in those islands* (London: John Murray, 1817) at 125.

⁹³ *Ibid* at 168.

The focus in this project is on the traditionality of law rather on traditions preloaded with content, so there is no preconceived notions of what may constitute 'traditional' or 'modern'. First, the legal traditions under consideration are analysed both as Tongan legal traditions and as British legal traditions in order to examine how those legal traditions developed over time in different contexts. Next Tongan legal traditions are analysed after they have undergone change as a result of their colonial encounter with the British. What has endured from the past as well as the changes adopted illuminates the direction that Tongans wanted to take in the future.

I have chosen this approach for three reasons. First, my consideration of law is from both the position of the law giver and legal subject, so that law must be something more than commands from above. Second, if the position of the legal subject is to be taken seriously, then there must be some role for the legal subject in the process of legal change. Therefore my view of law is grounded in law as a normative concept occurring within the ambit of social interaction. Third, the legal subject is credited with a capacity for agency in this model, and the temporal, authoritative power of tradition serves to contextualize the exercise of agency of the legal subject.

Tradition changes over time. The idea of 'changing traditions' as a paradox was created when the Europeans relegated colonized indigenous populations to live a life according to their existing traditions. Culturally appropriate legal change has transpired in post-colonial Tonga. However, that change was never considered as a case of custom transformed into law. Fijian anthropologist Rusiate Nayacakalou commented that a framework of change building on traditional institutions "contain[ed] a basic contradiction in that one cannot change and

preserve the same thing at the same time.”⁹⁴ It is suggested that this is not a contradiction but a statement about the value of pastness. The past is important and continues authoritatively in the presence even in the face of change because the foundation of change is always found the past.

Thus, in Tonga existing local legal traditions are re-interpreted in response to societal change. The starting point is Tongan legal traditions, and it was these traditions which responded to the introduction of British legal traditions. Tongan society was organized very differently than British society in the late nineteenth century, but it was possible to make imported British law Tongan. Existing legal traditions were either incorporated into the state legal code, or operated as non-state law which could impact imported legal traditions in order to make imported law acceptable Tongan law. New legal traditions were adopted to deal with new legal issues, and some existing legal traditions were discarded in the face of change.

The avoidance of a dichotomous analysis does not necessarily mean that the real effects of colonialism are not considered. Jolly suggested that although colonial history is a necessary context for analysis, it should not become a restrictive frame.⁹⁵ It cannot be forgotten that the European colonial contact occurred within a context of radical social differentiation, an extreme contrast between ‘our ways’ and ‘their ways’.⁹⁶ This differed from the other instances of cross-

⁹⁴ Rusiate Nayacakalou, *Leadership in Fiji* (Melbourne & Suva: Oxford University Press & Institute of Pacific Studies, USP: 1975) at 135.

⁹⁵ M Jolly & N Thomas, “Introduction: The politics of tradition in the South Pacific” (1992) 62(4) *Oceania* 241, at 242.

⁹⁶ *Ibid.*

traditional influences before the arrival of the Europeans. The Europeans came with a civilizing agenda, modeling that civility on their own societies.

This is the colonial thinking that this project hopes to extinguish. The understanding of *all* legal systems as complex traditions considered in time and place avoids this dichotomous approach. Change does not destroy tradition, and following from this, tradition does not have to be protected from modernity or progress. The complexities of tradition, both western and non-western, cannot be simply represented as unitary essences so that it must be one or the other. For example, Sykes suggested that the persistent notion that the decline in the importance of kinship and family in the Pacific is brought about by the growth of capitalism, industrialization and urbanization is an “ideological maxim that scholars have repeated to themselves.”⁹⁷ Sykes pointed to empirical evidence of the very different patterns that can co-exist alongside capitalism which suggests that the quick dichotomous judgments might not tell the whole story.

⁹⁷ K Sykes. “Interrogating Individuals: the theory of possessive individualism in the Western Pacific” (2007) 17(3) *Anthropological Forum* 215 at 218.

Chapter 3: Theory of Apology and Forgiveness

3.1 Introduction

The purpose of this chapter is to provide a theoretical and empirical understanding of the concept of apology and forgiveness. It is to serve as an introduction to the following chapter which will consider the role of apology and forgiveness as part of the contemporary Tongan legal system. Apology and forgiveness play an important role in Tonga's plural legal system. It is far more than the performance of a ceremonial ritual. In modern Tonga it fills a gap between the need for restoring relationships in a collective society, and the remedies offered by an adopted western-style legal system.

First, the importance of apology and forgiveness in contemporary Tongan society is introduced in order to provide context for the discussion which follows. Every Tongan has a place in the social hierarchy which is determined by rank and kinship. In order to be part of the ordered society, a Tongan individual must belong, and that sense of belonging is of vital importance. A legal tradition of apology and forgiveness provides a process by which a person who has breached the shared moral code of the group may be forgiven for their transgression and invited to rejoin the group.

Second, the long history of apology and forgiveness in Tonga is briefly explored. The concept underpinned the smooth functioning of the hierarchical society. The highest chiefs, answerable only to the gods for their actions, utilized ritualized apology ceremonies in order to be assured of their gods' continued support after a transgression. Apology ceremonies were enacted between high chiefs in order to restore peaceful relations between communities. Apology ceremonies provided a forum for an admission of a wrongdoing along with a plea for

forgiveness which not only reinforced the shared moral code between the parties, but put an end to a possible cycle of revenge.

Next, an exploration of the human concept of apology and forgiveness is undertaken in order to elicit an understanding of how apology and forgiveness work to heal relationships and restore harmony in a group. Apology sits uneasily with western legal traditions, and these concepts are examined together in order to show how they might complement each other, as they do in modern Tonga.

3.2 Apology and Forgiveness in Tonga

The ideal view of behaviour and relationships which support Tonga's ranked society is one of harmonious living which requires conformity and an avoidance of an overt expression of anger.¹ In an ideal Tongan society happiness is achieved through the maintenance of harmonious relations with others and love is expressed through helpfulness and sharing.² One of the core values regarded highly by Tongans is humility (*angafakatokilalo*).³ This grounding in group harmony and humility has had, and continues to have an important impact upon the Tongan reception of western law which is based upon concepts of individual autonomy and competitiveness. What constitutes a good legal outcome may be conceived quite differently where the starting points are so divergent.

¹ Wendy E Cowling, "Restraint, Constraint and Feeling: Exploring some Tongan expressions of emotion" in Ian Campbell & Eve Coxon, eds, *Polynesian Paradox: Essays in honour of Professor 'I Futa Helu* (Suva: Institute of Pacific Studies, University of the South Pacific, 2005) 139 at 142.

² *Ibid.*

³ 'Asinate Samate, "Re-imagining the Claim that God and Tonga are my Inheritance" in Elizabeth Wood-Ellem, ed, *Tonga and the Tongans heritage and identity* (Alphington, Australia: Tonga Research Association, 2007) 47 at 55.

It is suggested that the concept of apology and forgiveness remains fundamental to a Tongan legal system, because its inclusion in the modern legal system has made the introduction of western law workable in a Tongan context. The legal tradition of apology and forgiveness has a long history in Tonga, and there is a powerful pastness in its continuing usage today. It not only reinforces Tonga's hierarchical social and political system, but it maintains a sense of Tongan community and what it means to be Tongan.

Asinate Samate suggested that there is a traditional Tongan way of thinking whereby logic starts with *who* rather than with *what* or *why*.⁴ The context of social and cultural understanding is found in human relationships that spiral out from a loop of authority in the centre.⁵ It is a bounded Tongan network of spiraling relationships as the very idea of *being* Tongan is wrapped up in the concept of belonging. Kalafi Moala stated the sense of belonging shapes everything that a Tongan is: "In Tonga, the social relationship starts with the family, from the immediate family to the *kainga* (extended family) which contributes to the grouping the families who make up the village which combine together to become a region and a nation which then become the *fonua*."⁶ *Fonua* is a symbol of national identity. It emphasizes the

⁴ *Ibid* at 49.

⁵ Samate at note 3 suggested that the authority may be God, your auntie, your teacher, pastor, parents or spouse

⁶ Pippa Brown interviewed author Kalafi Moala and asked him what it means to be Tongan with a sense of place in the world. Pacific Media Centre (June 24, 2009), Online: <http://pacificmediacentre.blogspot.com/2009/06/moala-explores-tongan-democracy-and.html>

connection between Tongan people and Tonga as a place.⁷ With a nod to Descartes, Moala summed up the notion of being Tongan as “I belong, therefore I am”.⁸

The connection between Tongans as well as their awareness of *being* Tongan is strong. Their position within social hierarchies is reflected in the observation of rules of respect. These rules that mediate daily Tongan life are only enforced against Tongans. This posture is not a courtesy to outsiders, but rather an indication that a non-Tongan does not belong and does not have a place within the network of Tongan relationships. In a speech to Parliament celebrating the promulgation of the Constitution of 1875, King George Tupou I introduced the phrase “Tonga for the Tongans”⁹ after he had successfully avoided colonial annexation, and promulgated a Tongan constitution. He urged Tongans to “not forget that we are all Tongans and we are working for Tonga to build up our little country so that we and our descendants, may possess Tonga forever.”¹⁰ These powerful words are reflected in contemporary Tonga in the maintenance of rules of respect that support a social hierarchy that includes only Tongans. An outsider is not connected to the Tongan community in the sense that there is no expectation of any obligation or duty based upon kinship and/or rank.

Keeping Tonga for Tongans has highlighted for Tongans the importance of the rules of respect which maintain Tonga’s particular social structure, and a Tongan way of being. I

⁷ Steve Francis, “People and Place in Tonga: The social construction of *Fonua* in Oceania” in Thomas Anton Reuter, ed, *Sharing the Earth, Dividing the Land and Territory in the Austronesian world* (Canberra: ANU Press, 2006) 345 at 347.

⁸ *Supra* note 6.

⁹ King George Tupou I Speech to the Members of the Parliament on the last day of the Parliament of Tonga, November 4, 1875, translated by Viela Kinahoi (1875) 2(6) Ko e Boobooi.

¹⁰ *Ibid.*

witnessed an illuminating example of this sort of 'inclusion by exclusion' in Magistrate's Court. I attended Magistrate's Court with an interpreter as part of my fieldwork. Every Tongan who entered the courtroom was expected wear a *ta'ovala* or *kiekie*. The *ta'ovala* is a small mat woven from pandanus leaves, and it is worn around the waist and tied with a coconut fibre rope. The *kiekie* is similar but is made up of woven strips that hang from a belt at the waist and is generally worn by women. These mats are worn as a sign of respect, just as they were in the formal apology ceremonies cited below. The sheriff in the courthouse would not admit any Tongan who was not properly attired in one of these mats. One day my Tongan interpreter forgot her *kiekie* and I lent her mine to wear. She assured me that I was not required to wear a mat, but that she would not be admitted without one. She proved to be correct when the sheriff ignored my entry while every Tongan who he noticed without a mat was turned away.

During the session a woman who was not wearing a mat (she must have eluded the sheriff) appeared before the Magistrate as a defendant. He looked at her and asked: "Why are you dressed like that. Are you a prisoner or a foreigner?" The Magistrate would not hear the woman until she was properly attired. It is notable that the Magistrate mentioned prisoners and foreigners as exceptions to the dress requirement.

In Tonga the shame of being held in prison is grounded in the loss of your place in society. Likewise, a foreigner does not belong to Tongan society. It is a terrible thing to not belong in Tonga, and thus it was a severe admonishment to a Tongan to be likened to a prisoner or a foreigner. This stance underlines the importance of harmonious relationships, and the necessity for a legal process that allows a resumption of a social position or the all-important 'belongedness' after a wrongdoing. This is the important role for apology and

forgiveness in Tonga. It allows a Tongan wrongdoer to resume their position in Tongan society. The legal tradition does not right a wrong, but affords a wrongdoer an opportunity to humble themselves before their community, acknowledge a breach of community norms and ask for forgiveness, and a re-admittance to Tongan society.

The concept of effective apologies explored in this project is more than the simple statement of “I am sorry”, although this may sound like an apology. This project considers *real* apologies which are those apologies which can effectively repair relationships and restore harmony to a community. A Tongan Magistrate¹¹ clarified for me what constituted a real apology in Tonga. I was prompted to ask the Magistrate what he meant by ‘apology’ after noting that he routinely asked every convicted offender in his Court whether an apology had been made to the injured party. If no apology had been offered then the offender was told to ensure that an apology was undertaken. I asked the Magistrate what he meant by ‘apology’ in these cases, as clearly it carried some legal weight in his Court.

In reply, the Magistrate explained that it was more than an expression of sorrow or remorse. It was an admission of fault and a request for forgiveness often directed to the eldest sister of the victim’s father. In Tonga’s ranked society the paternal aunt is the highest ranking member of the family, and she can accept an apology, and forgive the wrongdoer on behalf of the family of the victim. Apology and forgiveness in Tonga are not actions taken between

¹¹ Magistrate’s Court in Tonga is the lowest court of record. The Court has a broad jurisdiction extending to criminal cases in which the punishment provided does not exceed \$10,000 or three years imprisonment, and to civil cases in which the amount claimed does not exceed \$10,000.

individuals but between families because the basic social unit in the hierarchical society is the family. It is important to restore relationships between families, and here the tradition of apology and forgiveness functions as a legal remedy intended to restore harmony following the breach of a community norm.

The concept of apology in Tonga is something very different from a contemporary western apology which is often characterized as an expression of compassion or empathy.¹² Some of the confusion which surrounds the concept of apology centres upon language. The root of the English word 'apology' is the Greek *apologia* which is translated as a "verbal defense".¹³ The translation of apology as a defense implies more of an explanation for a transgression rather than a feeling of contrition. The Tongan tradition of apology discussed in this project is never given as an explanation or defense of an action. A Tongan apology that can restore community harmony requires the admission of a transgression without excuses.

The concept of apology considered in this project is better defined by the Tongan language. In Tongan, the words *kataki* and *fakemolemole* are used together to express the concept of apology. *Kataki* is a form of the expression 'excuse me' and asks the victim to hold their temper. The expression *fakemolemole* goes a step further and asks for forgiveness or the washing away of the memory. Apologies in Tonga are never merely words said automatically without meaning. Rank determines who one owes an apology to, and apologies in Tonga are always made in acknowledgment of a desire to remain in a genial relationship with the

¹² Aaron Lazare, *On Apology* (Oxford: Oxford University Press, 2004) at 99.

¹³ Plato's *The Apology* relates the speech which Socrates gave to defend himself against legal charges.

offended party.¹⁴ Even a simple ‘*tulou*’ which one may say for interrupting a speaker or passing in front of someone is not regarded as mere politeness, but rather “permits one to wrong another respectfully”.¹⁵

Sociologist Nicholas Tavuchis differentiated between those apologies that come before and after the offense.¹⁶ An apology before the offence such as “*tulou*” reveals that one is thinking like a member of the community. In order to use the expression properly in Tonga, one must be aware of what will constitute wrongful behaviour in the community. This not only includes the action itself, but also to whom and to what degree one owes another respect. In Tonga’s society ranked by inherited titles as well as kin, this appears as a complicated process to outsiders.

Tavuchis posited that answering a call to apologize after the offense has been committed implies that one is seeking reconciliation with the community, and a reconfirmation of a moral worthiness to be a part of that community.¹⁷ Here, Tavuchis was commenting on the nature of apologies generally, but his statement captures the importance of the legal tradition of apology and forgiveness in Tonga. Once the moral code of the Tongan community has been breached a simple *tulou* will not suffice. The harm from the breach extends beyond the damages caused by the action and the individuals involved. An apology must be undertaken in

¹⁴ Jione Havea, “From Reconciliation to Adoption: A *talanoa* from Oceania” in Robert Schreiter & Knud Jorgensen, eds, *Mission as Ministry of Reconciliation* (Oxford: Regnum books International, 2013) at 295.

¹⁵ *Ibid* at 296.

¹⁶ Nicholas Tavuchis, *Mea Culpa: A sociology of apology and reconciliation* (Stanford, Calif: Stanford University Press: 1991) at 22.

¹⁷ *Ibid*.

order for the offender and her family to be reconciled with the community. In the collective society a breach of the moral code has a ripple effect as relations of the wrongdoer and victim are estranged until a proper apology is undertaken and the wrongdoer is forgiven.

3.3 History of Apology and Forgiveness in Tonga

There is a long history of a legal tradition of apology and forgiveness in Tonga. The concept is anchored in Tonga's hierarchical society. When the Europeans arrived on the shores of Tonga in the seventeenth century they found a highly organized socio-political system. There were four classes making up the social pyramid: the kings or high chiefs, the chiefs and their attendants (*matapules*), the priests, and the commoners. The priestly class had a role as mediators between the chiefs and mythical gods. The commoners were obligated to the chiefs for access to land and security, and their obedience to the chiefs was ensured by the absolute authority of the chiefs who were obeyed on penalty of a severe beating or death. However, the chiefs were dependent upon the commoners to work the land, to build houses and canoes, and to wage war so that there was an element of reciprocity in the relationship that tempered an abuse of a chief's absolute authority.¹⁸

The chiefs rendered judicial authority over their villages. There were no public trials and minor offences such as whistling, shouting or failing to observe the obligations of respect owed to the chief were punishable by a thrashing with a branch or beating of the face with bare fists.¹⁹ Severe punishments including execution resulted from violations of the more stringent

¹⁸ Sione Lātūkefu, *The Tongan Constitution: A brief history to celebrate its Centenary* (Nuku'alofa: Tonga Traditions Committee Publication, 1975) at 8.

¹⁹ *Ibid* at 12.

taboos, and immediate execution followed refusal to serve in the chief's army. Rank determined which laws had to be obeyed. The higher one was in the stratified pyramid, the fewer rules one had to obey. Murder, theft and adultery were only considered offences if they were committed against a person of higher rank.²⁰

The behaviour of the chiefly class was regulated from above by their fear of retribution from the gods for violations of taboos or for angering those gods. Chiefs made offerings to obtain the favour of their gods especially before an ocean voyage or going to war. Any misfortune or natural disaster was attributed to the gods' anger. The priests enjoyed a role as the mediators between the chiefs and the gods, and it is in this interaction with the gods that the concept of apology and the seeking of forgiveness is first observed in Tonga. In a society balanced by reciprocal duties, the chiefs gained the favour of their gods by making offerings and sacrifices to them. It was the top and last piece in the puzzle that connected all of society and just as the human superiors could punish the human inferiors, so could the supernatural gods punish the chiefs. When the chiefs thought that the gods were angered they endeavoured to appease them in order to restore a harmonious relationship.

In the early nineteenth century John Mariner²¹ witnessed an apology ceremony²² enacted by Tongan chiefs asking forgiveness from the gods. The necessity for an apology arose

²⁰ *Ibid*, at 13.

²¹ William Mariner was an Englishman who was shipwrecked in Tonga from 1805-1811. On his return to England, Mariner related his experiences to Dr John Martin who published a book about Mariner's sojourn in Tonga: *An account of the natives of the Tonga islands, in the South Pacific Ocean. With an original grammar and vocabulary of their language* (London: J Murphy, 1818).

²² John Martin, *Tonga: An account of the natives of the Tonga islands, in the South Pacific ocean. With an original grammar and vocabulary of their language* (London: J Murphy, 1818) at 358.

when a chief killed an enemy within a consecrated place, and this act constituted a severe sacrilege. The priests ordered that a child be sacrificed in order to appease the anger of the gods. The supreme sacrifice was made as a signal to the gods that the chiefs acknowledged the seriousness of their transgression. The chiefs attended the ceremony clothed in mats, and wearing *ifi* leaves (leaves of chestnut tree) around their necks. This attire indicated respect for the gods as well as their humility before the gods as they atoned for the offense.²³ On behalf of the chiefs the priest asked the gods to accept the sacrifice of the child for the committed sacrilege and to withhold punishment of the chiefs and their subjects. The formal apology ceremony reinforced the inferior position of the chiefs to the gods as they humbled themselves and asked for forgiveness. It also acknowledged a shared code of behaviour which originated with the gods and controlled the behaviour of the chiefs. The absence of retribution by the gods against the chiefs or their subjects was observed as an acceptance of the apology, and forgiveness by the gods.

Mariner also recorded a ceremony of apology which occurred between warring chiefs. Again the goal of the ceremony was the return of harmonious relations, and to end the threat of vindictive behaviour by the offended chief. Mariner witnessed the ceremony midway through the “long civil war” which lasted from 1777 until 1820.²⁴ During this time the country was thrown into anarchy as the principal chiefs fought for supremacy. Revenge took a

²³ Meredith Filihia, “Rituals of Sacrifice in Early Post-European Contact Tonga and Tahiti” (1999) 34(1) *The Journal of Pacific History* 5 at 8.

²⁴ see IC Campbell, *Island Kingdom: Tonga Ancient and Modern* 2d ed (Christchurch, NZ: Canterbury University Press: 2001) c 5.

particularly grave toll. Mariner reported that it was a Tongan custom not only to kill an enemy, but also all of his friends and relations if possible.²⁵ Finau was a high Tongan chief who embodied this revengeful spirit. After he had won many battles on the main island of Tongatapu he withdrew to rule the island group of Ha'apai knowing that he could never conquer and hold the entirety of Tongatapu.²⁶ However, over the next several years he made an annual raid on Tongatapu only to seek revenge on his enemies and to disrupt that island's peace.²⁷

Tupoumalohi, another important chief, wished to leave Tongatapu and return to the island of Ha'apai where his family once resided. He had fought Finau in previous battles in the annual raids on Tongatapu. Now he required Finau's pardon for his participation in those battles in order to be permitted to live peaceably in Ha'apai where Finau ruled. He was required to put an end to the violence between them, and therefore arranged for a ceremony of apology in order to signify his humility to Finau.

Mariner reported that Tupoumalohi and his entourage arrived at the ceremony dressed in large mats signifying their respect, and with *ifi* leaves around their necks indicating their submission to Finau. To begin the ceremony, the priest addressed the gods who were responsible for the chiefs' power: "Here thou seest the men who have come from Tongatapu to implore thy pardon for their crimes; they have been rebels against those chiefs who hold power

²⁵ *Supra* note 22 at 69.

²⁶ IC Campbell, *Island Kingdom: Tonga Ancient and Modern* 2d ed (Christchurch, NZ: Canterbury University Press: 2001) at 67.

²⁷ *Ibid.*

from divine authority, but, being sorry for what they have done, they hope that thou wilt be pleased to extend thy protection towards them for the future.”²⁸

Mariner described how the chiefs indicated their submissive and humble positions relative to Finau from whom they sought forgiveness. The chiefs and their *matapules* were seated across from Finau with their hands clasped, and their heads were bowed almost to touch the ground. The priest addressed Finau saying that the chiefs and his followers “have come to humiliate themselves before you; not that they expect you will pardon them after so obstinate a rebellion, but they come to endeavor to convince you of their sorrow for so great and heinous a crime; they have no expectation but to die, therefore your will be done. Pass your sentence, Finau.”²⁹

Finau granted his forgiveness and Tupoumalohi was allowed to return to Ha’apai unmolested. The description of these ceremonies offers compelling examples of the importance of apology and forgiveness as a legal tradition in Tongan history. The concept provided a rationalization for the high chiefs’ community with the gods as only the chiefs could appease the anger of the gods through the intervention of their priests. It also demonstrated the limits of authority of the chiefs who believed that they had to obey the rules of the gods or face punishment. As between chiefs it provided a means to finally terminate violent retribution. A wrongdoing indicated high handed behaviour, and the apology ceremony allowed the chief

²⁸ *Supra* note 22 at 358.

²⁹ *Ibid.*

seeking forgiveness to humble himself in front of the offended chief in order to re-establish harmonious relations.

Today, formal apology ceremonies have been largely abandoned in Tonga, but the use of apology and forgiveness as a legal tradition remains an important component of the broader plural legal system. Tonga has a highly ordered society based on rank and kinship, and the tradition works to restore and reinforce an assigned place in society, and restore social harmony just as it once did with the high chiefs and their gods. Because of the nature of Tongan society, the social effect of wrongdoings in Tonga is never restricted to the individuals directly involved. Wrongdoings in Tonga have repercussions which disrupt the social relations between members of the extended families, and can extend through the ranks of the social hierarchy.

The next section considers the theory of apology from a psychological and sociological perspective. The theory of apology is broadly considered because it is not specifically a Tongan tradition, but rather a human concept. It is the use of apologies that is culturally shaped rather than the act of apologies themselves. Apologies themselves are not culturally specific, and understanding the theory behind apology and forgiveness gives important insights to the concept as a legal tradition, and particularly to the limits of the concept.

3.4 Theory of Apology and Forgiveness

3.4.1 Apologies

There is something inexplicably powerful about apologies. In the examples from early Tonga discussed above, societal harmony was restored and revenge forsaken as the result of ceremonial apologies. In modern Tonga the words of apology have a similar effect.

Relationships are restored as a result of words spoken. Aaron Lazare, a leading authority on the

psychology of apology reflected on this power of apologies. He characterized the offering and accepting of apologies as “[o]ne of the most profound human interactions”.³⁰ Lazare saw the power of apologies in their capacity “to heal humiliations and grudges, remove the desire for vengeance, and generate forgiveness on the part of offended parties.”³¹

Sociologist Nicholas Tavuchis went beyond a psychological examination of the concept, and revealed a connection between apology and community and social order. He referred to apology as not only symbolic, but also as “mysteriously potent”.³² Tavuchis’ approach explored those circumstances which call up a human need to resort to apologies to repair social rifts rather than using excuses, defenses, justification, or legal measures.³³ Tavuchis also had a related query that is especially relevant to this project. He questioned what place apologies might have in a western society “permeated with litigiousness and increasingly subject to legal and administrative rules”.³⁴ Perhaps addressing the situation in Tonga may provide some answers to this question as apology and litigation appear to co-exist comfortably in the Tongan plural legal context.

The sociological approach is particularly important to the consideration of apology as a legal tradition. A basic concept of law requires that the system of rules that is regarded as regulating the actions of its members be recognized as such by that particular moral community of members. It is precisely membership in that moral community that determines who we

³⁰ *Supra* note 12 at 1.

³¹ *Ibid.*

³² *Supra* note 16 at 2.

³³ *Ibid.*

³⁴ *Ibid* at 4.

apologize to, and what we apologize for. Thus, Tavuchis characterized apologies as “sensitive indicators of members’ (and non-members’) actual, if unspoken, moral orientations”.³⁵ Further, members apologize because of moral transgressions recognised to be transgressions by members of their community. In this way, apologies are viewed as civil norms which operate in societies and which proceed from the culture of those societies.³⁶ Genuine apologies act as “social barometers” linking changes in which transgressions call for an apology with changes in social behavior and cultural expectations.³⁷

Tavuchis differentiated accounts from apologies.³⁸ An account is a defense or excuse that asks the victim to be reasonable and to excuse the offender, whereas an apology seeks forgiveness for an action that is admittedly wrong. Only an apology has the power to redeem the offender in the eyes of the moral community, because the breach of the moral benchmark must be acknowledged.³⁹ There is moral pain and shame in an apology, and it is the admission of the transgression with no excuses that reinforces the moral code of the community.

The social context of apologies is important. In a comparison between apologetic behaviours and the role of apology in legal settings in the United States and Japan, Wagatsuma and Rosett noted that the significance of an act of apology can be attributed to cultural

³⁵ *Ibid* at 13.

³⁶ Prue Vines, “The power of Apology: Mercy, forgiveness or corrective justice in the civil liability arena?” (2007) 1(5) *Journal of Law and Social Justice* 1 at 9.

³⁷ *Supra* note 16 at 13.

³⁸ *Ibid* at 17.

³⁹ *Ibid*.

difference.⁴⁰ In the United States it is rare for an apology to be part of conflict resolution. It would be unusual for the police or judge to demand that the offender apologize to the victim. If the apology was linked to a reduction of sentence then it is likely that the apology would be viewed as insincere. Conversely, in Japan, there is a basic assumption that an apology is an important part of conflict resolution. In fact, the authors noted that an offer to pay damages without expressing apology was considered suspect.⁴¹

Wagatsuma and Rosett hypothesized that the members of different societies attribute different significance to apologies because of different assumptions about their world.⁴² In western societies the insistence on the protection of individual rights is based on a personally-held illusion that individuals are autonomous and will choose what is best for themselves. Why would an offender apologize unless there was some benefit for themselves, such as the reduction of sentence? In hierarchical societies such as Tonga, members hold an illusion that social life reflects a hierarchical order and the aim of law is to maintain a harmony inherent to that order. In Tonga, apologies can take on a greater significance in the legal system where the act of apology itself acknowledges the hierarchical structure which is the basis for the social harmony. As such, apologies may be more important in societies which stress the collective over the individual. There is more at stake where disharmony infects a community rather than the happiness of one individual. Collectivists tend to utilize apologies more often to restore

⁴⁰ Hiroshi Wagatsuma & Arthur Rosett, "The Implications of Apology: Law and Culture in Japan and the United States" (1986) 20(4) Law & Society Review 461.

⁴¹ *Ibid* at 462.

⁴² *Ibid* at 463.

harmonious relations. Thus, in Tonga apologies are widely offered because of the importance of belonging to the community.

Richard Abel described apology as a “ceremonial exchange of respect”.⁴³ He suggested that a transgression of community norms demanded that an offender express a moral inferiority through the humbling experience of offering an apology. The offended party is left to accept or reject the apology. If the apology is accepted then the moral status between the parties can be equalized. If the moral status is not equalized the offender may be left out of the collective, as she is no longer a member of that group that is bound by the existing moral code. This exclusion would clearly be more distressing to the person whose cultural outlook is collectivist rather than to one who values independence and autonomy from the group.⁴⁴

A real apology has gravity if the acceptance or rejection of the apology can determine whether or not the offender may be permitted to rejoin their social community. Lazare’s test for a genuine apology is to ask whether the person offering the apology would repeat the behaviour if a similar situation arose.⁴⁵ This promise not to reoffend is not only a recognition of a shared norm between the offender and the victim, but also the implicit understanding that if the offender wants readmission into the group she must promise to recognize that shared norm.

⁴³ Richard Abel, *Speaking Respect, Respecting Speech* (Chicago: University of Chicago Press, 1998) at 265.

⁴⁴ Joshua N Hook, Everett L Worthington Jr & Shawn O Utsey, “Collectivism, Forgiveness, and Social Harmony” (2009) 37(6) *The Counselling Psychologist* 821 at 825.

⁴⁵ *Supra* note 12 at 25.

Lazare examined those elements which make an apology effective. He began by asking why a person who was offended required an act of apology in order to heal a fractured relationship. Apologies are more than just words and Lazare pointed to a number of psychological needs that are satisfied by an apology.⁴⁶ First is the need to restore self-respect and dignity. This is particularly important where an individual has experienced humiliation as a result of an offence.⁴⁷ Lazare stated that anger followed humiliating offences, and persistent grudges may form against the offender. An apology can restore dignity and peaceful relations. The offense which humiliated the victim left her feeling powerless. The act of apology has the power to reverse the power imbalance created by the offense as the offender must humiliate and humble herself before the victim. The balance of power is shifted as the victim holds the power to forgive or not to forgive.

Second, an apology reaffirms that the parties have shared values.⁴⁸ This is of utmost importance to the continuing relationship amongst members of a social group as discussed above. The affirmation of shared values is addressed by an apology that acknowledges the offense, expresses regret and assures that the offense will not be repeated. Importantly, trust in the goodness of the individual is re-established so that she can once again be part of the relationship or collective. If there is a repeat of the offense, then there is a loss of trust, not only in the offending individual but in the veracity of her apologies.

⁴⁶*Ibid* at 44.

⁴⁷ In the western legal tradition apologies have a real legal presence only in cases of defamation where humiliation and loss of social status is basic to recovery.

⁴⁸ *Supra* note 12 at 52.

Third, apologies assure victims that they are blameless.⁴⁹ This refers back to the difference between accounts and apologies. A real apology does not express excuses or shared blame, but rather is a full acknowledgment of a transgression of a shared value. This is an especially important psychological need for victims of sexual abuse or domestic violence.⁵⁰

Fourth, apologies may satisfy a need to restore the victim's physical and psychological feeling of safety.⁵¹ In order for an apology to satisfy this need, it must go beyond an acknowledgment of a shared value. The apology must speak to the motives for the offense so that the victim may evaluate whether to reconcile or to terminate the relationship. That is, forgiveness is not automatic. The offender must explain not only why the offending behaviour happened, but why it will never happen again.

3.4.2 Forgiveness

Sometimes forgiveness is not important. Apologies can mean different things in different cultural and social settings, and whether forgiveness is an important component of a successful apology depends on how that apology is received. Cultural differences may render both apology and an ensuing forgiveness meaningless to one victim, but highly important to another. Fehr and Gelfand identify three self-views which influence an individual's receptiveness to apology.⁵² Victims who view themselves as independent and autonomous entities are likely to equate compensation with apology. In these instances, a formal legal

⁴⁹ *Ibid* at 57

⁵⁰ *Ibid* at 59

⁵¹ *Ibid* at 60

⁵² Ryan Fehr & Michele J Gelfand, "When apologies work: How matching apology components to victims' self-construals facilitates forgiveness" (2010) 113(1) *Organizational Behavior and Human Processes* 37.

remedy allows impersonal equity to be restored through exchange. Nothing more is necessary. Forgiveness is neither expected nor given.

Where one's self-view is relational, then some expression of empathy is expected from the offender. Close personal relationships are the focus, and an expression of empathy is necessary to restore that relationship. In these cases an expression of forgiveness may be necessary if that personal relationship is to continue. Lastly, if an individual emphasizes the collective self, then it is important that apologies acknowledge the violated norms of the group. The existing hierarchical structure and harmony of the group may not be restored by payment of damages alone to an injured individual member. There must be an apology as well as an expression of forgiveness in order to allow re-entry into the collective.

It is only in the last instance where forgiveness may have some legal standing. In the individualist setting forgiveness is personal and is often described as "a road to inner peace."⁵³ A victim may forgive only to feel better about themselves.⁵⁴ This may be a stand-alone forgiveness in the absence of a real apology. It is deeply personal. Conversely, from the collective perspective, the focus is first on the apology itself, and then the ensuing acceptance of the apology, or forgiveness. Forgiveness connotes something different in the collectivist setting. Forgiveness in the collectivist setting is a serious decision that speaks to the value of

⁵³ *Supra* note 44 at 821.

