**The Woven Object of Law and the Weaving Process of Law: An Interdisciplinary Conception of Legal Pluralism in Samoa**

by

Crystal R. Reeves
B.A. University of Lethbridge, 2000
L.L.B. Osgoode Hall Law School, York University, 2003

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## Abstract

This thesis develops an interdisciplinary, theoretical framework for analyzing moments of legal pluralism in banishment cases in Samoa. In the first two chapters, select theoretical forms, discourses and practices from legal anthropology, comparative legal scholarship and law and society studies are critically analyzed. Chapter three examines the role of metaphors in theorizing legal pluralism and legal change in both comparative legal scholarship and law and society scholarship. In chapters four and five, elements that were critically analyzed in chapters one through three are drawn together and recombined to theorize legal pluralism in Samoa. As part of this recombination, I employ two metaphors to guide my analysis. Metaphor one, *woven objects*, is employed to represent select strands of legality existent in Samoa. Metaphor two, *the weaving process*, is used to analyze how people create moments of legal pluralism in Samoan banishment cases through the adoption of particular subjectivities, through articulation of legal information, and via relations of power.

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# Acknowledgements

The beginnings of this thesis were formed over daily cups of coffee and conversations at the lower campus at the University of the South Pacific in Suva Fiji. I would like to thank all my colleagues at the Pacific Judicial Education Programme for your knowledge, your patience and your listening ears. In particular I thank Afioga Tagaloa Enoka Puni, Senior Judge Fonoivasa Seiuli Ah Ching, Tina Pope and Vere Bakani—we were a great team. I would also like to thank Wanda McCaslin and the Native Law Centre at the University of Saskatchewan for starting me on the journey and for the ongoing support and encouragement. I am also extremely grateful for the guidance, constructive feedback and patience of my supervisors, Professor Jeremy Webber and Dr. R. Christopher Morgan. Many thanks to you both. Also, thank you to Professor Sally Engle Merry for her insightful review and comments on the thesis. Finally, to my Mom and Dad, thank you for supporting all my endeavors, and to my husband Scott, you have encouraged, supported, discussed, and listened—even late into the night. Without you, I could not have done it.

# Introduction

Legal pluralism has become a dominant theme in a variety of empirical and theoretical studies regarding the meaning and operation of law within other parts of the world. It is described as a key concept in the postmodern view of law [1] and, although traditionally associated with legal anthropology, it is also a central theme in law and society studies and comparative legal studies. Despite the variety of scholars working in the area and the general acceptance of legal pluralism, both as a theoretical concept and as a lived phenomenon, further theorization is required to move the analysis past description of legal traditions and debates regarding the definition of law. Consideration should be given to other important questions such as how people articulate legal pluralism, how choices are made between legalities in a legally plural context and the forms of control that are exerted through the use of different legalities.[2]

In order to move toward a different theoretical conception of legal pluralism and toward some of the questions I have noted above, an interdisciplinary approach is needed. As Annelise Riles suggests, academic disciplines are separate, incomplete entities on the one hand, but also representative of the same order of knowledge construction.[3] Therefore, intellectual productivity requires that one take steps to completeness, part of which, according to Riles, involves recombining disciplinary opposites such as law and

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[1] Boaventura de Sousa Santos, "Law: A Map of Misreading: Toward a Postmodern Conception of Law" (1987) 14 J.L. & Soc'y 279 at 297. [Santos, Map of Misreading]
[2] John Griffiths, "Preface" in Baudouin Dupret et. al., eds., *Legal Pluralism in the Arab World* (The Hague: Kluwer Law International, 1999) at ix.
[3] Annelise Riles, "Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity" (1994) U. Ill. L. Rev. 597 at 633.

anthropology into new forms.[4] To build on Riles' proposal, I will take as a starting point that some in-between disciplinary forms already exist, as suggested by the existence of legal anthropology and comparative law, and law and society studies, as well as perhaps legal pluralism itself. However, even with such forms of interdisciplinarity, there is a need for a greater level of recombination, and not just at the level of disciplines writ large, but a recombination of specific theoretical forms, discourses and practices. Thus, my project will ultimately be a specific recombination of theoretical forms and discourses from the disciplines I have mentioned, creating new relations between them, and facilitating further understanding of legal pluralism through them.[5]

Before mentioning the specific theoretical forms, discourses and practices that I critically analyze in my thesis, it is instructive to note some of the challenges of interdisciplinary work. This will allow the reader to digest more easily some of the potentially creative possibilities they will encounter in the thesis, as well as some of the limits that will be present. The challenges associated with interdisciplinary work are well described by Susan Drummond in her study of marriage law in Spanish Gitano Communities.[6] In bringing together the disciplines of comparative law and legal anthropology, she discusses how some theoretical and methodological forms, which are

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[4] *Ibid*. Others are hesitant to combine such opposites, suggesting instead a hermeneutic dialogue between two disciplines in order to engage with the multiplicity of issues that inform each field. See Clifford Geertz, "Local Knowledge: Fact and Law in Comparative Perspective" in *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) at 170.

[5] I agree with Riles that legal pluralism offers a way for lawyers and anthropologists to build relations around cognate problems. She states "Legal pluralism, attracting the lawyer because it is legal and the anthropologist, because it is plural, would seem to be just the sort of phenomenon neither could leave safely to the care of the other." Thus, studies in legal pluralism are a chance for new forms of interdisciplinarity, and different forms of in-between, making them a space of intellectual productivity rather than inadequacy. See Riles, *supra* note 3 at 639-640.

[6] Susan Drummond, *Mapping Marriage Law in Spanish Gitano Communities* (Vancouver: UBC Press, 2006) at 8ff.

considered *de rigueur* for each discipline, must be left behind—which may lead to a sense of unfamiliarity, and even disappointment, for the reader.[7] This jettisoning of standard theoretical and methodological forms becomes part of interdisciplinary work, as new interdisciplinary objects are created which do not conform or 'belong' to either discipline.

In my thesis, the interdisciplinary object that will be created is a theoretical framework for analyzing legal pluralism that is appropriate to contexts of substantial legal diversity. Using this interdisciplinary framework, I will explain the diversity of legalities operative in Samoa, and then suggest how moments of legal pluralism are created through the articulation of, and negotiation between, legalities in banishment cases. In my analysis of legal pluralism in Samoa, I rely primarily on secondary sources including previous historical and ethnographic accounts of interlegality in Samoa. I also draw upon some primary sources to point to the existence of plural legalities in Samoa, including legislation, colonial government reports as well as a select number of court cases. There are certain limitations to using court cases as a source of data, which I will discuss further in Chapter 5. However, they do offer some insight into the existence of plural legalities in Samoa, augmenting legal ethnographic materials already in existence, which tend to focus less on legal pluralism and more on specific forms of legality. The thesis, then, is not an ethnography of legal pluralism in Samoa, but it does try to ensure that the theoretical analysis is firmly grounded in the interplay of legal traditions within

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[7] *Ibid.* In her own analysis, the standard theoretical and methodological frames of anthropology, particularly the paradigmatic focus on culture and jurisdictional conceptions of the state are left behind, as is the legal comparativist's focus on comparing national legal systems.

the richly defined context of Samoa. I hope to pursue the collection of ethnographic data at a later stage in the context of a doctoral program.

In creating a new interdisciplinary object of legal pluralism, I forego some expected features from each of the disciplines I will be considering. One of the features that readers might expect to see but will be missing is an extensive discussion of the meaning of law in legal pluralism. Although some may appreciate the need for ongoing discussion and debate regarding definitions, I want to avoid becoming mired in polemical debates about definitions of law, which Santos has rightly described as Sisyphean and sterile.[8] For the purpose of my thesis, I use the definition of legal pluralism suggested by Santos, who refers to a plurality of legal orders as the "constellation of different legalities (and illegalities) operating in local, national and global time-spaces."[9] I add to this the caveat that 'legalities' in my thesis refers to both legal and normative orders broadly conceived.[10] I also jettison some other features in creating my interdisciplinary object, such as a standard literature review of legal pluralism, legal anthropology and

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[8] Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation*, 2nd ed. (London: Butterworths Lexis Nexis, 2002) at 93 [Santos, Common Sense].

[9] *Ibid* at 85. Santos eschews the term 'legal pluralism' here in favour of 'plurality of legal orders,' wanting to escape the normative claim, that pluralism is better than its non-pluralistic counterpart, made in previous legal pluralist scholarship. He suggests that there is nothing inherently good, progressive or emancipatory about legal pluralism and that in fact, in some cases, legal pluralism can be quite reactionary. However, in a more recent article, "The Heterogeneous State and Legal Pluralism in Mozambique" (2006) 40 L & Soc'y Rev. 39 [Santos, Legal Pluralism], he uses the term 'legal pluralism'. Although it is not clear the reason for this shift, perhaps it reflects the view that there is a difference between legal pluralism as an analytical concept and as a political statement. This differentiation between meanings of legal pluralism can be found in Franz von Benda-Beckmann, "Citizens, Strangers and Indigenous Peoples: Conceptual Politics and Legal Pluralism" (1997) 9 Law & Anthropology 1 at 2ff.

[10] Here I am suggesting that law can mean a variety of things such as suggested by Conley and O'Barr in their essay "Back to the Trobriands: The Enduring Influence of Malinowski's *Crime and Custom in Savage Society*" (2002) 27 Law and Soc. Inq'y 847 at 865 [Conley and O'Barr, Back to the Trobriands]. They argue that law can mean norms of acceptable conduct, the primary agency of social control, or the rules and mechanisms for dealing with instances of deviance and disorder. They argue such ambiguity or fluidity in talking about law is accepted in contemporary legal scholarship, and that it is necessary to explore the complex dynamics of law in society.

comparative legal studies,[11] as well as a discussion of the success of legal pluralism in Samoa.

## Creating an Interdisciplinary Conception of Legal Pluralism

In chapter one, the specific theoretical forms, discourses and practices that I critically analyze and draw upon from within the discipline of legal anthropology are: legal ethnography, subjectivity, localized contexts and spaces, and the intersection of law and power. My main reason for choosing these five specific forms and discourses is because they have influenced, and continue to influence, contemporary understandings of law and legal pluralism within, as well as outside the discipline of legal anthropology.

The specific theoretical discourses and practices that I consider from comparative legal studies include the differentiation of legal rules and texts, the deep description of 'formal' state legalities, and the use of metaphor in analyzing law and legal change. I discuss the importance of metaphor below but the differentiation of legal rules and texts is important to consider and apply in my thesis because it demonstrates the need for specificity in the description of legal pluralism in a particular context, moving our analysis beyond general and abstracted notions of legalities that are often present in legal anthropological accounts of legal pluralism.[12] The extensive description of 'formal', state legalities is arguably a central feature of comparative legal studies and thus important to

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[11] For overviews of legal pluralism, see Sally Engle Merry "What is legal pluralism" (1988) 22 L. & Soc'y Rev 869 at 870. [Merry, Legal Pluralism]; Anne Griffiths, "Legal Pluralism" in R. Banakar and M. Travers, eds., *An Introduction to Law and Social Theory* (Oxford: Hart Publishing, 2002) at 289.

[12] For example, in "Law as Object", in Sally Engle Merry & Donald Brenneis, eds., *Law and Empire in the Pacific: Fiji and Hawai'i* (Santa Fe: School of American Research Press, 2003) 186 at 190, Annelise Riles discusses how lawyers [the majority of comparative law scholars, trained in law schools] view law as multiple and varied phenomena while anthropologists in the current moment tend to discuss the Law as a singular phenomenon, although recognizing that the law is internally composed of various elements. Others suggest that legal anthropologists give only a caricature of state law, not understanding it as a diverse and complex phenomenon.

consider. Applying this practice in my own analysis allows for a better understanding of how moments of legal pluralism in Samoa are created and how legalities are negotiated.

Finally, from Law and Society studies, the theoretical forms that I consider are criticality and the use of metaphorical analysis. Criticality, as defined within law and society literature, is important in my thesis because it emphasizes the need for specificity and particularity rather than general modes of understanding in analyses of law and legal pluralism, as well as emphasizing the connections between power and law. Finally, criticality will feature in my thesis through my attention to the fact that my view of legal pluralism in Samoa is partial and objectifying. The discussion of criticality, as defined in law and society studies, will be discussed in chapter two.

As mentioned, one of the specific theoretical forms and practices that I critically analyze and combine within this thesis is metaphor. The use of metaphor to explicate difficult concepts such as processes of legal change, or to creatively draw together literary forms and law, is well documented within comparative legal literature and in Law and Society studies. Many legal comparativists use metaphor to describe the law and legal change in certain places. For example, the metaphor of transplantation is used to describe how law is moved from one socio-political space to another and the effects of that movement. Another example is the use of different food mixtures to explicate how different legal systems appear and operate in different parts of the world. Some law and society scholars also use metaphor to discuss patterns of legalities in time and space. I will discuss the use of metaphors within both these disciplines in chapter three.