⁵⁴ "It takes a big person to forgive" is a common refrain. Desmond Tutu famously talked about forgiveness in *No Future Without Forgiveness* (New York: Doubleday, 1999). It is an important concept personally and emotionally in this context, but it is not legal if there is no preceding apology that acknowledges the violation of the moral code.

group cohesion and permanence.⁵⁵ It allows the offender (and his family) to be regarded as a member of that society again.

In a collectivist setting, forgiveness is viewed within a broad concept of reconciliation.⁵⁶ The act of forgiving must go beyond a possible renewed accord between two individuals to a reinforcement of the normative code of the collective. Thus public rituals for apology and forgiveness are often found in collectivist societies where a *feeling* of interpersonal justice may be sacrificed for group harmony.⁵⁷ If an apology is properly performed, then forgiveness should be forthcoming if only because it is the only way the society can peacefully move forward.

Joseph Butler based his treatment of forgiveness on a 'theory of resentment'.⁵⁸ He observed that the resentment which precipitated vindictive passions was a natural human response occasioned when one was wronged by another responsible agent. In this scenario, resentment was not necessarily seen as a negative value. Jeffrie G Murphy explained that resentment reveals respect for the self and for the moral order.⁵⁹ Resentment reaffirms the existence of the moral order, and an absence of resentment for an action which formerly violated the moral code may indicate a changing moral code. Thus the existence of resentment may act as a benchmark for the existing moral code.

⁵⁵ *Supra* note 44 at 821.

⁵⁶ *Ibid* at 827.

⁵⁷ *Ibid* at 834.

⁵⁸ Joseph Butler, *The Works of Joseph Butler*, Vol. 2, Fifteen Sermons [1726], W.E. Gladstone (ed) (Oxford: Clarendon Press, 1897), at sermon VIII, ii.

⁵⁹ Jeffrie G Murphy, "Forgiveness, Reconciliation and Responding to Evil: A philosophical overview" (1999) 27(5) *Fordham Urb LJ* 1353 at 1359.

Resentment must be addressed if its corollary is vindictive behaviour; and the contrary passion to resentment is the ability to forgive. In Butler's view, the normal human condition is to live in harmony, even if this demands that one love one's enemies.⁶⁰ In this context, loving one's enemies means putting aside resentment and accepting an apology. Forgiveness is the human process that allows an end to resentment. If forgiveness is forthcoming in response to a real apology, then it does not excuse bad behaviour which might undermine the existing moral code. Rather it is a response to an acknowledgment of a breach of the moral code.

In order to be considered as a legal tradition, apology and forgiveness must be taken as a set. As a set, apology and forgiveness serve a remedial function. First, a genuine apology acknowledges and reinforces the existing moral code, and is offered in the hope that forgiveness will be forthcoming. Forgiveness, as a response to a genuine apology, connotes an end to vindictive actions. Acceptance of an apology indicates that damage to relationships occasioned by the transgression has been remedied. Thus, an apology that does not seek forgiveness is not a genuine apology but perhaps an expression of remorse. Likewise, forgiveness in the absence of apology is an individual choice that does not have to acknowledge or remedy the breach of an accepted community norm.

3.5 Retribution, Reparation and Apology

There is an uneasy co-existence between forgiveness and punishment, and this is an important consideration where a legal tradition of apology and forgiveness exists alongside a western-style legal system as is the case in Tonga. Joanna North pointed out that both Hegel

⁶⁰ *Supra* note 58 at sermon IX, 10.

and Kant recognized the importance of retribution, and regarded forgiveness and retribution in conflict.⁶¹ Both saw forgiveness as the undoing of a wrong, and Kant in particular thought that forgiveness always involved the forgoing of punishment. If apology and the promise to reform made a 'new man', then Kant argued that forgiving a wrongdoer (who is now a 'new man') would be a redundant exercise.

North untangled this reasoning and in doing so revealed the real power of forgiveness. She stated that "far from removing the fact of wrongdoing, forgiveness actually relies upon the recognition of this fact for its very possibility. What is annulled in the act of forgiveness is not the crime itself but the distorting effect that this wrong has upon one's relations with the wrongdoer and perhaps with others."⁶² Therefore, the wrongdoing itself may attract a penalty even though there is an accepted apology. The apology is not solely directed at the wrongdoing but to the damage to relationships in the community that it has caused.

Lazare also recognized that apologies can co-exist with retributive remedies. Lazare suggested that a victim may have to see the offender suffer in order for her to regain her self-respect.⁶³ At times the need for suffering is satisfied by the expression of shame and humiliation of the apology, but retribution and reparation may be necessary in order to humble the offender so that she no longer can feel that she is above and somehow excused from the

⁶¹ Joanna North, "Wrongdoing and Forgiveness" (1987) 62(242) *Philosophy* 499 at 499.

⁶² *Ibid* at 500.

⁶³ *Supra* note 12 at 61-64.

observance of community norms. Retribution and reparation may serve to address the real wrongfulness of the transgression of community norms.

In western legal systems it is usual to see reparation or retribution alone as legal remedies to wrongdoings. The focus of the remedy is shifted from the wrongdoer and victim to the wrongdoing itself. Here there is usually a legal settlement without apology and forgiveness, and Lazare characterized this outcome as “making amends without remorse”.⁶⁴ The focus of the court is the autonomy of the individual rather than the restoration of a social hierarchy or community harmony.

In fact apologies are resisted in western courtrooms because apologies are in effect confessions. In criminal hearings the offender may express regret, but regret does not require any action on part of the victim. The important component of forgiveness is ignored. Vines suggested that an acknowledgement of regret falls short of an acknowledgement of fault. A statement of regret does not recognize the imbalance created between the parties by the commission of the offence and therefore does not begin to re-balance the parties as a real apology might do.⁶⁵ The presence of regret and mercy may evince an extralegal morality in the criminal law system, but these concepts fall short of apology and forgiveness. This stems from the fact that the primary obligation of western criminal courts is to the State, and not to the restoration of relationships.⁶⁶

⁶⁴ *Ibid* at 64.

⁶⁵ *Supra* note 36 at 21.

⁶⁶ See Douglas Ammar, “Forgiveness and the Law: A Redemptive Opportunity” (2000) 27 Fordham Urb LJ 1583 at 1589.

Apologies in civil litigation can also be problematic. Generally lawyers advise clients not to apologize because the apology may be viewed as an admission of liability. In the western legal system, the plaintiff must prove the fault of the defendant. Taft maintained that the moral dimension of apology is lost when it enters the legal arena.⁶⁷ Taft relied upon Margaret Radin's distinction between commodified and noncommodified concepts of compensation where some personal harms can be equated with dollar values, but others cannot.⁶⁸ Taft stated that the "distinction is helpful because it shows that while commodified concepts of compensation may provide financial redress, such concepts do not necessarily restore moral balance."⁶⁹ It seems odd to discuss moral balance in a western legal setting, but Taft was concerned that civil litigation fell short in compensating a plaintiff who had been spiritually and psychologically broken. That is, compensation does not restore the moral imbalance that a real apology can address.

Jonathon Cohen saw a paradox in the role of apology in civil litigation.⁷⁰ On the one hand defendants may be advised to refrain from admitting their mistakes by their legal counsel and insurance providers. On the other hand, Cohen pointed to statistical evidence that it is the absence of apology that sometimes triggers a lawsuit. Legislators appear to have accepted the argument that apologies may reduce litigation, and have responded by introducing legislation to protect apologies in tort law. Vines suggested that "legislation protective of apologies in

⁶⁷ Lee Taft, "The Commodification of Apology" (2000) 109(5) Yale LJ 1135.

⁶⁸ Margaret Jane Radin, "Compensation and Commensurability" (1993) 43 Duke LJ 56 at 56.

⁶⁹ *Supra* note 67 at 1137.

⁷⁰ See Jonathon Cohen, "Advising Clients to Apologize" (1999) 72 S Cal L Rev 1009.

private law disputes has been developed on the basis that the legal system was damaging society by having a chilling effect on apologies.”⁷¹ However, Martha Minow queried whether forgiveness can ever have a genuine role in a legal system premised on equal treatment, impartiality, just desserts and respect for individual autonomy.⁷² She viewed forgiveness as possessing a degree of compassion that is lacking in the western legal system.

The problems of reconciling forgiveness and punishment arise when the two are treated as alternatives to one another. Thus arises the conundrum discussed in the first chapter. Minow suggested that the two cannot be alternatives for each other because the moral ambitions of punishment and forgiveness are very different. Remember that apologies reinforce the moral standards of a community. Apologies permit an offender the chance to affirm that she is aware of, and will respect the moral code of the community if she is readmitted. Apologies also work to heal the victim by the offender’s admission that there are no excuses for the actions of the offender. Forgiveness is in the hands of the victim or the wronged community. Forgiveness is about forgoing revenge, and admitting the offender back into the community on the condition that the behaviour will not be repeated. Merely punishing the wrongdoer does not necessarily heal a victim. Retribution may not restore a community.

3.6 Limits to Apology and Forgiveness

However, just as there are clear limits to the healing power of an impersonal implementation of punishment, there are also limits to the power of forgiveness and apology to

⁷¹ *Supra* note 36 at 3.

⁷² Martha Minow, “Forgiveness and the Law” (2000) 27(5) Fordham Urban Law Journal 1394 at 1396.

restore a harmonious community. It is at the limits of a legal tradition of apology and forgiveness that an impartial, impersonal legal tradition which imputes blame and punishment may have something of value to add.

At times an apology is inadequate. An apology may not fully compensate the victim for the injury suffered, or it may be viewed as an inadequate response to the seriousness of the transgression where the safety of the community must be addressed. Murphy distinguished between forgiveness without reconciliation, and reconciliation without forgiveness.⁷³ He suggested that a victim may forgive a wrongdoer, but nonetheless never trust or want to live with that person again. On the other hand, reconciliation without forgiveness is characterized as waiving a right.⁷⁴ The latter course may imply that a victim has sacrificed her own self-respect or respect for the moral order by ignoring or excusing a wrong. In either case, the role of apology to restore harmonious relations has not been successful.

As noted above, the concept of apology and forgiveness is not necessarily a substitute for punishment or liability. The different remedial approaches are potentially separate as the former operates interpersonally, and the latter impersonally.⁷⁵ One addresses the transgression itself, while the other addresses the detrimental effects that the transgression has on the offender's relations with the victim and other members of the community.⁷⁶

⁷³ *Supra* note 59 at 1357.

⁷⁴ *Ibid.*

⁷⁵ *Ibid* at 1398.

⁷⁶ *Supra* note 59 at 500.

Tavuchis suggested that there are apologetic thresholds.⁷⁷ At one end of the scale are those minor offences with trivial consequences where there is no call for an apology. At the other end of the scale are those offenses that are so terrible that an apology is an inadequate means to repair a relationship.⁷⁸ In Tonga, a perusal of the reported criminal cases suggests that an apology to the victim's family is always forthcoming even in the cases of brutal murder. Apologies are always called for because there are two forms of justice operating in Tonga – punitive justice and remedial justice. Punitive justice is the justice of the State which serves as punishment to the offender, and as a public notice that the behaviour of the offender will not be tolerated. Remedial justice is directed towards to the healing of relationships, not only between the offender and the victim, but also between their families.

Punitive justice may be called for where there is a failed apology. A genuine apology affirms that a relationship is safe and predictable again.⁷⁹ For violent offenses there must be an acknowledgement of shared values and an affirmation of the social contract. Thus, serial apologies for repeated offenses are not genuine because the affirmation of shared values carries with it a promise not to repeat the offensive behaviour.⁸⁰

The following chapter examines the application of apology and forgiveness in the settlement of disputes in contemporary Tonga. The limits of the concept are explored in relation to domestic violence. It is increasingly recognized that apology and forgiveness should

⁷⁷ *Supra* note 16 at 241.

⁷⁸ *Supra* note 16, Tavuchis suggests that the Nazi war crimes are an example of a transgression too terrible to forgive.

⁷⁹ *Supra* note 12 at 52.

⁸⁰ *Ibid* at 53.

not be privileged over punitive justice in the case of gendered harms.⁸¹ The limits of the efficacy of apology and forgiveness in a hierarchical community may be revealed when the transgression itself is grounded in the inequalities that characterize the structure of the hierarchical community.

3.7 Conclusion

The concept of apology and forgiveness has been a mainstay in Tongan society even after the adoption of a western-style legal system. It has always been important to the maintenance of Tonga's hierarchical social structure where everyone has a place according to rank and kinship. Historically, the concept acted as a moderating force on the chiefs who held absolute power over the commoners, but had to humble themselves before their gods. It worked to end cycles of revenge between warring chiefs. In contemporary Tonga the concept allows a legal avenue by which a wrong-doer may regain their place in society. It permits an acknowledgment of the damage done to relationships in the community as a result of a wrongdoing, and this remains very important in Tonga.

The theoretical approach to an examination of the concept of apology and forgiveness exposes it as a human concept. It is an important legal tradition in those societies where communal harmony is valued, and where the social consequences of a wrongdoing are addressed by the legal system. The use of forgiveness and apology has endured as a legal tradition in Tonga because it continues to work as an efficacious legal tradition. It addresses the

⁸¹ Julie Stubbs, "Beyond apology? Domestic violence and critical questions for restorative justice" (2007) 7(2) Criminology and Justice 169 at 171.

harms that are not addressed by formal legal sanctions which were adopted from the British legal system. The next chapter discusses the concept's continued role in Tonga's contemporary plural legal system where it operates alongside the adopted legal system.

Chapter 4: Contemporary Apology and Forgiveness in Tonga

4.1 Introduction

In the previous chapter the theory of apology and forgiveness was explored. It is a powerful concept that works to reinforce a shared normative code, and to repair relationships after a transgression. The concept is particularly significant to societies where collectivity is valued over individualism. In Tonga's hierarchical society where duties, obligations and benefits are determined by an observance of rank and kinship a sense of belonging is crucial. As such, the concept of apology and forgiveness continues as an important means by which to remedy damaged relationships. Tonga adopted a western-style legal process in the nineteenth century, but apology and forgiveness has continued on as a legal tradition, not because it is protected as a custom or tradition by the constitution, but because it continues as an efficacious legal remedy.

This chapter looks at the continuing role of apology and forgiveness in contemporary Tonga. The first section examines the role of apology and forgiveness as a legal remedy which addresses damage to relationships where there is a perceived wrongdoing but no formal legal liability. Next, the role of apology and forgiveness alongside formal legal liability is reviewed. Here apology and forgiveness works to fill the remedial gap left by formal legal remedies that do not recognize damage to relationships. Lastly, legal change is discussed in relation to the continuing development of the legal tradition of apology and forgiveness. The efficacy of apologies as a legal remedy has been challenged in cases of domestic violence. Changing views about the nature of domestic violence as well as a growing recognition of women's rights in Tonga has led to a reassessment of the value of apology and forgiveness as a traditional legal

remedy in these cases. The challenge to the concept is viewed in terms of its efficacy as a legal remedy in the face of social change rather than as a conundrum between tradition and modernity.

4.2 Understanding Apology and Forgiveness in Contemporary Tonga

There is little formal ceremony involved in the contemporary Tongan process of apology and forgiveness, but the origins of the practice are not forgotten. In 2008 the “ancient practice”¹ of *hū lou-ifi* was enacted by the people of the village of Tatakamotonga at the home of King George Tupou V. This was a rare occurrence as the ritual had only been enacted once before in contemporary Tonga.² The literal translation of *hū lou-ifi* is “to enter with a bowed head, donning leaves of the chestnut tree”. The name of the ceremony connotes the humble approach required of one seeking forgiveness as was discussed in the previous chapter.

The two modern enactments of this ceremony involved commoners asking their monarch for forgiveness. It was coined an “ancient tradition” by media outlets. However, it is doubtful whether commoners ever approached their high chiefs asking for forgiveness at any time before the last half of the nineteenth century. Up until that time the commoners were under the absolute authority of their chiefs, and the pursuit of harmonious relations were reserved for relationships between chiefs and other chiefs, or chiefs and their gods.

¹ As described in the local newspaper in “Tatakamotonga Hu Lou Ifi to the King”, *Matangi Tonga*, online: March 4, 2008 <http://matangitonga.to/>.

² It was performed in the 1950s when one of the Queen’s attendants was murdered, and again in 2008 after the torching of one of the King’s estates. See Jione Havea, “From Reconciliation to Adoption: A *Talanoa* from Oceania” in Robert Schreiter & Knud Jorgensen, eds, *Mission as Ministry of Reconciliation* (Regnum Edinburgh Centenary series, vol 16, Oxford: Regnum Books International, 2013) 294 at 296.

However, the modern ceremony is clearly modeled after those which involved the chiefly class as discussed earlier. On this recent occasion more than 100 villagers dressed in black and with *ifi* leaves around their necks and waists to signify humility, marched to the King's residence. Once there, they humbled themselves before the King and apologized to him for the torching of his royal residence in 2005. The villagers did not apologize for the arson itself because the perpetrator was unknown. Instead they stated that the purpose of the *hu lou-ifi* was to show their allegiance for the King and to apologize for their inability to prevent the arson.

The event was interesting in itself as a rarely occurring cultural spectacle, but it was the letters to the editor in the local newspaper in the days following that revealed a Tongan understanding and appreciation of the ceremony. One writer complained that "one of our most sacred cultural ordinances is being trashed with dog and pony shows."³ He lamented that the wrongdoer must be present for the *hu lou-ifi* or it is meaningless. He set out the requirements for an effective apology ceremony including admission of the offence, remorse, request for forgiveness and an acceptance of punishment "as per law or custom". He premised his comments with the statement: "*Hu lou-ifi* follows the Lord's Principle of Forgiveness". The responses⁴ to these comments corrected the first writer's naming of the spectacle, calling it a ritual rather than an ordinance because there were no written rules as to its performance. There was broad agreement with the earlier comment that there must be a perpetrator to ask

³ Letter to the Editor, Matangi Tonga (13 March 2008) online: <http://matangitonga.to/>.

⁴ Letters to the Editor, Matangi Tonga (14 March 2008) online: <http://matangitonga.to/>.

for forgiveness or the ritual is without meaning. Again Christian principles were invoked in a description of the involvement of the Tongan Princess and Prince “who decided to follow Jesus Christ’s principle of atonement and lay themselves down for their people.”

The letters revealed an unselfconscious blending of the past with the present. Clearly, the ritual was admired and respected. The importance of its traditionality was exposed by a repeated reference to the ceremony as ‘ancient’. An understanding of genuine apology was evident as many pointed out the requirement that the wrongdoer be present in order to ask for forgiveness. Nobody else can do that on someone else’s behalf as it requires a personal acknowledgment of a transgression. There were also references to modern concepts such as law and custom, and Christian principles. This exchange epitomized the nature of the understanding and development of legal traditions in Tonga. As much as the pastness is understood and admired, legal traditions are not frozen in the past. New elements are added but the concept remained traditional, even ‘ancient’. The human concept of apology and forgiveness still underpinned the modernized ceremony, and there was an important pastness that gave the ritual an added value. The ritual retained its basic form and function, but Tongans assessed it through a modernized lens that included concepts such as Christianity and law.

Christianity has had a huge influence on Tongan society, and the concept of apology and forgiveness is no exception. Tongan philosopher and historian, Futa Helu explained that before the arrival of Christianity to the shores of Tonga, apology and forgiveness ceremonies were available only to the chiefly class. Helu suggested that the adoption of Christianity resulted in

the ‘compromise morality’ of contemporary Tonga.⁵ He explained that when the missionaries arrived there were two moralities existing side by side. The morality of the aristocratic classes (*hou’eiki*) promoted courage, aggressiveness and assertiveness. The morality of the commoners (*tu’a*) promoted loyalty, submissiveness and respectfulness. Largely, the ‘heroic morality’ of the chiefly classes was lost to Christianity because Christian ethics were more congruent with the morality of the commoners. However, the notion of forgiveness as practiced by the chiefly class was maintained because this attribute coincided with Christian values. Today, the legal system remains grounded in a Tongan Christian morality. The interrelated concerns of the maintenance of harmonious relations and a display of appropriate respect in the context of existing status relations which characterize Tongan society⁶ also ensure the continuing importance of apology and forgiveness as a normative principle.

Given that Tongan society is grounded in the pursuit of harmony, the rules of respect and Christian principles it is no wonder that apologies are ubiquitous. Parents may go to other parents, teachers or pastors to apologize for the misbehaviour of their children, and on the other end of the spectrum families meet to apologize for the death of a family member. Tongan lawyer, Sela Tupou recognized that any transgression committed against an individual in Tonga is considered a violation of the relationship between the families involved.⁷ Therefore, in the

⁵ In Wendy E Cowling, “Restraint, Constraint and Feeling: Exploring some Tongan expressions of emotion” in Ian Campbell & Eve Coxon, eds, *Polynesian Paradox: Essays in honour of Professor ‘I Futa Helu* (Suva: Institute of Pacific Studies, University of the South Pacific, 2005) 139 at p 145.

⁶ Helen Morton, *Becoming Tongan: An ethnography of childhood* (Honolulu: University of Hawai’i Press, 1996) at 246.

⁷ Sela Tupou, “Juvenile Justice: A comparative Analysis of Juvenile Justice in New Zealand and the Kingdom of Tonga” (LLM Research Paper 582, Victoria University of Wellington, 2002) at 20.

event of any wrongdoing it is always necessary to address damage to relationships. Families meet to offer apologies in ceremonies that loosely recall the old apology ceremonies between chiefs. The degree of formality of the ceremony depends upon the seriousness of the transgression. Tupou described a typical apology process:

...it is customary for the offender, together with members of his or her family, to visit the victim's family and to offer an apology, and present gifts of food and tapa. Each family is often represented by an elder⁸... The dialogue between the families is conducted through the elders [speaking] for and on behalf of the young people involved. The meeting will often begin with a prayer. The elder from the offender's family will then start by paying tribute to the victim's family, before explaining the reason for the visit. He or she will then conclude by offering the families sincere apologies on behalf of the offender. The elder from the victim's family will often reciprocate by paying tribute to the offender's family. He or she may then outline how the family and the victim feel about the offence, before accepting the apology offered by the offender's family. The meeting will often end with a prayer before there is informal conversation between members of the families.⁹

The apology ceremony is an informal, but serious encounter between families. The process reflects the old ceremonies which were restricted to the chiefly classes. Here, even as commoners apologize to commoners rules of respect for the hierarchy within families and communities are observed by the speaking order and manner of dress. There are Christian prayers that open and close the ceremony reflecting the former ceremonies that invoked the power of the gods to forgive by forgoing punishment. Again, there are gifts offered as part of the atonement but the gifts include money or useful gifts rather than sacrificial offerings. Overall the goal of the apology remains the same—the return of harmonious relationships.

⁸ This is not the eldest person but usually the eldest son in the extended family, or it may be the eldest sister of the victim's father.

⁹ *Supra* note 7 at 20-21.

There does not have to be a possibility of legal action for an apology to take place. Some apologies are made as a result of minor offences or insults which would not attract legal liability but still disrupt the harmony of the families. In other cases where there are terrible losses suffered, but no formal legal liability, apologies are still necessary for any involvement in the incident. A neighbor told me of a motor vehicle accident where a child had been killed. There were no police charges related to the accident as the driver was not at fault. However, a formal apology was made to the family of the deceased child by the family of the driver. It was an expression of sorrow and remorse for the loss of the child as well as an acceptance of responsibility for their part in the child's death (as driver of the automobile). The apology ceremony gave the families an opportunity to reconcile and put the tragedy behind them so that normal relations could resume.

In those cases where formal legal liability is not an issue, traditional apologies provide the only forum for representatives of the affected family, *kainga* or village to set the record straight, explain their role in the incident, accept the shame and humiliation of their actions, ask for an apology and move on from there. The damage to relationships is remedied. These cases indicate that traditional apologies are not only an adjunct to the formal legal system, but perform a separate important role of their own.

I am reminded of an incident that I witnessed in Nuku'alofa. It concerned a Tongan businesswoman who was convicted of embezzling her clients' funds.¹⁰ There was a very public

¹⁰ See *Rex v Bloomfield*, [2013] TOSC 19 (PACLI); CR 212 (24 October 2013).

trial, covered extensively by the local media, and she was convicted and sentenced to prison. After her release she attended a Christmas party in Nuku'alofa. One of her victims, an Australian living in Tonga, approached her and asked how she had the nerve to show up at a Christmas party. The businesswoman replied that the incident was over, and that her former client "had to get over it too". The real difference between the relational damage and the material damage caused by her wrongdoing was made clear by this exchange. The prison sentence was a remedy directed towards the material damage caused. It was a punishment or retribution for her actions. Even after her release from prison it was very unlikely that she would ever hold another position of trust. The effect of her crime lingered as far as her future employment prospects were concerned. However, her apology had remedied the social relational damage that her wrongdoing had caused amongst her Tongan family and associates. Once forgiveness was granted, she and her family were once again full members of the Tongan community.

4.3 Apologies and the Formal Legal System

This section considers the role of apology where the wrongdoing at issue also constitutes a legal wrong. The real separateness and difference of apology from formal legal remedies is described above. The cases which follow also reveal another important truth about traditional apologies in Tonga. The concept is not subsidiary to the formal legal system. First, traditional apologies are not protected as custom or tradition by formal legal provisions, so is not subsidiary in that sense. Second, it is a stand-alone legal remedy which addresses damages not addressed by the formal legal system. Third, apologies are undertaken whether there is legal liability or not, making apologies more widely utilized than formal legal remedies. Lastly,

given the goal of social harmony, the social impact of apology is more profound than any formal legal remedy.

Lazare characterized court proceedings as “formalized substitutes for the apology process complete with offense, explanation, remorse, reparation and negotiation.”¹¹ This characterization gives primacy to apology over the formalized legal process, and this reflects the true situation in Tonga. The formal legal remedial process is dominated by the process of apology and forgiveness whenever the wrongdoing has affected relationships between Tongans. As the following cases show, the formal legal system is additional to, and sometimes even subsidiary to apology and forgiveness. This makes good sense as the overall goal of the legal system in Tonga is to maintain social harmony, and this goal has not been altered by the adoption of a formalized legal system.

There are no village courts dedicated to the adjudication of custom or tradition in Tonga, and this reflects the fact that custom or tradition were never formally separated from ‘law’ by colonial rule. For example, both Samoa and Tonga hold *fonos* which are assemblies governed by state legislation.¹² In Samoa the *fonos* are held in order to delegate work in the village, but also to adjudicate and punish village misconduct according to custom.¹³ In Tonga the *fonos* are held only to relay government information or to organize village work.

¹¹ Aaron Lazare, *On Apology* (Oxford: Oxford University Press, 2004) at 258.

¹² *Village Fono Act* 1990, Consolidated Acts of Samoa 2011; *Fonos Act*, [1988] Laws of Tonga, c 50.

¹³ Section 5 provides that: “village misconduct” in relation to any village means any act conduct or behaviour which is or has been traditionally punished by the Village Fono of that village in accordance with its custom...

The establishment of a western-style court system in Tonga was initiated by Tāufa'āhau in response to a threat of colonial annexation in the nineteenth century. The aim of Tāufa'āhau was to preserve Tongan political control by having Tonga recognized as a nation on equal footing with the European nations. To this end, he adopted a western-style constitution, promulgated a legal code, and set up the first independent state courts. The latter move also served to consolidate Tāufa'āhau's political power as it put an end to the role of the chiefs as supreme arbiters in serious disputes and quarrels.¹⁴

The state legal system today reflects its British origins with an inferior, superior and court of appeal model. The addition of a Land Court adds a Tongan element and reflects the special issue of land in the Tongan context, but that discussion is beyond the scope of this paper.¹⁵ The lowest court of record in Tonga is the Magistrate's Court. Civil trials are tried without a jury and the court has jurisdiction to hear and determine civil actions in which the claim does not exceed \$10,000.¹⁶ Criminal jurisdiction is limited to the determination of cases where the maximum punishment provided by law does not exceed three years imprisonment or a fine of \$10,000.¹⁷ Magistrates are appointed by the Prime Minister with the consent of Cabinet.¹⁸ At present only one magistrate has a law degree. The atmosphere in Magistrate's

¹⁴ Sione Lātūkefu, *Church and state in Tonga: The Wesleyan Methodist Missionaries and political development, 1822-1875* at 122.

¹⁵ The Land Court adjudicates all issues dealing with land or any interest in land. It is the only court that utilizes the expertise of an assessor who assists the Judge with explanations and advice in regard to Tongan usages and customs as they relate to land. (s146)

¹⁶ *Magistrate's Court Act*, [1988] Laws of Tonga c 11 s 59.

¹⁷ *Ibid*, s 11.

¹⁸ *Ibid*, s 3.

Court is informal without the British-style robes and wigs donned in the Tongan Supreme Court. All of the court personnel is Tongan and proceedings are conducted in the Tongan language.¹⁹ These courts have been in existence since the promulgation of the first legal code by Tāufa'āhau in 1839.²⁰

The procedure of the Court follows that which would be found in a Canadian lower court but, as Susan U Philips pointed out, the “moral framing” is distinctly Tongan.²¹ Philips describes a Tongan morality “in which a bad act is not just intrinsically bad, or bad in a universal way for all who do it, but bad because of the particular kinds of social relationships in which it is embedded.”²² For example, the presiding magistrate often asks the position of the defendant in relation to the offended. The magistrate may admonish an older boy for his assault upon a younger boy, or chastise the defendant for un-Christian like behaviour. One of the longest custodial sentences that I saw meted out in Magistrate's Court was given to a woman for the offence of swearing in her village, and at the police. The Magistrate sentenced her to one year imprisonment, and he was clear that the sentence was not related to her drunkenness, but to her swearing and lack of respect. Like Philips, I also heard the magistrate exhort to the defendant: “*Nofo feuulufi*” meaning “Stay mutually respectful”. It is this focus on the social element of the offence that makes forgiveness and apology so important. As mentioned in the

¹⁹ Non-Tongans must utilize an interpreter in this Court.

²⁰ See *Code of Vava'u, 1839* reprinted in Lātūkefu, *supra* note 14 at appendix A.

²¹ Susan U Philips, “The Organization of Ideological Diversity in Discourse: Modern and neotraditional visions of the Tongan State” (2004) 30(2) *American Ethnologist* 231 at 235.

²² *Ibid* at 242.

previous chapter the Magistrate routinely asks every defendant if an apology has been offered and accepted before he considers sentencing.

The Magistrate's Court is not a custom court like the *fono* held in Samoa. In fact I saw a magistrate recuse himself from a case because he knew that he was a distant cousin of the accused. In a village custom court the adjudication is not necessarily impartial as the adjudicators live in, and are part of the village. Custom courts, when they are established by state legislatures are expected to play a different role than the state courts, adjudicating custom rather than law. Conversely, it is interesting how Tongan magistrates straddle local and imported western legal traditions. They strive to establish the nature of the relationships between the parties, and the social implications of the wrongdoing, but then they are bound to apply the Tongan Legal Code as if the parties were strangers. This is why a separate remedy, outside of the formal legal system has been retained in order to specifically address the social disharmony that flows from a wrongdoing. Far from being lost to a western legal system that stresses individual rights, the legal tradition of apology and forgiveness has remained a dominant role in the Tongan legal system.

The Tongan Supreme Court hears appeals from the Magistrate's Court, and is also a court of first instance for all cases not amenable to the lower courts' jurisdiction.²³ Appeals from this court are made to the Tongan Court of Appeal. The influence of western legal tradition is evident in these courts. Wigs and robes are worn, and the procedure is formalized.

²³ *Supreme Court Act*, [1988] Laws of Tonga c 10.

Here, the cases also conducted in Tongan, but with an English translation available for the judges who at the present time are English speaking.

The judges of the higher courts are not Tongan and so rarely is the court able to frame issues in a “Tongan morality” as was observed in Magistrate’s Courts. However, the important role of apology maintains the ‘Tonganness’ of the process. The important position of traditional apology in relation to the formal legal system was discussed by the Supreme Court in *Vaka’uta v Napa’a*.²⁴ In this case, the plaintiff sued a machine operator and his employee for the psychological harm she suffered as a consequence of having witnessed the death of her nine year old son due to the negligence of the defendants. The defendants submitted that the plaintiff should be estopped from recovery of damages in court as she had already accepted a traditional apology and accompanying gifts from the defendants. The Court replied that it recognized that an apology had been given and accepted, but because there was no formal legal recognition of customary law in Tonga, that traditional remedy could not limit the plaintiff’s legal rights in state court. The court recognized that “it might be socially unacceptable for the plaintiff to have gone back on her word after accepting the apology, but it was not legally unacceptable.”²⁵ Thus, when the plaintiff did not feel properly compensated for her injury by the traditional local remedy, there was no reason that she could not also make a claim in court. In its refusal to grant estoppel the Court recognized not only that legal tradition of apology operated outside of the formal legal system, but also that the traditional remedy did

²⁴ *Vaka’uta v Napa’a*, [1998] ToLawRp 6; [1999] Tonga LR 50.

²⁵ *Vaka’uta*, *supra* note 24 at para 3.

not act as an alternative to a formal legal remedy. Formal legal remedies may serve as remedies adjunct to apologies when the damage caused goes beyond the damage to the relationship. In this situation the legal tradition of apology was not viewed as an alternative to the formal legal system, but rather as a legal remedy that addressed those damages that the state legal remedy could not.

South Pacific legal scholars Robert Hughes and Peter MacFarlane considered a similar estoppel case which was decided in Samoa.²⁶ In their article, the authors discussed the impact and influence of custom on the resolution of contractual disputes, and expressed concern that the “vitality of customary law” in Pacific island legal systems was being eroded by an increasing number of common law trained lawyers engaged as judges and practitioners.²⁷ Pursuant to this discussion a Samoan case²⁸ was considered, and it provides an interesting counterpoint to the Tongan estoppel case considered above. In the Samoan case, an issue arose as to whether a customary ceremony of apology and forgiveness known as *ifoga* could ground an estoppel so as to bar further negligence litigation. The plaintiff suffered serious leg injuries which resulted in amputation when a bus driven by the defendant’s employee ran off the road. The defendant admitted that the injuries suffered by the plaintiff were a result of the negligence of its

²⁶ Bob Hughes & Peter MacFarlane, “The Application of Custom in South Pacific Contract Law and as a Basis for an Estoppel” (2004) 20(1) *Journal of Contract Law* 35. See p 36: The authors define custom as “traditional social, political, religious and economic values and understandings carried on and respected by an identifiable community” and the bias of custom is held to be “towards community of interest in property and obligations rather than the protection of individuals”.