One of the benefits of using metaphor as a heuristic device for theorizing is that it concretizes abstract concepts into 'everyday' objects and processes—allowing others to

access unfamiliar theory. Using metaphor for theorizing legal pluralism can also make complicated and obscure details more comprehensible, especially when everyday objects and processes are used to make sense of abstract theoretical concepts such as structure and agency. In this thesis, I will be using metaphor as a heuristic device to represent two aspects of legal pluralism: first, as a form for describing legalities existent in a particular context; second, to explain the processes by which different legalities are brought together in particular moments through human agency. Metaphor one, *woven objects*, is used to describe some of the strands of legality existent in Samoa at different moments, providing a specific theoretical form for descriptive analysis in this thesis. This metaphor will be introduced and utilized in chapter four. Metaphor two, *weaving process*, will be used to illustrate the ways in which people create moments of legal pluralism through the adoption of certain subjectivities, through articulation and through relations of power. The metaphor of weaving will be developed in chapter five.

These two metaphors were chosen for several reasons, one being that they are specific to the local context of Samoa, which is the geographical space I am considering in this thesis. Using a localized metaphor is a conscious choice that allows me to remove a layer of abstraction in my analysis; using something representative of the place I am engaging with rather than an object that is unfamiliar to Samoa. My choice of the weaving metaphor is also significant because it emphasizes not only the weaving together of legalities, but also alludes to the theoretical weaving I am practicing in this thesis—weaving together forms from different disciplines to create a theoretical object which bears only some resemblance to the raw materials of each discipline. Finally, the choice of two intricately linked metaphors, woven objects and weaving process, emphasizes that

a theoretical conception of legal pluralism requires both description of legalities, alluding to the structure of legal pluralism, as well as discussion of the processes of human agency in the creation of legal pluralism.

## Engaging with Legal Pluralism in Samoa

At this point, the reader might wonder why I draw upon legal pluralism in Samoa to construct an interdisciplinary metaphorical conception of legal pluralism. My choice comes out of my own limited engagement with the realities of legal pluralism in Samoa. In 2003, shortly after I graduated from Law School, I began what would become an 11-month internship as a Legal Research Officer at the Pacific Judicial Education Programme (PJEP) in Suva, Fiji. My job was to research and write Bench Books (a type of reference manual) for Justices, Commissioners and Magistrates of lower level courts in the South Pacific. The very first Bench Book I wrote was for Magistrates of the Samoan Land and Titles Court (LTC).

My research involved legislation and cases pertaining to the Samoan Land and Titles Court, as well as any available secondary material. It also involved working with a LTC Magistrate from Samoa, who informed us of the inner workings of the court, and discussing the Samoan legal system with PJEP's Director, who had been a lawyer for many years in Samoa. In the fall, once the Bench Book was completed, I was also able to travel to Samoa while making my way to and from Niue on a legal research trip. During this trip, I was able to meet with several lawyers who shared some of their insights into the Samoan legal system, giving me yet another perspective into legal pluralism in Samoa.

This experience of researching and writing the Samoan Bench Book evoked many questions about the intersection of legalities in Samoa, both among our team during the writing of the bench-book, as well as by myself as I considered current conceptions of legal pluralism in a variety of disciplines. The most intriguing questions were not really about whether there were multiple legalities existent in Samoa (to the most casual observer, at least two legalities are recognized in Samoa: Samoan 'custom' and the common law) but about how people live with them, make choices between and within them, and how different legalities are articulated in different moments. This question certainly arose as we considered how Magistrates might navigate between applying Samoan custom and usage, the common law procedural and evidentiary rules, and human rights in the Land and Titles Court.

In researching these questions further, it became apparent that current theoretical conceptions of legal pluralism were too limited for analyzing the complexity of legal pluralism in Samoa, and for considering the processes by which human agents engage with different legalities. One of the deficiencies in legal pluralist analysis that I have encountered is that analysis of the plurality of laws in a given place is done at a level of abstraction and generality, without due consideration given to the complexities of laws and norms with the legal 'systems' or 'traditions' being analyzed. For example, many studies of legal pluralism discuss the existence of 'customary' law (as it is often referred to) but do not consider its multi-faceted nature—that there are different laws, rules, practices and norms governing different aspects of life, including governance of human relationships with the land, between each other, and relationships to and between other living entities to name a few. Similarly, the common law is portrayed as a behemoth,

without regard to the vastness of rules, practices and effects that exist within an entity called the common law. What is required to address this issue is specificity, where consideration is given to how particular rules, practices and norms representative of different legalities and governing different relationships intersect in particular times and spaces.

Legal pluralist theory that focuses on structure and description can be expanded through consideration of how individuals and communities negotiate the complexities of living with multiple legalities, and how different people in a socio-political space articulate different forms of legality in various moments. This moves the analysis beyond the question of what is legal pluralism, as both a social reality and a theoretical concept, and beyond mere definition and description of legalities. Instead it allows for rich analyses that grapple with effects of living with legal pluralism in the everyday. My thesis will be a step in such a direction and will attempt to address the problem of generalized descriptions of legal pluralism through a discussion of the specificities of legalities in Samoa, as well as providing a theoretical conception of legal pluralism that recognizes ongoing negotiation between, and articulation of, legal pluralism in everyday life.

## Introducing Samoa

Samoa is a chain of islands in the central Pacific Ocean, at latitude of 13° and 15° South and longitude of 171° and 176° West (see figure 1). Except for Rose Island, which is an atoll, the islands are of volcanic origin—being mountainous in the center, with tropical forest, then sloping down to coastal lowlands and beaches. Most of the population lives in the coastal lowlands, where the plantations are and where the ocean is

easily accessible. The islands of Samoa are separated into two geo-political entities: American Samoa and independent Samoa. It is independent Samoa, which will be referred to as Samoa throughout the thesis that I am concerned with. The majority of the population of Samoa lives on the two largest islands: Savai'i and Upolu. The capital of Samoa is Apia, which is on the island of Upolu.

Archeologists suggest that humans arrived on the islands about 3000 years ago, coming by sea from South East Asia, and eventually populating Fiji, Tonga and Samoa. However, Samoan oral tradition suggests that Samoans have always inhabited the islands, being created by *Tagaloa*, along with the land. The history of Samoa has been and continues to be passed down through oral tradition in the form of genealogies, songs, legends and stories. In addition, others have provided written descriptions of Samoa and its people since about the 18th Century.[13]

Samoa's social structure is centered on the *aiga* (family) and the *matai*, who are hereditary titleholders that govern each *aiga* and their property. Larger groups of *matai* provide leadership and governance both within their families and within the villages, districts, urban areas, as well as in the Samoan emigrant community. The first recorded European encounter with Samoa was in 1722. The first Europeans to arrive on Samoan land were beachcombers and castaways, then merchants from Europe and United States, and then Christian missionaries in 1830. Europeans brought with them new technologies, ways of living and being, but also disease, death and colonial rule.

Colonial governance was set up on the islands, with one effect being the splitting of Samoa politically between American and German governance in 1899 under the Berlin

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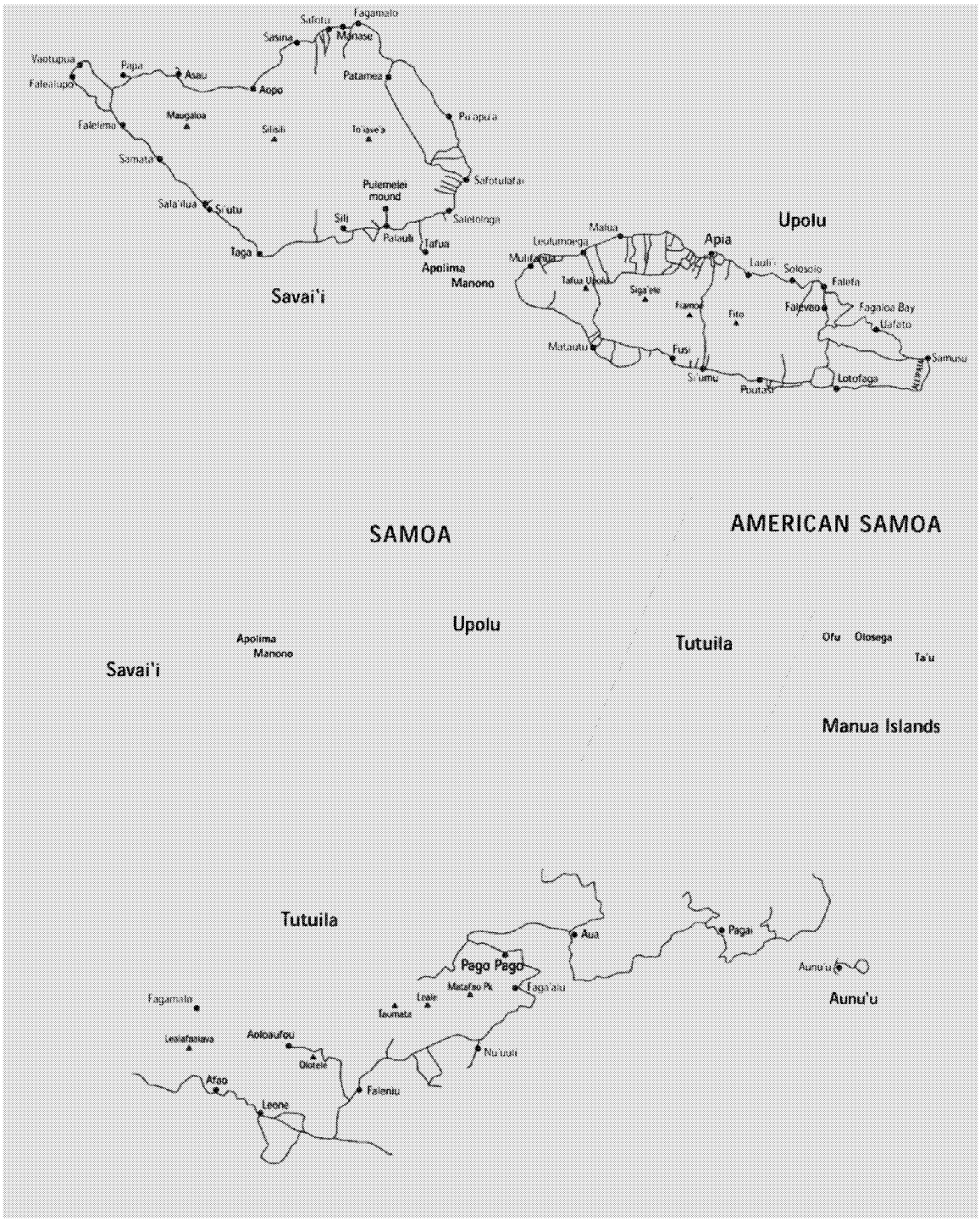
[13] Sean Mallon, *Samoan Art and Artists: O Measina a Samoa* (Honolulu: Univ. of Hawaii Press, 2002) at 17.

Act. The separation of the islands into two different political entities exists to this day, with Western Samoa eventually reaching independence in 1962 after German and New Zealand colonial rule. American Samoa has remained under American jurisdiction. Despite years of colonial rule, Samoans have managed to maintain a strong Indigenous governance structure, which is based on the *matai* system, and continue to uphold the values of *fa'asamoa*.

**Figure 1: Map of Samoa**




Source: Sean Mallon, *Samoan Art and Artists: O Measina a Samoa* (Honolulu: Univ. Hawai'i Press, 2002) at 12. Permission for use granted by © Craig Potton Publishing, Auckland: New Zealand/Aotearoa.

# Chapter One: Critical Analysis of Select Features of Legal Anthropology

This chapter involves an analysis of select features from the discipline of legal anthropology. My analysis serves to point out those features that I believe are prominent symbols of the discipline, which I will be using to further my own theoretical conception of legal pluralism in the coming chapters. The prominent features of legal anthropology that I will point to and make use of include: (a) the use of ethnography as a methodology to study legal pluralism; (b) the importance of highlighting one's own subjectivity in both theoretical and empirical work (particularly in recent anthropological works); (c) legal anthropology's attentiveness to local spaces and context; (d) finally, the focus on the intersection of law and power within legal anthropological discourse.

## Ethnography

Ethnography is one of the foundational components of cultural anthropology, being the key methodology that is used in the study of cultures and societies. A simplistic, starting definition of ethnography is that it is the "description of a culture, or a piece of a culture, through the collection of data."[1] According to an introductory text on research methods in anthropology, ethnography involves a number of elements including gaining access to areas of study, conducting interviews, participant observation, and note-taking.[2]

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[1] Russel H. Bernard, *Research Methods in Anthropology: Qualitative and Quantitative Approaches*, 2nd Ed. (London: Kluwer Publishing, 1995) at 16.
[2] Karen O'Reilly, *Ethnographic Methods* (New York: Routledge Press, 2005) at 84.