²⁷ The authors cite Guy Powles, “The Common Law at Bay?—The scope and status of customary law regimes in the Pacific” (1997) 21 *Journal of Pacific Studies* 61 at 75 for this proposition.

²⁸ *Lemalu Puia’l v Frank Jessop* [1950-69] WSLR 214.

employee. However, the defendant also claimed that the plaintiff had accepted an *ifoga* in accordance with Samoan custom, and therefore was estopped from proceeding with a claim for further compensation.

In the result, the Court did not accept the argument for estoppel because the plaintiff had made it clear before acceptance of the *ifoga* that he would be taking his claim to court in any case. However, the Court did not rule out the possibility that a custom reconciliation could ground an estoppel so as to bar a civil suit. In their commentary on this case, McFarlane and Hughes suggested that the doctrine of estoppel could be an effective tool for the Pacific courts to utilize in order to “bridge the gap” between customary and introduced law when the courts are mandated to consider custom when applying the law.²⁹ In effect, the authors characterized a customary settlement and a legal settlement as alternate remedies, with the result that an estoppel could be grounded in one in order to bar the other. It seems that this dichotomous reasoning actually creates a gap of incommensurability that requires that bridging in the form of estoppel. Indeed, it is this sort of dichotomous reasoning that is the root of the conundrum discussed in Chapter 1.

In Tonga the remedial goal of apology is well understood at the Magistrate’s Court level where the moral framing is Tongan simply because all of the participants (with a very few exceptions) are Tongan. The British legal rules are made acceptable to Tongans because they are applied within the Tongan moral framing. At the higher court levels the establishment of a

²⁹ *Supra* note 26 at 46.

Tongan moral framing becomes problematic because the judiciary is predominantly non-Tongan. However, Tongan plaintiffs expect a traditional apology from defendants in order to remedy relational damages. The power of the local legal tradition of apology in Tonga has been maintained because it continues to be an efficacious legal remedy, not because its use is mandated by the formal legal system.

Apologies continue to play an important role in the Tongan formal legal system. Whether or not an apology is received may determine whether the parties will seek redress in the formal court system. An accepted apology may forestall recourse to the state courts if an apology is considered to be an adequate remedy for the wrongdoing. In some cases victims will not engage the police, or will refuse to testify in court in those instances where an apology has been accepted. If an apology precedes a criminal trial, a guilty plea will likely follow as the apology signifies that the accused has taken responsibility for the wrongdoing.

On the other hand, a person may feel forced to seek formal legal redress where an apology is expected but not forthcoming. In *Rex v Toma*³⁰ the complainant waited several months to lodge a formal complaint with the police after she had been indecently assaulted in a nightclub. In this case the accused had leaned up against the complainant and stroked her body without her consent. The complainant stated that she was humiliated and embarrassed and explained to the Australian judge presiding that “in Tonga no man ever touches a woman like that unless she is a whore or his own woman.” The defense counsel queried why the

³⁰ *Rex v Toma*, [2000] TOSC 51 (PACLI); CR 194 (9 November 2000).

complainant had waited so long to file a complaint. The complainant explained that she was “allowing the accused the opportunity of making an apology for his actions in the customary Tongan way”. A proper apology would have remedied the offense, but only when no apology was forthcoming did she sought a legal remedy. In this case the courtroom provided a forum for the complainant to set the facts straight, and to ensure that her reputation was not tarnished by the incident. The accused could have accomplished this with an apology by which he would have taken responsibility for the incident, but instead was convicted of indecent assault when the matter was brought before the Court.

In Tonga, families go to great lengths to restore harmony among the affected families following a socially disruptive wrongdoing. I have been told that a family may offer one of their own children to replace a child that died as a result of the actions of one of their family members. It is not unusual for apologies to co-exist with the state legal system in order to ensure that a transgression is fully remedied to the satisfaction of the courts as well as the community.

Cases which involve death as a result of drunk driving provide good examples of new legal issues that must be addressed by both traditional and state remedies. The state court addresses the serious transgression itself, but the apology process addresses the effect of the wrongdoing on the parties’ families. In *Rex v Saafi*³¹, the defendant’s friend died in an automobile accident as a result of the defendant’s drunk driving. The defendant and the

³¹ *Rex v Saafi*, [2004] TOSC 59 (PACLI); CR 300 2003 (27 August 2004).

deceased had been good friends. The defendant's family apologized to the victim's family paying restitution to the victim's family and providing mats, food and money for her funeral. The parents of the deceased wrote a letter to the Court asking for leniency and no custodial sentence. In accepting the apology, the victim's father explained to the Court that he wished that the defendant be given a chance to face his future. The Court took the views of the victim's family into consideration suggesting that to do so is "appropriate in a country like Tonga where the cultural emphasis upon apology and restitution underlines the important role of victims in dealing with the aftermath of offending in the community."³² In the result, the defendant had his entire three year sentence for manslaughter by negligence suspended.

However, in coming to this decision, the Court made it clear that it did not suspend the entire sentence solely on the grounds of sympathy for the offender who had been forgiven by the victim's family. The Court distinguished two cases³³ that also dealt with drunk driving resulting in death and where there was also a consideration of apology and forgiveness. In one case³⁴ the victim's family went so far as to suggest to the Court that they hoped that the defendant could take the place of their own child who had been killed as a result of his drunk driving. However, in these cases the convicted drivers served a portion of their sentences because the Court found that these drivers showed a degree of pre-meditated recklessness that was not found in the later case. The courts recognized that the sentences imposed must

³² Saafi, *supra* note 31 at para 23.

³³ *Rex v Tofavaha*, [2000] TOCA 2 (PACLI); [2000] Tonga LR 316; *Rex v Holani* [2001] TOCA 12(PACLI); CA 06 2001 (27 July 2001).

³⁴ *Tofavaha*, *supra* note 33.

illustrate to the community the seriousness of the offence of drunk driving, and custodial sentences were imposed in order to deter such behaviour in the community.

Again, in another recent case³⁵ the Court refused to completely suspend a sentence for a drunk driving. This case is interesting to this project because it provides an illustration of the extent to which an offender will go in order to restore harmony in his community through a traditional apology. The victim was the defendant's cousin. After her death the defendant sought and gained forgiveness from the family. He paid for funeral expenses, and airfares to enable overseas family members to attend. He assisted the bereaved family by payment to them on a weekly basis, and supported one of the children in obtaining further education. The husband and family of the deceased informed the Court that they preferred a non-custodial sentence so that this degree of support could continue. The Court only partially suspended the sentence, stating that failing to impose a custodial sentence would "send the wrong message to the community and undermine the deterrent message that Parliament had sent to the community."³⁶

In these cases the apologies acted as a mitigating factor in the courts' view because the apologies to the victims' families indicated remorse and a good chance for rehabilitation. However, the apologies were not performed in order to garner the court's sympathy, but rather represented a separate remedy used in order to restore the relationships between the affected

³⁵ *Rex v Tuputupu* [2013] TOSC 20 (PACLI); CR310.2011 (5 November 2013).

³⁶ *Tuputupu*, *supra* note 35 at para 14. (The Court also noted that In 2010 the maximum penalty for drunk driving causing death was increased from 10 to 15 years reflecting the concern for this growing danger to the public.)

families. In western criminal prosecutions the victim takes a decreased role as the state takes on the role of the plaintiff. In Tonga, the traditional legal remedy retains an important role for the victim and the victim's family. The sentences imposed by the courts are intended to punish the offenders and to deter others from similar behaviour. However, the apologies and accompanying restitution are performed solely for the victims' families in order to restore relationships, and this local remedy represents an enduring and important local legal tradition. The cases reveal the importance of reconciliation and the lengths families will go to in order to achieve this return to harmony.

Tongan legal traditions were not lost because they were not protected by the formal legal system. In fact the legal tradition of apology has retained an important role providing remedial relief for relational harm, a harm not recognized by the adopted legal system. Tongan apologies have changed. The only immemorial element of a Tongan apology is the human concept of apology at the core of the tradition. How apologies are made, and who apologizes today reflects the larger social context where commoners are not at the mercy of chiefly absolute authority, where Christian principles permeate all aspects of society, and where apologies are only part of a larger legal remedial process.

4.4 Limits to Apology

There are instances where forgiveness is not forthcoming. Apologies may not restore harmony where the transgression is particularly cruel. In *Otuafi v Sipa*³⁷ a thirteen year old boy sued for damages arising from brutal assaults he suffered at the hands of an off-duty

³⁷ *Otuafi v Sipa* [1990] TOSC 9 (PACLI); CC042 1989 (3August 1990).

policeman. Within a few days of the incident a Statement of Claim was filed. Within a day of the filing the defendant along with his aunt and sister went to the home of the boy. They offered a formal apology to the boy's father along with gifts and cash. The Court noted that the apology was not accepted, but the gifts were retained. When awarding damages for the assault the Court took into account the value of the gifts. However, the relational damages went unremedied as the defendant was not forgiven by the family of the young boy.

In cases which involve the sexual assault of a child, the family may not accept the apology. *Moli v Police*³⁸ involved the sexual assault of a nine year old girl by a friend of the family. In this case, the court reported that an apology had been offered, but the family was too upset to accept the apology and forgive the defendant. In other circumstances there may be a limited acceptance of an apology. In *'Aisea v Rex*³⁹ the parents extended their forgiveness to the family of their daughter's rapist, but would not accept the apology of the defendant himself.

In other cases the transgression further injures already existing disharmony between the families. In *Rex v Mafi*⁴⁰ the defendant was convicted of causing grievous bodily harm to the manager of the family bakery in which both the defendant and the victim were involved. The defendant attacked the victim, who happened to be his nephew, with a machete as a result of his annoyance at the lowering of a weekly stipend he received from the bakery. The victim

³⁸ *Moli v Police*, [2010] TongaLR 28; [2010] Tonga LR 183 (21 October 2010) (SC).

³⁹ *'Aisea v Rex*, [2012] TOCA 12 (PACLI); AC 20 of 2011 (27 April 2012).

⁴⁰ *Rex v Mafi* [2014] TOSC 13 (PACLI); CR 32 of 2013 (11 June 2014).

suffered serious injuries. At the sentencing hearing the Court asked for a victim impact report because the probation report indicated that the defendant's apology had not been accepted by the family. The Court found that the declining fortunes of the family business had caused a serious rift between the defendant and the other family members. He was not welcomed back into the family, until three years after the incident and in failing health, the defendant was forgiven.⁴¹

These cases illustrate the limits to apology to effect reconciliation. Courts in the formal legal system may order remedies to address issues of deterrence, public safety and the public's condemnation of wrongdoings. In civil suits a claimant's material loss is remedied. However, the tradition of apology is not always available to restore relational harmony, so that within the collective hierarchical society, tensions still exist and may never be resolved. The notion of a harmonious society is a goal, not necessarily a reality achieved.

4.5 Legal Change at the Limits of Tradition

When I asked Sela Bloomfield, senior counsel in the Tongan Attorney General's office about the limits to traditional apologies, she surprised me with her answer. I was referring to limits to apology in its 'traditional' domain, but she referred me to the 'no-drop' policy recently adopted in Tonga. This policy acts as a formal legal limit to traditional apologies. Where a complaint of domestic violence is made to the police, prosecutions must proceed to Magistrate's Court. The 'no-drop' policy provides a good example of the process of legal change

⁴¹ However, three years later, and in declining health the defendant was forgiven by his nephew, and the Court took this into consideration at his sentencing hearing.

which occurs when a law, be it tradition or state law, is no longer considered efficacious. In the case of the 'no-drop' policy adopted by the state, it is a recognition of the failure of apology and forgiveness to effectively remedy domestic violence. The apologies may have provided limited reconciliation between families, but the actual violence against women was not eliminated, and domestic violence continues to be a widespread problem in Tonga.⁴²

The structure of Tonga's hierarchical society is often invoked as an explanation for the prevalence of domestic violence. Those of higher status in the hierarchy are viewed as protectors and providers, but also as punishers and holders of power.⁴³ Within the Tongan family, wives and daughters hold an inferior rank to husbands and fathers. Women's inferior position to men is enhanced by provisions in the *Constitution*⁴⁴ and the *Land Act*⁴⁵ which restrict women's access to land ownership. Further, within the familial structure, Tongan women may be reluctant to press charges against abusive men, It was reported that many Tongans regarded domestic violence as a private and shameful matter, best dealt with by the family leaders and not discussed in public. Reconciliation was encouraged in order to avoid social disruption to the extended family and community.⁴⁶

⁴² See Christine Forster, "Ending Domestic violence in pacific Island Countries: The critical role of law" (2011) 12(2) Asian Pac L & Pol'y Journal 123.

⁴³ Helen Morton, *Becoming Tongan: An Ethnography of Childhood* (Honolulu: University of Hawai'i, 1996) at 210.

⁴⁴ *Constitution of Tonga* s 111 succession of lands to males

⁴⁵ *Land Act* c 132, s 7 only males are entitled to allotments of land; s80 widows are entitled only to life estate

⁴⁶ Peggy Fairbairn-Dunlop & Denise Lievore, Pacific Prevention of Domestic violence Programme: Tonga Report (2007) Prepared for New Zealand Police at 11, 17, 34 online: <http://www.ppdvp.org.nz/wp-content/media/2009/03/PPDVP-Tonga-Final-Report-14-June-2007.pdf>

A study of violence against women in Tonga completed in 2011⁴⁷ revealed alarming statistics. 79 percent of Tongan women and girls reported having experienced physical or sexual violence in their lifetime, mostly at the hands of husbands, fathers and teachers. The report found that many women found justification for the violence in the perceived traditional Tonga relationships of power mentioned above. In fact, many women believed that, in some situations, men are justified in ‘disciplining’ their wives.⁴⁸ 83 percent of women agreed with the statement that “a good wife obeys her husband even if she disagrees”⁴⁹ indicating that expectations about male dominance are widespread.⁵⁰

In a forward to the report the Prime Minister⁵¹ stated that it must be accepted that violence against women is a crime, and a crime that disputes Tongan traditional values. He stated that the issue posed a “compelling challenge because it confronts the very essence of our make up as a Tongan people.”⁵² He pointed to recommendations of the study that called for to a return to the core Tongan values of respect, reciprocity, love and humility in order to reduce the cause and incidence of violence against women. It is interesting to note that Tongan culture is touted as holding both the cause and the cure for violence against women. Can love

⁴⁷ Henrica Jansen, Seu’ula Johansson-Fua, Betty Hafoka-Blake & Gabiella Renee ‘Ilolahia, *National Study on Domestic violence against Women in Tonga 2009* (AusAid, 2012) online: <http://countryoffice.unfpa.org/pacific/drive/tonga-vaw-report-final-2012.pdf>

⁴⁸ *Ibid* at 128.

⁴⁹ *Ibid* at 67.

⁵⁰ *Ibid* at 70.

⁵¹ Lord Tu’ivakano served as Prime Minister of Tonga from 2010-2014.

⁵² *Supra* note 50 at xvi

and respect outweigh the vulnerability of women who hold inferior positions to their husbands and fathers?

The report centred on violence against women as a violation of human rights, and acknowledged the fact that traditional power relationships in Tonga made it difficult for women to exercise their constitutional rights to be equal, and free from abuse. I suggest that it is not the hierarchical ranking itself that necessarily makes women vulnerable to violence. Rather, the violence prevails as a result of an abuse of the superior power held by men. Apology and forgiveness does not address that abuse of power where domestic violence has become endemic. Indeed the repetitiveness of the violence points to the ineffectiveness of the traditional remedy to address this problem.

In 2013 the King assented to the *Family Protection Act*.⁵³ It was the first Tongan legislation to address domestic violence. The stated objects of the Act were not only to ensure the safety and protection of those who experienced domestic violence, but also to provide support and redress for victims of domestic violence and economic abuse, and to implement programs for recovery for victims of domestic violence.⁵⁴ Part 3 of the Act deals with prevention, providing programmes to promote public awareness about human rights and gender equality targeting judicial officers, police officers, health practitioners, community workers, counsellors, youth groups, media personnel and civil society organisations and educators. The legislation goes beyond the criminality of domestic violence. Through the

⁵³ *Family Protection Act*, (2013) Tonga Sessional Legislation, Act 19.

⁵⁴ *Ibid* at s 3.

proposed support and education programs it reaches out to situate domestic violence in the context of social relationships,⁵⁵ always a reality in domestic violence, but of particular relevance in Tonga. The Act also criminalizes domestic violence⁵⁶, and seals the legal framing (as opposed to the moral framing of non-state law) with section 28(3) which provides that: “It is not a defence to a domestic violence offence that the respondent has paid compensation or reparation to the complainant or to the complainant’s family.”

The ‘no-drop’ policy along with section 28(3) of the Act clarified the intention of the legislature that traditional apologies do not adequately remedy domestic violence. The legislature responded to demands from women’s groups⁵⁷ and NGOs representing Tongan women that the safety and protection of women was more important than the appearance of relational harmony in the social hierarchy. The approach to combat domestic violence arose from a Tongan perspective. The Prime Minister accepted the results of the report that determined that the tolerance for domestic violence was grounded in the unequal power of males and females in the Tongan social hierarchy. The act was criminalized in order to take it out of the cultural environment that provided excuses for the violence.⁵⁸ It recognized that traditional apology was not an efficacious remedy because it neither prevented further violence, nor addressed other non-relational harms occasioned by the abuse. Further, programs

⁵⁵ Sally Engle Merry, “Narrating Domestic Violence: Producing the “Truth” of Violence in 19th and 20th Century Hawaiian Courts” (1994) 19 Law & Soc Inquiry 967 at 970.

⁵⁶ *Supra* note 56 at s 6.

⁵⁷ See Clare Bleakley, “Women of the New Millennium: Tonga Women Determine Their Development Direction” (2002) 14(1) The Contemporary Pacific 134.

⁵⁸ Sally Engle Merry, “Narrating Domestic Violence: Producing the “Truth” of Violence in 19th and 20th century Hawaiian courts”, (1994) 19 Law & Soc Inquiry 967 at 993.

to educate Tongans about the potential for abuse that existed within the hierarchical social structure were established.

The result was a new legal tradition that explicitly recognized the right of Tongan women to safety and protection, while the older tradition of apology and reconciliation alone in the case of domestic violence was discontinued. The social hierarchy was maintained, but the right of women to be safe within that hierarchy was newly recognized. In the resort to the adoption of western style law to address the criminality of the domestic violence, modernity was embraced, not to westernize the process, but rather to appropriate a western legal tradition⁵⁹ that addressed the deficiency in the Tongan legal system when women demanded that their rights be recognized.

A 'no-drop' policy to combat domestic violence makes good legal sense given the gender inequality recognized within the family. In the Tongan moral framing where traditional apologies reside, women are at a disadvantage to men. The relationship of unequal power between the genders is institutionalized by tradition. The 'no-drop' policy, which introduces the formal legal system addresses the power differential which underlies the violence. It does so by moving the remedial consideration of the violent act to the legal framing of formal law where the parties come as equals. In the formal legal arena, the abuse of the power differential may be addressed and legally remedied.

⁵⁹ See Sally Engle Merry, "Legal Pluralism" (1988) 22 Law & Soc'y Rev 869.

This chapter ends with a brief discussion of the adoption of legislation to address domestic violence in the Republic of Vanuatu. Vanuatu has protected custom⁶⁰ in its liberal constitution which was adopted upon Independence in 1980. Legislation to address domestic violence was enacted in 2008.⁶¹ A look at the legislation as well as the debates that led up to it provide a glimpse into the constitutional conundrum which must be negotiated when custom is protected as something different from law. The debate moves away from the goal of providing protection and safety for families to a discourse which pits the preservation of custom against legal change which is characterized as an adoption of western values.

The Republic of Vanuatu has a serious problem of domestic violence.⁶² Domestic violence is dealt with by the village or custom courts in accordance with local customs and traditional practices.⁶³ Village courts are typically presided over by male chiefs or traditional elders. The customary system is patriarchal and status based, and women are excluded from leadership roles and decision-making. The power differential between men and women is

⁶⁰ *Constitution of the Republic of Vanuatu* (1988) Vanuatu Consolidated Legislation CAP 1. The preamble refers to a commitment to “traditional Melanesian values, faith in God, and Christian principles”. Article 52 establishes specific courts with jurisdiction over matters involving customary law. Article 47(1) provides that where there is no applicable law a court must determine the matter in conformity with custom. Article 95(2) provides that existing law should be applied “taking due account of custom”. Article 95(3) provides that customary law continues to have effect as part of the law of the Republic of Vanuatu.

⁶¹ *Family Protection Act*, (2008) Vanuatu Sessional Legislation No. 28.

⁶² See Peggy Fairbairn-Dunlop, “Pacific Prevention of Domestic Violence Programme: Vanuatu report” (2009) online: <http://www.ppdvp.org.nz/wp-content/media/2010/01/PPDVP-Vanuatu-Final-Report-5-Nov-20093.pdf>

⁶³ See UN DAW, Harmful Practices against Women in Pacific Island Countries: Customary and Conventional Laws, at 7, U.N. Doc. EGM/GPLHP/2009/EP.15 (2009), online: http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20Imrana%20Jalal_.pdf

founded in, and perpetuated by custom as it is practiced.⁶⁴ Chiefs are responsible for the maintenance of family harmony, which includes the settlement of family disputes, and women reported dissatisfaction with the way that the chiefs dealt with their complaints of domestic violence.⁶⁵ The chiefs always gave priority to reconciliation, and the sanctity of the family so that women were told to return to the family, usually to face more violence.

Legislation to address domestic violence took more than ten years to enact because of “fierce and long” opposition from some Christian churches and traditional chiefs who maintained that the law contradicted ni-Vanuatu custom and both Christian and Melanesian values.⁶⁶ The conundrum arose as a result of the dissonance between gender equality as guaranteed by the Constitution, and the patriarchal and status based norms of customary law, also protected in the Constitution. The chiefs unanimously agreed that “the Bill should not go ahead in its current format and that it needed further discussion—that the Bill was a western Bill and did not suit Vanuatu Society”.⁶⁷ The local newspaper reported that the delays surrounding the Bill were reportedly due to “the customary attitudes regarding traditional familial roles in Melanesian society...and to the misconception and misunderstandings of the Bill by the general public who think the Bill is another of the Women’s Rights Movement charade designed to grant women more power to destabilize the status quo in Melanesian

⁶⁴ *Supra* note 65 at 134.

⁶⁵ *Ibid.*

⁶⁶ *Ibid* at 140.

⁶⁷ *Ibid* at 23.

society.”⁶⁸ Even after the final compromise the chiefs argued that the Bill eroded the power of chiefs and promoted the breakdown of families.⁶⁹

In the end the Act closely resembled that enacted in Tonga with provisions for criminal and civil sanctions, and for the promotion of education as to equality and rights. Two notable differences reflected the compromises that had to be made in order to appease the chiefs who did not wish to lose their position of power. First, the Act provided for the grant of a temporary protection order to address situations of immediate danger.⁷⁰ The Act authorized a temporary protection order to be issued by an “authorized person” as well as a court. Persons authorized under the Act included chiefs, church leaders and community leaders in addition to police officers. Thus, in some cases women must request a protection order from the very chiefs who did not protect them in the past. Next, section 16 enables the court to order mediation or counselling, which effectively restricts the choices of the woman who is facing domestic violence.⁷¹

Whereas Tonga lawmakers could approach the problem of domestic violence as one that revealed the abuses of custom and tradition, Vanuatu’s discussion centred upon the

⁶⁸ *Ibid* at 22 citing *The Ni Vanuatu* 26 August 2004.

⁶⁹ Australian Government, *Violence Against Women in Melanesia and East Timor* (Canberra: 2008), online: http://www.igwg.org/igwg_media/melanesia/melanesiafullrpt.pdf at 173.

⁷⁰ *Family Protection Act*, *supra* note 68 at s17.

⁷¹ Section 8 provides that a person to be registered as a counsellor under the Act for the purpose of counselling or mediation must have appropriate qualifications or experience in counselling. However, section 8(3) provides that “A person who in accordance with the rules of custom conducts counselling or mediation in relation to domestic violence may be considered to have appropriate experience.” The court may order a woman into mediation presided over by a chief, the very situation women wanted the Act to address.

preservation of custom while the exercise of rights was viewed as western impingements on custom values. Tonga was able to legally protect the exercise of women's rights without compromise. Formal legal sanctions are not considered western remedies, but rather as Tongan legal remedies which addressed the criminality of the offence.

Legal traditions and formal law are not at odds with each other in Tonga. In fact, there is a sort of elision between the two, and a consideration of the 'no-drop' policy illustrates this point. Traditional apologies and court ordered remedies exist as a possible two-part answer to a wrongdoing. Philips observed that the Magistrate's Courts in Tonga may alternate between more Tongan-based moral framings and more British-influenced legal framings of crimes.⁷² This reasoning is reflected in the broader society that considers all law, both modern and traditional, as Tongan. Under the legal framing, everyone is considered equal. The formal legal process was adopted by Tāufa'āhau, and that 'modernness' is still viewed as something of value by Tongans.⁷³ The formal legal process is well utilized and well respected.

The call for changes to the law concerning domestic violence came from local women's groups who saw increasing rates of domestic violence in their communities. In those countries where custom is protected as something separate from law, the unequal treatment of women and local chiefs' jurisdiction over women may be retained because it is 'custom'. Bad custom may be preserved even after its lack of efficacy as a source of law for particular circumstances

⁷² Susan U Philips, "The Organization of Ideological Diversity in Discourse: Modern and neotraditional visions of the Tongan state" (2004) 31(2) *American Ethnologist* 231 at 233.

⁷³ See Futa Helu, "Democracy Bug Bites Tonga" in Ron Crocombe, Uentabo Neemis, Asesela Ravuvu & Werner Von Busch, eds, *Culture and Democracy in the South Pacific* (Suva: University of the South Pacific, 1992) 139.

has been recognized. In the case of domestic violence, women's rights as guaranteed by the constitution could not be recognized without a tailoring of the exercise of those rights by custom.

In Tonga, the agency of women to exercise their rights is not confined by a separated legal regime of custom or tradition where male chiefs continue to define women's rights. In Tonga the recognition of the value of the pastness of Tongan tradition is something different from tradition or custom which carries with it a content that must be saved. In Tonga a much better argument can be made for the 'no-drop' policy. Simply, the legal tradition of reconciliation through apology and forgiveness as it stands is not an efficacious remedy for domestic violence. Tongan law is Tongan law and a 'no-drop' policy adopted by a Tongan government and utilized by Tongan people in an effort to find an efficacious means to combat domestic violence recognizes the agency of Tongan women to choose to exercise their constitutional rights. If it is an embrace of modernity, then it can be characterized as a Tongan embrace of modernity. The challenge to custom or tradition may be directed to the efficacy of the tradition rather than to the very notion of custom or tradition's place in society as somehow the bulwark against encroaching modernity.

4.6 Conclusion

Apology and forgiveness continue to be utilized as an important remedy in the Tongan legal system. In both the non-state and formal legal system apology and forgiveness addresses the relational damages that result from a breach of the shared moral code. Although custom has not been saved by the formal legal system, the relevance of apology and forgiveness to the legal system has not been lost.

In the formal court setting the traditional remedy of apology and forgiveness serves to paint the imported legal system with a Tongan brush. It provides a recognition that a breach of the shared moral code results in damages to the broader society rather than to only the individuals involved. The traditional remedy works alongside legal remedies which may provide compensation, or punishment and retribution. It is never an alternative to a legal remedy as it addresses a different loss, one that arises as the result of the collective nature of Tonga's hierarchical society.

Apology and forgiveness remain important in Tonga not because custom or tradition is saved but because the remedy remains an efficacious part of the legal system. As the adoption of the 'no-drop' policy demonstrated, legal traditions may be changed. In this case Tongan women decided to exercise their constitutional rights in order to challenge the abuse of men's traditional power over women. The nature of traditions is to change over time, and when apology and forgiveness no longer ended a cycle of domestic violence, the tradition was replaced by resort to the formal legal system.

Chapter 5: Theory of Reputation

5.1 Introduction

The preceding chapters described how the Tongan legal traditions of apology and forgiveness have been maintained in spite of no formalized state protection or preservation. These legal traditions underpinned dispute resolution before the adoption of the current western-style legal process. And while Tongans embraced the new approach to law, already existing legal traditions were not discarded. Rather, introduced legal traditions were grafted upon existing Tongan legal traditions and interpreted through a Tongan legal lens. Apology was never separated as a 'custom' apart from 'law', and the legal traditions of apology and forgiveness retain important functions both inside and outside the current Tongan legal system. Importantly Tongan legal traditions remain responsive to societal change as 'custom' has not been preserved as unchanging traditional content.

King Tupou I adopted a western-style legal code and constitution in order to demonstrate to the colonizing nations in the region that Tonga was capable of managing its own affairs. In doing so he not only avoided annexation, but also cemented his own authority over all of Tonga. The western-style legal code adopted by Tupou was not simply imposed upon the Tongan population. It was interpreted and applied in a manner that reflected Tongan legal sensibilities. When Tongans sought to exercise rights which conflicted with existing legal traditions a conundrum did not develop between 'custom' and 'law'. There was no conundrum between newly recognized legal rights and existing legal traditions because the Tongan legal system had not been bifurcated into two categories of law and custom by a colonial regime. Tongan culture is not defined by traditions that have been preserved, but rather by a Tongan

approach to change which has integrated change always with a view to improve the quality of life.¹

In the case of apology and forgiveness, new legal traditions were modified in order to fit in with existing traditions. Even though the existing legal traditions of apology and forgiveness were alien to the introduced western-style legal process they were retained as an integral part of the Tongan legal system, and influenced the manner in which the new legal traditions were implemented. This chapter examines another way in which the Tongan legal system introduced change, while demonstrating a distinct Tongan approach to that change. British-style defamation law was introduced into the Tongan legal system by the promulgation of a law code by King George I in the mid nineteenth century. The formalized provisions were new, but the notion of the value of a good reputation with the concomitant recognition of that reputation was not unknown in Tonga. This chapter examines how formal legal provisions aimed at defamation were integrated into an existing Tongan legal tradition, and how the resulting regime remained distinctly Tongan.

The chapter begins with a short discussion of the social importance of the concept of reputation. Legal traditions which serve to protect reputations reflect the “meaning and significance of reputation”² to society. They reveal not only whose reputation is considered

¹ Sione Lātūkefu, “The Definition of Authentic Oceanic Cultures with Particular reference to Tongan Culture” (1980) 4(1) Pacific Studies 60 at 78.

² Robert C Post, “The Social Foundations of Defamation Law: Reputation and the Constitution” (1986) Cal L Rev 217 691 at 693.

worthy of protection, but also how and why those reputations are valued. These values may change over time in response to social and political change.

Next, the concepts of reputation that have had the most impact upon the British law of defamation are explored. The common law recognized a protectable value in a good reputation that both reflected and reinforced particular social and political values. When a new legal code introduced defamation legislation to Tonga, there already existed Tongan legal traditions that addressed reputation and respect, and it is in this commonality that introduced defamation legislation found a footing in Tonga.

The last section examines the value of reputation in Tonga and how reputations were protected by legal traditions up until the mid-nineteenth century when a codified law of defamation was introduced. It is clear that even though the law may have added state authority and legitimacy to the protection of reputation, the value of a good reputation had long been recognized and legally protected in Tonga.

5.2 The Value of a Good Reputation

Reputation is a product of the society in which it emerges, and it is viewed as an “essential component in all human social systems.”³ It matters what others think of us. Leaders depend upon a good reputation, either earned or ascribed, to maintain their position in the community as leaders and policy makers. A reputation allows third parties to make assessments

³ See Ernst Fehr & Bettina Rockenbach “Detrimental effects of Sanctions on Human Altruism” (2003) 422 *Nature* 137; Manfred Milinski, Dirk Semmann & Hans-Jürgen Krambeck, “Reputation helps solve the tragedy of the Commons” (2002) 415 *for the science of reputation*.

of others without direct interaction. It allows growth of a community beyond the small village. Leaders maintain power on the basis of reputation rather than on the direct observation of their leadership qualities. Further, reputation is “shared and reflected”.⁴ Reputations of a parent, child, spouse or friend reflects on those associated with them. On a broader scale, communities, churches, businesses and other public organizations possess reputations that depend upon the reputation of its representative members.

Reputations are important in society, and it follows that legal traditions are developed in order to protect the values which they represent. A legal tradition that protects reputation must be culturally specific. It depends upon how and why reputation is valued in each society. Broadly put, legal traditions that protect reputation uphold “the individual’s projection of self in society”⁵ and that projection is shaped not only by society, but by the role played by that individual. In fact, there is no notion of “reputation” outside of a social setting because the value of a reputation depends upon a relationship between persons.⁶ David Ardia defined reputation as “the quintessential public good.”⁷ There is no reputation outside of cooperation with others, and relative to relationships with others. It signals not only information about the individual, but also about the individual’s place within society.⁸ “When an individual’s

⁴ Robert Bellah, “The Meaning of Reputation in American Society” (1986) 74 Cal L Rev 743 at 745.

⁵ Jerome H Skolnick, “Foreword: the sociological tort of defamation” (1986) 74(3) Cal L Rev 677.

⁶ *Supra* note 4 at 743.

⁷ David S Ardia, “Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law” (2010) 45 Harv CR-CLL Rev 261 at 262.

⁸ *Ibid* at 263.

reputation is improperly maligned, it degrades the value and reliability of this information and devalues the community identity.”⁹

The value of a good reputation may be important to the individual as well as to the community. Regarding reputation from a purely individualistic perspective reflects a society’s emphasis on autonomy and achievements of individuals.¹⁰ Conversely, other societies value the group so that reputational harm of an individual accrues to the individual’s social group, such as the family or village.¹¹ In either case, a reputation is only as valuable as others in the community think it is.¹² An individual may have control over the acts and statements that form the basis of a reputation, but the assessment of the reputation is in the hands of others.¹³ In effect, “reputation is the result of the collective act of judging another and the potential use of that result to direct future engagements.”¹⁴ That is, the actual value that accrues to reputation is in the hands of the community. The assessment of reputation by the community may guide the future actions of the community, and there is power in that. Therefore, legal traditions that protect or secure reputation are not only protecting the reputation of an individual, but may also effectively rein in the power of community judgment.

⁹ *Ibid* at 262.

¹⁰ *Supra* note 4 at 743.

¹¹ Kyu Ho Youm, “Libel Law and the Press in South Korea: an Update” (1992) Contemporary Asian Studies Series, Number 3 at 3, online:

<http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1109&context=mscas>

¹² Laura A Heymann, “The Law of Reputation and the Interest of the Audience” 52 BCL Rev 1341 at 1342.

¹³ *Ibid*.

¹⁴ *Ibid*.

The protection of reputation was formalized in Tonga by Tupou I in the earliest law code promulgated in 1839.¹⁵ Latūkefu suggested that Tupou's first attempt at legislation was largely influenced by mission teaching.¹⁶ The protection of reputation in the early Code reflects Biblical influences as well as the input of British missionaries, but it is clear that the concept of the protection of reputation already was well established as a Tongan legal tradition. The following section compares the development of the law of reputation in England and Tonga. There are many similarities to note. Unlike the legal tradition of apology which had no counterpart in English law, the law of defamation in Tonga could draw on the similarities in the existing English formal legal process. It was another manner in which Tonga law developed, not separated from a system of adopted law, but rather through the critical embrace of a part of another legal process in order to improve their own.

5.3 Protecting the Value of Reputation in English Law

Robert Post identified three concepts of the value in reputation that justified legal protection by the common law over time.¹⁷ In his seminal work, Post noted that the common law has not attempted to define 'reputation'.¹⁸ Rather, "defamation law presupposes an image of how people are tied together, or should be tied together, in a social setting. As this image

¹⁵ See *Code of Vavau, 1839* reprinted in Lātūkefu, *Church and State in Tonga: The Wesleyan Methodist Missionaries and Political Development, 1822-1875* (Honolulu: University of Hawai'i, 1974) at appendix A.

¹⁶ Sione Lātūkefu, *Church and State in Tonga: The Wesleyan Methodist Missionaries and Political Development, 1822-1875* (Honolulu: University of Hawai'i, 1974) at 120.

¹⁷ *Supra* note 2 at 691.

¹⁸ *Ibid* at 692. Post cites "Developments in the Law:Defamation", (1956) 69(5) Harv L Rev 875 at 877 for this statement.

varies, so will the nature of the reputation that the law of defamation seeks to protect.”¹⁹ Thus, when the Tongan King adopted formal law from Britain to protect reputation in Tonga he did not necessarily adopt the social milieu that surrounded and informed the understanding of reputation in Britain at that time. Rather, he brought to Tonga some new ideas about the implementation of defamation law and the protection of reputation.

Post’s consideration of the various concepts of the value of reputation which justified protection by the common law provides a good introduction to the nature of defamation law, or any legal tradition that protects reputation. Although the legally protectable values are extrapolated from a consideration of the common law, Post’s conceptualization of reputational value as property, honour or dignity broadly reflects the place of reputation in most societies. The different social and political influences are reflected in the predominance of one concept of the value of reputation over another.

5.3.1 Reputation as Intangible Property

First, reputation is conceptualized as a form of intangible property, or “the reputation in the marketplace.”²⁰ This is an earned reputation that is characterized as having value that is measurable in the marketplace like any other property. Thomas Starkie, prominent nineteenth century English jurist, described this concept:

Reputation itself, considered as the object of injury, owes its being and importance chiefly to the various artificial relations which are created as society advances.

The numerous gradations of rank and authority, the honours and distinctions extended to the exertion of talent in the learned professions, the emoluments acquired by

¹⁹ *Ibid* at 693.

²⁰ *Ibid*.

mechanical skill and ingenuity, under the numerous subdivisions of labour, the increase of commerce, and particularly the substitution of symbols for the property in commercial intercourse—all, in different degrees, connect themselves with credit and character, affixing to them a value, not merely ideal, but capable of pecuniary admeasurement, and consequently recommending them as the proper objects of legal protection.²¹

In other words, reputation in the marketplace has a measurable pecuniary value. The reputation earned in the marketplace through exertion and skill, provided a good reputation a value that could be assessed and protected by law. William Blackstone went further, asserting that the law had a role to protect reputation, characterizing the security of a good reputation as a right: “The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is [e]ntitled, by reason and natural justice; since without these it is impossible to have the perfect enjoyment of any other advantage or right.”²²

The view of reputation as property with a quantifiable value arose with the development of a mercantile class. By this time, a good character or reputation could be *earned* rather than only inherited. Individuals were no longer constrained by their birthright to a particular station in society. An earned reputation was understood to be a form of “capital”,²³ and “[u]njustified aspersions on character [could] thus deprive individuals of the results of their labors of self-creation, and the ensuing injury can be monetarily assessed.”²⁴ Reputation as capital was earned and could be lost in the marketplace. Thus, this conceptualization of a

²¹ *Ibid* at 694 citing Thomas Starkie, *A Treatise on the Law of Slander, Libel, Scandalum Magnatum and False Rumours* (New York: G Lamson, 1826).

²² William Blackstone, *Commentaries on the Laws of England*, a facsimile of 1765-1769, vol 1 (Chicago: University Press, 1979) at I(5).

²³ *Supra* note 2 at 695.

²⁴ *Ibid*.

protectable value in reputation presupposed that “individuals [were] connected to each other through the institution of the market.”²⁵

However, the concept of a reputation earned and lost in the marketplace defies the simple accounting that may follow other losses in the marketplace. Thomas Gibbons suggested that the common law tradition protected more than ‘property damage’ in earned reputations simply because proof of special damages is not always a requirement for recovery.²⁶ The common law also protected a “potential defamatory effect”²⁷ which had no quantifiable marketplace value. The potential defamatory effect is that value added to a reputation through personal efforts and is characterized as the “social assignment of a reputation”.²⁸ A good earned reputation will serve as a basis for future social relationships, and this represents an unquantifiable value which is protectable by a law.

Gibbons recognized that an earned reputation may be somewhat less *and* more than a property right. It is less than a true property right because of the unquantifiable social value of reputation, but in some cases that social value may be in addition to the quantifiable value (such as measureable lost sales). The more commercial a pursuit of an individual or corporation, the easier it appears to quantify the value of damage ensued from defamatory

²⁵ *Ibid.*

²⁶ Thomas Gibbons, “Defamation Reconsidered” (1996) 16(4) Oxford J Legal Stud 587 at 594.

²⁷ *Ibid* at 594.

²⁸ *Ibid* at 592.

comments,²⁹ but that is not to say that non-commercial reputations do not have legally protectable values.

Joseph Blocher's approach to this issue further broadened the purview of the concept of reputation as property outside of the marketplace. Blocher suggested that "reputation can be property-like even without demonstrating economic value."³⁰ Blocher was commenting on the value of reputations in virtual economies where a reputation is built and 'owned' even though it does not interact with a market economy. Blocher posited that there is always property value in a reputation in that it can be gained, lost, traded, protected, and shared, ...without regard to whether it has independent economic value."³¹ The advantage may be social rather than monetary, but it is a right to future reliance on a reputation that has been earned, and that is worthy of legal protection. This is an important addition to the idea of reputation as property as it allows for a consideration of a protectable value in an earned reputation away from the institution of the market.

The social aspect of reputation cannot easily be pecuniarily assessed. Indeed, Post acknowledged that the concept of reputation as only property is inconsistent with common law doctrine. As Gibbons pointed out, damages may be presumed from a publication without accounting evidence of actual damage to reputation. Post also referred to the doctrine

²⁹ *Supra* note 12 at 1368.

³⁰ Joseph Blocher, "Reputation as Property in Virtual Economies" (2009) 118 Yale L J Pocket Part 120 at 122.

³¹ *Ibid* at 120

whereby the common law of defamation requires that an untrue statement be defamatory for recovery even if the statement caused accountable damage to one's business.³²

Thus, the concept of the value of reputation as property is neither concise nor measurable in every instance. Reputation always maintains a social value and the common law has not been able to neatly account for its value in pecuniary terms. Post recognized the social aspects of the value of reputation as the concepts of honour and dignity and these are discussed below. This moves the concept of reputation out of the marketplace, but as Blocher suggested, this move does not necessarily negate the value of reputation as property.

5.3.2 Reputation as Honour

The tradition of reputation as honour "views the worth of reputation as incommensurate with the values of the marketplace."³³ Post supported this contention with the oft quoted observation by Shakespeare that a "purse" is merely "trash" when compared to the value of a "good name".³⁴ This position reflected an earlier conceptualization of the value of reputation in England, and it arose in a society premised on inequality as opposed to an assumption of equals in the marketplace. Reputations as honour are ascribed by rank or position rather than earned, and an individual attains a degree of honour through the status ascribed to their social position. A reputation as honour is fixed and absolute so that "[d]ifferent social positions will be more or less honorific, and within each social position either

³² *Supra* note 2 at 697. Post cites *Cohen v New York Times Co.*, 153 AD 242 985 (1978). In this case the communication to the effect that an individual was dead did not attract damages even though the statement caused a business loss.

³³ *Ibid* at 699.

³⁴ William Shakespeare, *Othello*, act III, scene iii, ll 155-61 cited in *supra* note 2 at 699.

one will have the honor which is due that position, or one will not and be accordingly dishonored.”³⁵ The role of the law here is not to protect the value of the property accruing to an individual reputation, but rather to maintain the whole of the society that is based on deference to the ascribed status of individuals.³⁶

English law has a long history of recognizing the protectable value of honour in reputations, and it is interesting to note how the legal concept of reputation changed over the centuries. In 1275 the English parliament passed legislation addressing *scandalum magnatum*.³⁷ In doing so, Parliament sought to protect the nation’s “best men” from insult in order to preserve the existing feudal order.³⁸ The statute was directed “against the spreading of “false gossip” ...about the great persons of the Kingdom.” The *scandalum magnatum* action was aimed at critics of the Crown and nobility. By the late fourteenth century The Star Chamber was charged with the enforcement of this statute. Defamation was treated as a threat to internal order, and written defamatory acts were treated as crimes. In the view of the Star Chamber any written criticism of the government was a punishable wrong.

Even after the collapse of the feudal order the ‘best men’ were protected from derogatory statements as it was suggested that uncontrolled criticism would keep the “best

³⁵ *Supra* note 2 at 700.

³⁶ See J Barton Scott, “How to Defame a God: Public Selfhood in the Maharaj Libel Case” (2015) 38(3) South Asia: Journal of South Asian Studies 387.

³⁷ See John C. Lassiter, “Defamation of Peers: The Rise and Decline of the Action for *Scandalum Magnatum*, 1497-1773”, (1978) 22(3) Am J Legal Hist 216.

³⁸ For an overview of the history of this concept see Norman Rosenberg, *Protecting the Best Men: An Interpretive History of the Law of Libel* (Chapel Hill, University of North Carolina Press, 1986).

men” out of public office.³⁹ The Crown also would not tolerate public criticism that might pose a threat to its legitimacy. Slander against the ‘best men’ was characterized as seditious libel. Truth of the defamatory statements was not a defence, and it was suggested that “a true statement against a highborn man could be even more damaging to the social order than a false one.”⁴⁰ The appearance of honour was important to the maintenance of the social hierarchy. The goal of the legal traditions was the maintenance of the political order, as well as the continued subordination of the population to the Monarchy.

By the fifteenth century defamation law became an alternative to violence for the nobility. Nobles could defend their honour in court rather than take up arms against a perceived slanderer. Lawrence McNamara suggested that by the seventeenth century the law began to perform an unusual function with respect to reputation.⁴¹ The nobility used a *scandalum magnatum* action to identify *themselves* as one of the ‘great men’ of the realm in an action against a member of the rising middle class. Unlike defamation laws which resolved disputes about reputation within a community, the *scandalum mangnatum* laws were used to distinguish one community from another. There was honour to defend between peers, but the law was utilized by the nobility to resolve a defamatory action against an untitled defendant in order to uphold their self-described superiority.

³⁹ *Supra* note 38, Rosenberg at 4.

⁴⁰ *Supra* note 36 at 395.

⁴¹ Lawrence McNamara, *Reputation and Defamation* (Oxford: Oxford University Press, 2007) at 76.

Where the law protected honour, legal traditions served to both define and enforce the ascribed status of social roles.⁴² In effect, those who “transgress[ed] the hierarchy’s boundaries by calling one’s honour into question “cause[d] an overall societal harm by disrupting the expected flow of interaction.”⁴³ Legal traditions that protected the value of honour in reputation aimed to protect not only the individual’s interest in a good reputation, but also society’s overall interest in maintaining the existing hierarchical relationships.

Nathan Oman recognized that honour could also be valued outside of the ascribed positions in the vertical hierarchy. He suggested that there was a horizontal notion of honour because there is value in the respect of one’s peers in a deference society.⁴⁴ To be dishonoured on this view “is to be placed outside the community of equals.”⁴⁵ Oman argued that an individual’s self-respect or honour needs the esteem of others in order to exist.⁴⁶ Therefore an insult or defamatory statement devalued an individual’s self-respect as it compromised the esteem of equals.

There is no pecuniary accounting in relation to the legally protectable value of honour that arises in ascribed reputations in a hierarchical society. There is only honour and dishonour. Post suggested that the objective of defamation law in a deference society for the loss of honour is the restoration of honour, or a “status rehabilitation ceremony”.⁴⁷ In early common

⁴² *Supra* note 2 at 702.

⁴³ *Supra* note 12 at 1370.

⁴⁴ Nathan Oman, “The Honor of Private Law” (2011) 31 Fordham L Rev 31 at 53.

⁴⁵ *Ibid.*

⁴⁶ *Ibid* at 56.

⁴⁷ *Supra* note 2 at 703.

law a defamed victim elected to proceed either by indictment or by action. In the former, the truth of the libelous statement was immaterial. The victim was vindicated by the punishment of the libeller rather than by disproving the statement. This approach harkened back to the vindication of honour through duel.

However, if the plaintiff proceeded by way of civil action, then the fact of truth of the statement was a full defense. The remedy was payment of damages, not for the value of the reputation lost, but rather payment for the affront to one's socially ascribed honour. It was important that the truth of the statement was material as this indicated that there was an expectation by the courts that the individual would live up to the demands of his ascribed station.⁴⁸ If the individual had acted dishonourably, then there was no recovery. Therefore the legal tradition protected the very value of honour.

The goal of legal traditions which protected reputations in a hierarchical society was twofold. First, the honour which was expected from each stratum in society was protected. The nobility had to live up to their expected reputations, but deference was also enforced within the vertical hierarchy. There was also legally protectable value in the honour among peers, so that the law functioned both to reveal and to enforce a standard of honour at each level in society.

⁴⁸ *Supra* note 2 at 706.

5.3.3 Reputation as Dignity

The value of reputation as dignity is closely related to the value of honour in reputation.⁴⁹ However, it is a broader concept. Whereas reputation as property presumes a marketplace, and reputation as honour presumes a stratified society, the value of reputation as dignity is found in the “respect (and self-respect) that arises from full membership in society.”⁵⁰

Post differentiated between a breach of the rules of civility that occurs in a purely dyadic exchange and that which occurs in the presence of third parties.⁵¹ In the former situation, Post explained “it is not clear whether the dignity of the recipient or the social competence of the actor has been impaired.”⁵² However, in the presence of a third party, the audience may decide to side with the actor with the result that the recipient is “discredited and stigmatized” and excluded from society.⁵³ It is the publication of the breach that takes the damage beyond hurt feelings.

A particular society defines and maintains dignity through its own rules of civility. Only members of that society are bound by those rules. In this context, legal traditions that protect reputation have both a private and public function. They protect an individual’s interest in her own dignity as member of that society, but also define and maintain the parameters of that

⁴⁹ For an interesting comparison of dignity and honour see Orit Kamir, “Honor and Dignity in the Film *Unforgiven*: Implications for Sociolegal Theory” (2006) 40(1) Law & Soc’y Rev 193. Orit characterizes honour and dignity as two antithetical bases of unique value systems in western societies. In Tonga’s distinct hierarchical system based on rank and kinship the concepts overlap and often there is protected dignity in rank.

⁵⁰ *Ibid* at 707.

⁵¹ *Ibid* at 711.

⁵² *Ibid*.

⁵³ *Ibid*.

society's accepted rules of civility. They not only define whose reputation will be protected, but also delineate what constitutes an affront to dignity. The protectable value of dignity in reputation is found in the value in the "relations between persons."⁵⁴ Post linked social life and personal identity in his theory of reputation as dignity: "Dignity is concerned with the aspects of personal identity that stem from membership in the general community."⁵⁵

Like the value of honour, the protectable value of dignity in reputations incorporates relational aspects in order to justify legal protection.⁵⁶ The protectable interest goes beyond the individual. In the case of honour discussed above, legal traditions are important in the maintenance of the hierarchical socio-political order. As to dignity, an affront to the dignity may change the way in which the relevant community views the recipient.⁵⁷ The legal tradition which addresses affronts to dignity actually enforces the normative power of the constitution of a good reputation in a given community. As the value of dignity is protected in the community, so are those values and norms which are considered important in order to qualify for membership in that community. Legal traditions that protect the value of dignity have a dual function—"the rehabilitation of individual dignity and the maintenance of communal identity."⁵⁸

⁵⁴ *Supra* note 4 at 743.

⁵⁵ *Supra* note 2 at 715.

⁵⁶ *Supra* note 12 at 1375.

⁵⁷ *Supra* note 12 at 1390.

⁵⁸ *Supra* note 2 at 715.

David Anderson posited that defamation is well described as a ‘dignitary tort’ when he questioned whether defamation really belonged in a Restatement of *economic* torts.⁵⁹ Citing Post’s seminal work on the theoretical underpinnings of common law defamation, Anderson concluded that defamation cannot be reduced to simply a remedy for economic losses because there are more important social and cultural values that defamation law serves. Society has an interest in the protection of reputation, and legal traditions that protect reputations enforce a socially and politically determined level of respect.

James Whitman characterized defamation laws generally as a means to “enforce civility and respect”.⁶⁰ Whitman distinguished between the legally protectable interest in reputation and the legally protectable interest in honour and dignity.⁶¹ He posited that the legally protectable interest in reputation is an interest in ensuring that defamatory statements do not become public. Conversely the interest in honour and dignity is an interest in making sure that others show respect in public *and* private. Whitman added that a show of disrespect does not necessarily involve an imputation of fact. It could be constituted by an insult, or a failure to show the locally expected rituals of respect. The common law of defamation which is the basis of Post’s discussion does not protect dignity in this sense. Common law evolved over time to only allow recovery for public statements. However, it is important to note that the origins of

⁵⁹ David A Anderson, “Rethinking Defamation” (2006) 48(4) Arizona Law Review 1047 at 1047.

⁶⁰ James Q Whitman, “Enforcing Civility and Respect: Three Societies” (2000) 109 Yale LJ 1279.

⁶¹ *Ibid* at 1286.

the common law defamation are found in Anglo-Saxon law wherein defamation law was concerned with personal insults and did not require that communication to a third party.⁶²

Whitman's observations are particularly relevant to the discussion about the adoption of defamation law in Tonga that follows. The values of reputation that are legally protectable in the sense that they are socially valuable and legally relevant to the smooth operation of a particular society are not necessarily equally or similarly protected in every society. However, a commonality does lie in society's interest in maintaining socially determined levels of civility and respect.

The defamation law introduced to Tonga reflected what was considered to be legally protectable values of reputation in British society in the early nineteenth century. That is not to say that British values were adopted in Tonga. However, there was an overlap between the legal traditions that protected reputations because reputations were valued in both societies. The next section examines the concept of reputation in Tonga. It is clear that there were existing legal traditions in place to protect reputation in Tongan society when the formalized law of defamation was adopted.

5.4 Reputation in Tonga

As discussed above, reputation is important in every society, and Tonga is no exception. This section discusses the value of reputation in Tonga, and how that value was protected prior to the adoption of British defamation law. While the adopted law introduced a new legal

⁶² *Supra* note 2 at 710.

process that addressed the protection of reputation from defamatory language, those formalized legal traditions were grafted upon already existing legal traditions that protected the value of reputations. The distinct cultural underpinnings of the existing Tongan legal traditions were not undermined, and the adoption of the new legal traditions were part of a larger political change orchestrated by the Tongan king.

This section follows Post's approach to common law defamation discussed above. While Post extracted concepts of legally protectable values of reputation from a review of English common law defamation, this section reveals legally protectable values of reputation through a review of the Tongan legal traditions that surrounded reputation.

5.4.1 Tongan Rank and Ritual

Historically, Tonga has always been a ranked society. Three royal dynasties formed the apex—the *Tu'i Tonga*, the *Tu'i Ha'atakalaua* and the *Tu'i Kanokupolu*. Beneath the *Tu'i* in status were the chiefs (*hou'eki*), minor chiefs (*mu'a*) and the chiefly attendants (*matapule*). The commoners (*tu'a*) and slaves (*me'avale*) occupied the lowest rank. There were other specialty ranks including the priests (*taula*), navigators (*toutai*) and skilled tradesmen (*tufunga*). Relationships among these classes were strictly governed by rules of behaviour based upon three important values: respect (*faka'apa'apa*), obligation (*fatongia*) and loyalty (*mateaki*).⁶³

The *fatongia* relationship, grounded in obedience was the basis of the functioning society. Each individual knew of their *fatongia* to members of their own rank, and more

⁶³ *Supra* note 1 at 65.

importantly to those of higher status. Land was granted by the *Tu'i* to the *hou'eki* and the lower ranked chiefs were granted land from the *hou'eki*. The *tu'a* worked the land and provided the best of the crops to their chiefs, and lower ranked chiefs brought tribute to those of higher rank. The lower ranks were at the mercy of their chiefs who exercised arbitrary power over them.⁶⁴ In return, the chiefs provided protection to the lower ranks and settled disputes to maintain peace. The highest chiefs were ruled by the sky gods. Every rank performed for fear of retaliation by a higher ranking chief, or by supernatural forces.

The expected *mateaki* reinforced the reciprocal obligations. Complete loyalty was expected to one's chief and one's community. The rules of *faka'apa'apa* were a form of ritualized respect that provided a public display of superior rank, and epitomized the importance of reputation in this stratified society. I characterize these taboos and rituals of respect as legal traditions that developed in order to sustain respect for superior ranks, and through that, sustained the function of the hierarchical society. The rituals engendered a submissiveness to rank that became a point of pride in the Tongan character.⁶⁵

The highest chief was considered sacred. If his foot touched the ground, that ground became holy and belonged to him. Any home he entered or food he touched became taboo for those lower in rank. He was carried on the shoulders of bearers when he traveled about the island. When he passed by, everyone had to strip to the waist and stand still, on penalty of

⁶⁴ See IC Campbell, *Island Kingdom: Tonga Ancient and Modern* (2d ed) [1992] (Christchurch: Canterbury University Press, 2001) at p 49. "The only restraints on chiefly powers were self-imposed, and although commoners could be beaten robbed or killed by chiefs without reason or defence, this extreme conduct was probably rare."

⁶⁵ *Ibid* at 49.

death. The early missionary George Vason⁶⁶ reported that the high chiefs were “feared and honoured as gods; the king’s voice they called *thunder*, his canoe, the *rainbow*, his house, the *clouds*, and burning lamps in it the *lightning of heaven*.”⁶⁷

The next higher in rank was the principal chief of the locality (*kainga*) which included many extended families. He had control over land holdings, and in turn performed judicial functions and protected his *kainga* from outside attack. The principal chief ate his meals separately and no person inferior to him in rank could touch his food. Certain foods were reserved for chiefly consumption. He was addressed in a special language of respect, and to pass in front of him inferiors had to crawl on their hands and knees. Severe punishments were meted out by the principal chief for breaches of these taboos, in addition to the fear of reprisal by the gods. The strictly enforced taboos not only symbolized the superior rank of the chiefs, but also served to maintain his authority over those inferior in rank.⁶⁸

The values of respect, obligation and loyalty flowed upwards throughout the ranked society. The highest chiefs answered to no one but their gods. In fact, murder, theft and adultery were not regarded as offences unless committed against a person of equal or higher

⁶⁶ George Vason lived in Tonga from 1797 until 1801. He arrived as a missionary but left his order and married a Tongan woman. An account of his sojourn in Tonga is found at Anonymous, *An Authentic Narrative of Four Years in Tongatapu* (London: Longman, Hurst, Rees and Orme, 1810) and James Orange, *Life of the Late George Vason of Nottingham* (London: John Snow, 1840), reprinted in David G May, ed, *Narrative of the Late George Vason of Nottingham* (Nuku’alofa, Tonga: Friendly Islands Bookshop, 1998).

⁶⁷ *Supra* note 65, May at 22.

⁶⁸ Sione Lātūkefu, *The Tongan Constitution: A brief history to celebrate its Centenary* (Nukualofa, Tonga: Tonga Traditions Committee Publication, 1975) at 8.

rank. Tongan chiefs were supreme in their own territory providing they fulfilled their obligations to the king.⁶⁹

The exalted reputations of the sacred king and principal chiefs was founded in myth. It was believed that the ranked leaders possessed *mana* or spiritual power which derived from their descent from the sky gods. When chiefs died it was believed that their souls went to a Tongan paradise (*Pulotu*). Conversely, it was believed that commoners lacked souls, and when they died they became vermin. The taboos and required signs of respect which the commoners paid to the chiefs reinforced the social order. The reputation of the chiefs was treated as sacrosanct by the commoners who feared punishment from both chiefs and gods if the rules of respect were not observed.

During his sojourn in Tonga, John Mariner observed that “there [was] no necessity to dwell upon the respect that is universally paid to chiefs, for it form[ed] the stable basis of their government.”⁷⁰ Mariner added that there was one universal principle and that was “that it is every man’s duty to obey the orders of his superior chief in all instances, good or bad, unless it be to fight against a chief still superior...”⁷¹ Queen Salote, speaking with an anthropologist about eighteenth century Tonga, remarked that a very powerful chief who was respected by other chiefs could be cruel to those beneath him in rank because it showed that “he that he

⁶⁹ Elizabeth Bott, *Tongan Society at the Time of Captain Cook’s Visits: Discussions with Her Majesty the Queen fefafa Tupou* (Wellington: The Polynesian Society (Incorporated), 1982) at 160.

⁷⁰ William Mariner and John Martin, *An Account of the Natives of Tonga Islands, in the South Pacific Ocean. With an original grammar and vocabulary of their language* (London: J Murray, 1818) at 353.

⁷¹ *Ibid.*

was so great he could incur their resentment”⁷² Salote suggested that the people put up with a cruel king because their own reputations depended upon that of their chief: “...the chief was the embodiment of themselves; if he was great, they were great; if he was a fool, they were fools. It was in their interests to see that their chief was regarded as an important man by outsiders.”⁷³

The kava ceremony⁷⁴ embodied and reinforced the legal traditions of respect.⁷⁵ The seating placement, the presentation of gifts, and the preparation and drinking of the kava was ordered according to an individual’s status in the social hierarchy. Any mistakes resulted in severe punishment and public disgrace.⁷⁶ Kava ceremonies were held to commemorate all important occasions, and importantly heralded any change in positions of authority.⁷⁷ There is a well-known legend about the origin of kava in Tonga.⁷⁸ It is reproduced in a short summary here as it exemplifies the tension embedded in Tongan society, a tension which required legal traditions to enforce the recognition of positions in the social hierarchy. There was value in the ascribed reputations that ordered society, but those reputations needed an element of enforcement in order to be sustainable, and the acknowledgement of this fact is clear in the kava legend.

⁷² *Supra* note 68 at 71

⁷³ *Ibid.*

⁷⁴ Kava is a mildly narcotic drink made from the root of the pepper plant. It is consumed at social and ceremonial events throughout the South Pacific region. There are rituals associated with the preparation and consumption of kava that vary from country to country.

⁷⁵ See Charles Urbanowicz, “Drinking in the Polynesian Kingdom of Tonga” (1975) 22(1) *Ethnohistory* 33.

⁷⁶ *Supra* note 1 at 65.

⁷⁷ *Supra* note 73 at 40.

⁷⁸ *Supra* note 68 at 92.

The legend holds that a couple Fevanga and Fefafa and their leprous daughter, Kava were the only inhabitants of the island of 'Eueiki. One day the King landed at the island with his royal party. The King sat and rested under a taro plant while his men searched the island for food. The couple were informed that the King was on their island and they hurried to prepare a feast for him as was demanded by the rules of respect owed to the King. However, they could not access the lone crop of taro as that was where the King was resting, and the rules of respect forbade them from disturbing the King. There was no other food available on the island and so the couple killed their daughter and baked her body in the earth oven (*umu*) for the King's feast. The King was informed of their sacrifice, was deeply touched by it, and immediately left the island leaving the couple to bury their daughter properly. Two plants grew out of the burial mound, one at each end. A mouse was observed biting the plant on the head and staggering, and then running to eat the plant at the feet.

Lo'au enters the story here. Lo'au appears in Tongan legends that found "customs and regulators of social life."⁷⁹ Lo'aus are described as *tufunga fonua* which is translated as "carpenters of the country",⁸⁰ and so the appearance of Lo'au in legend is significant. Here, Lo'au came to the island to hear the couple's story. He advised them to take the plants which had grown in the grave to the King, and gave them instructions as to how the plants were to be used. The kava which had grown at the head was to be used as a drink, and the sugar cane from the foot end of the grave was to be eaten with the drink. Upon hearing the instructions, the

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

King was at first reluctant to drink as he thought the plant might be poisonous. He had his attendant taste it first, and afterwards directed the people to carry out Lo'au's instructions, which was the beginning of the kava ceremony.

Based on this legend, Queen Salote characterized the ritual of drinking kava as a communion⁸¹ commemorating the "sacrifice of the people for their king, but also the sympathy and appreciation of the king for his people."⁸² Elizabeth Bott was rare combination of anthropologist and psychoanalyst, and she brought added insight to her interpretation of the Tongan legends. She noted that the legend of kava was not merely a love story between a king and his people.⁸³ If that were so then Bott suggested that the sacrificed daughter would have been healthy, and the King would not have suspected poisonous plants. Bott concluded that the story expressed not only the good relationship between the King and the people, but the doubts and suspicions as well.

The kava ceremony clarified social principles and social roles through an explicit recognition of stratification by titles in the social system. Bott explained: "A ceremony is a condensed and partially disguised representation of certain aspects of social life serving the same double and contradictory function: they release and communicate dangerous thoughts and emotions; but at the same time they disguise and transform them so that the element of danger is contained and to some extent dealt with."⁸⁴ The kava ceremony galvanized social and

⁸¹ *Ibid* at 93.

⁸² *Ibid*.

⁸³ *Ibid*.

⁸⁴ Elizabeth Bott, "The kava ceremonial as a dream structure" in Mary Douglas, ed, *Constructive Drinking: Perspectives on Drink from Anthropology* (Cambridge: University of Cambridge, 1987) at 182.

political ranking by explicit recognition. Likewise, other legal traditions that enforced the recognition of ascribed reputation through taboos and ritualized signs of respect bolstered the ascribed reputations. As Bott so perceptively recognized, the respect for ascribed reputations must be reinforced somehow because that respect may not be naturally perpetuated. There is always tension where rank is ascribed and obligation enforced. It is from this tension that the necessity for a legal regime to officially recognize and protect reputations arises.

Even though the value of an ascribed reputation appeared to accrue only to the higher ranked individual in the form of tributes and obedience, the real value accrued to a smooth and peaceful functioning society. Ranking, along with an explicit recognition of rank was pervasive in Tongan society. Even the organization of the family mirrored that of society at large. The father had authority over the family members. Within the family, a sanctity surrounded his person and personal belongings and it was taboo for the children to touch his head or hair, to eat while sitting near, or to share anything he ate or drank.⁸⁵ The authority of fathers over their children reflected the accepted standard of ascribed authority that was universal in Tongan society.

5.4.2 Rank and Authority

As discussed above, ascribed reputations were fixed by rank at birth. The basic distinction in rank was between *'eiki* (chief) and *tu'a* (commoner ranking). The former category encompassed all chiefly people including the paramount chief and the *matapule* (chief's ceremonial attendants). The titles of principal chiefs, priests and the *matapule* (chief's

⁸⁵ *Supra* note 67 at 7.

attendants) were hereditary. Practicing trades such as canoe building and navigation were also hereditary and restricted to these classes. The arts of music, poetry and dancing were knowledges passed on to chiefly descendants in strict secrecy. Only chiefs employed the services of these specialists as the commoners could not afford their services, nor were they allowed to do so.⁸⁶

Although there were trade practitioners and artists producing goods and services for the chiefly classes, there was no sense of a value of reputation as property as conceptualized by Post, because these positions were in themselves ascribed by rank. However, there was an element of *achieved* rank within the chiefly ranks that was found in that chiefly group exercising political authority over a *kainga*. There existed sanctions against chiefs who neglected their people, and a chief could be abandoned or assassinated.⁸⁷

Criticism and challenge to these chiefly reputations arose from peers or those of superior rank. It is a somewhat complicated situation to discuss because the level of an individual's rank and degree of political authority did not necessarily coincide. At the time of Cook's visit in the late eighteenth century the political power of the Tu'i Tonga was not nearly as strong as that of the paramount chief, Tu'i Kanokupolu. However, the Tu'i Tonga was still considered to be of higher rank. Thus Cook was surprised that the person shown the most

⁸⁶ *Ibid* at 9.

⁸⁷ Lawson, Stephanie. *Tradition versus Democracy in the South Pacific: Fiji, Tonga and Western Samoa* (Melbourne: Cambridge University Press, 1996) at 85.

respect was not necessarily the most politically powerful. Cook's confusion stemmed from his prior understanding of English society where rank and authority coincided.⁸⁸

In theory, all land belonged to the sacred King, the Tu'i Tonga. However, the land was ruled by men of high rank, title holders and certain members of their patrilineal kin.⁸⁹ The tenure of title holders was not necessarily secure because rulers could be deposed by other title holders, or by the paramount chief who ultimately controlled the land.⁹⁰ There was value in maintaining a good reputation so that one could be allotted land tenure or retain the land already possessed. Succession to landed titles was not automatic. Close relatives and other title-holders decided who the most suitable man for the title was. Thus, ascribed reputations did not necessarily carry with them political power over land, so there was an element of earned reputation that was important.