James Clifford, in his piece *On Ethnographic Authority*, traces the establishment of ethnography as a 'scientific' discipline and how it became the norm for European and American anthropology between 1900 and 1960. Ethnography during this period was characterized by "intensive fieldwork, pursued by university-trained specialists who emerged as a privileged and sanctioned source of data about exotic peoples."[3] Clifford notes that by "the mid-1930's, an international consensus had developed: valid anthropological abstractions were to be based, wherever possible, on intensive cultural descriptions by qualified scholars."[4] Bronislaw Malinowski is credited with being the first to demonstrate that ethnography could be applied to the study of law.[5] John M. Conley and William M. O'Barr, in their discussion of Malinowski's contribution to legal studies, and particularly of his book *Crime and Custom in Savage Society*, argue that Malinowski had an ethnographic agenda that was revolutionary for its time, and that it was Malinowski who proposed shifting the focus of anthropology from form to function and to the study of everyday life through the use of ethnography; ideas which were to influence the coming generation of anthropologists.[6] It was data collected through professional ethnographic methods that allowed Malinowski to pose those questions which have come to define the discipline of legal anthropology; the questions of "what is

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[3] James Clifford, "On Ethnographic Authority" in *The Predicament of Culture: Twentieth Century Ethnography, Literature and Art* (Cambridge: Harvard University Press 1988) 19 at 24.
[4] *Ibid* at 25.
[5] John M. Conley & William M. O'Barr, "Back to the Trobriands: The Enduring Influence of Malinowski's *Crime and Custom in Savage Society*" (2002) 27(4) Law and Soc. Inq'y 847 [Back to the Trobriands]; Chris Fuller, "Legal Anthropology, Legal Pluralism and Legal Thought" (June 1994) 10 Anthropology Today 9 at 9.
[6] For example, Conley and O'Barr, in an article dissecting the contributions of Llewelyn and Hoebel's *Cheyenne Way*, point out that Llewellyn was one legal scholar who was influenced by Malinowski's work. He was "impressed by Malinowski's development of the participant observer method" but was also critical of "the number of cases Malinowski presented and that his ethnographic materials failed to answer basic questions about how disputes were resolved and why." See John Conley and William O'Barr, "A Classic in Spite of Itself: The Cheyenne Way and the Case Method in Legal Anthropology" (2004) 29 Law & Soc. Inq'y 179 at 184 [Conley and O'Barr, Cheyenne Way].

the definition of law?; how does the law work?; how do you study law?"[7] It is not that other scholars had not asked these types of questions, but their analysis relied on a top down approach, based on abstract conceptions of law and in some cases, on limited and partial studies of 'primitive' law.

Since Malinowski, legal ethnography has arguably become the most prominent and symbolic feature in the landscape of legal anthropology, with legal ethnographies carried out in almost every corner of the globe and used to consider a myriad of legal questions, including those first posed by Malinowski. In the 1930's and 40's, legal ethnography (or something approaching it) was conducted by the likes of Isaac Schapera, Karl Llewellyn and E.A. Hoebel. In the 1950's and 60's, the method was increasingly used by a variety of legal scholars, including those using ethnography to 'capture,' at least momentarily, dispute processing among various groups around the world, as well to describe legal pluralism in colonial and post-colonial contexts, particularly in Africa.[8] Some of the most polemical debates within the field of legal anthropology arose from differing conceptions of how to interpret data collected through legal ethnography; the most famous of these debates between Max Gluckman and Paul Bohannan, who disagreed as to how non-western law ought to be characterized and defined by primarily western scholars.[9]

Ethnography has remained a standard practice within legal anthropology, but it has also transcended academic boundaries, becoming a favoured method of legal scholars of all stripes who want to use 'hard' data elicited from their own observations of 'law on the

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[7] Conley & O'Barr, Back to the Trobriands, *supra* note 5 at 864ff.
[8] Clifford Geertz, "Off Echoes: Some Comments on Anthropology and Law" (1996) 19(2) PoLAR 33 at 34.
[9] The polemics between Bohannan and Gluckman have been characterized as "some of the most wasteful and debilitating quarrels in anthropology which resulted in the deadening of legal anthropology as a sub-discipline in the 1970's." Chris Fuller, *supra* note 5 at 9.

ground' or who want to consider the cultural aspects of law.[10] This is certainly true of scholars working within a legal pluralism framework (which of course includes many legal anthropologists but also scholars from other disciplines), where legal ethnography is the method *de rigeur* for the study of the intersections of local, national and global legalities and normative orders in a variety of places. One could safely argue that the use of ethnography could be considered one of the defining characteristics of legal pluralism studies as well as legal anthropology.[11]

Thus ethnography stands out as a prominent feature in legal anthropology, and thus requires a listing of both its attributes and dangers for those who are considering it as part of their conception of legal pluralism. As to ethnography's attributes as a methodology, it allows legal scholars to describe and interpret rules, institutions and systems of thought in worlds other than one's own, as well as in those places which are more familiar, giving "access to the complex ways in which laws, decision-making and legal regulations are embedded in wider social processes and helping one to understand legal change."[12] Ethnographic observation also allows for the consideration of relationships and practices,

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[10] Ethnography, in one form or another, is used by a variety of legal scholars who would not necessarily categorize their work under the disciplinary marker of legal anthropology. For example, contributors to the recent book *Practicing Ethnography in Law*, edited by June Starr and Mark Goodale, include scholars from sociology, political science, law as well as anthropology. Even those who have not necessarily conducted ethnography themselves find the ethnographies of others useful for their own work. See Lawrence M. Friedman, "A Few Thoughts on Ethnography, History, and Law" in June Starr & Mark Goodale, eds., *Practicing Ethnography in Law* (New York: Palgrave MacMillan, 2002) at 185. Despite the interdisciplinary borrowings of ethnography to study law, some have issued a cautionary note, suggesting that it can result in decontextualized and dehydrated borrowings. See Laura Nader "Moving On-Comprehending Anthropologies of Law" in *Practicing Ethnography* at 199.

[11] One need only look at articles on various legal databases which have legal pluralism in the title and which use legal ethnography as the methodology to get a sense of the predominance of legal ethnography in legal pluralism studies.

[12] June Starr & Mark Goodale, *supra* note 10 at 2.

which is one of its strengths as a method for analyzing law in society.[13] Anthropologists claim it is the study of relationships that is one of their contributions to the study of law, one that compensates for over-attentiveness to rules and institutions by lawyers in traditional legal analysis. Such a contribution does not seem surprising given that relationship is the foundation of the ethnographic method, only taking place through various relations between anthropologists, informants, translators and communities.

Another attribute of ethnography, which I alluded to earlier, is that it provides legal scholars with empirical evidence with which to make sense of their theoretical conceptions of law. Thus, the attractiveness of ethnography as a method is that it can be easily meshed with various philosophical and theoretical positions. Finally, ethnography is simply interesting, possessing a certain academic *savoir-faire* that other methodologies lack, at least according to the myth of ethnographic fieldwork that abounds in western academic circles.[14] Despite the appeal of ethnography and its methodological usefulness for legal scholarship, it does present some dangers for the unprepared scholar attempting to arrive at their own conception of legal pluralism. As a methodology, ethnography has been the subject of strident critique and debate, both from anthropologists and those from other disciplines. These critiques highlight some of the problematic assumptions existent in the practice of ethnography, and require some consideration if I am to borrow from ethnographic studies of legal pluralism.

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[13] Norbert Rouland, *Legal Anthropology*, Eng. Trans. Philippe G. Planel (London: Athlone Press, 1994) at 139.

[14] James Clifford points out that there is a myth of fieldwork, which I've glamourized in the above description but which is also very similar to various descriptions of fieldwork in course texts at university. He points out that the actual experience is "hedged with contingencies and rarely lives up to the ideal." See Clifford, *supra* note 3 at 24. In addition, as anthropological perspectives shift to understanding trans-national policies and process, less emphasis is placed on local, personalized fieldwork (which the myth of fieldwork is predicated on), with the possibility of overcoming some of the earlier critiques. See Sally Falk Moore, ed., *Law and Anthropology: A Reader* (London: Blackwell Publishing, 2005) at 303-304.

The critiques of ethnography that I will be focusing on relate to the following dangerous aspects of ethnography: (a) the potential erasure of ethnographied subjects' knowledge and voice through the practice of textual interpretation and academic authorship; (b) the reduction of ethnographied subjects to observed objects and constructed 'Others', seen through a predominately Western, 'expert' gaze; (c) the belief that ethnographers are objective, outside observers of a particular culture, rather than engaged in a subjective endeavor in which their understandings are partial and limited by their own subjectivity. By drawing on the debates regarding these aspects of ethnography, which have been a part of anthropological discourse in the last twenty years, I want to highlight the need for legal scholars to reflect critically upon their/our use of ethnography as a methodology in analyses of legal pluralism.

Much has been written on the first danger of ethnography, which relates to how 'ethnographied' subjects and their knowledge can be hidden or misrepresented within academic scholarship. According to Clifford, the 'professionalization' of ethnography de-emphasized both the processes of translation inherent to cross-cultural study and the crucial role of interpreters and informants in the gathering of fieldwork data, as university-trained specialists became the "privileged, sanctioned sources of data about exotic peoples."[15] The literal erasure of informants' and interpreters' voices is the most explicit example of this particular danger of ethnography, yet it is the act of textual translation away from the observed events and people that subsumes different voices into one generalized voice (for example that of the Samoans or the Nuer, etc.), thus abstracting authorship of knowledge, as well as giving the perception that the

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[15] *Ibid.*

ethnographer is the interpretive author and representative of discursive events and Indigenous Knowledge.

A second potential hazard of legal ethnography, which is tied to the first danger, is the construction of an abstract, objectified 'Other' through a western 'expert' gaze. Like the first danger or hazard of ethnography, creation of an exotic 'Other' is part of the interpretative process characteristic of much ethnography. The abstraction of events and discourse through textual interpretation situates the ethnographer as the expert who speaks authoritatively about those whom he/she has ethnographied and allows the ethnographer to reconstitute individuals and communities as essentialist, simplified versions of reality. The dangers of this aspect of ethnography, and of anthropology in general, have been commented upon extensively in postmodern and critical anthropology, much of it building upon Edward Said's criticism of western knowledge in *Orientalism*.[16] Although Said focused on the construction of the exotic Other through western writings on the Orient in the 19th and 20th Century, his main arguments against the hegemony of western forms of knowledge and the study and representation of others by western scholars are important points to consider when writing about legal pluralism in a foreign and unfamiliar context.

The question that ultimately arises for the scholar working towards a new conception of legal pluralism, based on an analysis of a foreign and unfamiliar space, is whether such a journey should be made at all, considering the dangers. I have decided that I can continue the journey toward a metaphorical conception of legal pluralism, as long as I retain a critical stance toward my own work and the work of others. It is also useful to

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[16] Edward Said, *Orientalism* (New York: Random House, 1978).

draw upon the work of Indigenous Samoan scholars and knowledge holders as much as possible, and to steer clear, as much as is possible, of making authoritative claims about individuals and communities in Samoa.

Part of the work of remaining attentive to, and limiting the dangers I have outlined above is being cognizant of the third potential danger of ethnography (as well as other forms of expert and authoritative knowledge which makes claims about Others), which is the belief that ethnographers (or other experts) are objective, outside observers of a particular culture rather than engaged in an inter-subjective endeavor in which their understandings are partial and limited by their own subjectivity. In fact, the hazardous effects of the first two dangers I outlined are subsumed by this third danger. No neutral, observer status exists. As Paul Rabinow points out, "there is no privileged position, or no absolute perspective from where we can eliminate our own consciousness from our object."[17] Therefore, any claims made regarding legal pluralism and the operation of law in society, based on an ethnographic perspective, is filtered through our own experiences, understandings and beliefs about what *we* think is going on; it is an "inter-subjective creation that ultimately eliminates both subjectivism and objectivism."[18] By highlighting the inter-subjective process that characterizes legal ethnography, and in fact any type of analysis, we not only set out the limits of our own understanding but also remove the abstractions that erase the voices of those with whom our subjectivity is co-constructed and amplified.

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[17] Paul Rabinow, *Reflections on Fieldwork in Morocco* (Berkeley: Univ. California Press, 1977) at 151.
[18] Kirsten Hastrup, "The Ethnographic Present: A Reinvention" (Feb. 1990) 5 Cultural Anthropology 45 at 46.

Attentiveness to inter-subjectivity also tends to lessen the authoritative claims we make about others, whether these claims are essentializing or exocitizing. At times, there seems to be a lack of attention paid to these dangers in many studies of legal pluralism, be they theoretical or empirical in nature. There is a tendency to write as if we are neutral, authoritative observers/analyzers of law without locating ourselves, or discussing the possibilities/pitfalls our location(s) presents for our analysis. Part of this project then is to model inter-subjective legal theorizing, even when the analysis derives primarily from the study of theoretical discourses, ethnographies carried out by other scholars, case analysis and personal experience.

Now that I have highlighted some of the attributes and dangers of legal ethnography, and where this leads me in terms of my own conception of legal pluralism, I will now draw attention to two other important features legal anthropology that I will eventually incorporate into my theoretical construction. The first feature is the focus on local contexts and spaces within legal anthropological discourse and the second feature is the discussion of the relationship between law and power within legal anthropological theorizing.