Further, once the paramount chiefs chose lesser chiefs to rule an area of land they had no authority to compel obedience of the commoners to those selected chiefs. Therefore, a newly installed chief had to ensure that his authority would be acknowledged by the deposed chief and the commoners formerly under his control. Queen Salote explained three ways in which the new chief could ensure that his position was respected.⁹¹ First, the paramount chief would not send in a new chief if the present chief was strong and effective. A good reputation meant that it was less likely that one would be deposed. Second, the rank of the new chief

⁸⁸ *Supra* note 68 at 18.

⁸⁹ *Ibid* at 69.

⁹⁰ *Supra* note 85 at 85.

⁹¹ *Supra* note 68 at 158.

would likely be higher than the rank of the old, and therefore the deposed chief would be required to respect the rank of the incoming chief. Lastly, marriages could be arranged between the daughters of the former chief and the new leader, and this was desirable because it would raise the rank of the former chief's descendants. Notably, each of these legal traditions which governed the installation of new chiefs exemplifies a protectable value of reputation. In the first instance, a chief with a reputation as a strong and effective chief living up to his obligations would not be replaced. Second, rank was always respected in this hierarchical society so that a chief of lower rank would not challenge an incoming chief of higher rank, and he would not be able to summon his *kainga* in a battle against a chief of higher rank. Lastly, the rules which governed marriage could offer a deposed chief consolation for losing his chiefly authority to another. His grandchildren would be hold a higher ascribed rank than his own.

The legal traditions which designated the rules of rank and marriage were important in the maintenance of peace. Although rank or ascribed reputation was fixed at birth, a chief could improve the rank of his descendants by marrying the sister of a chief of higher rank because sisters have a higher rank than their brothers. The resulting offspring would be of higher rank than the chief who deposed the father in the situation discussed above. Thus, marriage was often an important mediating tool, and Queen Salote described the system as one where "kinship was substituted for warfare".⁹² A chief would accept the loss of his land to a greater chief if he could elevate the rank of his descendants in the process.

⁹² *Ibid.*

5.4.3 Defamation and Reputation

There was value in ascribed and, to a lesser extent in achieved reputations as examined above. Strict adherence to rituals and taboos reinforced the core values of loyalty, respect and obligation which organized and maintained Tongan society. Criticism of those higher in rank was taboo, but sanctions could be exercised against peers and those lower in rank who did not live up to societal expectations dictated by rank. As Lawson explained, criticism was an anti value⁹³ in this system that depended upon respect for rank for its successful survival. Social stability depended upon the maintenance of reciprocal relations and the balance of interests existing in Tonga's ranked society.⁹⁴

At times criticism formed the basis of a challenge to power, but acceptable criticism centred on suitability for the rank, rather than on the individual. An early eighteenth century incident will illustrate this contention: In Tongatapu the position of paramount chief, Tu'i Kanokupolu was held by Ma'afu'otuitonga. His three sons Tupoulahi, Maealiuaki and Mumui all succeeded to the position. When Maealiuaki's son decided to vacate the position of Tu'i Kanokupolu, Tupoumohefo, the daughter of Tupoulahi, decided to make herself Tu'i Kanokupolu. Although a woman had never held such a position of power before, her extraordinary move was explained by her unwillingness to see Mumui and his descendants in the position of Tu'i Kanokupolu because Mumui's mother was of lower rank than both her and Maealiuaki's mothers.⁹⁵ Mumui's son, Tuku'aho was angered and eventually deposed

⁹³ *Supra* note 85 at 85.

⁹⁴ *Supra* note 16 at 9.

⁹⁵ *Supra* note 16 at 12.

Tupoumohefo, making his aged father Tu'i Kanokupoluo while he himself retained the real political power. Over time Tuku'aho extended his power and succeeded his father in 1797. He ruled with particular harshness and cruelty.⁹⁶ Tuku'aho was eventually assassinated in a plot supported by the highly ranked chiefs in Tonga. Apparently, Topoumohefo was instrumental in stirring up ill feelings towards her brother, but those efforts were greatly assisted by Tuku'aho's own growing unpopularity because of his exceedingly harsh treatment of those he ruled.⁹⁷

In those challenges it appeared that it was not the character of the individual but rather the unsuitability of the individual for their position which was questioned. Peers had a vested interest in ensuring that the sanctity of rank was upheld—that the chiefly ranks fulfilled their obligations, and/or had suitable genealogy to hold that rank. Otherwise the viability and smooth operation of the ranked system was in jeopardy.

Mariner observed that defamation of character was understood to be a very negative activity. Of course, during Mariner's sojourn in Tonga in the early nineteenth century he lived with the chiefly class and therefore it is likely that it this class which he wrote about in the following excerpt.

No bad moral habit appears to a native of Tonga more ridiculous, depraved, and unjust, than publishing the faults of one's acquaintances and friends; for while it answers no profitable purpose, it does a great deal of mischief to the party who suffers; and as to

⁹⁶ *Supra* note 69 at 71. Mariner reported: "He is reported to have been a man of vindictive and cruel turn of mind, taking every opportunity to exert his authority; and frequently in a manner not only cruel, but wanton; as an instance of which, he on one occasion gave orders, (which were instantly obeyed), that twelve of his cooks, who were always in waiting at his public ceremony of drinking cava, should undergo the amputation of their left arms, merely to distinguish them from other men, and for the vanity of rendering himself singular by this extraordinary exercise of his authority."

⁹⁷ *Supra* note 16 at 15.

downright calumny or false accusation, it appears to them more horrible than deliberate murder does to us. It is better, they think, to assassinate a man's person than to attack his reputation. In the first case, you only cause his death, which must happen to him some time or another, whether you will or not; but in the latter case you take from him what otherwise he might, strictly speaking, never have lost, which he might have carried with him faultless to the grave, and which afterwards might have attached to his memory as long as the memory of him existed.⁹⁸

Of course defamatory statements made by one of lower rank would be seen as disrespect of rank and punishable, but it appears that defamation of character was not punishable when the remarks were uttered by peers or those higher in rank.⁹⁹ However, Mariner's observations reveal the utmost importance of a good reputation in Tonga to the extent that it would be better to murder an individual than to tarnish a good reputation with false reports, because that tarnished reputation continued after an individual's death. Mariner added that not speaking of an individual's faults was considered a "just and honourable principle and ... so that instances of calumny and defamation are very rare."¹⁰⁰

Even though there appeared to be no legal traditions that provided for punishment for defamatory statements, the legal traditions were found in the ritualized observation of reputation. Further, legal traditions which governed grants to land and authority depended upon an untarnished reputation in the recipient.

5.5 Conclusion

Post stated that "...by looking carefully at the nature of the 'injuries affecting a man's reputation or good name' defamation law is actually designed to redress, one can uncover a

⁹⁸ *Supra* note 69 at 358.

⁹⁹ See Edwin N Ferdon, *Early Tonga: As the explorers saw it 1616-1810* (Tucson: University of Arizona Press, 1987) at 41.

¹⁰⁰ *Supra* note 69 at 358.

more focused image of the exact kinds of social apprehension that defamation law considers 'normal, or desirable' or deserving of the law's protection."¹⁰¹ The legal traditions that surround reputation reflect a great deal about a specific society. The answers to the questions of who is considered deserving of respect, how that respect is shown, how one can gain or lose respect (if at all), why some are respected more than others reveals how the society is structured and how that structure is maintained.

In Tonga, ascribed reputation was maintained and protected by legal traditions that were comprised of taboos and ritual. In England ascribed positions were protected by the special provisions of *scandalum magnatum* an enactment that gave special legal status to the 'best men'. In both societies, earned reputations were important as well. In mercantile England damage to reputations could be remedied by money damages. In Tonga it was worse than murder to defame someone because a good reputation was considered a legacy.

Perhaps respect for the rank was more important than respect for the individual in Tonga, but overall there were many similarities in the legal regimes that protected defamation in Tonga and England. As a result, modern defamation law in Tonga cannot be understood only as an adopted legal tradition. The protection of reputation was not a foreign notion to Tonga in the nineteenth century when a legal code was adopted. Just as apology and forgiveness rendered adopted law Tongan, so too did existing legal traditions that protected reputation. A new legal process and formal rules of defamation law were adopted by Tonga, but these

¹⁰¹ *Supra* note 2 at 692.

supplemented already existing Tongan legal traditions because legal traditions that protected reputation were not new to Tonga.

Chapter 6: Defamation Law in Tonga

6.1 Introduction

Just like the legal tradition of apology and forgiveness, the respect for reputation, also grounded in Tongan legal tradition, was not lost when custom was not saved or protected. Over the years, rules of respect for those higher in the hierarchy, and the tapus related to personal status have been modified and sometimes curtailed due to changing social and political conditions. A large part of the legal tradition to uphold the recognition of reputation was formalized in a formal law regime. However, the changes made to the nineteenth century legal traditions which protected reputation reflect Tongan-led change rather than an imposition of formal law system alongside a 'custom' regime. Tongan legal tradition prevails in both the signs of respect still owed to those higher up in the hierarchy, and in the formalized legal provisions which continue to govern defamation.

Tongan defamation law existed prior to the influence of European contact as was discussed in the last chapter. Later, the adoption of European ideas amid challenges to Tongan independence molded the contemporary legal regime. Importantly, it was a Tongan response which reinterpreted and restated the Tongan value of reputation as it was impacted by new ideas, challenges and opportunities. Unlike apology and forgiveness, the legal tradition to protect reputation was largely codified in Tonga's early legal codes. This development made sense in the case of the latter legal tradition because reputation was also valued as law in the European context. Thus, European religious texts and written legal codes provided a framework for the written legal codes designed by Tongan leaders.

This chapter addresses the development of defamation law in Tonga in order to show how the Tongan legal traditions which protected reputation in Tonga endured within and outside of a formalized legal system. First, the historical development of the law is discussed in order to show how the law governing the protection of reputation evolved in response to religious, social and political change in Tonga.

Next, the contemporary law governing the protection of reputation is described in order to show how the law reflects the distinct Tongan society which continues to be grounded in a hierarchical structure. However, it is noted that the legal changes formally adopted affected those higher in the hierarchy more than the commoners whose lives carried on much the same for more than a century following the changes.

Lastly this chapter reviews the cases that tested the law governing reputation in a series of cases beginning in the 1990s. By this time many Tongans were beginning to question the broad authority of the monarch and nobility in Parliament. The government's defense to this challenge centred on the cultural backdrop of the law. Importantly, the issue could not be framed as one of 'custom' versus rights because custom was not saved as something apart from Tongan law. It was all part and parcel of the existing law and constitution. The battle for the freedom of the press was fought within the confines of the laws and Constitutional provisions adopted by the Tongan monarch many years earlier. This last section illustrates how the law continues to be changed and reinterpreted in response to societal and political change without being confined to a custom versus law conundrum.

6.2 History of the Law to Protect Reputation in Tonga

The Tongan King developed a formalized legal system in the nineteenth century in response to a threat of annexation from European nations colonizing the region. Much of the new formal legal order was inspired by the advice and experience of Christian missionaries in Tonga at that time.

Missionaries first arrived in Tonga in the early 1820s, and the impact of Christianity reshaped the socio-political hierarchy in Tonga.¹ However, the marriage of religion and politics was not new to Tonga.² Prior to the adoption of Christianity, Tongans recognized a hierarchy of gods. The political power of Tonga's chiefs arose from their possession of *mana* which was derived directly from those gods, and the more *mana* possessed, the greater the power of that chief. The power of the priests who served as intermediaries between the gods and the chiefs was second only to that of the chiefs. Just as the chiefs had once looked to the priests for political guidance, those converted to Christianity now consulted the missionaries as they pursued political change according to Christian principles.³

There was early opposition to the introduction of Christianity, but the missionaries experienced growing success as the Tongan ruling chiefs began to question the validity of their old religion, and the failure of their gods to assist them in war.⁴ Further, the missionaries had

¹ 'I Futa Helu, *Critical Essays: cultural perspectives from the South Seas* (Canberra: Journal of Pacific History, 1999) at 178.

² Stephanie Lawson, *Tradition versus democracy in the South Pacific: Fiji, Tonga and Western Samoa* (Melbourne: Cambridge University Press, 1996) at 86.

³ Sione Lātūkefu, *Church and State in Tonga: The Wesleyan Methodist Missionaries and Political Development, 1822-1875* (Honolulu: University Press of Hawai'i, 1974) at 119.

⁴ Sione Lātūkefu, "The Wesleyan Mission" in Noel Rutherford, (ed), *Friendly Islands: A History of Tonga* (Melbourne: Oxford University Press, 1977) 114 at 124.

the support of the British warships, and this fact lent some political expediency to conversion as the chiefs aligned themselves with this power base. The commoners followed their chiefs as they had always done in this hierarchical society, but in any case the tenets of Christianity held some attraction for the commoners. First, the Tongans had always been a religious people who worshipped principal and secondary gods so that faith in the guidance of a god was not a foreign concept. Second, the Tongan religion was directed to the chiefs and priests as only these two classes possessed souls and could enter paradise after death.⁵ The Tongan religion saw commoners as nothing more than worms who would go back to the earth upon death. Christian scripture offered commoners a human role in religious teachings and a chance for a life after death.⁶ There was a democratic component to the teachings of the Wesleyan missionaries that allowed commoners and chiefs to be spiritual equals.

6.2.1 Code of Vava'u 1839⁷

By 1839, when the first legal code was produced, the northern island groups, Ha'apai and Vava'u were following Christian missionaries' teachings.⁸ At this time the two island groups were ruled by the powerful chief Tāufa'āhau (later to become Tupou I) who was a fervent Christian convert. There was little opposition to an acceptance of Christianity here—it was

⁵ See Heneli T Numeitolu, *The State and the Church, the State of the Church in Tonga* (PhD thesis, University of Edinburgh, 2007) [unpublished], online: <https://core.ac.uk/download/files/39/278075.pdf> at 69. Numeitolu describes early religion in Tonga as a “chiefly domain where principal gods related primarily to the chiefs, just possibly on behalf of or for the survival of the people.”

⁶ Sione Latūkefu, “The case of the Wesleyan Mission in Tonga” (1969) 25 *Journal de la Société des océanistes* 95 at 99.

⁷ *Supra* note 3 at Appendix A.

⁸ *Supra* note 6 at 95.

accepted by the vast majority, not only because of the reasons cited above, but also because Tāufa'āhau wished them to do so.⁹

Tāufa'āhau was the author of the first legal code and his admiration for Biblical scripture and the missionaries' teachings is evident throughout the document. Tāufa'āhau stated that he "wanted to imitate Abraham and those of whom the scriptures speak".¹⁰ He respected the Europeans for their advanced technology and their successes abroad. He did not think of them as a superior people, but rather suggested that they had gained their superior knowledge from the Bible. In a sermon recorded by missionary Robert Young, Tāufa'āhau stated:

"Is it that white men are born wise? Is it that they are naturally more capable than others? No: but they have obtained knowledge; and that knowledge has come from the Book. This is the principal cause of the difference."¹¹

Tāufa'āhau's first legal code reflected his admiration for Biblical tenets. Much of the Tongan hierarchical political structure was retained, but the influence of the Ten Commandments and Wesleyan Methodism appeared as a strong influence throughout. Tāufa'āhau drew upon Wesleyan doctrine, but the code was largely his own composition.¹² His boldest step¹³ in the 1839 Code was to limit the arbitrary power of the chiefs over the commoners¹⁴. He set up a court of magistrates which would have jurisdiction over both

⁹ *Supra* note 3 at 103.

¹⁰ From the journal of Peter Turner, December 26, 1831 cited in Lātūkefu, *supra* note 3 at 121.

¹¹ Robert Young, *The Southern World* (London: Hamilton, Adams, and Co., 1854) at 443.

¹² *Supra* note 3 at 122.

¹³ *Ibid.*

¹⁴ Sarah Farmer explained: "King George [baptised name of Tāufa'āhau] (in Vava'u) was desirous of governing his people with wisdom and with kindness. He found that great evils arose from chiefs and private persons taking the law into their own hands. He wished that impartial justice should be dealt out to the poor as well as to the rich, to the servant as well as to the master." In *Tonga and the Friendly Islands; with a sketch of their mission history* (London: Hamilton, Adams, & Co, 1865) at 264.

commoners and chiefs. Sunday was recognized as a Sabbath day to be observed. The Code also forbade local customs which were regarded as unsuitable for a Christian country.¹⁵ Overall the first code set out Tāufa'āhau's vision of Tonga as a Christian and so-called civilized country, according to the advice of the missionaries. The laws contained the essence of a criminal code, but they also upheld the supreme power of the king and regulated a Christian life.¹⁶ It is reported that the code was presented publicly to the chiefs and people for approval.¹⁷

The early Code did not specifically address the law of defamation, and it is safe to assume that the existing Tongan legal traditions as to respect and reputation persisted. These laws were not disallowed by the Code as were various other activities which the missionaries found to be unsuitable for a Christian populace. Indeed, the search for a peaceful existence along with a disapproval of speaking ill of others were two areas of thought where Wesleyan teachings and Tongan beliefs coincided. Section 4 of the 1839 Code exemplified this convergence of doctrine:

It is my mind that my people should live in great peace, no quarrelling, or backbiting, having no wish for war, but to serve the god of peace in sincerity...¹⁸

In this section the King enjoined his people not only to live in peace, but also to avoid 'backbiting'. Here the King restated the existing Tongan law of defamation using Christian terminology. Reputation and the protection of reputation were important tenets of Tongan law

¹⁵ Including laws against fornication, polygamy, and dancing

¹⁶ Niel Gunson, *Messengers of Grace: Evangelical missionaries in the South Seas 1797-1860* (Melbourne: Oxford University Press, 1978) at 288.

¹⁷ *Ibid.*

¹⁸ See 1839 *Vava'u Code* reprinted in Appendix A in Lātūkefu *supra* note 3, Appendix A.

as was discussed in the previous chapter. Observance of tapus was strictly enforced to maintain the political hierarchy, and as noted in the previous chapter, reputation was something very highly valued so that speaking ill of someone was worse than actual murder. The inclusion of backbiting along with the pleas for peace and no wish for war underlined the continuing importance of this value. The King's choice of words here is interesting and I suggest that the use of the term 'backbiting' revealed the influence of Christian teachings on the Tongan king.

The term 'backbiting' is found in the English Bible,¹⁹ and it holds a strong place in Wesleyan theology. Wesleyans defined backbiting as "evil speaking to be guarded against"²⁰ explaining that it is "not the same with lying or slandering. All a man says may be as true as the Bible; and yet the saying of it is evil."²¹ Thus the truth of a statement was irrelevant. Backbiting included making negative comments about any absent person to third parties.

Rabone, a Wesleyan missionary published a Tongan dictionary in 1845.²² He included the word *fakafekoviaki* which he translated as 'backbiting'. The very common Tongan prefix *faka* denotes likeness or causation. *Fekoviaki* is defined as "to be evil disposed to each other" or "to be at variance with each other". It may be surmised that the missionaries introduced the

¹⁹ For example, see *Proverbs* 25:23 "The north wind brings forth rain, And a backbiting tongue, an angry countenance."

²⁰ John Wesley, *Wesleyana: A complete System of Wesleyan Theology: Selected From the Writings of the Rev. John Wesley* (New York: T Mason & G Lane, 1840) at 277.

²¹ *Ibid* at 278.

²² Stephen Rabone, *Vocabulary of the Tonga Language* (Neiaff, Vava'u: Wesleyan Mission Press, 1845), online: https://archive.org/stream/avocabularytong00rabogoog/avocabularytong00rabogoog_djvu.txt.

Biblical expression of backbiting to the Tongan language combining the ubiquitous *faka* with an existing Tongan word.²³

Lātūkefu suggested that the law code represented a “deliberate effort to reconstruct Tongan society upon the new Christian beliefs and values” and “[i]t was to be based only upon those old customs and traditions which the missionaries and their chiefly converts thought suitable for the new design.”²⁴ That which did not conflict with the Christian teachings was retained. In the case of backbiting, the Wesleyan notion coincided with the Tongan rules of respect and the protection of reputations. In the small hierarchical Tongan community the making of negative comments about others had always been discouraged to ensure a peaceful society. The seed for a written law of defamation was planted in the 1839 Code. It appeared as Biblical terminology in 1839, but in later legal codes, defamation law was refined to reflect the particular Tongan society.

6.2.2 The 1850 Code of Laws²⁵

The next legal code was produced in 1850. By this time Tāufa’āhau who had been baptized as ‘King George’²⁶, was now in fact the monarch of a unified Tonga, and he reigned as King George Tupou. He had gained this position through a series of wars and rebellions to subdue and defeat the other reigning chiefs. It was not a peaceful devolution of power, and Tāufa’āhau emerged as a powerful leader.

²³ Today ‘backbiting’ would be translated as *lau’i* (talk against someone), or *lohiaki’i* (deceive or backbite).

²⁴ *Supra* note 3 at 119.

²⁵ *Ibid* at Appendix B.

²⁶ Tāufa’āhau chose King George as a Christian name in honour of the King of England.

The 1840s saw increased educational opportunities for all Tongans, as well as challenges to Tupou's rule from chiefs who saw their power diminish as Tupou consolidated his own. In light of these developments Tupou saw a need for a more comprehensive legal code.²⁷ He required laws which were amenable to the whole Kingdom²⁸ as well as a legal means to control the recalcitrant chiefs. The missionaries recognized that a legal vacuum had been created by the first code. A code of laws had been created, but without a judicial system to enforce the new laws. Reverend Lawry reported: "Formerly they were ruled by terror: the chief dealt death to whom he would with the end of his club; a man who was found refractory was quickly despatched. But, now that they are freed from the reign of terror, it would be too much to expect that such an emancipation would not be abused."²⁹

When Tupou went to the missionaries for advice as to developing a new legal code, he was directed to the highest legal authority in New Zealand, Chief Justice Sir William Martin.³⁰ In answer to the King's inquiry, Sir Martin, suggested that Tonga adopt a code similar to the *Huahine Code*³¹ which Wesleyan missionaries had produced for Tahiti. In Tahiti the missionaries had written the legal code and it had been simply forwarded to the chiefs for ratification. The

²⁷ Thomas West, *Ten Years in South-Central Polynesia* (London: James Nisbet & Co, 1865) at 212.

²⁸ The 1939 Code applied only to the northern island groups of Vava'u and Ha'apai.

²⁹ Reverend Walter Lawry, *Friendly and Feejee Islands: A Missionary visit to the various stations in the South Seas in the year 1847*, 2d ed (London: Gilpin, 1850) at 23.

³⁰ Martin was chief justice of New Zealand from 1841-1857. He is remembered for his affinity for the evangelical movement in the South Pacific and also for his deep respect for the Maori people in New Zealand. See The encyclopedia of New Zealand, online: <http://www.teara.govt.nz/en/biographies/1m21/martin-william>.

³¹ A translation of the code is included in William Ellis, *Polynesian Researches, during a residence of nearly eight years in the Society and Sandwich Islands* 2d ed. Vol. III (London: Fisher, Son & Jackson, Newgate Street, 1838) at 177.

missionaries provided a translation of this code to Tupou and his chiefs for their consideration.

However, the Tongan chiefs were by now leery of missionary interference and always vigilant to avoid annexation.³² Reverend Peter Turner reported:

“...the King and his chiefs are becoming jealous of our interfering with what they think their prerogatives. We have been recommending to them a better Code of Law, but O no, things must remain as they are and we are thought evil of for our wishing to elevate them in the scale of civilisation...”³³

After consultation with his chiefs, Tupou did not adopt the proffered code. The 1850 Code modified and enlarged the 1839 Code, but adopted only a few provisions from the *Huahine Code*, and it was reported that the Tongan code came short of what the missionaries would have liked.³⁴

The 1850 Code³⁵ continued the transformation which the earlier code had begun. The power of the chiefs was limited while the economic, religious and political status of the commoners was somewhat improved. Importantly, the powerful position of the King was firmly established. Section I of the *Code* entitled *The Law referring to the King* provided that the King was the root of all government and further, that it was his role to appoint those who should govern. Further, he commanded the assembly of chiefs, and was named as the ultimate judicial authority.

³² *Supra* note 3 at 131.

³³ Journal of Reverend Peter Turner, Vol 10, 1846 -1850 (28 November, 1849), Sydney, Mitchell Library (Call no: B 309).

³⁴ For example the missionaries did not like the idea of ‘native’ judges who “may have got into office by mere favour or rank” in extract of letter from the Rev. Peter Turner dated June 11, 1850 in (1851) 4 (VII) Wesleyan-Methodist Magazine 326.

³⁵ *Supra* note 3 at Appendix B.

As to defamation, the language of backbiting was gone in the second legal code. More formalized language protected the reputations of those in power. Section XXXIX entitled *The Law referring to persons who depreciate the character of others, and to evil-speakers* provided:

If there is anyone who shall depreciate the character and speak evil of the King, the Chiefs who govern the people, the Judges, or the Missionaries, and, when tried, are found guilty, the Judge shall order him to be punished according to the evil he has done.

This section is reminiscent of the protection of the ‘best men’ in England as discussed in the last chapter as the law only protected the King, Chiefs, Judges and Missionaries. It codified existing defamation law in Tonga to the extent that it protected those of higher rank. It reflected the recognition and respect for ascribed reputation which underpinned the hierarchical society in Tonga. It looked more like the written law from New South Wales than the previous code, and the language of the law echoed Wesleyan Biblical nomenclature.³⁶ Again, this law emerged from the juncture of Tongan law as it existed before the acceptance of the missionaries’ teachings, and the law founded on the Ten Commandments and Wesleyan sermons. It is noteworthy that the Huahine Code which the missionaries provided as a guide for the Tongan legal code contained no reference to the protection of reputation. This new section was Tongan input which reflected the importance of the protection of status in Tongan society

³⁶ See *The Sermons of John Wesley* sermon 49 entitled “The Cure of Evil-Speaking” where he discusses the evils of lying and slander (Wesley Center Online <http://wesley.nnu.edu/john-wesley/the-sermons-of-john-wesley-1872-edition/sermon-49-the-cure-of-evil-speaking/>; and (1846) 9 The Wesleyan Methodist Association Magazine 327 which seeks the motivation for slander suggesting “We cannot at all times ascertain the motive by which the slanderer is actuated; but often it is of the most base and despicable kind; sometimes, perhaps, it is to be revenged for some slight or supposed injury received; at other times they strive to depreciate the character of another, in order to exalt themselves.” (327)

which the King and chiefs wished to maintain. As Lātūkefu surmised: “...it was left to the King and his chiefs to decide what laws were most suitable for their people” and “[T]he eventual success of these laws can be attributed to the fact that it was the Tongan leaders who decided the final content of the codes they wanted.”³⁷

Within two years of the new legal code which formalized the very broad authority of Tupou, civil war arose when dissentient chiefs challenged the newly created oligarchy which had robbed them of their independence and power.³⁸ The Wesleyans alleged that the French Roman Catholic missionaries instigated the uprising by suggesting to these chiefs that the new laws meant submitting to the King of England, not to the King of Tonga.³⁹ Here was the balance that Tupou always weighed. He wanted Tonga to look like a nation of the world on equal footing with the likes of Britain, Germany and France, but on the other hand he wanted to ensure that Tonga remain Tongan. His power lay in convincing the chiefs that he was still in control. In 1852 King George declared war against the uncooperative chiefs. The King succeeded in quelling the rebellion and the French priests returned to Tahiti. This episode settled the supreme position of Tupou within Tonga, and now he turned his mind to the maintenance of Tonga’s independence, and its recognition by the major world powers.⁴⁰

³⁷ *Supra* note 3 at 132.

³⁸ See Steven Roger Fischer, *A History of the Pacific Islands* (Basingstoke, Hampshire & New York, NY, 2002) at 146; Lātūkefu, *supra* note 3 at c 8 and 9.

³⁹ *Supra* note 3 at 151.

⁴⁰ *Ibid* at 156.

6.2.3 The 1862 Code of Laws⁴¹

In the next decade the King set out to improve the legal code and achieve those goals. Although he remained strongly influenced by his adopted Christian beliefs, he began to look beyond the advice of the missionaries. At this time the missionaries lamented their diminishing realm of influence over Tongan society. There was increasing exposure to new ideas through travel, and through communication with visitors to the islands. The Wesleyan missionaries reported at the end of 1857:

“The Lord’s work has been seriously affected during the year by the influx of notions and principles familiar to those who have witnessed the incipient civilization of New Zealand and other islands similarly peopled. The circumstances attending the sudden introduction of liberty to a community of Tonguese are far from being favourable to the cultivation of the religious element.”⁴²

By the middle of the 1850s the role of the missionaries as ‘unofficial political advisors’ was challenged by European settlers in Tonga. Further, by this time most Tongans could read and write, and the missionaries no longer inspired the awe that they once did.⁴³ There was a revival of Tongan customs and entertainment which had been banned by the missionaries. The first two legal codes had prohibited these activities, and the absence of a similar provision in the 1862 Code indicated the growing gulf between the King and the missionaries, not to

⁴¹ *Ibid* at Appendix C.

⁴² Australasian Wesleyan Methodist Missionary Society, *The Third Report for the Year Ending May, 1858* (Sydney: Reading and Wellbank, 1858) at 31.

⁴³ *Supra* note 3 at 138.

mention the King's good sense of political expediency⁴⁴ in listening to the desire of the Tongan people to return to some of their former entertainments and customs.

The King explored new political and legal topics through discussions with European settlers, sea captains and British Consuls.⁴⁵ In 1853 he visited Sydney in search of strategies which would enable him to maintain the independence of Tonga.⁴⁶ Here he met and began a correspondence with Charles St. Julian, a legal journalist and Consul to the King of Hawaii. St. Julian encouraged King George to establish a constitutional government, and provided the King with a copy of the constitution of Hawaii to use as a model. St Julian advised the King that permanent independence could only be secured by the establishment of a 'good and efficient government', and provided lengthy suggestions as to how this might be accomplished.⁴⁷ He assured the King that a western-style constitution and written code of laws would win international recognition as an independent nation.⁴⁸

⁴⁴ The French missionaries who led the opposition against the King and the Wesleyans were much more lenient towards existing customs and this was attractive to those who opposed the Wesleyan strict Christian regime.

⁴⁵ There were many new sources of legal advice during this time. For example, A British sea captain advised the King to have a flag of Tonga made so that it could be saluted. The British consul in Samoa, George Pritchard, advised the King on port regulations. The King consulted with his friend Sir George Grey, Governor of New Zealand.

⁴⁶ Tracey Banivanua Mar, *Decolonisation and the Pacific: Indigenous Globalisation and the Ends of Empire* (Cambridge, UK: Cambridge University Press, 2016) at 70.

⁴⁷ St Julian to Tupou I. Hawaii State Archives. Foreign Office and External Papers. Hawaiian Officials Abroad, December 1855 (copy of letter (no 55/50) from the Commissioner to the King of the Friendly Islands dated 27th June 1855).

⁴⁸ St Julian to Tupou, 25 June 1855; St Julian to Tupou, 15 October 1855: both from Foreign Office and external Papers, Archives of Hawaii, Honolulu cited in Noel Rutherford, *Shirley Baker and the King of Tonga* (Melbourne: Oxford University Press, 1971) at 16.

Upon his return to Tonga, the King held three meetings⁴⁹ of the chiefs in order to discuss the implementation of St Julian's suggestions. No advice was sought from the older missionaries who had previously held a dominant role in developing the written law.⁵⁰ The meetings made little progress as the chiefs were unwilling to give up the privileges they still enjoyed. In 1862 the King turned to newcomer missionary Reverend Shirley Baker for advice as to how to bring his political and social reforms to the chiefs. Baker transcribed the King's ideas into legal language. The King called together the chiefs once more in 1862. The chiefs were impressed with the prepared schedule for a new and comprehensive legal code, and the code was passed.⁵¹

The 1862 Code mostly reiterated the 1850 code in new language. However, there were a few important changes. The later Code made the King subject to the law⁵², and there was a new emphasis on the duties of the chiefs rather than a statement of their privileges.⁵³ Most importantly was the so-called Emancipation Edict⁵⁴ which freed the people from the control of their chiefs. The clause provided that "all chiefs and people are...set to liberty from serfdom...and it shall not be lawful for any chief or person to seize or take by force or beg authoritatively in Tonga-fashion anything from anyone." While the emancipation edict reversed

⁴⁹ Held in 1859, 1860 and 1861.

⁵⁰ Noel Rutherford, *Shirley Baker and the King of Tonga* (Melbourne: Oxford University Press, 1971) at 16.

⁵¹ *Ibid* at 18.

⁵² Clause I.

⁵³ Clauses V and XXXIV.

⁵⁴ Clause XXXIV.

a long standing legal tradition, Clause II legislated an existing legal tradition by forbidding the sale of any land in Tonga to foreigners “for ever and ever”.⁵⁵

Tupou’s new legal code addressed his desire to establish and maintain Tonga’s independence by prohibiting the sale of land, but also he wanted Tonga to be recognized as a nation on par with the European nations. Thus, the language of the new code revealed a timbre more legal than biblical. Overall, the new laws described a more egalitarian society, embracing the rule of law and again limiting the formerly absolute power of the chiefs. The new defamation law reflected these changes: Clause XXIX addressed defamation. Entitled *The Law concerning Slander and Evil Speaking*, it provided:

If anyone shall speak evil of the King, or Ruling Chiefs, or Judges, or Missionaries, or anyone else, and it be judged and proved, he shall be fined ten dollars.

It is notable that the language of the Wesleyan sermons was gone, and the written defamation law now had a more legalistic tone. The term ‘slander’ was used rather than backbiting or depreciation of character and the reference to ‘evil-speakers’ is gone. The action must be adjudicated and proved and there was a set penalty. The law was extended to include defamatory statements against ‘anyone’ rather than only the prominent and powerful. This change indicated a new direction for Tonga, led by a worldlier King for whom the goal of Tongan independence remained paramount, but whose horizons had been expanded by travel and communication with outsiders other than the Wesleyan missionaries.

⁵⁵ *1862 Code of Laws*, Clause II provides that whoever breaks this prohibition on the sale of land “shall work as a convict all the days of his life until he die, and his progeny shall be expelled from the land”

6.2.4 Constitution of Tonga, 1875⁵⁶

In 1854 St Julian suggested to Tupou that he should establish a constitutional government in order to secure formal recognition of Tonga's independence by major powers. By the 1870s events in the region convinced Tupou that he had to undertake this suggested course in order to prevent the annexation of Tonga. European powers were increasingly involved in the region, and by 1874 Fiji had been annexed by Britain. There was a growing number of traders residing in Tonga who resented the restrictions placed on them by the Tongan government, especially the prohibition on the sale of land.⁵⁷ Traders were openly advocating the annexation of Tonga and refusing to respect the local laws and government of Tonga. In one instance, British residents in Tonga petitioned the Governor of New South Wales to complain "of the manner Europeans are treated and what they are subjected to in these islands" and requested the governor to "define a limit to the arbitrary authority of a government, which, to say the least, is and only can be semi-civilised."⁵⁸

'Semi-civilized' is an interesting choice of words here. Certainly, with the 1862 Code of Laws Tonga was considerably more 'westernized' than the other countries in the region. The traders equated their European homelands with 'civilization' and it was inconceivable to them that a Pacific islander could adopt their own style of laws and apply it to them. Herein lies the uniqueness of the developing Tongan law. It looked European, and was certainly influenced by

⁵⁶ *Supra* note 3 at Appendix D.

⁵⁷ *Supra* note 3 at 184.

⁵⁸ Robert Hanslip and eighteen others to the Earl of Belmore, February 1871, F3/2, file 1880, item 9 cited in Noel Rutherford, *Shirley Baker and the King of Tonga* (Melbourne: Oxford University Press, 1971) at 50.

European ideas, but was developed by and applied by Tongans. This differed from neighbouring Fiji for example where the Europeans applied their own laws which favoured the traders and their development of commerce, while the Fijians retained their 'custom' ways in the villages. There was a clean divide between 'civilized' and 'uncivilized' (corresponding with European and local) which allowed the traders the freedom to acquire access to land and go about their business mainly unfettered by local leaders.

Tupou was rightfully concerned with the growing discontent of the settlers, and his next step to ensure the continuing independence of Tonga was to gain international recognition of his government. The promulgation of the Constitution in 1875 was described as the "culmination of several progressive attempts by King George to achieve acceptable, Christian, civilised legislation for his country".⁵⁹

The constitution was made up of three parts—the Declaration of Rights, Form of Government and The Lands. It had the appearance of a European-style constitution which it was intended to emulate, but it was Tongan in many ways. The significance of the spiritual realm was preserved in clause 6 which declared the Sabbath to be "sacred in Tonga for ever." Land held an important place in Tonga. The constitution made it unlawful for anyone "to sell one part of a foot of the ground of the Kingdom of Tonga, but only to lease it in accordance with this Constitution."⁶⁰

⁵⁹ *Supra* note 3 at 209.

⁶⁰ Clause 109.

The person of the King was declared sacred,⁶¹ and even though he was no longer an absolute ruler,⁶² he still wielded very considerable power. All laws passed by the Legislative Assembly needed his approval before they became law. It was declared that all land in Tonga belonged to the King who could grant estates to the twenty nobles⁶³ appointed by him. Clause 7 reflected the special position of the King and his family:

It shall be lawful for all people to speak, write, and print their minds and opinions, and no law shall be enacted to forbid this for ever. There shall be freedom of speech and newspapers (Press) for ever. But this does not nullify the law relative to libel, and the law for the protection of His Majesty and the Royal Family.

The Declaration of Rights closely followed that of the Hawaiian Constitution of 1852, which St Julian had translated and presented to the King in their correspondence twenty years earlier. It appears that the Tongan protection of freedom of expression differed from the corresponding Hawaiian clause which provided:

All men may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press.⁶⁴

Sione Lātūkefu, the preeminent authority on the development of the Tongan constitution cited the 1852 Hawaiian constitution as Reverend Baker's model for the Tongan

⁶¹ Clause 44.

⁶² The 1875 Constitution created a constitutional monarchy so that the power of the King could be limited on important political matters by the disapproval of the Cabinet, Privy Council or Legislative Assembly.

⁶³ Twenty of the most powerful chiefs were appointed nobles. Many former chiefs who were not especially powerful or popular lost their standing as land holders.

⁶⁴ *Kingdom of Hawai'i Constitution of 1852*, Article 3, online: <http://www.hawaii-nation.org/constitution-1852.html>.

constitution.⁶⁵ However, it is interesting to note the changes made in the 1864 Hawaiian constitution. Kamehameha V refused to take an oath to the 1852 constitution, and he rewrote the constitution to reflect a restoration of some of the power lost to the King pursuant to the liberal constitution of 1852. The freedom of expression provision in the latter document is extended to include: “...except such laws as may be necessary for the protection of His majesty the King and the Royal Family”.⁶⁶

The point here is not whether the Tongan constitutional rights were actually based on the later Hawai’i constitutional wording, but that the Tongan king did not merely adopt the 1852 constitution as recommended by St Julian in order to present a façade of constitutionality to European countries. The development of the constitutional rights was a considered project, and represented a particular Tongan approach to rights. Here the Tongan legal traditions that protected ascribed status were maintained as a limit on the freedom of expression.

The 1875 Constitution marked the culmination of formal law making in Tonga. The respect for ascribed reputations was preserved at every step of that development. There was a continued recognition of Tongan custom or legal traditions that made Tongan society what it was. Those tapus which enforced the recognition of rank and were once enforced by beatings administered by chiefs, were now transformed as part of a formalized legal system where ascribed reputations could be protected in Tongan courts. In the particular case of Tonga, the

⁶⁵ See Sione Lātūkefu, *The Tongan Constitution: a brief history to celebrate its centenary* (Nuku’alofa: Tonga Traditions Committee, 1975) at 45.

⁶⁶ *Kingdom of Hawai’i Constitution of 1864*, Article 3.

very promulgation of a constitution reflected the makeup of Tongan society. Unlike the liberal constitutions adopted post-independence in former colonies in the south pacific region, this constitution grew out of the already existing legal traditions. It did not represent a legal system to stand apart from existing 'custom' but rather built upon already legal traditions or custom.

Although the guarantees of constitutional liberty found in the 1875 Constitution appeared to mirror western-style constitutions, there was an important difference. The liberties were not “wrested from rulers by popular demand”.⁶⁷ There had never been a demand for a constitution from the common people. Rather, the constitution was bestowed upon the Tongan people by their King. At the opening of the Parliament in 1875 when the Constitution was presented for discussion the King stated:

The form of our Government in the days past was that rule was absolute, and that my wish was law and that I chose who should belong to the Parliament and that I could please myself to create chiefs and other titles. But that, it appears to me, was a sign of darkness and now a new era has come to Tonga—an era of light—it is my wish to grant a Constitution and carry on my duties in accordance with it...⁶⁸

It is not surprising that it was at the King's initiative that a constitution was created for Tonga. The constitution represented the King's vision of Tonga as an independent nation among nations. Even as he endorsed the constitutional limits on his authority, he clearly was still very much in control. Clause 44 began with the statement: “The person of the King is

⁶⁷Sione Lātūkefu, *The Tongan Constitution: a brief history to celebrate its centenary* (Nuku'alofa: Tonga Traditions Committee, 1975) at 43.

⁶⁸ King George Tupou I's speech at the Opening of Parliament 1875, Ko E Boobooi, Vol II(6), 1875. Translated by Viela Kinahoi reproduced in HG Cummins, *Sources of Tongan History: a collection of documents extracts and contemporary opinions in Tongan political history 1616-1900* at 175, online: <http://www.buoyanteconomies.com/Tonga/>.

sacred”; and then went on to explain the limits to his power: “he governs the land, but his Ministers are responsible. All laws that have passed the Legislative Assembly must have His Majesty’s signature before they become law.” In fact the breadth of the King’s power was still very significant. Clause 47 stated: “The King is the Sovereign of all the chiefs and all the people. The kingdom is his.”

It was a Tongan constitution which was developed through existing and evolving Tongan legal traditions, as had been the previous legal codes developed by the King. The structure of the legislative assembly created by the constitution has been described as “uniquely Tongan... and unmatched anywhere else in the world.”⁶⁹ Indeed the tripartite Assembly was “a replication of [Tonga’s] social structure with each of its three pillars—His Majesty and the Royal Family, the Nobles of the Realm, and the People—electing their Representatives.” However, the constitution greatly enhanced the status of the Tongan Monarch. There was little opposition to the King’s legal developments from the Tongans except for those chiefs (and their followers) who were not included in the new category of Nobles created in the constitution.⁷⁰

Even though the constitution declared equality, the commoners continued to be subservient to the King and Nobility especially because the Nobles received their land from the King, and it was the Nobles who determined the commoners’ access to that land. Further, the power of the Nobles depended very much on the whim of the monarch who allotted them land

⁶⁹ Lopeti Senituli, “Tongan Government did Best to Facilitate Reform” January 23, 2007 Pacific Islands Report, online: <http://www.pireport.org/articles/2007/01/23/tongan-government-did-best-facilitate-reform>

⁷⁰ *Supra* note 3 at 215.

and determined who would hold power in the government. This guaranteed that their allegiance was to the King rather than to the interests of Assembly. Indeed the commoners were disproportionately underrepresented in the Legislative Assembly. The interests of the Nobles were represented by the 20 Chiefs who were appointed for life by the monarch.⁷¹ The interests of the commoners who made up the vast majority of the population were represented by twenty elected members.⁷² However, because of the underlying hierarchical society which the constitution maintained, the view of the commoners was one of “unquestioned acceptance and reverence”⁷³ given to those of higher rank.

6.2.5 1882 Libel Law

A new libel law codified in 1882⁷⁴ reflected the constitutional development, and continued to reproduce the inequalities founded in hierarchical system. Section 2 defined libel as: “Should any one speak or say or write or print anything so as to defame the good name of another or to cause the same to be held in public hatred or in contempt or ridicule.” Section 4 provided that libel was divided into two degrees. Libel of the first degree was defined as libel of “anyone who holds a high position”; and those holding a high position included: “His Majesty or any member of the Royal Family or any member of the cabinet or any Noble or Governor or any one of the Justices or any Representative of a foreign kingdom or any ordained Minister of Religion.”⁷⁵ First degree libel penalties included prison terms of two to seven years and fines

⁷¹ Clause 63(2).

⁷² Clause 63(3).

⁷³ Supra note 3 at 217.

⁷⁴ *An Act Relative to Libel*, c 20.

⁷⁵ Section 7.

from 50 to 500 dollars. Second degree libel attracted penalties of less than three months imprisonment or fines of less than twenty-five dollars. Reputation was protected, but in Tongan fashion, some reputations were worth more than others.

In an infamous case of 1883 the new libel law was utilized in order to punish a group of men who appeared to defy the rule of the King. The case revealed the power of the adopted legal process to enable the King to maintain, and ensure the recognition of his superior status, but without resort to punishment by execution. The facts leading up to the case exposed the position that the King occupied as he balanced his ascribed exalted reputation as ruler of Tonga with his desire to maintain Tonga's independence. The latter goal was achievable only by tempering his absolute rule by complying with his recently promulgated constitution.

The events leading up to the case centred on Reverend Shirley Baker. He was the Wesleyan missionary mentioned above, and the King's trusted advisor throughout most of the period from 1860 until 1890.⁷⁶ By the 1880s there were many factions in Tonga who disagreed with and disliked Baker. He was responsible for the introduction of license fees that applied almost exclusively to Europeans. The new land laws which he proposed limited the amount of land that a minor chief could hold, thus destroying any authority over the people that the minor chiefs retained. He also advocated for the transformation of the Wesleyan mission into an

⁷⁶ Baker came to Tonga as a Wesleyan missionary in 1860. He became an advisor to the King in 1862. He returned to Sydney in 1866, but returned to Tonga in 1869 and resumed his role as advisor to the King. Baker was recalled to Sydney by the Wesleyan missionary committee in 1879 but returned to Tonga in 1880 and was appointed as the King's premier, a post he held until 1890. See Noel Rutherford, *Shirley Baker and the King of Tonga* (Melbourne: Oxford University Press, 1971) or, for a less flattering portrait, see Basil Thomson, *Diversions of a Prime Minister* (Edinburgh: William Blackwood, 1894).

independent Tongan church. The discontented parties joined forces and formed an opposition party.⁷⁷ The group petitioned the King to change the laws and to limit the power of Baker. When the group did not respond to the admonishments of the King to halt their interference in parliamentary affairs, the representatives were charged with high treason and breach of agreement. However, at trial the magistrate acquitted the group leaders, unable to find any laws broken. The King instructed the magistrate to inform the participants that any further action on their part would be treated as a rebellion and they would be hanged.⁷⁸

The European traders continued to agitate for change, and in 1882 encouraged the minor chiefs to petition Queen Victoria to have Baker ordered to leave Tonga. The King felt that a rebellion was afoot, and had the petitioners arrested, but again the courts could find no law broken. The King declared that “if the law would not hang the men, they should be hanged without it.”⁷⁹ Tupou’s careful plan to adopt the rule of law and a constitution in order to avoid annexation was put into jeopardy when the King’s proposed action to execute the men came under the scrutiny of the British High Commission in the Pacific.

The peaceful independence of Tonga was saved when Baker convinced the King to accept a compromise that would prevent British intervention. The petition to Queen Victoria had included a statement which implied that the King was old and under the influence of Baker.⁸⁰ On the basis of this statement, the accused were convicted on charges of libelling the

⁷⁷ See Rutherford, *supra* note 50 at c 8.

⁷⁸ *Supra* note 50 at 114.

⁷⁹ *Ibid* at 116.

⁸⁰ The petition stated: “Your majesty will be surprised perhaps at our addressing ourselves to you, and passing by our own King Tubou. Quite true; but we see that He is advanced in years and under Mr.

King, and received five year sentences. Reliance on the libel laws which codified the legal tradition of utmost respect for ascribed reputations in Tonga allowed the court to temper the punishment which the King could inflict, but not impinge upon Tongan notions of a required respect for superiors. In reality the courtroom only lent a façade of legality to the proceedings. Before the trial, Baker provided the judge with detailed instructions as to how the accused were to be tried, and even prescribed the sentences to be imposed.⁸¹ The reputation, as well as the authority of the King was upheld. This early case illustrated how the adopted legal process could be utilized to quell threats to Tongan authority, but it remained subsidiary to Tongan legal traditions which had not been discarded.

6.2.6 Protection of Reputation in the Legal Code

In 1890 Reverend Baker, who had played such a prominent role in the development of Tonga's formalized legal system was removed from Tonga. He left the administration in some disarray as many laws and records had been only kept in English which made the new Tongan premier's job very difficult. The leading chiefs, on the advice of King Tupou requested the aid of a British administrator to assist them.⁸² Basil Thomson arrived, and within the year had produced a new code of laws. These were not new laws, but the 1891 Code represented the first comprehensive consolidated criminal and civil code. The objective of the new Code, prepared under the direction of the King, and subsequently approved by the Legislative

Baker's influence..." ("petition to Queen Victoria requesting removal of Baker" WPHC 21- location 3029889 AU MICROFILM 77-71(1) item no. 18D).

⁸¹ 1/1/'83 M. Premier of Tonga (S.W. Baker) to Iseleli Fehoko. Instructions as to conduct of the trial of the prisoners for libelling H.M. the King of Tonga. Certified copy of translation. WPHC 21 location 3029889 AU MICROFILM 77-71(1) location 18L.

⁸² *Supra* note 65 at 66.

Assembly, was to make the law accessible and understandable. Foreign expressions were to be replaced with Tongan words wherever possible, and sections were numbered and referenced.⁸³ It provides a snapshot of the law of Tonga at that time, and also is the foundation of the present legal system.

The 1888 version of the constitution was appended to the 1891 Code. By this time, some of the language as to the authority of the King had been somewhat toned down. Clause 44 reiterated that the person of the King was sacred. However, in Clause 47 the wording describing the powers of the King provided that “The King is the Sovereign of all the Chiefs and all the people. He governs the Kingdom.” In 1875 this clause, as noted above, the latter statement provided that “[t]he kingdom is his”. The 1888 wording more accurately described the role of the King in the constitutional monarchy. Even so, the ascribed position of the King remained paramount, and the wording remains similar in the present constitutional provision on the powers of the King.⁸⁴

Again the freedom of the press was limited by special provision for the King and family. Section 7 provided that no law would ever be enacted to restrict the liberty of freedom of speech and the press, “but nothing in this section shall be held to outweigh the law of slander or the laws for the protection of the King and the Royal Family.”

⁸³ *Ibid.*

⁸⁴ Section 41 of the present Constitution set out King’s powers as follows: The King is the Sovereign of all the Chiefs and all the people. The person of the King is sacred. He governs the country but his ministers are responsible. All Acts that have passed the Legislative Assembly must bear the King’s signature before they become law.

To this end, the Criminal Code provided that “Whoever shall slander or libel the King shall on conviction be imprisoned with hard labour...”⁸⁵ The Civil Code also carved out extra protection for the monarch and the superior classes⁸⁶ whereby defamation of a member of the Royal Family, Cabinet Minister, Noble, Governor, Magistrate, Representative of a Foreign State or Ordained Minister attracted much harsher penalties than a conviction for defamation against anyone else.

The 1891 Code codified existing rules of respect. Section 429 of the Municipal Regulations⁸⁷ provided that “salutes shall be paid by raising the hand” and;

1. It shall be unlawful to pass the King’s fence on horseback or in any vehicle.
2. It shall be unlawful to pass any of the nobles on horseback or in any vehicle.
3. It shall be unlawful to wear the *fa’u* (turban) or be *navu* (have the hair dressed with lime) or be *huluhulu* (without belt) or be without a *taovala* (cincture) if in native dress in the presence of any noble...

The present edition of the Tongan legal code contains the virtually the same regulations.⁸⁸ I did not witness anyone saluting a noble during the two years I spent in Tonga.⁸⁹ However, I did spend time in traffic behind members of the royal family as no one would pass their slow moving vehicle. Further, when the King or his family were present in their residence in Nuku’alofa the street in front of their home was always blocked off to traffic. As to dress, the requirement of wearing a *taovala* or *kie kie* when meeting or appearing before any superior

⁸⁵ *Offences Against the State Act, 1891 Criminal and Civil Code of the Kingdom of Tonga*, C VII, s 259.

⁸⁶ *Ibid* C XX11, s 549.

⁸⁷ c 17.

⁸⁸ *Town Regulations Act, (2012) Rev Ed* c 22.32, s 14.

⁸⁹ The Attorney General explained to me that the Nobles expressly requested that some form of respect be retained in the revised statutes.

was strictly enforced. As I mentioned in an earlier chapter, people were turned away from Magistrate's Court because they did not show the proper respect for the Court and the Magistrate by wearing *taovola* or *kie kie*. Thus, the requirement went beyond that stated in the formalized law.

The present *Defamation Act*⁹⁰ also continues to reflect the different measures of reputation in Tonga. Section 3⁹¹ sets out the penalties for the defamation of the King or any member of the royal family. Next, section 4 provides for substantially lower penalties for defaming "the character of any member of the Privy Council, Cabinet Minister, Noble, Governor, magistrate, representative of a foreign power, ordained minister of religion or representative elected ...to the Legislative Assembly."⁹² Lastly, section 5 sets out penalties for "defamation of other persons" and these penalties are half that of those provided for in section 4.⁹³

Clearly a distinct Tongan manner to protect reputation has developed over time, and has survived the adoption of a western legal process. However, at the same time, section 4 of the Constitution provides a distinctly western directive: "There shall be but one law in Tonga for chiefs and commoners for Europeans and Tongans. No laws shall be enacted for one class and

⁹⁰ *Defamation Act*, Rev Ed 2012, c 33.

⁹¹ "...liable to a fine not exceeding \$400 and in default of payment to imprisonment for any term not exceeding 2 years."

⁹² "...liable to a fine not exceeding \$200 and default of payment to imprisonment for any term not exceeding one year."

⁹³ "...liable to a fine not exceeding \$100 and in default of payment to imprisonment for any term not exceeding 6 months."

not for another class but the law shall be the same for all the people of this land.” Herein lies the paradox of the Tongan constitution.⁹⁴ From a western perspective, this section presents a paradox. Rodney Hills questioned how a constitution which appeared to be democratic, could at the same time protect a hierarchical society with deeply entrenched obligation system. He pointed to the continuing power of the monarch, and also to the “traditional system of chiefly allegiance” and the inherent difficulty of Nobles to accept direct questioning in Parliament⁹⁵ because of their superior social status. Hills comments reflected his western perspective. As such, he missed the beauty of the constitution that has and continues to have a Tongan led development.

There is no ‘equality’ in Tonga in the European legal sense of the word. The rule of law *does* apply to everyone in the sense that ranking superiors may not rob, assault and murder those beneath them in the hierarchy as they once could with impunity. In that sense everyone is equal before the law. However, there is a hierarchical structure in Tonga that is very present in the adopted legal framework. The Tongan protection of reputation continues to reflect the Tongan hierarchy, and as long as this system continued to provide an efficacious system for Tongans to live peaceably in their society, then there was no call for change.

⁹⁴ Rodney C Hills, “Tonga’s Constitution and the Changing State ” in *Regime Change and Regime maintenance in Asia and the Pacific* Discussion Paper No 4 (Canberra: Department of Political and Social Change, Research School of Pacific Studies, The Australian National University, 1991) at 7.

⁹⁵ *Supra* note 94 at 8.

6.3 Informal Legal Observance of Reputation

Outside of the formalized law, the observance of rank also remains evident in Tonga.

Josephine Latu noted in her 2010 thesis that “[a]ll Tongan customs and traditions involve significations that reinforce this hierarchical connectedness....as far as the cultural framework goes, the imperatives of the *kainga* system is maintained as a central point of reference.”⁹⁶ Latu provides illustrations to support this statement:

“...at the beginning of any formal speech, a speaker always carries out the *fakatapu*, which is a form of greeting that acknowledges all ranking persons present, from highest to lowest. In social functions such as weddings and funerals, the highest ranked *mehikitanga* (father’s sister) holds the position of the *fahu* (which her children, male or female, will also carry), and receives the best gifts and mats. In traditional group performances, the position at the centre of the front row (*vehenga*) is reserved for the dancer with the most elevated status.”⁹⁷

Latu explained that even though the system of hierarchical relations appears to be inequitable, there are “balancing mechanisms” which allow a shared access to authority.⁹⁸ Within the kin matrix of the *kainga* a member enjoys both privileged and underprivileged relationships simultaneously. Thus, whereas a man is obligated to his sister, he is privileged above his mother’s brother; or a woman may have authority over students as a teacher, but she also is obligated to her family through kinship ties.⁹⁹ In the contemporary context, it is

⁹⁶ Josephine Latu, “Political Reform and the Media in Tonga: An examination of cultural, political and media attitudes towards democratic reform in two Tongan newspapers” Masters Thesis, June 14, 2010, School of Communications, AUT University.

⁹⁷ *Ibid* at 37.

⁹⁸ *Ibid*.

⁹⁹ *Ibid*.

important that ascribed social roles provide a useful counterpoint to economic inequalities amongst community members.¹⁰⁰

Respect for rank, or *faka'apa'apa* is instilled in childhood.¹⁰¹ Children are taught respectful behaviour and this includes learning a language of respect when addressing those of higher status. Respect is also shown by remaining physically lower than higher status persons. Thus, Tongan children are inculcated to the idea of ranked social standing early on. The concept of *fatongia* also plays an important role in the children's socialization.¹⁰² This refers to the duties involved in all social relations, and children's *fatongia* to their parents and other family members continues throughout their lives.¹⁰³

Perhaps because of the concepts such as *faka'apa'apa* and *fatongia* that prescribe Tongan behaviour, there are few defamation cases heard in Magistrate's Court.¹⁰⁴ The magistrates who I spoke with shared a view that the *Defamation Act* was rarely resorted to by ordinary Tongans because transgressing the rules of respect was rare, and if there were transgressions they were dealt with within the *kainga*.¹⁰⁵ The cases brought to court most often are those where the defamatory statement impugned the morals of the plaintiff.¹⁰⁶ Often

¹⁰⁰ *Ibid* at 38.

¹⁰¹ See Helen Morton, *Becoming Tongan: An ethnography of childhood* (Honolulu: University of Hawaii Press, 1996) c. 4.

¹⁰² *Ibid* at 92.

¹⁰³ *Ibid*.

¹⁰⁴ In the nearly 100 sessions of Magistrate's Court that I attended in Fasi, Nuku'lofa in 2012 there was not one defamation case on the docket.

¹⁰⁵ Apology is an important remedy in these cases.

¹⁰⁶ For example see *Maini v Talanoa* [2015] TOSC 47; AM 17. 2015 ; *Fotu v Loketi* [2003] TOSC 23 rev'g No AM 7/2003; *Piukana v Akeripa* [1999] TOSC 8; C APP 0047 1999.

the cases are brought not so much for damages, but rather in order to have the court “clear their name”.¹⁰⁷ Clearly in the case of the commoners, the legal tradition of respect for reputations has survived in Tonga in spite of the introduction of a formal legal process, and without the protection of ‘custom’. The continuing importance of the reciprocity of obligations within the *kainga* ensures that the respect for reputations endures.

6.4 Challenges and Changes to the Protection of Reputation in Tonga

Lātūkefu has suggested that the monarchical structure set out in the Constitution may be viewed as simply an extension of the *kainga* system.¹⁰⁸ However, Latu pointed out that the balancing reciprocity found in the traditional *kainga* system was not retained when the Constitution centralized the stratification so that cultural obligations were “heavily biased towards demands at the top”.¹⁰⁹ As discussed above, Tupou I transformed the prior chieftainship into a kingship. He sought to ensure his own power as monarch, but also to quell fighting and struggle for power between chiefs.¹¹⁰ When the King appointed the Nobles, they were no longer chiefs of the people, but Nobles beholden to the monarch for their power and position.¹¹¹ Thus, the reciprocity that had once governed the *kainga* relationships between the commoners and chiefs was greatly diminished.

¹⁰⁷ See *Fotu v Loketi* [2003] TOSC 23 overturning No AM 7/2003; *Lasalosi v Hausia* [200] TongaLawRp 40, [2000] Tonga LR 415.

¹⁰⁸ *Supra* note 65 at 7.

¹⁰⁹ *Supra* note 96 at 39.

¹¹⁰ Yaniv Roznai, “Unconstitutional Constitutional Amendments: A study of the Nature and limits of Constitutional Amendment Powers” Phd Thesis, Department of Law, London School of Economics, February 2014.

¹¹¹ Epeli Hau’ofa, “Thy Kingdom Come: the Democratization of Aristocratic Tonga” (1994) 6(2) *The Contemporary Pacific* 414 at 416.

As a result, by the 1980's commoners in Tonga began to demand better representation of their interests in Parliament. Between 1930 and 1980 the population in Tonga had almost tripled. A land shortage ensued, and by the mid-1980s more than 1900 Tongans were leaving Tonga each year.¹¹² Commoners began to feel that their interests were not being adequately considered by traditional hierarchy of power. In 1981 there was a slight enlargement of the number of People's Representatives when the number of ministers appointed from outside Parliament increased from ten to twelve.¹¹³ Otherwise the calls for change were ignored, and the minority People's representatives in Parliament were powerless to effect change in the face of the power held by the Nobility and the Monarch. In 1992 the Human Rights and Democracy Movement of Tonga was formed in order to promote political and civil rights for the commoners. The protestors chose to exercise their freedom of expression as guaranteed in the Constitution in order to expose what they saw as abuses of the monarch and nobility's power over land and resources in Tonga.

Throughout the period of protest, the Government of Tonga tried to restrain the right of free speech and resorted to the *Defamation Act* in order to stifle criticism of the government.¹¹⁴ In response to criticism in the press, the government banned the importation of the *Taimi'o*

¹¹² Cathy A Small, David L Dixon, "Tonga: Migration and the Homeland" (2004) Migration Policy Institute, online: <http://www.migrationpolicy.org/article/tonga-migration-and-homeland>.

¹¹³ See IC Campbell, "Across the Threshold: Regime change and uncertainty in Tonga 2005-2007" (2008) *The Journal of Pacific History* 95 at 96.

¹¹⁴ See *R v Pohiva*, [1998] TOLawRp5; [1998] Tonga LR 95; *Edwards v Moala*, [1999] TOSC 52/ C0045 1997 (4 February 1999); *Rex v Pulu*, [1999] TOSC 30; CR 647 1998 (27 July 1999); *Rex v Simiki*, [2001] TOSC 53; CR 049 & 050 2001 (7 December 2001); *Attorney General v 'Akau'ola*, [1999] TOLawRp 15; [1999] Tonga LR 71 (14 April 1999); *Attorney General v Saulala*, [2001] TOLaw Rp 19; [2001 Tonga LR 110 (5 June 2001); *Attorney General v Po'uhila* [1999] TOLawRp 18; [1999] Tonga LR 86 (8 June 1999).

Tonga newspaper in 2003. Court challenges¹¹⁵ were successful and the bans were lifted. Later in 2003 Parliament enacted legislation¹¹⁶ in order to control media licensing, prevent the importation of foreign newspapers and dictate appropriate newspaper content. Additionally Parliament amended clause 7 of the Constitution in order to restrict the freedom of expression.¹¹⁷ A new sub-clause provided:

It shall be lawful...to enact such laws as are considered necessary or expedient in the public interest, national security, public order, morality, cultural traditions of the Kingdom, privileges of the Legislative Assembly...

Here, by invoking “cultural traditions of the Kingdom”, the Government sought to rely on the traditional inviolability of the Monarch, as well as the hierarchical political structure of the *kainga* system¹¹⁸ in order to quell criticism of the actions of the highly ranked members of the government including the Monarch. This may be characterized as a strategic use of tradition by the Government to maintain their unquestioned power.

Members of the Human Rights and Democracy Movement and editors of the affected newspapers challenged the legislation by way of judicial review. In defence of the amendment Solicitor General, Alisi Taumoepeu again appealed to a maintenance of tradition to prevent a review of government activities:

I fully respect all the foreigners who come to this country and the contribution they have made, but I don't think they can fully understand the real national pride, which is the basis of a Tongan's life. There will be a time when we will differ because they would advocate the right of the individual, whereas the Tongan way of life is not based in the

¹¹⁵ *Lali Media & Others v Prince 'Ulukalala Lavaka Ata & The Kingdom of Tonga* [2003] Tonga LR 186; *Lali Media & Others v Prince 'Ulukalala Lavaka Ata & The Kingdom of Tonga* [2003] Tonga LR 117.

¹¹⁶ *Newspaper Act 2003*, no. 18 of 2003; *Media Operators Act 2003*, no. 4 of 2003.

¹¹⁷ *Constitution of Tonga (Amendment) Act 2003*.

¹¹⁸ *Supra* note 96 at 39.

right of the individual but that of the extended family, the church and the whole country. We have a collective peoples' value, and that is where our strength is, and we do not want to give that up. Our local complaints about traditional obligations is a local affair....

The Press Freedom that is spelled out in [the existing] Clause 7 is not an absolute freedom, there are limitations, which are spelled out in the laws on defamation, National Security, protection of His Majesty the King and the Royal Family; so already there are limitations to Press Freedom in this country. This new amendment is to clarify these limitations because we are all aware that there are changes in how the media operates and we have to make the law relevant.

So there is a need for a code of conduct to be written down. It is simply setting a standard, which we had assumed was there.

The only new limitation that has been added on to the existing limitations is our cultural heritage. These were unwritten limitations because we grew up with that inherited sense of respect for traditional leaders, to seniors in the community, and to church ministers, but today's world is different and it is acceptable to be disrespectful and to be rude to people, and that is why it has to be written down.¹¹⁹

In essence the Solicitor General held that the amendment to Clause 7 merely codified the traditional law of Tonga. Taumoepeu sought to legally save or protect "cultural heritage" in a way never done before in Tonga.

In a similar vein Dr. Taufe'ulungaki prepared a report for the government wherein she argued that the freedom of speech as a human right must be subjected to the test of "*poto*" stating:

"The core values of *fe'ofa'aki* (mutual love and caring, generosity), *faka'apa'apa* (respect), *feveitokai'aki* (reciprocity, cooperation, consensus; maintenance of good relationships), *mamahi'l me'a* (loyalty commitment) *lototoo* (humility, generosity), *fetokoni'aki* (sharing, cooperation, fulfilment of mutual obligations) are embedded in the socialisation process of all Tongans as the means through which the intact circles of Tongan society and its inter-connected woven mats of relationships are protected and sustained.

¹¹⁹ Reported in (August, 2003) 18(2) Matangi Tonga Magazine <http://matangitonga.to/2003/08/30/we-don-t-believe-individual-rights-says-tongas-solicitor-general>

The sustainability of any community, be it a socio-cultural group or an ecosystem, depends on protecting and mending the broken circles of communities. When one component of this circle is weakened or broken, the whole system becomes vulnerable and at risk. Freedom of speech in Tonga must be understood within that context. It must be and is subjected to the test of *poto* that is behaving appropriately within the socio-cultural context of Tonga, and must operate within the parameters defined by Tongan core values.”¹²⁰

In a landmark decision¹²¹ the Supreme Court declared the legislation limiting freedom of press void. In response to the government’s invocation of cultural heritage and the preservation of Tonga’s “core values” the Court stated that “culture is not a relevant factor” in the interpretation of the Constitution “except of course to any extent that it formed part of the context when the Constitution was adopted in 1875.”

In other words, because custom or tradition had not been formally protected by law in Tonga, the Court did not have to consider custom as something apart from the law except to recognize that the 1875 Constitution reflected Tongan values and culture. Although the laws promulgated by the first King of Tonga had provided special protection to those of higher rank in the hierarchy, there was no constitutional provision to save or protect custom or tradition as something apart from “law”. Law evolved in Tonga as society demanded change. The special position of the monarch and nobility was not challenged, but nonetheless those of high rank could not act with impunity and without accountability to the commoners. Custom could act as a limit on the exercise of constitutional rights but only insofar as the 1875 Constitution had

¹²⁰ Extracted from affidavit Dr Taufe’ulungaki made for the Supreme Court in *Taione v Kingdom of Tonga* [2004] reproduced in Lopeti Sentiuli “Tongan Government did Best to Facilitate Reform” January 23, 2007 Pacific Islands Report. <http://www.pireport.org/articles/2007/01/23/tongan-government-did-best-facilitate-reform>.