## Local Contexts and Spaces

In his essay, "Local Knowledge: Fact and Law in Comparative Perspective," Geertz argues that law *is* local knowledge and not only in terms of place, time, class and issue but also as to its accent, which he describes as "vernacular characterizations of what

happens connected to vernacular imaginings of what can."[19] He suggests that both anthropologists and legal scholars have a place in the study of law, as he has conceived of it, since both "law and ethnography are crafts of place: they work by the light of local knowledge."[20] Although attention to the local is one of the major features of legal anthropology, it has also been criticized as being overly narrow and restrictive by focusing on the local to the exclusion of national and trans-national law and legal processes.[21] In answer to such criticisms, legal anthropologists shifted their gaze to the study of trans-national laws and legal processes, although they maintained their emphasis on the local by considering the ways in which national and trans-national laws intersected with and transformed the local.[22]

Both Geertz and Merry suggest that the study of these legal intersections within the local context is perhaps the reason for a renewed interest in legal pluralism within legal anthropology.[23] Although the broadening of legal anthropology's gaze to include the national and trans-national has been important for enlarging our view of law and for an expanded version of legal pluralism, there is still a need to expand our conceptions of the local from its parochial confines, where the local always appears to be the one which receives or is transformed by the trans-national, or at most, is an act of localized

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[19] Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) at 215.
[20] *Ibid* at 167.
[21] Sally Engle Merry, "Anthropology, Law and Transnational Processes" (1992) 21 Annu. Rev. Anthropology 357 at 357ff [Merry, Transnational Processes]. Merry suggests reading Starr and Collier's collection for a criticism of the narrow focus on local dispute processing. June Starr & Jane Collier, eds., *History and Power in the Study of Law: New Directions in Legal Anthropology* (Ithaca, NY: Cornell Univ. Press, 1989).
[22] For an excellent example this type of legal anthropological analysis, see Susan G. Drummond, *Mapping Marriage Law in Spanish Gitano Communities* (Vancouver: UBC Press, 2006).
[23] S.E. Merry, Transnational Processes, *supra* note 21 at 360 and Clifford Geertz, *supra* note 19 at 221 refer to a renewed interest in or 'fluorescence' of legal pluralism in the world.

resistance to the global. Ruediger Korff suggests that our analysis should move toward analyses of how local frames are globalized or how to find locality in globalization.[24]

So, what does paying attention to local contexts and spaces mean in relation to my own project? First, it means that I will be conducting an analysis of the local by considering the local legal context in Independent Samoa, and more specifically, the main island of Upolu, in order to gain an improved understanding of the intricacies and nuances of legal pluralism, both in Samoa but also for legal theorizing in general. Second, I will also engage the local in my metaphors for theorizing legal pluralism. By this I mean that my metaphors will draw upon the language and symbolism of both material/cultural objects and socio-cultural processes in Samoa. Part one of my metaphor will use *'ie toga* woven objects as a resource for describing the different strands of legality existent in moments of legal pluralism in Samoa, while my second metaphor will use the weaving process in Samoa as the basis for theorizing processes of legal pluralism. The use of these localized metaphors will not only be important for moving beyond the generic forms of metaphor in legal theorizing, but also allow me to explore the interconnections between global and local legalities in a way that is specific to Samoa.

## Law and Power

The other prominent feature in the landscape of legal anthropology that will provide a referential point in my navigation toward a conception of legal pluralism consists of theoretical discussions of relationship between law and power. The reason for my consideration of this feature is that the second part of my metaphorical conception of

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[24] Ruediger Korff, "Local Enclosures of Globalization: The Power of Locality" (2003) 27 Dialectical Anthropology 1.

legal pluralism, in which I consider law as weaving process, is predicated on the notion that law and power are so intimately connected that one cannot talk about legal pluralism without addressing the issue of power. There are a number of different theoretical perspectives one can take in regards to power, and its operation in and through law and society. However I will only focus on one perspective; power as viewed through a Foucaultian lens.

If engaging in academic scholarship today, one will invariably come across the work of Michel Foucault, either through engagement with his own writings (preferable) or by reading works that have been influenced by his thought, or at the very least, by reading works that cite one of his essays or make use of the term power relations in the body of text. Regardless of whether one agrees with all or parts of Foucault's thinking, or whether one finds it useful for one's own theorizing, the extent of his influence on current scholarship, particularly in fields such as anthropology, cannot be contested. For myself, I believe that Foucault provides excellent insights into the way that power is exercised and operates through social/relational space, as well as new ways of examining the intimate connections between the production of knowledge/truth discourses and power in history.

Foucault's thoughts on power are considered some of his most innovative work. Foucault was "interested in new ways of seeing the relations between power and knowledge, and their respective relation to the 'subject'."[25] In his January 7, 1976 lecture at the *Collège de France*, Foucault characterizes his work in this way:

> What I have been trying to look at since 1970-1971 is the "how" of power…Now the question I would like to ask is a question from below, and it is a very factual question compared to that traditional, noble and philosophical question. My problem is roughly

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[25] Colin Gordon, "Introduction" in James D. Faubion, ed., *The Essential Works of Michel Foucault: Volume 3 Power* (New York: The New Press, 1994) at xv.

> this: What are the rules of right that power implements to produce discourses of truth? Or: What type of power is it that is capable of producing discourses of power that have, in a society like ours, such powerful effects?[26]

In framing his question about the "how" of power in his 1976 lectures, Foucault provides us with an articulation of his understanding of power, both in terms of where he has been and in terms of his future research agenda. He presents his thoughts in the form of five methodological precautions.[27] First, Foucault's objective is not to analyze rule-governed and legitimate forms of power, which have a single centre, but to look at the extremities of power, where it becomes capillary; in effect, to understand power in its most regional forms and institutions and where it oversteps or transgresses the rules of right.[28] Second, he is not attempting to analyze power at the level of intentions or decision (from the inside), but to study power where intentions are invested in real and effective practices, its field of application where power "implants itself and produces its real effects."[29] He argues that we should be trying to "discover how multiple bodies, forces, energies, matters, desires, thoughts and so on are gradually, progressively, actually and materially constituted as subjects, or as the subject."[30]

Third, we should not regard power as a "phenomenon of mass and homogeneous domination, as the domination of one individual or group over others, or as something that is divided between those who have it and hold it *exclusively* and those who do not

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[26] Michel Foucault, *"Society Must be Defended": Lectures at the College de France, 1975-1976*, Francois Ewald and Alessandro Fontana, eds., trans. by David Macey, (New York: Picador Press, 2003) at 24. [Michel Foucault, Society Defended]

[27] At this point in my project, I am simply providing a description of Foucault's thinking on power, as well as how it relates to legal theorizing and in particular legal anthropology. I will be employing several of Foucault's methodological prescriptions in chapter five, using these abstract concepts to make sense of the role of power and processes of legal pluralism.

[28] Foucault, Society Defended, *supra* note 26 at 27.

[29] *Ibid* at 28.

[30] *Ibid*.

have it and are subject to it."[31] Rather, power should be analyzed as something that circulates or operates as part of a chain; that functions and is exercised through networks. Most importantly, individuals are in a position to both submit to and exercise power (power passing through individuals) and are not inert and consenting targets of power (where power is applied to them).

Fourthly, we should not deduce power by making a descending analysis from the centre, attempting to determine how far it goes down. Instead, we should make an ascending analysis of power, starting with the small mechanisms that have their own techniques, and looking at how they have been and are invested, colonized, used, inflected, transformed, displaced and annexed by general mechanisms and forms, by global phenomena.[32] Finally, the last point he makes is that "the delicate mechanisms of power cannot function unless knowledge, or rather knowledge apparatuses are formed, organized and put into circulation."[33] In summing up then, he suggests that our research should be oriented toward the "uses made of the local systems of subjugation on the one hand and apparatuses of knowledge on the other."[34]

Later on in his work, Foucault articulated further his understanding of the "how" of power in the social field, arguing that power is productive and that subjectivity is constituted through power relations. By productivity of power, Foucault meant "power relations are integral to modern social productive apparatus and are linked to active programs for the fabricated part of the collective substance of society."[35] In suggesting

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[31] *Ibid* at 29.
[32] *Ibid* at 30.
[33] *Ibid* at 33-34.
[34] *Ibid* at 34.
[35] Colin Gordon, *supra* note 25 at xix.

that subjectivity is constituted by power relations, Foucault argued that the "individual impact of power relations does not limit itself to pure repression but also comprises an intention to teach, to mold conduct, to instill forms of self-awareness and identities."[36] Or, as he stated elsewhere, "power constantly asks questions and questions us: it constantly investigates and records; it institutionalizes the search for truth, professionalizes it, and rewards it."[37]

What did Foucault mean by relations of power? In "The Subject and Power," he suggests that what characterizes power is that it brings into play relations between individuals or between groups, which builds on his third methodological point outlined in the 1976 lectures. Thus, he refused to treat power as a substantive entity, institution, or possession that was independent of the set of relationships in which it is exercised.[38] If one is speaking of structures or mechanisms of power, it can only be in terms of certain persons exercising power. Accordingly, "power designates relationships between partners, not with any fixed rules but in an ensemble of actions that induce others, as well as follow from one another."[39] The exercise of power is the way in which some act upon the action of others; thus power relations are "rooted deep in the social nexus" and are not a supplementary structure over and above society.[40] Accordingly, power comes from below: "global and hierarchical structures of domination within a society depend and operate through local, low-level and capillary circuits of power relationships."[41]

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[36] *Ibid.*
[37] Michel Foucault, Society Defended, *supra* note 26 at 25.
[38] Colin Gordon, *supra* note 25 at xxiv-xxv.
[39] Michel Foucault, "The Subject and Power" in James D. Faubion, ed., *The Essential Works of Michel Foucault: Volume 3 Power* (New York: The New Press, 1994) at 337. [Foucault, Subject/Power]
[40] *Ibid* at 343.
[41] Gordon, *supra* note 25 at xxiv-xxv.

What defines a relationship of power then, is that it is a mode of action that does not act directly and immediately on others, but acts upon their action: an action upon an action, or an action on present, possible and future actions.[42] This is differentiated from a relationship of violence; whose opposite pole is passivity. In a relation of violence, which he also refers to as relation of domination, the "only response to resistance is to break resistance down."[43] Accordingly, "what is different about a relation of power are two indispensable elements: that the other (the one over whom power is exercised) is recognized and maintained to the very end as a subject who acts; and that, faced with a relationship of power, there are a whole field of responses, reactions, results and possible inventions that may open up."[44] So, what are the implications of Foucault's conceptions of power for understanding the relationship between law and power?

Most scholarly readings of Foucault highlight his aversion to discussing power using the language of law and rights.[45] For example, Carole Smith, in examining the legal and juridical manipulation of expert knowledge in relation to sterilization and caesarean section cases, challenges Foucault's notion that law is a legitimating discourse for forms of power rather than an exercise of power itself. Quoting Hunt and Wickam's influential book on applying a Foucaultian perspective to law, Smith characterizes Foucault's discussion of law as "incidental to his enterprise, discontinuous, at times ambiguous and contradictory, as well as relatively undeveloped."[46] She cites two reasons for Foucault's

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[42] Foucault, Subject/Power, *supra* note 39 at 340.
[43] *Ibid.*
[44] *Ibid.*
[45] Gordon, *supra* note 25 at xxix.
[46] Carole Smith, "The Sovereign State vs. Foucault: Law and Disciplinary Power" (2000) 329 The Sociological Review 283 at 284. For further discussion of the supposed limits of a Foucaultian perspective on law, see Alan Hunt and Gordon Wickham, *infra* note 49. In their book, they argue that Foucault refuses to give any role to legal regulation in the creation of modernity and marginalizes the role played by law.

marginalization of law in his analysis of power: one, that Foucault considered law as a form of sovereign power, which he believed masked the real source and operations of power, which are the various forms of disciplinary knowledge, and second, that his methodological approach required him to "see through the institutional meta-narratives of sovereignty, law, the state to consider more dispersed and subtle modalities of power."[47]

Although Smith suggests that she is sympathetic to Foucault's project, finding value in his discussion about the link between power and knowledge, and in conceptualizing disciplinary power in new ways, she believes that his characterization of law does not reflect our "our everyday experience in the context of the modern liberal state."[48] Again, she uses Hunt and Wickham's critique of Foucault's treatment of law to build her argument.

They suggested that Foucault neglected two possibilities for law. First, that law may re-define forms of disciplinary power in its own terms and second, that law and legal rights may act to protect the subject from the coercive influence of such power.[49] Smith argues that both these possibilities, which she calls the 'reversal of power', are exhibited in reported judgments on sterilization and caesarean interventions that have been performed without consent. Smith does not discount Foucault's contribution to our understanding of power in general, but argues that his analyses have the potential to blind us to the power of law and the fact that sovereign law is a pre-eminent site of power.[50]

Legal anthropologists that have been guided by Foucault's work on power appear to be more sanguine about applying a Foucaultian conception of power to their own

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[47] Carole Smith, supra note 46 at 284.
[48] *Ibid* at 291.
[49] Alan Hunt and Gordon Wickham, *Foucault and Law* (London: Pluto Press, 1994) at 56.
[50] Smith, *supra* note 46 at 285, 304.

theorizing of the law/power relationship. For example, Sally Engle Merry discusses how she became intrigued with Foucaultian theories of power/knowledge and his work on disciplinary power, using them to guide her analysis of American colonialism in Hawaii.[51] She states that in her study she was interested in "how legal systems and their associated disciplinary systems were part of the colonizing process… and how historical processes accompanying the introduction of a new legal system revealed the expansion of discipline and creation of a new normative order backed by law."[52] Her later project, which focused on the use of law to diminish gender violence in Hawaii, also made use of a Foucaultian perspective. Here, she looked at how the legal discourse of gender violence was different from other discourses, asking how law as a system of discipline and surveillance is different than it was in the nineteenth century. She found expansion of the idea of syndromes and victimization as a source of anti-social behavior in late twentieth century contrasts with nineteenth-century understandings of gender violence.[53]

This more optimistic approach to Foucault's work on power, and its use in understanding the law/power relationship, appears to stem from viewing law in two ways: first, as a disciplinary form of power similar to that of the prison or psychiatric institution, which was Foucault's focus in *Discipline and Punish* and the *History of Sexuality*; secondly, viewing law as a discourse that induces power effects, in the same way that Foucault discussed the power effects of truth discourses regarding sexuality and madness from the seventeenth century forward. I believe that we can use Foucault's analytics to account for the relationship between law and power, taking our cue from

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[51] Sally Engle Merry, "Pluralizing Paradigms: From Gluckman to Foucault" (1999) 22 PoLAR 115 [Merry, Pluralizing Paradigms]
[52] *Ibid* at 118-119.
[53] *Ibid* at 120.

works such as Merry's, yet I am also aware of the possible limits as suggested by Smith, Hunt and Wickham, who argue that his analysis has limited application to understanding the power of law, and in particular state law.

Part of this theoretical ambiguity towards Foucault arises from the fact that we will never know exactly "what Foucault meant by his words, act and associations and that, in the act of attempting to constitute and reconstitute the logic of any great thinker's work, there is also a tendency toward either reverence or rebellion."[54] Regardless of whether we are rebels or reverent disciples, there is a need to continue reading Foucault's works, not necessarily to define the work but, as Jonathan Simon suggests, to continue it. Part of this continuance requires consideration of new publications of Foucault's work and applying his tools and methodologies to new forms of research.

As I alluded to earlier, Foucault's 1976 lectures provide us new insight into his thoughts on power, which I believe opens up new spaces for analyzing power and how this relates to law. In his January 14th, 1976 lecture, Foucault states that the general domain that he has been studying is the relation between right and power. In his lecture, he first discusses what he believes to be the general principle guiding his work, which is:

> In western societies, the elaboration of juridical thought has essentially centered around royal power ever since the middle ages, and the juridical edifice of our societies was elaborated at the demand of royal power, for its benefit and to serve as its instrument or its justification.[55]

He points out that even when this juridical edifice (which includes law and other institutions) escaped from royal control, and actually was used against royal power; it was still built around the king, his rights, his power and the possible limits to his power.

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[54] Jonathan Simon, "In Another Kind of Wood: Michel Foucault and Socio-legal Studies" (1992) 17 Law & Soc. Inquiry 49 at 49-50.
[55] Michel Foucault, Society Defended, *supra* note 26 at 26.

Therefore, he argues that the role of the theory of right has been to establish the legitimacy of royal power by organizing it around the problem of sovereignty. Viewing the central problem as sovereignty means that the technique and discourse of right is used to dissolve the element of domination and power and to replace it with two things: the legitimate rights of the sovereign on the one hand, and the legal obligation to obey on the other.[56]

So the first part of his work in *Society Must be Defended* highlights how the problem of sovereignty, and the theory of right, have been used to legitimatize royal power and have been the main discourse for understanding the relation between right and power. Next, he discusses how his work has inverted the analysis of power, from a theory of right to a theory of relations of power. He states:

> I have been trying to do the opposite, or in other words to stress the fact of domination in all of its brutality and its secrecy, and then to show not only that right *is an instrument of that domination-that is self-evident-but also how, to what extent and in what form (and when I say right, I am not thinking just of the law, but all of the apparatuses, institutions and rules that apply it) serves as a vehicle for and implements relations that are not just relations of sovereignty but relations of domination.*[57] [emphasis added]

By domination, he is not referring to the domination of one over many, or one group over others, but of:

> the multiple forms of domination that can be exercised in society, so not the king in his central position, but subjects in their reciprocal relations, not sovereignty in its one edifice, but the multiple subjugations that take place and function within the social body. The system of right and the judiciary field are permanent vehicles for relations of domination and for polymorphous techniques of subjugation. Right must, I think, be viewed not in terms of a legitimacy that must be established, but in terms of the procedures of subjugation it implements. As I see it, we have to bypass or get around the problem of sovereignty-which is central to the theory of right-and the obedience of

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[56] *Ibid.*
[57] *Ibid* at 27.

> individuals who submit to it and reveal the problem of domination and subjugation instead of sovereignty and subjugation.[58]

From this point forward, he discusses the methodological precautions which I have already outlined above, such as: (a) the need to analyze power by looking at its extremities (in its most local forms and institutions, as well as where it transgresses the rule of right that organizes and delineates it); (b) studying power at its application, where it is vested in real practices, produces real effects and gradually constitutes material bodies, desires, forces, and subjects; (c) studying power as something which circulates, passing through individuals and in their relations to others.

What I take from Foucault's lectures is that he was interested in law and its power, but he wanted to study how the judiciary field was a constant medium for relations of domination (power) and techniques of subjugation. Since he viewed domination (power) as taking on many forms within society and being *between* subjects rather than as the king over subjects, he believed that the judiciary field (which includes the law, judiciary, legal institutions) is a vehicle or medium for facilitating these relations of domination between subjects, and for facilitating techniques of subjugation. This seems to link law and power very tightly in Foucault's work in that he sees law as both: (a) a foil in the discourse of sovereignty, where reference to the rights of the sovereign or the legal obligation to obey the sovereign is used to mask or dissolve the element of domination in power, therefore becoming an instrument of that domination, which he believes is self-evident (and which is the point that Smith and others draw our attention to); (b) a form which facilitates relations of domination, circulating between subjects at the extremities of society (in its most localized forms and institutions).

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[58] *Ibid.*

This being the case, I believe that Foucault's perspective does account for the power of state law, including its ability to redefine forms of power, since he recognizes its ability to dominate (he argues that this power is self-evident) but also because he sees the juridicial field (which includes sovereign/state law) as facilitating relations of power at the extremities of society, which would seem to suggest that the law would be able to redefine relations of power as it facilitates its operations. In addition, the way that Foucault characterizes relations of power in this lecture suggests that we can examine an infinite variety of relations operating at the extremities, and how those relations are facilitated through the juridical field. However, such an analysis of power requires starting with the local, looking at the relations of power operating between subjects and institutions at the extremities and then having our analysis move in an ascending direction to consider relations of power at the level of whole populations, which again, involves the juridicial field and the facilitation of domination (power). As such, I believe that Foucault's approach to power can contribute significantly to our understanding of legal pluralism because it can elucidate how moments of legal pluralism are created, which I will be outlining in chapter five via the metaphor of the weaving process of law.

In this chapter I have discussed the salient features of the discipline of legal anthropology, identifying those theoretical forms and discourses that will inform the development of my interdisciplinary and metaphorical conception of legal pluralism in chapters four and five. Since I will be using the ethnographies of others as material for my own theory of legal pluralism, I have discussed both the attributes and dangers of ethnography, particularly highlighting the need to consider the work of Indigenous scholars, the need to highlight my own subjective perspective in my work, as well as the

need to read these ethnographies with a critical lens, attentive to creations of the essentialized Other. I have also focused on legal anthropology's attention to the local, since I will employ a local material object and process (woven objects and weaving) as the symbolic pieces of my two-part metaphor for conceptualizing legal pluralism and because my work will be attentive to local laws, institutions and subjects. Finally, my review of legal anthropology has ended with a discussion of Foucault's conception of power, which I will return to in chapter five in my analysis of the processes of legal pluralism. The next chapter will be similar to this first chapter, but rather than conducting an overview of certain aspects of legal anthropology, I will discuss those features of comparative law and law and society studies that are relevant to the development of my theoretical conception of legal pluralism.

# Chapter Two: Critical Analysis of Comparative Law and Law and Society Discourses

In this chapter, I will conduct a critical analysis of select features of comparative legal theory and law and society literature, pointing to those theoretical concepts within each of these disciplines that have, either explicitly or implicitly, influenced our understanding of legal pluralism and will aid in furthering my theoretical conception of legal pluralism. An initial question that may arise for some readers is whether comparative legal theory can offer insight into the workings of legal pluralism, considering the historical focus on state law and formal legal rules and relationships by comparative legal scholars.[1] Although such a concern is valid, comparative legal scholars are using the concept of legal pluralism to explain the complexities of law. For example, in Werner Menski's newest edition of his book, *Comparative Law in a Global Context*, he emphasizes the importance of considering legal pluralism in legal scholarship generally and in comparative legal studies in particular. He argues that legal plurality is a reality existent in the world and that legal pluralism, as a theoretical and methodological concept, is an essential tool for

[1] By comparative legal scholars, I am referring to those scholars who self-identify as such within their work, but also I am referring to those scholars who, although they don't explicitly identify themselves as comparativists, have their work featured in comparative law books and journals. I recognize that the disciplinary boundaries between legal anthropology, comparative law and law and society studies are thin and permeable, with scholars working across and within each of them. However, I also believe that one can trace certain, dominant perspectives and theoretical constructs to each of the disciplines I am considering, and that such tracing is more of a categorical naming process rather than an acceptance of rigid boundaries between academic disciplines.

understanding this reality.[2] Other comparative legal scholars have also acknowledged the need for re-orienting comparative legal theory towards legal pluralism.[3]

So, is this 'new' turn in comparative law sufficient reason for my overview of the discipline? Perhaps; yet it is certain features of comparative legal theory that are not explicitly referenced in the legal pluralism literature, but which are implicit in legal pluralism discourse, that are the motivation for my discussion of comparative legal scholarship. The two features of comparative legal theory I am interested in are: the differentiation of legal rules and systems for the purposes of comparison and the use of metaphor to discuss processes of legal change. Each of these features are useful for theorizing legal pluralism, however we must first name them as part of the already ongoing discourse of legal pluralism, then critically analyze them, and finally make alterations to them to work within a post-modern, interdisciplinary legal pluralist paradigm.

Although the differentiation of legal traditions for the purposes of comparison and the use of metaphor for understanding legal change are features of the discipline of comparative law, one can also find them within law and society studies. Of particular note in law and society scholarship is the use of metaphor for discussing law and legal change. However, there are some key differences between the way law and society scholars and comparative law scholars approach the subject of legal change and in the way they build and use metaphor, which I will also be discussing in this chapter.

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[2] Werner Menski, *Comparative Law in a Global Context: Legal Systems of Asia and Africa*, 2nd ed. (London: Cambridge Univ. Press, 2006) at 5, 15.
[3] For example, Roderick A. Macdonald, "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism" (1998) 15 Arizona. J. Int'l & Comp. Law 71; Susan Drummond, *Mapping Marriage Law in Spanish Gitano Communities* (Vancouver: UBC Press, 2006).

To begin, I will discuss the general scope of comparative legal studies, discussing the ways in which legal differentiation and legal change are approached within the discipline. Particular focus will be given to how comparative legal scholars collect and describe specific legal rules and forms, how they use micro and macro-comparative analysis in order to highlight uniformity or difference across legal traditions, as well as their preoccupations with legal change. I will then look at the ways in which legal traditions and legal change are theorized in law and society studies, pointing to what seems a more critical and empirical approach to legal difference and change.

## Comparative Law Discourse: Describing Legal Traditions and Legal Change via Comparative Analysis

Comparative law has been described as a 'strategic' discipline, one that has growing interest among legal scholars worldwide for its potential to help in our understanding of legal systems or traditions, legal change, law and globalization and how to achieve legal reform.[4] Despite its cachet among certain branches of legal scholarship, there is little agreement regarding the defining features of comparative law. One general definition suggests that comparative law is an "intellectual activity with law as its object and comparison as its process."[5] Besides pointing to the obvious role of comparison as a foundational concept of the discipline, this definition provides little insight into what kinds of questions legal comparativists engage through their work.

From a brief overview of the literature, one can find at least three major areas of ongoing debate and dialogue within comparative legal studies. They are: (a) the legal

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[4] Esin Örücü, " Unde Venit, Quo Tendit Comparative Law" in Andrew Harding and Esin Örücü, eds., *Comparative Law in the 21st Century* (London: Kluwer, 2002) 1 at 1. [Örücü, Unde Venit]
[5] K Zweigert and H. Kotz, *An Introduction to Comparative Law*, 3rd ed. (Oxford: Claredon Press, 1998) at 2.

objects that should be the basis of comparison (the debate centers on whether comparativists should focus on the comparison of legal texts and cases or on legal institutions and legal actors); (b) the level at which comparison should be done (should the comparison be macroscopic in which legal systems or cultures are compared or should it be at the microscopic level where specific legal rules and institutions are compared); (c) is the purpose of comparison to find similarities/uniformity between systems or rules or is it to highlight differences?

If we begin by looking at the first area of debate, which centres on the question of what legal objects should be the basis of comparison, we will see that historically, comparative legal scholars have conducted much of their analysis through the examination of specific legal texts, such as statutes, or sets of cases rather than focusing on the social or behavioural aspects of law.[6] Part of this focus on statutes, legal rules and cases in comparative legal analysis is traceable to the dual role that many comparativists often played: one-part academic scholar, one-part law reformer. Since many comparativists were asked to draft new legislation or make recommendations for legal reform, based on their understanding of 'similar' legal rules in other jurisdictions, their work tended to express this same technical expertise.