¹²¹ *Taione v Kingdom of Tonga* [2004] TongaLawRp 78; [2005] Tonga LR 67 (15 October 2004).

expressly allowed. The exercise of constitutional rights in this case addressed an abuse of the power held by traditional leaders.

6.5 Conclusion

Respect for reputation was a tradition in Tonga long before the adoption of a British style legal system by the Tongan monarch in the nineteenth century. Respect for reputation was, and still is the underpinning of Tonga's hierarchical society. Reputations are recognized by both the formal and informal legal system. The present defamation legal regime developed as Christian and British legal norms were adapted and refined to reflect the existing Tongan legal traditions surrounding of the protection of reputation.

Within the *kainga* system in Tonga individuals are ranked by position in the family, and within the community. There is a reciprocity that is observed so that obligations and rewards flow between ranks. The *kainga* system was not replicated at the highest ranks when the King created a class of nobility from chosen chiefs. The reciprocity which once flowed between commoners and chiefs was disrupted when a new class of inherited nobility was created. The interests of the nobles became more aligned with the monarch rather than their *kainga*.

In the 1980s Tongans began to question the exercise of power by the monarch and nobility. As the population grew, resources became limited and Tongans wanted a greater say in decision making. The Tongan press exercised their constitutional right of freedom of the press in order to expose what they considered to be misdealings by the government. The government, led by the monarch, attempted to silence the criticism in the press by passing legislation to limit the activities of the press and by a constitutional amendment that sought to preserve the inviolability of the monarch based on 'cultural traditions'.

The government was unsuccessful in Court. There was no protection of custom or tradition in the Tongan constitution. The special position of the highly ranked was already recognized in Tongan law by legislative and constitutional provisions. There could be no conundrum as a result of tradition conflicting with rights as the Tongan monarch had drafted the constitution with both in mind. Constitutional rights could be exercised in order to prevent an abuse of rank. The agency of ordinary Tongans to call for legal change had not been lost through a protection of tradition or custom.

Conclusion

The marginalization of the local law or legal traditions in former colonies as unchanging custom reflects an overall change of perspective wrought by colonialism. Once outward looking communities were relegated to lives truncated physically and socially by colonial administrations which designated local communities as traditional and unchanging in contrast to modern, dynamic European communities. Colonialism literally shrank the social, political and economic and legal lives of indigenous populations. The South Pacific region was no exception. The majority of the legal systems of the small island countries in the region are characterized by a dichotomy that places local law—renamed as custom or customary law by colonial powers—at a position subsidiary to imported state legal systems.

The creation of the binary of law and custom is a colonial legacy. Imperial powers turned their minds to the South Pacific region in the late nineteenth century. By that time uprisings in the colonies of India, New Zealand, Jamaica and Ireland had convinced the British that their so-called civilizing mission of colonialism was not working. It was surmised that primitive societies were not ready for modern law, and further that the attempts to introduce modern change to customary law led to societal breakdown and rebellion.

Thus, by the time colonization arrived in the South Pacific Islands, a functional characterization of custom prevailed. Custom was characterized as a legal order arising from, and entangled in the social order that could not withstand change. In contrast, European lawmaking was described as a rational activity that reflected progressive change in society. This dichotomous rendering of law in the colonies reflected the new overall approach to colonial domination. The colonial project as a so-called civilizing mission was replaced with a new

mandate that sought to preserve existing native culture as it was, or as it was perceived to be by colonizers.

Indirect rule established a model whereby local societies were designated 'traditional' in contrast to European 'modern' society. Members of the traditional society were no longer permitted to decide the direction of societal change. In fact, the aim of indirect rule was to isolate the local populations from participation in the exploitation of local resources except to supply labour. Indirect rule kept the local populations in the villages removed from broader decision making as well as from technological innovations and educational opportunities, all of which may have threatened the colonial presence.

The dichotomy of unchanging traditional society in contrast to a dynamic modern society in the South Pacific region was a colonial invention. Prior to the colonial foray into the region, the South Pacific islanders traveled to, and traded broadly between the island groupings. Political, material and cultural ideas moved from one island group to another. It was the indirect rule of colonialism that branded island culture as unchanging custom, altering the view of islanders from one of an outward embrace of new ideas to one of isolated traditional villages protecting a traditional way of life, thereby effectively robbing colonized peoples the agency to decide how they might adopt change.

The position of law as unchanging tradition was particularly impacted by the constructed colonial binary. Local legal systems became European legal systems' 'other'. Imported European law was portrayed as modern and dynamic in contrast to the longstanding immemorial traditions of existing local law. By the time of Constitutional independence in the

small Pacific Island countries, this view had become institutionalized whereby local law was relegated to the now inward-looking local populations living in the rural villages while imported European legal systems were the modern law of the outward looking urban areas.

When the Pacific island countries gained Constitutional independence in the latter half of the twentieth century there was a celebration of the local culture that had been so long denigrated by colonial occupation. As a result, constitutional provisions were drafted in order to preserve and protect custom and tradition. The very idea that custom and tradition required protection from modern law continued to reflect the colonial binary of law and custom. Whereas independence should have implied the re-emergence of local lawmaking, the colonial binary of law and custom served to continue to curtail the development of local law, as well as preserve local law's subsidiary position relative to adopted legal systems.

When legal provisions were adopted in order to protect custom as part of post-independence liberal constitutions, a constitutional conundrum was created. The legal protection of custom as an entity separated and different from law directed the consideration of law and custom by the courts. Thus, when custom clashed with the exercise of individual rights, also enshrined in the constitution, the courts had to make a choice between the two. The binary created by colonialism became the legal framework for the courts' decision-making. Even though legal challenges revealed that custom lifestyles were impacted by social, political and economic changes, custom could not be legally altered to reflect these changes without losing its essence as unchanging custom.

Presently, the particular configuration of legal pluralism described in former colonies continues to reflect the colonial binary of law and custom. Legal pluralism describes a number of normative orders that may co-exist with a positive or official legal system including religious/cultural, economic, functional, community/cultural and customary/cultural. It is noteworthy that only the latter order which is characteristic of the post-colonial legal system is described by what it is not. It is described as connoting a non-western orientation. Thus, the protection of custom in the constitution connotes something different than the protection of the laws of a religious, community or cultural group. While these groups may choose to adopt certain western legal principles without losing their status as a distinctive legal order, a customary normative order cannot do so. Custom is considered as more than a normative order, but rather as a way of life, specifically a non-western way of life.

The protection of local law as 'custom' echoes the rationale that led to a system of colonial indirect rule. The implication is that local non-western law is so embedded in culture that change is impossible without the loss of that particular culture. The Kingdom of Tonga avoided indirect rule and therefore presented an opportunity to examine a South Pacific island legal system that developed in the absence of the colonial dichotomy of custom and law. Legal change in Tonga occurred, and continues to occur outside of a binary of modern and traditional. In Tonga adopted modern law has been made more local (or traditional), and local law has been modernized. However, it has all been adopted as Tongan law. The result has been a legal system where local law is not considered subsidiary to imported law, and where local law has not been frozen in opposition to the adoption of imported legal principles. The

disagreements and human decisions which happen locally and lead to change of legal norms were not silenced as they were in those island countries which experienced indirect rule.

Rather than a dichotomous consideration law and custom in Tonga, this project considers the traditionality of law in all legal systems. This approach avoids the colonial binary which stole the dynamism of local law, and focuses directly on legal change over time. The very nature of tradition is to change over generations as stories are retold and reinterpreted, and the story of Tonga's encounter with western legal traditions has spanned nearly 150 years and six monarchs. Further, treating law as tradition assigns temporality to law and this serves to illuminate the value of the pastness in all law. The value of pastness is always weighed against the value of legal change, because there is value in the continuation of doing things like our grandmothers did if it still works.

If all law is considered as legal tradition, then both local and imported law are considered amenable to change. In either system that change may occur when existing law is no longer considered efficacious and is changed or discarded, or when new law presents better legal solutions to existing or new legal issues. All law must start from a base of traditions on which to build new law because each generation clearly does not start with a clean slate on which to devise a legal system. Therefore the embrace of new legal traditions which begins from a local perspective does not signal the end of tradition because there must always be some continuation, or remnant of former traditions in the new.

Although Tonga avoided annexation and indirect rule, it was not unaffected by the Imperial project. In an attempt to avoid annexation the ruling monarch sought to make Tonga a

‘civilized nation’ in the eyes of the colonial powers in the region. He imported a British-style legal system with a written constitution. He drafted law codes and installed a court system with judges and juries. He installed a constitutional monarchy that not only reflected his desire to emulate the colonial powers in order to deflect their imperial intentions, but also strengthened and centralized his own power. All in all it was a Tongan embrace of a western legal system. However, Tongan local legal culture was not lost. Rather, the imported legal system was reinterpreted in order to function as effective law in a Tongan context.

Two legal traditions are considered in this project. The starting point is the treatment of these particular substantive traditions in different legal systems, rather than a start from a consideration of broad cultural difference founded in so-called traditional and modern legal systems. The former approach avoids the custom/law dichotomy which inhibits a consideration of change in custom or local law. Similar normative concepts may be present in many cultural settings and my approach presumes cultural difference which dictates the direction of legal change or development, rather than antithetical legal systems which must be kept separate and different in order to preserve cultural integrity. Indeed the legal traditions considered are broadly human normative concepts present in all human societies. It is the treatment of the legal concepts by local society that renders them ‘local’.

The two legal traditions selected for this study serve to illustrate the ways in which local legal traditions may be retained in the face of an adopted legal system. In Tonga it was not necessary to take deliberate action taken to save local law. Rather, legal traditions that retained their efficacy in the face of change were retained. Legal traditions are not simply expressions of a local culture, but play a social role. As society changes, the role of a legal

tradition may be impacted by change. When the Tongan monarch decided to adopt a British style legal system in the late nineteenth century the local law was not lost but continued to reflect Tongan culture albeit in a changed legal setting.

Apology and forgiveness, a Tongan legal tradition which was not part of the imported legal system, was retained because it continued to perform an important legal function. In fact, apology and forgiveness continues to make the adopted legal system relevant to Tongan society. The dual concept of apology and forgiveness is anchored in Tonga's hierarchical society. Historically the chiefs exerted absolute control over the commoners. The treatment of the commoners was regulated somewhat by the system of reciprocity whereby the chiefs were dependent upon the commoners who were required to work the land and provide an army. More importantly the behaviour and the exercise of power by the chiefs was regulated by their fear of retribution from the gods. Any misfortune was attributed to the anger of the gods, and the chiefs sought to appease the gods through ceremonial offerings and sacrifices. The more serious the transgression, the greater the sacrifice was required in order to restore harmonious relations with the gods.

Early visitors to Tonga recorded similar apology ceremonies enacted between warring chiefs. The apology ceremonies were necessary in order to put an end to cycles of conflict and revenge. The ceremony required the apologizing chief to humble himself, acknowledge his transgression and ask for forgiveness. Harmonious relations in the community were restored as the transgression of the shared moral code was acknowledged and the positions of the chiefs was equalized again as the wrongdoer humbled himself before the wronged chief and showed his remorse through the apology and gift offerings.

The concept of apology and forgiveness is not strictly a Tongan concept. Apologies constitute civil norms operating in all societies, even if not part of the formal legal system. What one apologizes for, and to whom one owes an apology is dictated by the prevailing norms of that society. An apology can redeem an offender in the eyes of the moral community if the offender acknowledges the breach of the moral benchmark with no excuses. Real apologies with remorse carry an implication that the behaviour will not be repeated. It is essentially a plea to be readmitted back into the moral community with a promise that the offender is worthy of readmission into that community. An apology allows the community an opportunity to forgive the offender. Once true forgiveness is offered, the implication is that the offender is once again part of the community, and harmonious relations are resumed.

Apologies carry more weight in those communities where the community is valued over the individual. In the western-style legal setting the protection of individual rights reflects the premise that individuals will choose what is best for themselves. In a hierarchical community such as Tonga it is important for individuals to be recognized again as belonging to the greater community. In Tonga forgiveness goes beyond a renewed accord between two individuals as it acts as a reinforcement of the normative code of the collective.

When the western-style legal system was adopted in Tonga forgiveness and apology were not part of that system. However, the concept was not lost in Tonga even without a provision to protect custom or tradition. Apology and forgiveness continued as an important informal legal concept because it continued to be important to the maintenance of the Tongan hierarchical society. In effect, apology and forgiveness tailored the application of western legal concepts in order to make the remedial outcomes locally acceptable. Tonga adopted a western-

style legal system as well as Christianity, but this did not translate into a westernization of Tongan society. Rather, Tongan made these concepts their own.

Formal apology ceremonies are no longer commonly used in Tonga, but the concept remains of utmost importance to the maintenance of communal harmony within the social hierarchy. Any transgression committed against an individual is considered a violation between the families involved. Therefore apology and forgiveness prevails as a remedy that addresses relational damages, a remedy not found in the adopted legal system. Apologies are made by the family of the offender to family of the victim often through the dialogue of the elders. Gifts are offered to the family of the victim in atonement for the offence, echoing the sacrifices of the chiefs to the gods.

Apology and forgiveness constitute informal legal traditions that operate outside of the adopted western legal tradition. Even minor offenses or insults that would not constitute offenses in the formal legal system must be addressed by an apology in order to restore harmony between families. An individual may be expected to apologize in cases where serious losses have occurred even in the absence of formal legal liability. In these cases the performance of a traditional apology provides a forum for families and villages to come together in order to consider the roles played in the incident, to offer an explanation of the incident and to express apologies.

Where the wrongdoing at issue also constitutes a legal wrong the role of traditional apologies is not subsidiary to the formal legal system. Rather, it acts as a stand-alone remedy which addresses those damages not addressed by the adopted formal legal system. In

Magistrate's Court, the lowest court of record, the Magistrate routinely inquires whether an apology had been made and accepted. In this Court the social aspects of offences are often alluded to as the magistrates establish the social relationships of the parties in their determination of the seriousness of the offence. This reflects the Tongan moral framing of the offence which renders the application of the adopted western legal process a Tongan process. That is, it is in the asking about relationships between the parties and ordering apologies that renders western legal traditions appropriate Tongan law.

In the higher courts the influence of the adopted western legal traditions is more obvious with adopted formal court procedures adhered to. However, the courts consider the process of apology and forgiveness which has occurred outside of the courtroom. It is a separate remedy that addresses relational damage and as such is not considered an alternative to the formal legal process. Tongan families will go to great lengths to ensure that they remain viable members of the greater community. The courts may consider a traditional apology as a mitigating circumstance. However, in the Tongan context apologies are not given in order to garner the sympathy of the court. Whereas court ordered remedies address material or physical loss, or act to protect the public or punish the offender, apology and forgiveness is undertaken in order to restore relationships.

Thus, although never 'saved' by constitutional provisions, apology and forgiveness has prevailed as a legal remedy that addresses damages that are not addressed by the adopted legal system. It is a tradition that continues to be efficacious in the restoration of family and village relationships which are so important in Tonga's hierarchical society. However, in those

cases where the tradition is no longer considered to be an efficacious legal remedy it may be discarded precisely it was never saved or protected.

There are limits to apologies. When an apology is not accepted and forgiveness is not forthcoming inter family tensions continue and harmony is not restored. In fact, it must be remembered that harmonious relations are the societal goal of Tonga, not a reality always achieved. Recently a formal legal limit has been placed on traditional apologies in the cases of domestic violence. In these cases traditional apologies with the goal of the reconciliation of families has been displaced by women choosing to exercise their constitutional right to safety and freedom from violence. Tonga instituted a 'no drop' policy in order to address the increasing rates of domestic violence. Whereas a reconciliation could be achieved between families as a result of an apology, it did not appear to ensure the right of individual women to safety. There was a clear acknowledgement by lawmakers that traditional apologies were no longer adequate remedies for domestic violence.

The call for change came from Tongan groups representing the rights of women. There was no constitutional conundrum between the exercise of rights and custom because custom or tradition had not been protected. It was not Tongan culture that was being called into question, but rather the efficacy of the legal tradition of apology and forgiveness in the cases of domestic violence. In this instance Tongans agreed that the safety and protection of women was of greater importance than the appearance of relational harmony in the social hierarchy. The social hierarchy was maintained, but the right of women to be safe within that hierarchy was legally recognized. In Tonga legal change is not characterized as westernization because

legal change has always occurred and the embrace of change, be it Western or otherwise, has been Tongan-led.

The other legal tradition considered is that of the protection of reputation. Unlike the concept of apology and forgiveness, the idea of a legally protectable value in reputation was common to the Tongan and the adopted legal system. The adopted legal system introduced a formal western-style defamation regime, but it was reconfigured through a Tongan legal lens.

The protection of reputation is a human concept essential in all social systems. It allows the growth of a community beyond the small village as leaders may be known, respected or obeyed on the basis of their reputation rather than by direct observation. Thus, there is social value in a good reputation and legal traditions have developed in order to protect that value. Legal traditions are directed to the control of the community assessment of reputation. Legal traditions adopted to protect reputation are culturally specific because their development reflects how and why reputations are valued in a particular society.

Generally reputation may be conceptualized as property, honour or dignity and the predominance of one concept over the other reflects local social and political influences. The value of reputation appears to be somewhat of a fluid concept. This point is well illustrated by a consideration of protected reputations in Britain centuries before the colonial foray into the Pacific. In thirteenth century Britain the goal of defamation law was to protect ascribed reputations. Defamatory statements against the King or nobility was treated as threats to internal order, as the existing feudal order depended on the maintenance of, and respect for ascribed reputations. After the collapse of the feudal order defamation law continued to

protect the honour of ascribed reputations and the Crown. The legal tradition served to maintain the existing political order and the continued subordination of the population to the Crown. There was no pecuniary valuation of reputation in such a hierarchical society. There was only honour or dishonour, and defamation law was a peaceful means to restore lost honour.

With the rise of the marketplace in the eighteenth century the value of reputations could be earned rather than only ascribed at birth. Damage to reputations could be assessed monetarily, and this new notion of reputation altered the legal protection of reputations. Not only were the reputations of different individuals protected, but what constituted an injury to reputation and the manner of the assessment of damages were both reconsidered. Whereas the value of ascribed reputations was found in the maintenance of a social hierarchy, the value of earned reputations is found in the marketplace.

There is also a broader connotation of the value of reputation that goes beyond the consideration of the hierarchical society or marketplace. It speaks to the value of reputation as dignity, or the respect that accompanies full membership in society. Every society has its own rules of civility that not only delineate who is bound by those rules, but also what constitutes an affront to civility. Thus the legal tradition which protects the value of dignity is protecting those values and norms which are considered important in order to qualify for membership in that community. In this way, legal traditions which are adopted to protect the value of reputation are socially specific.

The defamation legal regime that was adopted by Tonga in the nineteenth century looked much like the British defamation law of the feudal era. However, this was not a

westernization of Tonga, but reflected Tonga's hierarchical society and the fact that reputation was already valued in Tonga. Early visitors to Tonga commented on the stringent rules of respect which surrounded the high chiefs. The rules of respect were enforced on pain of death, and the legal traditions of respect were reinforced by kava ceremonies where the seating placement, presentation of gifts and the preparation and drinking of kava were ordered according to an individuals' status in the social hierarchy.

The smooth running of the hierarchical society depended on a recognition and respect for rank. The ranking and taboos surrounding superior ranks of chiefs was mirrored in families where fathers garnered special respect from children. Even though there does not appear to have been legal traditions that provided for punishment for defamatory statements, the legal traditions were found in the ritualized observation of reputation. As in Britain, there was a legally protectable value in a good reputation.

The Tongan protection of reputation was not lost when a western style legal system was adopted. The legal tradition was retained but was formalized in the adopted legal system. The legal codes were not imposed upon Tongan society but were drafted from a Tongan perspective by the Tongan monarch and his chiefs. The existing hierarchical social and political structure was rooted in protecting the ascribed value of reputation, and this position was strengthened rather than diminished by the adoption of formalized rules and system of enforcement.

The drafting of the first code of laws in 1839 was strongly influenced by the Monarch's conversion to Christianity, and the general embrace of Christianity by the Tongan peoples. The

Code limited the power of the chiefs over the commoners for the first time, but the protection of the value of reputation was not lost. In fact, the Wesleyan doctrine against speaking ill against others dovetailed with the valued position of reputation in Tonga so that an admonishment against backbiting was included in the same Section that called for peace.

By the time the Code of 1850 was adopted the Monarch was ruling over one unified kingdom for the first time. The power of the chiefs had been further limited but the King created a new hierarchical system with himself firmly in charge. The new formalized legal Code recognized the protection of the new ascribed reputations providing punishment for those who defamed the King, governing Chiefs, Judges or Missionaries. The next Code of 1862 reflected the King's vision of a more egalitarian Tonga. The new defamation provision protected all Tongans from defamatory statements.

Although the 1862 Code released the commoners from the authoritarian control of their chiefs the hierarchical system remained in place as it has to the present. The 1875 Constitution declared the King sacred, and the provision for the freedom of speech and press was limited by special protection for the Monarch and royal family. Legislation aimed specifically at libel was first introduced in 1891 and the penalties for defaming a member of the Royal Family, Cabinet Minister, Noble, Governor, Magistrate, Representative of a Foreign State or Ordained Minister attracted harsher penalties than for the defamation of anyone else. Existing rules of respect such as the required manner of dress required to appear before nobility were also codified at this time. These regulations remain in force at the present time. Further, the current *Defamation Act* continues to provide for different levels of penalties for libel at different levels

of the social hierarchy. The hierarchical society has not been westernized by the adoption of a western-style legal process. Rather, the laws were tailored over time to reflect Tongan society.

In the latter part of the twentieth century some Tongans began to question the broad political power of the Monarch and Nobility and sought to increase commoners' representation in Parliament. For the first time Tongan newspapers criticized the actions of the government, as well as the Monarch and nobles themselves. The government sought to rely upon the expected traditional, unquestioning loyalty to the monarchy and to those higher in the hierarchy in order to quell the exercise of the constitutional right of the freedom of the press. However, the government was unsuccessful in Court because the special provisions which protected the ascribed reputations of the Monarch and his family could not extend to the Monarch's role in government, and the press was free to investigate and expose the actions of the government to the people of Tonga.

In 2003 the government passed legislation in order to silence the media and went so far as to amend the Constitution so that the freedom of expression might be limited by "cultural traditions of the Kingdom". However, none of the new provisions survived a legal challenge. As was the case for apology and forgiveness discussed above, there could be no constitutional conundrum because custom or tradition were not protected at the time the Constitution was promulgated. The old tradition of unquestioning loyalty to the Monarch was not part of modern Tongan law. The Monarch certainly held a special position that garnered respect, but in his role as head of Parliament he was answerable to the people of Tonga.

In the Tongan hierarchical society there is an acceptance of broad power wielded by those in positions of power. However, it is likely that there were always limits to the abuse of that power. In the modern context, the bill of rights included in the Tongan Constitution plays this role. In this case the media exposed various government schemes where it appeared that the Monarch and the nobles were personally benefitting from the sale of Tongan passports to foreigners, and from the sale of air space over Tonga for the positioning of satellites. These were modern problems which tax-paying Tongans needed to be made aware of.

Legal traditions do not stand still. Had custom been protected then it would have been a difficult legal problem to install a no-drop policy which negated the effects of a traditional apology in the cases of domestic violence, or to exercise the freedom of expression which served to impugn the protected ascribed reputation of the monarch. Legal traditions change because they are no longer considered efficacious. In both of the cases examined by this project the exercise of constitutional rights confronted abuses of the existing legal traditions. In the case of domestic abuse apologies only worked to restore harmony between families, but these were not genuine apologies as the abuse was repeated, and the women were left unprotected. In the case of the protection of reputation, the Monarch and nobility used their positions in new ways in order to benefit themselves. The reciprocity that once underpinned the hierarchy and which allowed chiefs to retain their special positions was lost.

Because existing legal traditions were not protected Tongans retained the legal agency to demand change to legal traditions in order to respond to social and political change. Legal traditions which were no longer effective could be changed without an implication of westernization precisely because existing legal traditions were never considered as alternatives

to western law. Further, it must be recognized that the call for change came from Tongans, and even if the notion of individual rights is an adopted concept, it is a Tongan concept when Tongans decide to exercise those rights.

The study of legal traditions in Tonga, outside of the colonial binary of custom and law reveals three important points. First, the Tongan Monarch did not consider existing legal traditions as something conceptually different from the imported legal traditions. The adoption of western style legal traditions continued a tradition of an outward looking society that embraced new ideas that would benefit local peoples. Legal change was initiated by Tongans, and it is incorrect to presume that the adoption of new ideas, legal or otherwise, always implies some sort of capitulation by local peoples. The Imperial project presented the Tongan Monarch with difficult choices but legal change was accomplished in a manner that best suited Tongans at that time. Legal change has continued to reflect the development of laws rooted in Tongan traditions and amenable to change initiated by Tongans.

Second, local legal traditions were not lost to westernization. There was no need to protect existing local legal traditions because in fact local legal traditions were retained as long as they were efficacious either as part of the formal or informal legal system. The traditionality of law made change inevitable as traditions changed over time ensuring that they remained relevant to a changing society, and the demands for change that arose locally. The protection of law as custom diminishes local legal traditions making local law subsidiary to imported legal traditions. It is the bifurcation of law and custom that characterizes custom as something other than law and in need of protection. Local law does not need protection, but should be treated as a starting point for legal change and development.

Third, in the absence of protection, the dynamism of local legal traditions was not lost. The roots of local legal traditions founded in myth and remembered in ceremony were maintained as the starting point for change which occurred at the behest of Tongans. Rather than being lost to imported legal traditions, local legal traditions were maintained and the maintenance of local traditions continued to provide a platform for change. Local legal traditions were not replaced by imported legal traditions, but rather were retained to make the imported law acceptable to Tongan society.

Tonga is considered the most 'traditional' of the South Pacific Island small island societies, and Tongan scholar Sione Lātūkefu has responded that this statement does not mean that Tongan society and culture has not changed, but rather that it has changed in its own distinctive way. This change has been possible because Tonga avoided annexation and indirect rule. Tradition was not frozen in a pre-contact mode, but evolved in response to change and the adoption of new ideas as it had always done.

A consideration of legal traditions in the post-colonies as something different from law preserves the colonial binary of law and custom. Custom becomes what law is not, and this characterization of custom limits local agency to affect legal change. Legal traditions must be considered as substantive human concepts which acquire their legal difference from their social and cultural context, not because they are either law or custom. This new starting point allows culturally relevant legal change to occur. Custom is not immemorially frozen so that a move away from 'custom' as it existed at the time of colonial occupation is framed as westernization and a loss of local culture. There is no denying that colonialism under indirect rule or otherwise forced the direction of legal change. I suggest that moving away from the binary of custom and

law is a move to lessen that force. Local legal traditions grounded in local culture are important and they can retain their relevance in the face of inevitable social change only if they remain responsive to local demands for legal change.

The protection of custom or tradition may make sense in post settler colonialism. In this scenario settlers' legal principles may overtake existing local legal traditions as is often the case. However, where legal traditions are reclaimed and reinstated, protection cannot mean the preservation of so-called immemorial traditions. Legal traditions grounded in myths and stories should be the starting point for the development of effective local and contemporary legal traditions. Legal traditions that do not maintain a natural dynamism are lost as they lose their efficacy in the face of social change. However, when change occurs in a culturally relevant way a legal tradition that retains its efficacy is never lost.

Bibliography

Secondary Materials: Articles

Ammar, Douglas. "Forgiveness and the Law: A redemptive Opportunity" (2000) 27 Fordham Urb LJ 1583.

Anderson, David A. "Rethinking Defamation" (2006) 48(4) Arizona Law Review 1047 at 1047.

Ardia, David S. "Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law" (2010) 45 Harv CR-CLL Rev 261.

Bellah, Robert. "The Meaning of Reputation in American Society" (1986) 74 Cal L Rev 743.

Bleakley, Clare. "Women of the New Millennium: Tonga Women Determine Their Development Direction" (2002) 14(1) The Contemporary Pacific 134.

Blocher, Joseph. "Reputation as Property in Virtual Economies" (2009) 118 Yale L J Pocket Part 120 at 122.

Bott, Elizabeth. "The kava ceremonial as a dream structure" in Mary Douglas, ed, *Constructive Drinking: Perspectives on Drink from Anthropology* (Cambridge: University of Cambridge, 1987).

Campbell, IC. "Across the Threshold: Regime change and uncertainty in Tonga 2005-2007" (2008) The Journal of Pacific History 95.

Carrier, James. "Occidentalism: the world turned upside down" (1992) 19(2) American Ethnologist 195.

Cohen, Jonathon. "Advising Clients to Apologize" (1999) 72 S Cal L Rev 1009.

Corrin Care, Jennifer. "Negotiating the Constitutional Conundrum: Balancing cultural identity with principles of gender equality in post-colonial South Pacific societies" (2006) 5 Indigenous LJ 51.

Corrin, Jennifer. "A Constitutional Conundrum: Reconciling Human Rights and Customary Laws in the South Pacific" (12 March 2014) 21st Pacific Judicial Conference.

Cowling, Wendy E. "Restraint, Constraint and Feeling: Exploring some Tongan expressions of emotion" in Ian Campbell & Eve Coxon, eds, *Polynesian Paradox: Essays in honour of Professor 'I Futa Helu* (Suva: Institute of Pacific Studies, University of the South Pacific, 2005) 139.

Del Mar, Maksymilian. "Clio Unbound: Theories of Law between discourse and tradition", online: (2008) <http://ssrn.com/abstract=1305582>

Dupret, Baudouin. "Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, critiques, and praxiological re-specification" (2007) 1 (1) *European Journal of Legal Studies* 1 at 13.

Durutalo, Simone. "Anthropology and Authoritarianism" in Lenora Foerstel & Angela Gilliam, eds, *Confronting the Margaret Mead Legacy: Scholarship, Empire, and the South Pacific* (Philadelphia: Temple University Press, 1992) 205.

Fairbairn-Dunlop, Peggy & Denise Lievore. Pacific Prevention of Domestic violence Programme: Tonga Report (2007) Prepared for New Zealand Police, online: <http://www.ppdvp.org.nz/wp-content/media/2009/03/PPDVP-Tonga-Final-Report-14-June-2007.pdf>

Fairbairn-Dunlop, Peggy. "Pacific Prevention of Domestic Violence Programme: Vanuatu report" (2009) online: <http://www.ppdvp.org.nz/wp-content/media/2010/01/PPDVP-Vanuatu-Final-Report-5-Nov-20093.pdf>

Farran, Sue. "Is Legal Pluralism an Obstacle to Human Rights? Considerations from the South Pacific" (2006) 38(52) *J Legal Pluralism* 77.

Fehr, Ryan & Michele J Gelfand. "When apologies work: How matching apology components to victims' self-construals facilitates forgiveness" (2010) 113(1) *Organizational Behavior and Human Processes* 37.

Fehr, Ernst & Bettina Rockenbach. "Detrimental effects of Sanctions on Human Altruism" (2003) 422 *Nature* 137.

Filihi, Meredith. "Rituals of Sacrifice in Early Post-European Contact Tonga and Tahiti" (1999) 34(1) *The Journal of Pacific History* 5.

Forman, Charles W. "Theological education in the South Pacific Islands: a quiet revolution" (1969) 25 *Journal de la Societe des oceanistes* 151.

France, Peter. "The founding of an orthodoxy: Sir Arthur Gordon and the doctrine of the Fijian way of life" (1968) 77(1) *Journal of the Polynesian Society* 6.

Francis, Steve. "People and Place in Tonga: The social construction of *Fonua* in Oceania" in Thomas Anton Reuter, ed, *Sharing the Earth, Dividing the Land and Territory in the Austronesian world* (Canberra: ANU Press, 2006) 345.

Forster, Christine. "Ending Domestic violence in pacific Island Countries: The critical role of law" (2011) 12(2) Asian Pac L & Pol'y J 123.

Fuller, Lon. "Human Interaction and the Law" (1969) 14 American Journal of Jurisprudence 14.

Gibbons, Thomas. "Defamation Reconsidered" (1996) 16(4) Oxford J Legal Stud 587.

Glenn, H Patrick. "Doin' the Transsystemic: Legal Systems and Legal Traditions" (2005) 50 McGill 863.

Griffiths, John. "What is Legal Pluralism" (1986) 24 J Legal Pluralism 1 at 8.

Halpin, Andrew. "Glenn's *Legal Traditions of the World*: Some Broader Philosophical Issues" in Nicholas HD Foster, ed, "A Fresh Start for Comparative Legal Studies? A Collective Review of Patrick Glenn's *Legal Traditions of the World*, 2nd Edition" (2006) 1 Journal of Comparative Law 116.

Hau'ofa, Epeli. "Our Sea of Islands" (1994) 6(1) The Contemporary Pacific 147.

Hau'ofa, Epeli. "Thy Kingdom Come: the Democratization of Aristocratic Tonga" (1994)6(2) The Contemporary Pacific 414.

Havea, Jione. "From Reconciliation to Adoption: A *talanoa* from Oceania" in Robert Schreiter & Knud Jorgensen, eds, *Mission as Ministry of Reconciliation* (Oxford: Regnum books International, 2013) 294.

Helu, Futa. "Democracy Bug Bites Tonga" in Ron Crocombe, Uentabo Neemis, Asesela Ravuvu & Werner Von Busch, eds, *Culture and Democracy in the South Pacific* (Suva: University of the South Pacific, 1992) 139.

Heymann, Laura A. "The Law of Reputation and the Interest of the Audience" 52 BCL Rev 1341.

Hills, Rodney C. "Tonga's Constitution and the Changing State" in *Regime Change and Regime maintenance in Asia and the Pacific* Discussion Paper No 4 (Canberra: Department of Political and Social Change, Research School of Pacific Studies, The Australian National University, 1991).

Hook, Joshua N, Everett L Worthington Jr & Shawn O Utsey. "Collectivism, Forgiveness, and Social Harmony" (2009) 37(6) The Counselling Psychologist 821.