A classic example of this dual role, and its linkage to the study of rules and texts, is seen in the work of Abdel–Razzak Al Sanhuri. Sanhuri is considered one of the foremost comparative lawyers in the Arab world, and was responsible for much of the legal drafting in newly independent Arab states. He was an ardent reformist who wrote two

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[6] For example, the text *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* by H.C. Gutteridge (Cambridge: Cambridge Univ. Press, 1949, 2nd ed., 1971) has significant chapters entitled: the Comparative Approach to Case Law, the Comparative Interpretation of Statute Law, and The Problem of Legal Terminology.

dissertations. His first PhD dissertation, entitled *Contractual Restrictions on the Individual Freedom of Labour: A Comparative Study in Rules and Standards*,[7] focused on the restraints to trade applied by English courts to labour disputes, studying the "role of standards in the socialization of modern law where we find ourselves facing a conflict between interests of the individual and commercial enterprises…"[8] His second dissertation focused on the modernization of the Islamic law of *caliphate*. As Amr Shalakany notes in his discussion of Sanhuri's work, Sanhuri attempted to bring his two areas of study, the normative application of rules and standards and Islamic legal reform, together through his drafting of the Egyptian civil code.[9] Sanhuri's dual role as academic and legal reformer was not an uncommon one for legal comparativists in this century, which influenced the direction of comparative law toward technical analysis of legal texts and cases.

This is not to say that comparativists stayed with textual interpretation, and linguistic analysis, of cases and statutes. Eventually, they moved toward examining how legal statutes, codes or rules applied in different social contexts, as well as focusing on the role of legal actors and decision-makers in legal outcomes. Ernst Rabel, one of the 'fathers' of American comparative law, is considered one the leaders of this conceptual shift. He challenged the positivist view that foreign legal systems could be understood through linguistic analysis of various legal texts, arguing that it was how these rules and texts

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[7] Abdel-Razzak Al Sanhuri, Contractual Restrictions on the Individual Freedom of Labour: A Comparative Study in Rules and Standards (Lyons, 1925).
[8] Amr Shalakany, "Sanhuri: The Historical Origins of Comparative Law in the Arab World" in Annelise. Riles, ed., *Rethinking the Masters of Comparative Law* (Oxford: Hart Publishing, 2001) 152 at 178.
[9] *Ibid* at 179.

were applied that mattered in comparative legal analysis.[10] Thus, a number of studies began comparing how legal decision-makers applied rules and texts in various jurisdictions.[11]

This move toward analysis of legal actors, as well as legal institutions, was only the beginning of change in the landscape of comparative law. Other scholars began questioning the focus on rules and texts altogether, arguing that what was missing from legal analysis in general, but specifically comparative analysis was a consideration of social context. This type of argument was made by Rudolf Schlesinger, another influential American comparativist. In an overview of Schlesinger's work and influence, Ugo Mattei highlights that Schlesinger rejected the positivist or realist notion that only cases, as well as decision-making processes, mattered in legal analysis. Mattei argues that Schlesinger brought a structural analysis to comparative law, in which such things as political power, economic hegemony, cultural legitimacy, race relations, and so on are considered formative to the development of legal tradition as much or perhaps more than legal texts, cases or legal decision-making.[12]

Despite the move away from textual and case analysis in the work of many legal comparativists, this is still a central feature in recent comparative legal theory. For

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[10] See David J. Gerber, "Sculpting the Agenda of Comparative Law: Ernst Rabel and the Façade of Language" in Annelise Riles, ed., *Rethinking the Masters of Comparative Law* (Oxford: Hart Publishing, 2001) at 199.

[11] An example of the focus on particular decision-makers is Herbert J. Liebesny's *Foreign Legal Systems: A Comparative Analysis*, 4th Ed. (Washington: George Washington Univ., 1981). In his text, Liebesny compares judicial approaches to case law in Germany and the United States, as well highlighting judicial decision-making in India, Pakistan and 'Near-Eastern' States such as Turkey and Egypt. For a recent example of this type of analysis see D. Neil MacCormick and R. S. Summers, eds., *Interpreting Precedents: A Comparative Study* (Aldershot, 1997) or Anthony R. Dicks, "The Law-Making Functions of the Chinese Judiciary: Filling Holes in the Civil Law" in Ian Edge, ed., *Comparative Law in Global Perspective: Essays in Celebration of the Fiftieth Anniversary of the Founding of the SOAS Law Department* (New York: Trans-national Publishers, 2000) at 241.

[12] Ugo Mattei, "The Comparative Jurisprudence of Schlesinger and Sacco: A Study in Legal Influence" in Riles, Masters, *supra* note 8 at 254-255.

instance, in several recent comparative law texts, the authors consider the historical, social and cultural context of the regions that are being studied, while also focusing on particular legal texts and cases. For example, in discussing legal development in South Africa, David Carey-Miller is highly critical of the technical evaluation that comparative lawyers have employed in previous discussions of law in South Africa. He argues that 'perspective' and norms, as well as historical events, are crucial in shaping the present law in South Africa. [13]

However, Carey-Miller does not abandon the analysis of legal texts or cases in his move toward context, but rather integrates his discussion of normative influence with an analysis of the *South African Bill of Rights* and land reform cases. Another example of this type of integration between context and textual analysis in comparative legal studies can be found in Andrew Huxley's work "Rhodes, Arakan, Grand Cayman: Three Versions of Offshore."[14] Here, Huxley considers the *Special Trusts (Alternative Regime) Law 1997 (STAR) Act*, along with two other Acts passed in the Cayman Islands between 1997-1998. In the first part of his analysis, he focuses on the *STAR Act* itself, its meaning, its usefulness, as well as what has been borrowed from other jurisdictions in its development. However, the second part of his analysis is devoted to an historical overview of the role of offshore islands in the creation of international markets. He argues that an historical account is needed to help evaluate the current situation of offshore trusts in the Cayman Islands.

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[13] David Carey-Miller, "South Africa: A World in One Country on the Long Road to Reality" in Andrew Harding and Esin Örücü, eds., *Comparative Law in the 21st Century* (London: Kluwer, 2002) at 281.
[14] Ian Edge, ed., *Comparative Law in Global Perspective: Essays in Celebration of the Fiftieth Anniversary of the Founding of the SOAS Law Department* (New York: Trans-national Publishers, 2000) at 145.

The importance of integrative works in comparative law, such as the two examples offered above, is that they take legal analysis seriously while attempting to consider the social, historical and cultural context.[15] Taking the legal seriously is one of the features of comparative law that I will employ in my own analysis of legal pluralism in Samoa. This will offset the problem existent in many studies of legal pluralism where, in pursuit of studying 'non-state' legalities, state law is completely erased from the analysis. To understand the different legalities/illegalities operating in Samoa in a given moment, then consideration must be given to legal texts and cases; how they are operationalized, how individuals and communities react to or ignore them, how they are constructed through interaction, and so on. Even non-state legalities, texts, oratory, songs, biblical passages, etc ought to be considered in order to develop an understanding of legal pluralism in Samoa. This does not mean that historical and cultural context, through the use of ethnography, is put aside, but simply that the two are interwoven in my analysis, along with several other features.

A second area of debate and discussion within comparative legal studies relates to the level of comparison that is required, whether comparison should be macro-comparison or micro-comparison. Esin Örücü provides an excellent overview of these two different levels, and the 'variation' of perspectives in each level, in chapter four of her book *The Enigma of Comparative Law: Variations on a Theme for the Twenty-first Century*.[16] The first type of comparison that Örücü discusses is macro-comparison. Macro-comparison

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[15] Although the contextual analysis is often thin, and there is a tendency to over-generalize about cultures, at least there has been movement toward contextualization.
[16] Esin, Örücü *The Enigma of Comparative Law: Variations on a Theme for the Twenty-first Century* (Leiden: Martinus Nijhoff Publishers, 2004) at 41-50. [Örücü, Enigma]

has traditionally been concerned with comparing the legal systems of different nations.[17] There are two variations of macro-comparison, one that is broad (Variation I) and one that is narrow (Variation II). Comparative legal scholars who fall into Variation I of macro-comparison, understood as the broad approach, argue that comparativists must "understand the relations between legal systems, legal cultures and legal traditions as well as find rules that are not part of the formal or state legal system."[18] Included in their analysis should be 'extraordinary' legal traditions or systems and not just the common or civil law. Within this approach, criteria must be developed to differentiate between accidental and changeable factors, which should be ignored, and necessary factors. As such, part of the work to be done is to develop these criteria, but also to know the cultures under consideration.

Variation I macro-comparative scholars are in disagreement as to the number of traditions that exist and how they should be referred to. Some, such as John Merryman, argue that there are three main traditions existing today and differentiates between legal system and legal tradition. Legal systems being "the set of legal institutions, procedures and rules"[19] in a place and legal traditions being a set of deeply rooted, historically conditioned attitudes about the nature of law, the role of law in society and the polity and about the proper organization and operation of a legal system, and about the way that the law should be made, applied, studied, perfected and taught.[20]

Other Variation I scholars prefer the use of 'legal culture' rather than legal system or tradition. They argue that one must understand the general culture that the legal

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[17] *Ibid* at 41.
[18] *Ibid* at 42.
[19] *Ibid* at 43.
[20] *Ibid*.

community is part of and in order to distinguish legal systems, one must locate them within the broader cultural context in which they are situated.[21] To take this further, some argue that what should really be compared are cultures rather than law, since law is only one element within culture, and it is the influence of cultural context that ultimately determines the legal system that develops. Of course, there are disagreements as to what is included in culture, which reflects disagreements from other disciplines such as anthropology, as well as how we should study cultures. Some reject the notion of legal culture, due to the fact that it focuses on separation and limits the idea of mixité and does not pay attention to processes of globalization. For some, such as Patrick Glenn, legal tradition is more useful because it refers to the trajectory from past to present and asks: "how do we validate our knowledge of the law?"[22]

In summing up Variation I of macro-comparative analysis, Örücü highlights that the analysis has gone beyond the idea of legal systems to include broader units of analysis, and that there is no one definition for legal system, legal culture or legal tradition that is used in the literature. What is important in Variation I analyses is the reference to context; the idea that legal systems must be studied within their social, cultural, economic and political environment in order to reach a deeper understanding of the law and that attention must be paid to the interrelationships between legal systems.[23]

Variation II of macro-comparative analysis is a narrower interpretation of what should be compared in one's analysis. Variation II scholars argue that reference to legal culture obscures our understanding of law and leaves us with unanswerable questions

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[21] *Ibid* at 44. For example, see M. van Hoeke and M. Warrington, "Legal Cultures and Legal Paradigms: Towards a New Model for Comparative Law" (1998) 47 Int'l. and Comp. Law Quarterly 495.
[22] Örücü, Enigma, *supra* note 16 at 45.
[23] *Ibid* at 45-46.

such as whether national character causes differences in legal systems or whether legal systems mirror national character and culture, both of which are impossible to measure. In addition to their aversion to culture and context other than legal texts and institutions, Variation II scholars also argue that comparative law research is intra-cultural. In other words, the subject of comparison should be those legal systems or legal rules that are rooted in similar traditions and operating in the similar socio-economic conditions. This accords with the fact that one of the practical purposes of comparative law is to harmonize laws, which means that the most successful research is one that compares legal systems of the same family.[24]

For my purposes, the macro-comparative legal studies that are most useful for my own project are those that fit in Variation I. Since my primary objective is to offer a theoretical consideration of legal pluralism, those works that consider the cultural and social context are important. In particular, I am drawn to Patrick Glenn's concept of tradition, which invokes both a consideration of the past and present and how legal information moves between them. Despite my interest in Glenn's discussion of legal traditions, and the use I will make of certain works that consider different legal cultures and contexts for the purposes of description, macro-comparative analysis in general is not something I will be engaging in my thesis. I am not interested in putting the different legalities existent in Samoa into defined macro-comparative categories for the purpose of comparison.[25] As such, macro-comparison will not be a predominant feature of my

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[24] *Ibid* at 46-47.

[25] As Esin Örücü points out, one of the main pursuits of comparative law is the creation of groups of legal systems. Accordingly, this objective can be regarded even as the starting line of all comparative activity. Legal systems, legal cultures and legal traditions are classified for the purpose of comparison. See Örücü, Enigma *supra* note 16 at 35.

concept of legal pluralism, although I will draw upon work that has, at its base, a macro-comparative perspective.

The other level of comparison that Örücü identifies in comparative legal studies is micro-comparison. Those who employ a micro-comparative approach are concerned with legal rules: defining what a rule is, as well as considering the rules of different legal systems. Variation I of micro-comparison, which I would suggest reflects more recent approaches in comparative law, takes a broad view of understanding legal rules. Those who take this approach make several arguments: that legal rules should be studied with respect to their political, social, cultural and historical context, that rules are found not only in statutory texts but also in cases and judicial decisions of both higher and lower courts, and other rules beyond the 'official' rules of the state should also be considered by comparativists.[26]

Comparativists who take this broader approach argue that comparative legal studies should move beyond their traditionally narrow confines and take legal pluralism seriously; that comparativists should be concerned with both state and non-state law; and that analysis should be inclusive of local, national and global legalities. Such scholarship is closely aligned with the work of legal anthropologists and law and society scholars who advocate for the necessity of legal pluralism as a theoretical concept. Of course, not all comparative legal scholars agree that legal pluralism, or at least the 'strong' legal pluralism advocated in Variation I micro-comparison, should be a central aspect of comparative law. Comparativists who argue against legal pluralism as an object of comparative analysis fall into what Örücü calls Variation II micro-comparative analysis.

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[26] *Ibid* at 49.

According to Örücü, Variation II micro-comparativists not only reject strong legal pluralism, arguing that law is a creation of the state only, but also argue that a broader approach to comparative law is dangerous. They argue that comparative law should use a normative approach, with study and analysis of the law limited to legal texts and judicial decisions; it should not be involved in empirical field studies, as this would "sidetrack the comparativists into sociological and anthropological research."[27] In Variation II micro-comparison, if legal pluralism is to be considered at all in comparative legal studies, it is only non-state rules recognized by the state, such as the regulations of professional bodies, that should be compared and nothing more. In addition, Variation II scholars argue that comparative law is ultimately a practical pursuit, rather than a theoretical one. Their job is to simply compare and contrast official law and not use theory, which ultimately carries the political preferences of the comparativists.[28]

It is questionable whether such a view of comparative law, as an exclusively practical and apolitical pursuit, is valid given that most comparativists advance theoretical claims in their analysis, as well as many being avid supporters of legal reform, which is a decidedly political activity. The narrowness, as well as the romanticization, existent in this version of micro-comparativism would be of limited value for understanding the law in Samoa, and arguably anywhere. It simply leaves too much of the law outside of the frame of analysis and does not allow for the identification of one's own subjectivity in the theoretical and 'practical' pursuit of comparative analysis. I find this lack of subjectivity, and the belief that comparativists are merely disinterested, apolitical analysts

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[27] *Ibid* at 50.
[28] *Ibid*.

more dangerous than the broad approach suggested by Variation I.[29] As such, the narrow approach advocated by Variation II scholars will not be a feature of my analysis, while the legal pluralist approach adopted by Variation I scholars will be prominently featured within my project, with some alterations. The other area of debate and discussion within comparative legal studies, which has implications for how understandings of legal change and legal pluralism are constructed, concerns the purpose of comparison. Previously, the purpose of comparative law was to find uniformity across rules and systems via a functionalist approach. In more recent approaches it is difference and cultural context that is the focus.

The starting point of comparative law, as a valid methodological and social scientific discipline, is traced to the Paris Congress of 1900. Here, comparative legal scholars argued that comparative law should be based on the presumption that only similar legal rules and forms could/should be compared.[30] Based upon this assumption, many comparativists of the 20th Century worked toward finding these similarities among legal systems and legal rules and promoting universalism. For example, Ernst Rabel, who was highly influential in comparative legal studies, first in pre-World War II Germany and later in the United States, focused on finding the similarities between common law and civil law systems through the act of comparison. In his essay *Private Laws of Western Civilization*, Rabel argued that the "common and civil law systems move steadily nearer

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[29] The dangers of viewing one's academic work as neutral and objective, without reference to the social and cultural partiality that every researcher brings to their task, is well documented in Michael Jackson, *Minima Ethnographica: Intersubjectivity and the Anthropological Project* (Chicago: Univ. of Chicago Press, 1999).
[30] Esin Örücü, Enigma, *supra* note 16 at 20.

to each other"[31] and that the "primordial steps leading us from isolation to community in the legal field are in comparative research."[32] Vivian Grosswald Curran argues that, although the focus on similarity was part of the functionalist agenda of comparative law that was established at the Paris Congress, Rabel and other German émigrés who taught in U.S. law schools after World War II were strongly influenced toward finding uniformity and similarity due to their experiences under the Nazi regime, where 'difference' was used to justify legalized discrimination and atrocities against Jews and others who were deemed different from the German Völk.

Curran goes on to argue that the influence of the legal uniformity approach of *émigré* law professors such as Rebel, Max Rheinstein, and Rudolf Schlesinger can be seen today in the teaching and study of comparative law, particularly in the United States. For example, the authors of a prominent comparative law text state that "the objective of comparative law is to find similarities" [33] and their aim is in fact, to avoid finding differences. In one quotation, they go on to argue that similarity among legal systems is not just the result of comparative analysis but is actually a confirmation of the validity of the comparative act, suggesting that "if one finds there are great differences or diametrically opposite results, one should go back and check again."[34] Other fathers of American comparative law, such as John Henry Wigmore, also engaged in comparison for the purpose of discovering uniformity, with a "commitment to the discovery of

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[31] Ernst Rabel, as cited in Vivian Grosswald Curran, *Comparative Law: An Introduction* (Durham: Carolina Acad. Press, 2002) at 10.
[32] *Ibid.*
[33] H. Zwiegert and H. Kotz as quoted in Vivian Grosswald Curran, *Comparative Law: An Introduction* (Durham: Carolina Acad. Press, 2002) at 8.
[34] *Ibid.*

endless examples of universal innate legal ideas animating Wigmore's entire project."[35] Despite the influence of the functionalist-similarity approach within comparative law, other scholars have questioned its ability to say anything of value about legal systems in general or even about legal uniformity. As one scholar notes, comparative law can only meaningfully influence the ongoing conversation about legal uniformity if it is willing to overcome its obsession with suppressing difference across laws.[36]

There are two lines of argument from legal comparativists who focus on difference. The first type of argument is that uniqueness does not limit comparability, that we could compare different legal systems, institutions and rules and come to the conclusion that they are not alike, which would be as valid a type of comparison as finding them similar. The other line of argument is that comparison of the unique is not possible, that the cultural frameworks in which law is situated are incommensurable, so that comparison of these legal systems is ultimately futile. This latter type of argument has been referred to as 'framework-relativism' by some legal comparativists, who argue that such an analysis would do away with the very discipline of comparative law since the object is to be able to compare at some level, whether to find similarity or difference.[37]

Despite ongoing debate about the validity of certain analytical approaches within comparative law, such as the framework-relativism approach or the functionalist approach to comparison, scholars within the discipline have begun focussing their attention on other theoretical concerns. Increasingly, comparative legal scholars are

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[35] Annelise Riles, "Encountering Amateurism: John Henry Wigmore and the Uses of American Formalism" in A. Riles, ed., *Rethinking the Masters of Comparative Law* (Oxford: Hart Publishing, 2001) 94 at 108. [Riles, Amateurism]

[36] Pierre Legrand, "The Return of the Repressed: Moving Comparative Legal Studies Beyond Pleasure" (2000-2001) 75 Tul. L. Rev. 1033 at 1037. [Legrande, Return of the Repressed]

[37] A. Peters and H. Schwenke, "Comparative Law Beyond Post-modernism" (2000) 49 Int'l. & Comp. Law Quarterly 800 at 827.

considering notions of difference and cultural contexts in their scholarship. This exploration of difference finds its expression in theories about legal porosity and legal change, which has dominated much of the comparative legal scholarship since the 1970's. A number of theories have been developed to move away from a strict uniformity thesis, accounting for legal porosity and legal change.

These theories fall on a continuum: on one side, it is argued that legal systems are fairly closed, separate entities, where changes take place through a slow, internal process in which the individuals and communities formulate and reformulate information and ideas according to their own cultural and societal norms. At the other end of the continuum it is argued that legal systems are entirely open to other traditions and that legal change happens either through forced imposition or through willing adoption. In-between these two sets of arguments are those that suggest that legal traditions are open to influence from other traditions, but that when rules and institutions are transferred or imposed, they are never exactly the same in the new locale due to different social and cultural context. Over time, this permeability combined with specific cultural and social influence results in a complex mixité.

Of course, there are variations to each of these arguments. David Goldberg and Elspeth Attwooll suggest that one variation of the first type of argument, that legal traditions are closed systems that resist change, is often made by Indigenous peoples and "religious or nationally self-conscious groups,"[38] who see their legal tradition as either a reflection of, or a protection of a specific national culture, or as the soul of the nation.

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[38] David Goldberg and Elspeth Attwooll, "Legal Orders, Systemic Relationships and Cultural Characteristics: Towards Spectral Jurisprudence" in Esin Örücü, Elspeth Attwooll, & Sean Coyle, eds., *Studies in Legal Systems: Mixed and Mixing* (Boston: Kluwer Law Int'l., 1996) 317 at 331.

They claim that those who adhere to this position have few arguments to support their connection between national culture and the closedness of their legal tradition.[39] John Jackson echoes their doubts in his overview of Oscar G. Chase's paper "Legal Processes and National Culture."[40] Chase argues that cultural differences present formidable barriers to legal transplantation from foreign systems. He argues that three sorts of problems are likely to occur if transplantation were to take place: acceptance problems, legitimacy problems and social risks.

Although Jackson welcomes Chase's attention to culture, many unanswered questions remain. Jackson argues that little thought has been given to the strength of relationship between legal culture and national culture.[41] He himself is wary of finding too much harmonization between the two and disagrees that legal transplants will be as harmful as Chase argues. Jackson believes that a legal system relates closely to society but the degree to which the system penetrates and is penetrated by social life varies. He also warns of the problem of defining what represents national culture and that analyzing cultural differences is problematic. Chase himself is aware of these dangers and points to the need to find evidence of the link between cultural difference and differences in legal systems.[42]

This evidence of cultural difference, and linking this difference to legal systems, is the object of study of legal anthropologists. Goldberg and Attwooll draw our attention to

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[39] It doesn't seem that this claim can still be made. For example, Pierre Legrand has provided several arguments in support of a strong relationship between national culture and legal culture and legal cultures' resistance to change. For example, see P. Legrand, Return of the Repressed, *supra* note 36.
[40] Oscar G. Chase, "Legal Processes and National Culture" (1996) 5 Cardozo J. Int'l. & Comp. L. 1.
[41] John D. Jackson, "Playing the Culture Card in Resisting Cross-Jurisdictional Transplants: A Comment on 'Legal Processes and National Culture'" (1997) 5 Cardozo J. Int'l. & Comp. L. 51 at 52.
[42] Jackson's discussion of these matters if found on pages 51-58, *Ibid.*

this point by quoting Santos.[43] Santos argues that the traditional view of legal pluralism, espoused by many legal anthropologists, sees legal orders as separate entities existing in the same socio-political space.[44] In comparative legal studies, the idea of legal systems as separate entities is also considered, but comparativists often focus on the relationship existing between legal systems,[45] as well as the level of closure or openness/permeability of legal systems. For example, Goldberg and Attwooll discuss how some legal orders remain closed, in the sense that they do not take on aspects of other orders in whole or part either because of outright rejection or due to the lack of express adoption.[46] In other cases, ongoing closure is due to mutual recognition. In this case, each legal or normative order excludes itself from the others' sphere of activity. The example that Goldberg and Attwooll cite of this type of relationship is the co-existence and mutual recognition of feudal law and canon law in Scotland in the Middle Ages.[47]

In contrast, some legal systems are relatively permeable, with mixed legal systems being a key example of openness. According to Goldberg and Attwooll, the permeability of legal systems extends not only to laws but other sources of legality as well, including norms, religious standards, morality, etc.[48] For example, a legal order can be open to religious norms, emanating from either a domestic or foreign source, as well as to laws from other sources. Of course, extreme permeability would seem to lead to a conclusion

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[43] Goldberg and Attwooll, *supra* note 38 at 319.
[44] Boaventura de Sousa Santos, "Law: A Map of Misreading" (1987) 14 J. Law & Soc'y. 279 as quoted in Goldberg and Attwooll, *supra* note 38 at 319.
[45] The following works consider the relationships existing between different legal systems/traditions: Esin Örücü, Elspeth Attwooll, & Sean Coyle, eds., *Studies in Legal Systems: Mixed and Mixing* (Boston: Kluwer Law Int'l., 1996); Mark Van Hoeke, ed., *Epistemology and Methodology of Comparative Law* (Oxford: Hart Publishing, 2004).
[46] Goldberg and Attwooll, *supra* note 38 at 330.
[47] *Ibid* at 319.
[48] *Ibid* at 330.

that eventually, all legal systems will collapse into the same system. This is in fact the argument of some comparativists, who believe that most other systems of the world have been permeated by the common law and civil law, with the result that they have become the two dominant systems in the world, and as such, they should be the primary objects of analysis in comparative legal studies.[49] Of course, this argument is problematic since the common law and civil law change due to the influence of legal systems in 'extraordinary' places. [50]

In addition to the idea of legal systems being porous, those comparativists whose arguments fall on this end of the continuum seem to see legal change as being at the macro-comparative level, in which the entire system is changed either due to imposition or adoption. In terms of legal imposition, it is argued that the colonial imposition of the common law and civil law was so total that it replaced the Indigenous traditions that previously existed. They argue that the lack of resistance to outside legal influences, or the adoption of the new laws through legal reform, has resulted in the common law and civil law systems being the state legal system in most countries around the world. Of course, this accords with the traditional view of law, in which law is only the official law of the state. Such a view does not reflect recent innovations in comparative legal studies, where theorists have been more open to consideration of 'extraordinary legal systems' and the idea of legal pluralism. As such, I reject it as a possibility for my analysis of the processes of moments of legal pluralism in Samoa.

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[49] Örücü, Enigma, *supra* note 16 at 155.
[50] This term is used by Örücü to refer to those legal systems other than the common or civil law. Örücü, Enigma, *supra* note 16 at 155-157.