Hughes, Bob & Peter MacFarlane. "The Application of Custom in South Pacific Contract Law and as a Basis for an Estoppel" (2004) 20(1) Journal of Contract Law 35.

Jansen, Henrica, Seu'ula Johansson-Fua, Betty Hafoka-Blake & Gabiella Renee 'Ilolahia. *National Study on Domestic violence against Women in Tonga 2009* (AusAid, 2012) online: <http://countryoffice.unfpa.org/pacific/drive/tonga-vaw-report-final-2012.pdf>

Jessep, Owen. "The Constitutional Dimension of Customary Family Law in Papua New Guinea" in John Dewar & Stephen Parker, eds, *Family Law: Processes, practices, pressures* (Portland, Oregon: Hart Publishing, 2003) 452.

Jolly, Margaret & N Thomas. "Introduction: The politics of tradition in the South Pacific" (1992) 62(4) *Oceania* 241.

Jolly, Margaret. "Specters of Inauthenticity" (1992) 4(1) *The Contemporary Pacific* 49.

Kaeppler, Adrienne. "Tongan Dance: A Study in Cultural Change" (1970) 14(2) *Ethnomusicology* 266.

Kamir, Orit. "Honor and Dignity in the Film *Unforgiven*: Implications for Sociolegal Theory" (2006) 40(1) *Law & Soc'y Rev* 193

Kirch, Patrick V. "Long-distance exchange and Island colonization: The Lapita case" (1988) 21 (2) *Norwegian Archaeological Review* 103.

Kolo, F O. "Histography: The Myth of Indigenous Authenticity" in Phyllis Herda, Jennifer Terrell & Niel Gunson, eds, *Tongan Culture and History* (Canberra: Journal of Pacific History, 1990) 1.

Krygier, Martin. "Law as Tradition" (1986)5(2) *Law &Phil* 237.

Latu, Josephine. "Political Reform and the Media in Tonga: An examination of cultural, political and media attitudes towards democratic reform in two Tongan newspapers" Masters Thesis, June 14, 2010, School of Communications, AUT University.

Lātūkefu, Sione. "The Definition of Authentic Oceanic Cultures with Particular reference to Tongan Culture" (1980) 4(1) *Pacific Studies* 60.

Sione Lātūkefu, "The Wesleyan Mission" in Noel Rutherford, (ed), *Friendly Islands: A History of Tonga* (Melbourne: Oxford University Press, 1977) 114.

Latūkefu, Sione. "The case of the Wesleyan Mission in Tonga" (1969) 25 *Journal de la Société des océanistes* 95.

Lacey, Nicola. "Analytical Jurisprudence Versus Descriptive Sociology Revisited" (2006) 84(4) *Tex L Rev* 945.

Lassiter, John C. "Defamation of Peers: The Rise and Decline of the Action for *Scandalum Magnatum*, 1497-1773", (1978) 22(3) *Am J Legal Hist* 216.

Linnekin, Jocelyn S. "Defining Tradition: Variations on the Hawaiian Identity" (1983) 10(2) *American Ethnologist* 241.

Matangi Tonga. "Unitech student wins Speaker's Choice Award" (14 November 2013), online: <http://matangitonga.to/>

Merry, Sally Engle. "Law and Colonialism" (1991) 25(4) Law & Soc'y Rev 889.

Merry, Sally Engle. "Changing Rights, Changing Culture" in Jane K Cowan, Marie-Benedicte Dembour and Richard A Wilson, eds, *Culture and Rights: Anthropological Perspectives* (Cambridge, UK; New York: Cambridge University Press, 2001) 31.

Merry, Sally Engle. "Narrating Domestic Violence: Producing the "Truth: of Violence in 19th and 20th Century Hawaiian Courts" (1994) 19 Law & Soc Inquiry 967.

Merry, Sally Engle. "Legal Pluralism" (1988) 22 Law & Soc'y Rev 869.

Milinski, Manfred, Dirk Semmann & Hans-Jurgen Krambeck. "Reputation helps solve the tragedy of the Commons" (2002) 415.

Minow, Martha. "Forgiveness and the Law" (2000) 27(5) Fordham Urb LJ 1394.

Morton, Helen. *Becoming Tongan: An ethnography of childhood* (Honolulu: University of Hawaii Press, 1996).

Murphy, Jeffrie G. "Forgiveness, Reconciliation and Responding to Evil: A philosophical overview" (1999) 27(5) Fordham Urb LJ 1353.

Nader, Laura. "The Life of the Law—A moving story" (2002) 36(3) Val U L Rev 655.

Nader, Laura. "Orientalism, Occidentalism and the Control of Women" (1989) 2 Cultural Dynamics 323.

Napoleon, Val. "Thinking About Indigenous Legal Orders" in Dialogues on Human Rights and Legal Pluralism (Netherlands: Springer, 2013) 229.

Napoleon, Val & Hadley Friedland. "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61(4) McGill LJ 725.

Neubauer, Ian Lloyd. "Vanuatu, Cradle of Bungee Jumping, May Finally Get Just Recognition" (2013) August Time, online: <http://world.time.com/2013/08/01/after-decades-vanuatus-original-bungee-jumpers-may-get-financial-recognition/>

North, Joanna. "Wrongdoing and Forgiveness" (1987) 62(242) Philosophy 499.

Oman, Nathan. "The Honor of Private Law" (2011) 31 Fordham L Rev 31.

Olaniyan, Tejumola. "Africa: Varied Colonial Legacies" in Henry Schwartz & Sangeeta Ray, eds, *A Companion to Post Colonial Studies* (Victoria, Australia: Blackwell Publishers 2000) 269.

Olowu, Dejo. "When Unwritten Customary Authority Overrides the Legal Effect of Constitutional Rights: A critical review of the Tuvaluan Decision in *Mase Teonea v Pule O Kaupule & Another*" (2005) 9 J S Pac L 18.

Philips, Susan U. "The Organization of Ideological Diversity in Discourse: Modern and neotraditional visions of the Tongan State" (2004) 30(2) *American Ethnologist* 231.

Post, Robert C. "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 217 Cal L Rev 691.

Postema, GJ. "Implicit Law" in W van der Burg & WJ Witteveen (eds), *Rediscovering Fuller: Essays on Implicit and Institutional Design* (Amsterdam: Amsterdam University Press, 1999) 255.

Powles, Guy. "The Early Accommodation of Traditional and English Law in Tonga" in Phyllis Herda, Jennifer Terrell & Niel Gunson (eds) *Tongan Culture and History: papers from the 1st Tongan History Conference held in Canberra 14-17 January 1987* (Canberra: Australian National University, 1990) 145.

Powles, Guy. "The Common Law at Bay?—The scope and status of customary law regimes in the Pacific" (1997) 21 *Journal of Pacific Studies* 61.

Radin, Margaret Jane. "Compensation and Commensurability" (1993) 43 *Duke LJ* 56 at 56.

Ravuvu, Asesela. "Culture and Traditions: Implications for Modern Nation Building" in Ron Crocombe, Uentaba Neemia, Asesela Ravuvu & Werner Vom Busch, eds, *Culture and Democracy in the South Pacific* (Suva: Institute of the Pacific Studies, 1992) 57.

Samate, 'Asinate. "Re-imagining the Claim that God and Tonga are my Inheritance" in Elizabeth Wood-Ellem, ed, *Tonga and the Tongans heritage and identity* (Alphington, Australia: Tonga Research Association, 2007) 47.

Scott, J Barton. "How to Defame a God: Public Selfhood in the Maharaj Libel Case" (2015) 38(3) *South Asia: Journal of South Asian Studies* 387.

Senituli, Lopeti. "Tongan Government did Best to Facilitate Reform" January 23, 2007 Pacific Islands Report, online: <http://www.pireport.org/articles/2007/01/23/tongan-government-did-best-facilitate-reform>

Shoham, Hizky. "Rethinking Tradition" (2011) 52(2) *European Journal of Sociology* 313.

Shakespeare, William. *Othello*, act III, scene iii, ll 155-61.

Simpson, AWB. "Contract: 'The twitching corpse'" (1981) 1 *Oxford J Legal Stud* 265.

Skolnick, Jerome H. "Foreword: the sociological tort of defamation" (1986) 74(3) Cal L Rev 677.
 Small, Cathy A & David L Dixon. "Tonga: Migration and the Homeland" (2004) Migration Policy Institute, online: <http://www.migrationpolicy.org/article/tonga-migration-and-homeland>

Stehr, Nico & Jason L Mast. "Modernity and Postmodernity" in Samir Dasgupta & Peter Kivisto, eds, *Postmodernism in a Global Perspective* (Los Angeles: Sage, 2014) 116.

Stubbs, Julie. "Beyond apology? Domestic violence and critical questions for restorative justice" (2007) 7(2) Criminology and Justice 169.

Sykes, K. "Interrogating Individuals: the theory of possessive individualism in the Western Pacific" (2007) 17(3) Anthropological Forum 215.

Taekema, HS & W van der Burg. "Towards a Fruitful Cooperation between Legal Philosophy, Legal Sociology and Doctrinal Research: How legal interactionism may bridge unproductive oppositions" in R Nobles & D Schiff, eds, *Law, Society and Community: Socio-Legal Essays in Honour of Roger Cotterrell* (Farnham: Ashgate Publishing, 2014) 129.

Taft, Lee. "The Commodification of Apology" (2000) 109(5) Yale LJ 1135.

Tamanaha, Brian. "A Non-Essential Version of Legal Pluralism" (2000) 27 JL & Soc'y 296.

Tamanaha, Brian. "Understanding Legal Pluralism: Past to present, local to global" (2008) 30 Sydney L Rev 375.

Tupou, Sela. "Juvenile Justice: A comparative Analysis of Juvenile Justice in New Zealand and the Kingdom of Tonga" (LLM Research Paper 582, Victoria University of Wellington, 2002).

UN DAW, Harmful Practices against Women in Pacific Island Countries: Customary and Conventional Laws, at 7, U.N. Doc. EGM/GPLHP/2009/EP.15 (2009), online: [http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20Imrana%20Jalal .pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20Imrana%20Jalal.pdf)

Urbanowicz, Charles. "Drinking in the Polynesian Kingdom of Tonga" (1975) 22(1) Ethnohistory 33.

Vines, Prue. "The power of Apology: Mercy, forgiveness or corrective justice in the civil liability arena?" (2007) 1(5) Journal of Law and Social Justice 1.

Wagatsuma, Hiroshi & Arthur Rosett, "The Implications of Apology: Law and Culture in Japan and the United States" (1986) 20(4) Law & Soc'y Rev 461.

Webber, Jeremy. "Legal Pluralism and Human Agency" (2006) 44 Osgoode Hall LJ 167.

Whitman, James Q. "Enforcing Civility and Respect: Three Societies" (2000) 109 Yale LJ 1279.

Woodman, Gordon. "The Chthonic Legal Tradition—or Everything that is not Something Else" in Nicholas HD Foster, ed, "A Fresh Start for Comparative Legal Studies? A Collective Review of Patrick Glenn's *Legal Traditions of the World*, 2nd Edition" (2006) 1 *Journal of Comparative Law* 123.

Youm, Kyu Ho. "Libel Law and the Press in South Korea: an Update" (1992) *Contemporary Asian Studies Series*, Number 3 at 3.

Zorn, Jean. "Custom then and now: the changing Melanesian family" in Anita Jowitt and Tess Newton Cain, eds, *Passage of Change: Law Society and Governance in the Pacific* (Canberra: Pandanus Books, 2003) 95.

Zorn, Jean & Jennifer Corrin Care. "*Barava Tru*—Judicial Approaches to the Pleading and Proof of Custom in the South Pacific" (2002) 51(3) *ICLQ* 611.

Zorn, Jean. "Custom then and now: the changing Melanesian family" in Anita Jowitt and Tess Newton Cain, eds, *Passage of Change: Law Society and Governance in the Pacific* (Canberra: Pandanus Books, 2003).

.

Secondary Materials: Monographs

Abel, Richard. *Speaking Respect, Respecting Speech* (Chicago: University of Chicago Press, 1998).

Anonymous, *An Authentic Narrative of Four Years in Tongatapu* (London: Longman, Hurst, Rees and Orme, 1810).

Australian Government, *Violence Against Women in Melanesia and East Timor* (Canberra: 2008), online: http://www.igwg.org/igwg_media/melanesia/melanesiafullrpt.pdf

Australia Interstate Commission, *British and Australian Trade in the South Pacific: Report* (Melbourne: H J Green, Acting Govt. Printer, 1918).

Australasian Wesleyan Methodist Missionary Society, *The Third Report for the Year Ending May, 1858* (Sydney: Reading and Wellbank, 1858).

Bedford, Stuart Christophe Sand & Sean Connaughton, eds, *Oceanic explorations: Lapita and western settlement* (Canberra: Australian National University Press, 2007).

Bertram, Sir Anton. *The Colonial Service* (Cambridge: Cambridge University Press, 1930).

Bhabha, Homi. *Location of Culture* (London & New York: (1994).

Blackstone, William. *Commentaries on the Laws of England*, a facsimile of 1765-1769, vol 1 (Chicago: University Press, 1979).

Borrows, John. *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010)

Bott, Elizabeth. *Tongan Society at the Time of Captain Cook's Visits: Discussions with Her Majesty the Queen fefafa Tupou* (Wellington: The Polynesian Society (Incorporated), 1982).

Bouma, Gary D, Rodney Ling & Douglas Pratt. *Religious Diversity in Southeast Asia and the Pacific: National Case Studies* (New York: Springer, 2010).

Butler, Joseph. *The Works of Joseph Butler*, Vol. 2, Fifteen Sermons [1726] WE Gladstone (ed) (Oxford: Clarendon Press, 1897).

Campbell, IC. *Island Kingdom: Tonga Ancient and Modern* (2d ed) [1992] (Christchurch: Canterbury University Press, 2001).

Cocks, RCJ. *Sir Henry Maine: A study in Victorian Jurisprudence*. (Cambridge, UK: Cambridge University Press, 1988).

Cummins, HG. *Sources of Tongan History*: a collection of documents extracts and contemporary opinions in Tongan political history 1616-1900, online:
<http://www.buoyanteconomies.com/Tonga/>.

Dodge, Ernest S. *Islands and Empires: Western Impact on the Pacific and East Asia* (Minneapolis: University of Minnesota Press, 1976).

Ehrlich, Eugen. *Fundamental Principles of the Sociology of Law*, translated by Alex Ziegert (London: Transaction Publishers, 2002).

Ellis, William. *Polynesian Researches, during a residence of nearly eight years in the Society and Sandwich Islands* 2d ed. Vol. III (London: Fisher, Son & Jackson, Newgate Street, 1838).

Ewins, Rory. *Changing their Minds: Tradition and politics in Contemporary Fiji and Tonga* (Christchurch: Macmillan Brown Centre for Pacific Studies, 1998).

Farmer, Sarah. *Tonga and the Friendly Islands; with a sketch of their mission history* (London: Hamilton, Adams, & Co, 1865).

Ferdon, Edwin N. *Early Tonga: As the explorers saw it 1616-1810* (Tucson: University of Arizona Press, 1987).

Fischer, Steven Roger. *A History of the Pacific Islands* (Basingstoke, Hampshire & New York, NY, 2002).

Forsyth, Miranda. *A Bird that Flies with Two Wings: Kastom and State Justice Systems in Vanuatu* (Canberra: ANU Press, 2009).

Fuller, Lon. *The Morality of Law*, rev ed (New Haven: Yale University Press, 1969).

Glenn, H Patrick. *Legal Traditions of the World*, 2nd ed (Oxford: Oxford University Press, 2004).

Gunson, Niel. *Messengers of Grace: Evangelical missionaries in the South Seas 1797-1860* (Melbourne: Oxford University Press, 1978).

Helu, 'I Futa. *Critical Essays: cultural perspectives from the South Seas* (Canberra: Journal of Pacific History, 1999).

Hobsbawm, E J & T O Ranger. *The Invention of Tradition* (Cambridge; New York: Cambridge University Press, 1983).

House of Commons. *Report from the Select Committee on Africa (Western Coast)*, Parliamentary Papers V (1865).

Kames, Henry Home. *Historical law-tracts*, 4th ed (Edinburgh: 1792), online: *Eighteenth Century Collections*
<http://find.galegroup.com.ezproxy.library.uvic.ca/ecco/infomark.do?&source=gale&prodId=ECCO&userGroupName=uvictoria&tabID=T001&docId=CW3323708578&type=multipage&contentSet=ECCOArticles&version=1.0&docLev>

Kenihan, G H. ed, *The Journal of Abel Jansz Tasman 1642: with documents relating to his exploration of Australia in 1644* (Adelaide: Australian Heritage Press, 1964).

Latour, Bruno. *We Have Never Been Modern*, translated by Catherine Porter (Cambridge: Harvard University Press, 1993).

Lātūkefu, Sione. *The Tongan Constitution: A brief history to celebrate its Centenary* (Nukualofa, Tonga: Tonga Traditions Committee Publication, 1975).

Lātūkefu, Sione. *Church and State in Tonga* (Honolulu: The University Press of Hawaii, 1974).

Lātūkefu, Sione. *Church and State in Tonga: The Wesleyan Methodist Missionaries and Political Development, 1822-1875* (Honolulu: University Press of Hawai'i, 1974).

Lawry, Rev Walter. *Friendly and Feejee Islands: A Missionary visit to the various stations in the South Seas in the year 1847*, 2d ed (London: Gilpin, 1850).

Lawson, Stephanie. *Tradition versus Democracy in the South Pacific: Fiji, Tonga and Western Samoa* (Melbourne: Cambridge University Press, 1996).

Lazare, Aaron. *On Apology* (Oxford: Oxford University Press, 2004).

Lugard, Lord Frederick. *The Dual Mandate in British Tropical Africa* 5th ed. (London: Frank Cass & Co, Ltd, [1922] 1965).

MacIntyre, Alisdair. *Whose Justice, Which Rationality?* (Notre Dame: University of Notre Dame Press, 1988).

Maine, Henry Sumner. *Ancient Law: Its connection with the early history of society and its relation to modern ideas*. (London: John Murray, Albemarle Street, 1861).

Mamdani, Mahmood. *Citizen and Subject: Contemporary Africa and the Legacy of late colonialism* (Princeton, NJ: Princeton University Press, 1996).

Mantena, Karuna. *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton NJ: Princeton University Press, 2010).

Mar, Tracey Banivanua. *Decolonisation and the Pacific: Indigenous Globalisation and the Ends of Empire*. (Cambridge, UK: Cambridge University Press, 2016).

Mariner, William & John Martin. *An Account of the Natives of Tonga Islands, in the South Pacific Ocean. With an original grammar and vocabulary of their language* (London: J Murray, 1818).

McGrane, Bernard. *Beyond Anthropology: Society and the other* (New York: Columbia University Press, 1989).

McNamara, Lawrence. *Reputation and Defamation* (Oxford: Oxford University Press, 2007).

Meleisea, Malama. *The Cambridge History of the Pacific Islanders* (UK: Cambridge University Press, 1997).

Merry, Sally Engel. *Colonizing Hawai'i: The cultural power of law* (NJ: Princeton University Press, 2000).

Morris, H F & James Read. *Indirect Rule and the Search for Justice: Essays in East African Legal History* (Oxford: Clarendon Press, 1972).

Morton, Helen. *Becoming Tongan: An ethnography of childhood* (Honolulu: University of Hawai'i Press, 1996).

New Zealand Law Commission. *Converging Currents: Custom and Human Rights in the Pacific* (Wellington New Zealand: Study Paper 17, 2006).

Niumeitolu, Heneli T. *The State and the Church, the State of the Church in Tonga* (PhD thesis, University of Edinburgh, 2007) [unpublished], online:

<https://core.ac.uk/download/files/39/278075.pdf>

Nayacakalou, Rusiate. *Leadership in Fiji* (Melbourne & Suva: Oxford University Press & Institute of Pacific Studies, USP: 1975).

Ntummy, Michael A. *South Pacific islands Legal Systems* (Honolulu: University of Hawaii Press, 1993).

Orange, James. *Life of the Late George Vason of Nottingham* (London: John Snow, 1840), reprinted in David G May, ed, *Narrative of the Late George Vason of Nottingham* (Nuku'alofa, Tonga: Friendly Islands Bookshop, 1998).

Rabone, Stephen. *Vocabulary of the Tonga Language* (Neiaff, Vava'u: Wesleyan Mission Press, 1845), online:

https://archive.org/stream/avocabularytong00rabogoog/avocabularytong00rabogoog_djvu.txt

Roberts, Stephen H. *Population Problems of the Pacific* (London: George Routledge & Sons, 1927).

Rosenberg, Norman. *Protecting the Best Men: An Interpretive History of the Law of Libel* (Chapel Hill, University of North Carolina Press, 1986).

Roznai, Yaniv. *Unconstitutional Constitutional Amendments: A study of the Nature and limits of Constitutional Amendment Powers* (2014) Phd Thesis, Department of Law, London School of Economics.

Rundle, Kristen. *Forms Liberate: Reclaiming the jurisprudence of Lon L Fuller* (Oxford & Portland: Hart Publishing, 2012).

Rutherford, Noel. *Shirley Baker and the King of Tonga* (Melbourne: Oxford University Press, 1971).

Shils, Edward. *Tradition* (Chicago: University of Chicago Press, 1981).

Spengler, Oswald & Charles Francis Atkinson. *The Decline of the West* (New York: AA Knopf, 1926-28).

Starkie, Thomas. *A Treatise on the Law of Slander, Libel, Scandalum Magnatum and False Rumours* (New York: G Lamson, 1826).

Táíwò, Olúfémi. *How Colonialism Preempted Modernity in Africa* (Bloomington: Indiana University Press, 2010).

Tavuchis, Nicholas. *Mea Culpa: A sociology of apology and reconciliation* (Stanford, Calif: Stanford University Press: 1991).

Tutu, Desmond. *No Future Without Forgiveness* (New York: Doubleday, 1999).

Weber, Max. *The Theory of Social and Economic Organization*, translated by AM Henderson and Talcott Parsons (London: Free Press, 1964).

Wesley, John. *Wesleyana: A complete System of Wesleyan Theology: Selected From the Writings of the Rev. John Wesley* (New York: T Mason & G Lane, 1840).

Wesley, John. *The Sermons of John Wesley* (Wesley Center, 1872), online:
<http://wesley.nnu.edu/john-wesley/the-sermons-of-john-wesley-1872-edition/sermon-49-the-cure-of-evil-speaking/>

West, Thomas. *Ten Years in South-Central Polynesia* (London: James Nisbet & Co, 1865).

Yilmaz, Ihsan. *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralisms in England, Turkey and Pakistan* (England and USA: Ashgate Publishing Ltd, 2005).

Young, Robert. *The Southern World* (London: Hamilton, Adams, and Co., 1854).

Jurisprudence

Tonga

Aisea v Rex, [2012] TOCA 12 (PACLI); AC 20 of 2011 (27 April 2012), online:
[http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOCA/2012/12.html?stem=&synonyms=&query=title\(aisea%20and%20rex%20\)](http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOCA/2012/12.html?stem=&synonyms=&query=title(aisea%20and%20rex%20))

Attorney General v 'Akau'ola, [1999] TOLawRp 15; [1999] Tonga LR 71 (14 April 1999), online:
<http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOLawRp/1999/15.html?stem=&synonyms=&query=Akau%27ola>

Attorney General v Po'uhila [1999] TOLawRp 18; [1999] Tonga LR 86 (8 June 1999), online:
<http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOSC/1999/66.html?stem=&synonyms=&query=Po%27uhila>

Attorney General v Saulala, [2001] TOLaw Rp 19; [2001 Tonga LR 110 (5 June 2001),
[http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOLawRp/2001/19.html?stem=&synonyms=&query=title\(Attorney%20General%20and%20Saulala%20\)](http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOLawRp/2001/19.html?stem=&synonyms=&query=title(Attorney%20General%20and%20Saulala%20))

Edwards v Moala, [1999] TOSC 52/ C0045 1997 (4 February 1999), online: [http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOSC/1999/52.html?stem=&synonyms=&query=title\(Edwards%20and%20Moala%20\)](http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOSC/1999/52.html?stem=&synonyms=&query=title(Edwards%20and%20Moala%20))

Fotu v Loketi [2003] TOSC 23 rev'g No AM 7/2003, online: [http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOSC/2003/23.html?stem=&synonyms=&query=title\(Fotu%20and%20Loketi%20\)](http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOSC/2003/23.html?stem=&synonyms=&query=title(Fotu%20and%20Loketi%20))

Lali Media & Others v Prince 'Ulukalala & The Kingdom of Tonga, [2003] TOCA 6; CA 04 & 10 2003 *aff'g* [2003] Tonga LR Lavaka Ata 186 *Lali Media & Others v Prince 'Ulukalala Lavaka Ata & The Kingdom of Tonga* [2003] Tonga LR 117, online: [http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOCA/2003/6.html?stem=&synonym20Ulukalalas=&query=Prince%20\)](http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOCA/2003/6.html?stem=&synonym20Ulukalalas=&query=Prince%20))

Moli v Police, [2010] TongaLR 28; [2010] Tonga LR 183 (21 October 2010) (SC), online: [http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOLawRp/2010/28.html?stem=&synonyms=&query=title\(moli%20and%20Police%20\)](http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOLawRp/2010/28.html?stem=&synonyms=&query=title(moli%20and%20Police%20))

Otuafi v Sipa [1990] TOSC 9 (PACLII); CC042 1989 (3August 1990), online: [http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOSC/1990/9.html?stem=&synonyms=&query=title\(otuafi%20and%20Sipa%20\)](http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOSC/1990/9.html?stem=&synonyms=&query=title(otuafi%20and%20Sipa%20))

Piukana v Akeripa [1999] TOSC 8; C APP 0047 1999, online: [http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOSC/1999/8.html?stem=&synonyms=&query=title\(Piukana%20and%20Akeripa%20\)](http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOSC/1999/8.html?stem=&synonyms=&query=title(Piukana%20and%20Akeripa%20))

Rex v Bloomfield, [2013] TOSC 19 (PACLII); CR 212 (24 October 2013) (Tonga) online: [http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOSC/2013/19.html?stem=&synonyms=&query=title\(rex%20and%20Bloomfield%20\)](http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOSC/2013/19.html?stem=&synonyms=&query=title(rex%20and%20Bloomfield%20))

Rex v Holani [2001] TOCA 12(PACLII); CA 06 2001 (27 July 2001), online: [http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOCA/2001/12.html?stem=&synonyms=&query=title\(rex%20and%20Holani%20\)](http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOCA/2001/12.html?stem=&synonyms=&query=title(rex%20and%20Holani%20))

Lasalosi v Hausia [200] TongaLawRp 40, [2000] Tonga LR 415, online: [http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOLawRp/2000/40.html?stem=&synonyms=&query=title\(Lasalosi%20and%20Hausia%20\)](http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOLawRp/2000/40.html?stem=&synonyms=&query=title(Lasalosi%20and%20Hausia%20))

Rex v Mafi [2014] TOSC 13 (PACLI); CR 32 of 2013 (11 June 2014), online: [http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOSC/2016/30.html?stem=&synonyms=&query=title\(rex%20and%20mafi%20\)](http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOSC/2016/30.html?stem=&synonyms=&query=title(rex%20and%20mafi%20))

R v Pohiva, [1998] TOLawRp5; [1998] Tonga LR 27 (5 March 1998), online: [http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOLawRp/1998/5.html?stem=&synonyms=&query=title\(R%20and%20Pohiva%20\)](http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOLawRp/1998/5.html?stem=&synonyms=&query=title(R%20and%20Pohiva%20))

Rex v Pulu, [1999] TOSC 30; CR 647 1998 (27 July 1999), online: [http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOSC/1999/30.html?stem=&synonyms=&query=title\(Rex%20and%20Pulu%20\)](http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOSC/1999/30.html?stem=&synonyms=&query=title(Rex%20and%20Pulu%20))

Maini v Talanoa [2015] TOSC 47; AM 17 of 2015, online: [http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOSC/2015/47.html?stem=&synonyms=&query=title\(Maini%20and%20Talanoa%20\)](http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOSC/2015/47.html?stem=&synonyms=&query=title(Maini%20and%20Talanoa%20))

Rex v Saafi, [2004] TOSC 59 (PACLI); CR 300 2003 (27 August 2004), online: <http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOSC/2004/59.html?stem=&synonyms=&query=rex%20v%20saafi>

Rex v Simiki, [2001] TOSC 53; CR 049 & 050 2001 (7 December 2001), online: [http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOSC/2001/53.html?stem=&synonyms=&query=title\(Rex%20and%20Simiki%20\)](http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOSC/2001/53.html?stem=&synonyms=&query=title(Rex%20and%20Simiki%20))

Rex v Tofavaha, [2000] TOCA 2 (PACLI); [2000] Tonga LR 316; CA 11 (21 July 2000) online: [http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOCA/2000/2.html?stem=&synonyms=&query=title\(rex%20and%20tofavaha%20\)](http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOCA/2000/2.html?stem=&synonyms=&query=title(rex%20and%20tofavaha%20))

Rex v Toma, [2000] TOSC 51 (PACLI); CR 194 (9 November 2000), online: <http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOSC/2000/51.html?stem=&synonyms=&query=rex%20v%20toma>

Rex v Tuputupu [2013] TOSC 20 (PACLI); CR310.2011 (5 November 2013), online: [http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOSC/2013/20.html?stem=&synonyms=&query=title\(rex%20and%20tuputupu%20\)](http://www.pacii.org/cgi-bin/sinodisp/to/cases/TOSC/2013/20.html?stem=&synonyms=&query=title(rex%20and%20tuputupu%20))

Taione v Kingdom of Tonga [2004] TongaLawRp 78; [2005] Tonga LR 67 (15 October 2004), online: <http://www.pacii.org/cgi->

[bin/sinodisp/to/cases/TOLawRp/2004/78.html?stem=&synonyms=&query=title\(Taione%20and%20Kingdom%20of%20Tonga%20\)](http://www.paclii.org/cgi-bin/sinodisp/to/cases/TOLawRp/2004/78.html?stem=&synonyms=&query=title(Taione%20and%20Kingdom%20of%20Tonga%20))

Vaka'uta v Napa'a, [1998] ToLawRp 6; [1999] Tonga LR 50, online: <http://www.paclii.org/cgi-bin/sinodisp/to/cases/TOLawRp/1998/6.html?stem=&synonyms=&query=vaka%27uta%20v%20napa%27a>

Samoa

Lemalu Puia'I v Frank Jessop [1969] WSLawRp 1; [1960-69] WSLR 214, online: <http://www.paclii.org/cgi-bin/sinodisp/ws/cases/WSLawRp/1969/1.html?stem=&synonyms=&query=frank%20jessop>

Tuvalu

Teonea v Pule o Kaupule of Nanumaga [2009] TVCA 2; Court of Appeal Civil Appeal No 1 of 2005 (4 Nov 2009[2005] rev'g TVHC 2; HC CC no 23 of 2003 (October 2005), online: [http://www.paclii.org/cgi-bin/sinodisp/tv/cases/TVCA/2009/2.html?stem=&synonyms=&query=title\(Teonea%20and%20Pule%20\)](http://www.paclii.org/cgi-bin/sinodisp/tv/cases/TVCA/2009/2.html?stem=&synonyms=&query=title(Teonea%20and%20Pule%20))

USA

Brown v Board of Education of Topeka, Kansas (1954), 347 US 483.

Grutter v Bollinger (2003), 539 US 306.

Plessy v Ferguson (1896), 163 US 537.

Vanuatu

Assal Vatu v Council of Chiefs of Santo [1992] VUSC 5; [1980-1994] Van LR 545 (10 July 1992), (Vanuatu) online: http://www.paclii.org/cgi-bin/sinosrch.cgi?query=Assal+Vatu&results=50&submit=Search&rank=on&callback=on&meta=%2Fpaclii&method=auto&mask_path=vu%2Fcases

Noel v Toto [1995] VUSC 3; Civil Case 018 of 1994 (19 April 1995), (Vanuatu) online: [http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/1995/3.html?stem=&synonyms=&query=title\(noel%20and%20toto%20\)](http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/1995/3.html?stem=&synonyms=&query=title(noel%20and%20toto%20))

Legislation

Tonga

An Act Relative to Libel (1882) Laws of Tonga, c 20.

Constitution of Tonga, [1988] Laws of Tonga, c 1.

Constitution of Tonga (Amendment) Act 2003, no. 17 of 2003.

Defamation Act, (2012) Rev Ed c 33.

Education Act (Schools and general Provisions) Regulations (2002) GS 14.

Family Protection Act, (2013) Tonga Sessional Legislation, Act 19.

Fonos Act, [1988] Laws of Tonga, c 50.

Land Act, [1988] Laws of Tonga, c 132.

Magistrate's Court Act, [1988] Laws of Tonga c 11.

Newspaper Act 2003, no. 18 of 2003; *Media Operators Act 2003*, no. 4 of 2003.

Offences Against the State Act, 1891 *Criminal and Civil Code of the Kingdom of Tonga*, c VII.

Supreme Court Act, [1988] Laws of Tonga c 10.

Town Regulations Act, (2012) Rev Ed c 22.32.

Hawai'i

Kingdom of Hawai'i Constitution of 1852, online: <http://www.hawaii-nation.org/constitution-1852.html>.

Nauru

Custom and Adopted Laws Act 1971 (No. 11 of 1971).

Niue

Niue Act 1966 (1966 No 38).

Papua New Guinea

Constitution of the Independent State of Papua New Guinea, PNGCL, c. 1.

Samoa

Village Fono Act 1990, Consolidated Acts of Samoa 2011.

Tokelau

Tokelau Amendment Act 1967 (1967 No 37).

Tokelau Divorce Regulations 1987 (SR 1987/28).

Tokelau Village Incorporation Regulations 1986 (SR 1986/319).

Tuvalu

Constitution of Tuvalu (1990), 2008 Rev Ed, CAP 1.

Falekaupule Act, 2008 Rev Ed (Tuvalu), CAP 4.08.

Vanuatu

Constitution of the Republic of Vanuatu, (1988) Laws of the Republic of Vanuatu rev ed, CAP 1.

Family Protection Act, (2008) Vanuatu Sessional Legislation No. 28.

USA

US Const amend XIV.

US Const amend XIII.