This leaves us with arguments falling in the middle of the continuum, where legal systems are regarded as mixed and legal change is considered erratic and uneven due to a variety of factors such as historical and cultural context, accident, legal imposition and so on. The idea that legal traditions are constantly mixing, and that they have in fact always been blends of various normative and legal orders, is increasingly prevalent within comparative legal studies.[51] The idea of mixing links to the ideas of complexity and indeterminacy, which Örücü points to, stating that "instances of mixing are complicated as they may be overt or covert, structured or unstructured, complex or simple, blended or unblended, and often difficult to define."[52] H. Patrick Glenn has developed a loose system for the analysis and classification of mixed systems.[53] His classification differentiates between unstructured and structured mixité, and between conceptual and personal mixité. Unstructured mixité refers to the uncoordinated and informal mixing of disparate sources of law. The example of unstructured mixing he provides is the mixing of laws of Aboriginal peoples and French settlers in the North American *pays d'en haut*. He argues that, "a situation of unstructured mixité existed in terms of the diversity of Aboriginal laws and in terms of the relations between European (French) law and Aboriginal law."[54] He also argues that the French law in the *pays d'en haut* was also a mixture in itself, as settlers would have brought the laws and customs from various regions in France.

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[51] *Ibid* at 149.
[52] *Ibid*.
[53] It is a 'loose' system because he regards it as perilous to impose order on any discussion of mixité. H. Patrick Glenn, "Mixité and Monism" in Esin Örücü, Elspeth Attwooll, & Sean Coyle, eds., *Studies in Legal Systems: Mixed and Mixing* (Boston: Kluwer Law Int'l., 1996) 1 at 2. [Glenn, Mixité]
[54] *Ibid* at 3. A broader discussion of these legal relations is found in Jeremy Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall L. J. 623.

In contrast, structured mixité is where state structures and institutions work toward a "systemic ordering of the informal and disparate elements into a single framework."[55] There may be varying degrees of success to this ordering. In some places the result is legal monism whereas in other places, the structuring process never reaches its conclusion and unstructured mixité results. An example of structured mixité is in Quebec, where the laws applying to Aboriginal peoples became formalized, and eventually there was an ordering of English and French law through the *Quebec Act 1774*, as well through codification of Quebec private law, which erased a diversity of previous sources.[56] Further acts of structuration came with the *Constitution Act 1867*.[57]

According to Glenn, structured mixité is difficult to discern, since the relations between private and public laws and between English and French laws have been conceptualized according to "European categorization and conceptual boundaries."[58] He argues that the boundaries between laws are often faint or non-existent, while in other cases the boundaries are fairly distinct. What is required then, is "working across conceptual boundaries to understand the choices that have been made and the need to examine the phenomenon of ongoing mixité." [59] In order to understand ongoing mixité, he suggests his second level of classification. Here he differentiates between personal and conceptual mixité, as well as legislative and religious mixité. As the religious and legislative mixité that Glenn discusses is fairly particular to the Quebec example, I will

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[55] Sean Coyle, "Introduction" in Esin Örücü, Elspeth Attwooll, & Sean Coyle, eds., *Studies in Legal Systems: Mixed and Mixing* (Boston: Kluwer Law Int'l., 1996) at ix.
[56] Glenn, Mixité, *supra* note 53 at 5.
[57] 1867 30 & 31 Vict. Chap. 3, s. 93.
[58] Glenn, Mixité, *supra* note 53 at 5.
[59] *Ibid* at 5-6.

not conduct an overview of these two categories. However, personal and conceptual mixité appears to be more applicable to understanding mixité at a broader level.

Personal mixité refers to the fact that there are ongoing, autonomous sources of law that are not capable of expression in statist or monist terms. For example, Aboriginal customary law in Quebec continues to operate with respect to marriage, adoption, etc., without reference to state law, at least until a court determines otherwise. Glenn argues that this constitutes a personal mixité because it generally relates to private legal matters such as family law or religious matters. Conceptual mixité is where different fields of law are governed by sources of disparate historical origin, as in the case of Quebec, where law is governed by the common law and civil law.

Another form of mixité described by Glenn (although he does not give it a specific name), as well as Goldberg and Attwooll, is temporal mixing. Goldberg and Attwooll suggest that current legal orders are reflective of original traditions but that certain orders are more open to evolution through time than others, without much reference to the original tradition.[60] Thus, over an extended period of time, a mix of the original and the new develops. Glenn argues that the delineation of the boundary between different fields of law, which are drawn from different sources, is an ongoing process. As such, mixité is something that extends through time and is a complex process of change as well as preservation.[61] Esin Örücü has also given considerable theoretical attention to mixed legal system in her studies. She argues that mixed systems exist along a spectrum from simple mixes between two traditions, primarily the common law and civil law, to more

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[60] Goldberg and Attwooll, *supra* note 38 at 330.
[61] Glenn, Mixité, *supra* note 53 at 15.

complex forms.[62] She cites Scotland as a classic example of simple mixité, where the mix is only at the substantive level. The next type of mixing is where elements that are socio-culturally similar and legal-culturally different come together. She refers to this as a mixing bowl since the ingredients are still in the process of blending. Then there are the highly complex mixed systems, where elements that are both socio-culturally different and legal-culturally different are mixed together. This diversity creates either legal pluralism, mixed jurisdictions or hybrid systems, all of which defy the traditional classification of law into legal families.[63] At the far end of Örücü's spectrum is the purée, in which different legal elements are so mixed together that it is difficult to discern their origins, as well as the ways in which they have mixed.

The arguments that I find most persuasive, in relation to the porosity of legal traditions, are those that consider legal traditions as being complex mixes. Obviously, I am persuaded by such arguments since legal pluralism, which is the approach I am advocating in this project, is a form of complex mixité. However, I do not believe that extreme forms of mixité, either conceptual mixité or the purée, are really existent, but are rather due the undervaluing of non-state legal orders. As my metaphor of weaving suggests, one can still see the strands of law that form the complex mixture. As such, I agree with the idea of mixité, but also find myself advocating the idea that legal traditions are only semi-permeable, continuing to contain certain features of their formative cultures. Thus, the type of mixité that exists is a broader one, in which semi-permeable traditions co-exist in the same space, rather than a more conceptual type of mixité, in

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[62] Örücü, Enigma, *supra* note 16 at 152ff.
[63] Some have attempted to include mixed legal systems into the legal families categorization scheme by having mixed systems be its own separate type of legal family. See Vernon Palmer *Mixed Jurisdictions Worldwide: The Third Legal Family* (Cambridge: Cambridge Univ. Press, 2001).

which legal elements from different traditions are totally intertwined so that there is now a single mixed tradition.

The other aspect that comparativists consider is how mixing happens. Thus, they focus their analysis not only on the constitutive features of different mixes but also the processes by which they have developed. This is done through theorizing the processes of legal change. Accounting for legal change has arguably been one of the most prolific areas of theorization in comparative legal studies, and has led to what I consider to be one of the most prominent theoretical features of comparative law; the use of metaphor. As I too will be using a metaphor as an analytical tool to theorize legal pluralism in Samoa, I think it is important to review how metaphor has been used in comparative legal studies, as well as how it has been used by some law and society scholars. However, prior to going through these various metaphors, I think it is helpful to provide a brief overview of what I mean by law and society studies, and how such studies differ from comparative law and legal anthropology.

## Discourses of Law and Society Studies

Unlike legal anthropology and comparative law, which have fairly long histories and arguably some defining characteristics that have been agreed upon from within the discipline, the landscape of law and society studies is more difficult to describe. Questions arise as to where law and society studies begin and end, and whether there are defining theoretical and methodological characteristics that are indicative of law and society as a discipline. Perhaps the degree of uncertainty with respect to what is included in law and society studies is beneficial for scholars since it allows for a greater degree of flexibility as to the theoretical and methodological perspective one wishes to take.

Perhaps the law and society movement rightly reflects the breaking down of disciplinary boundaries in the study of law. Evidence of this is in several law and society journals, where a variety of scholars from other legal disciplines have published their work.[64]

Rather than trying to set out the boundaries of law and society landscape, it is better to ask what law and society scholarship has brought to our understanding of law. I believe one feature has been particularly prevalent within the literature, and which one might consider a defining feature of the 'movement', the feature being criticality.[65] In writing about the law and society movement, Susan Silbey and Austin Sarat state that the movement has "always imagined itself to be a critical enterprise, outside of the mainstream of legal discourse, participating at a remove while offering an alternative epistemology and sociology of law."[66] They go on to state that law and society scholars began as critics because they challenged the dominant paradigm regarding the sociology of law and legal studies and pushed for new understandings of the workings of law.

What did/do law and society scholars consider as their critical enterprise? It is to move beyond examination of laws and legal institutions to "seeing what the law does in the entire social environment,"[67] and discovering the inter-linkages between law and

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[64] In a breakdown of 'who' was publishing in the *Law and Society Review* between 1966 and 2000, Susan Silbey found that the majority were sociologists (36%) and political scientists (23.2%), with others identified as psychologists, legal scholars, anthropologists, and historians. Susan S. Silbey, "From the Editor" (2000) 34 Law & Soc'y. Rev. 859 at 866.

[65] Of course, these are also features of other legal disciplines but law and society scholars seem to make these key aspects of their work.

[66] Susan S. Silbey & Austin Sarat, "Critical Traditions in Law and Society Research" (1987) 21 Law & Soc'y. Rev. 165.

[67] *Ibid.* This, of course, only reflects the views of two prominent law and society scholars in the United States. Unfortunately, there are very few overviews of the law and society movement, particularly relating to its history and theoretical foundations.

culture.[68] Of course, such examination is often done with a particular critical perspective in mind, one that emphasizes indeterminacy and deconstructionism, taking its cue from the philosophical works of Jacques Derrida, Michel Foucault, Gilles Deleuze.[69] Rather than advocating the idea that we can gain understanding through scientific investigation, these critical scholars suggest that we are always going to be limited in our ability to know due in part to the limitations of our subjectivity but also because all knowledge is the product of different methods of exercising power, and thus subjugated knowledges will always be excluded to some extent. [70]

Despite an historical emphasis on criticality, Sarat and Silbey question whether law and society scholars have maintained their critical edge or have, in trying to make their understanding *the* understanding of law, objectified and reified the product of their reformist desire.[71] Have they pushed law and society scholarship from the margins to centre? Part of the move away from the margins is perhaps due to the roots of the movement. Although the origins of the distinction between 'law' and 'society' can be traced to European political struggles regarding the differentiation between civil society and the state, Sarat and Silbey argue that the law and society movement in the United States followed on the heels of the legal realist movement. In developing out of the realist tradition, they argue that many law and society scholars, although arguing for a new

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[68] Esin Örücü suggests that the combination of comparative law and culture took the form of "law and society studies" in the 1970's. See Esin Örücü, " Unde Venit, Quo Tendit Comparative Law" in Andrew Harding and Esin Örücü, Eds., *Comparative Law in the 21st Century* (London: Kluwer, 2002) 1 at 4.
[69] For instance, Jonathan Simon suggests that Foucault's work is particularly relevant for legal studies that are aiming to conduct a critical study of law. However, he suggests that more critical approaches could engage modernist works, such as the work of Jürgen Habermas. Jonathan Simon, "Between Power and Knowledge: Habermas, Foucault and the Future of Legal Studies: Comment" (1994) 28 L. & Soc'y. Review 947 at 959.
[70] Silbey & Sarat, *supra* note 66 at 169.
[71] *Ibid* at 166.

vision, never really threw off the notions about the "hopefulness of law and the possibilities of law for social change or as the impetus of reform."[72] In fact, they suggest that law and society studies were never at the margins in two respects. First, they claim that law and society scholars never threw off the liberal claims about the relationship between law and society, and second, law and society scholars underestimated the real consequences of law, or rather gave too small a role to law in constituting social life.[73] This relates to their other criticism of law and society scholarship, which is that in problematizing the relationship between law and society, we neglected to problematize the idea of law itself.[74] More specifically, in looking for connections between law and society, they argue that scholars created two fictitious, distinct categories with the labels 'law' and 'society', which have now become rigid and reified constructs within the discourse.

In 1987, when Silbey and Sarat wrote "Critical Traditions in Law and Society Research," they argued that in order for law and society studies to be a critical enterprise, a number of things were needed. First, criticality requires both a commitment to one's scholarly tradition while at the same time distancing oneself from it. What does this look like? It requires law and society scholars to move outside of what is comfortable and invert the orienting or central norms of the discipline so that the marginal, invisible and unheard becomes a voice and a focus.[75] In addition, it means that law and society scholars invert generalized categories and large exploratory understanding that has been part of the social sciences historically and rather emphasize particularity, specificity, and

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[72] *Ibid* at 170.
[73] *Ibid* at 171.
[74] *Ibid* at 172.
[75] *Ibid*.

the periphery.[76] Finally, they suggested that law and society scholars should pay attention to social processes and social transactions rather than just apply literary theory to legal doctrine. In this way, law would be seen as fused with all activities of living and knowing, and new voices would be heard.

So have law and society scholars moved toward the critical stance that Sarat and Silbey suggested, and thus maintained what is considered a key feature of the movement? If one looks at a post 1988 articles within the *Law and Society Review*, or at a recent conference program of Law and Society Associations in many parts of the world, you can see works that emphasize specificity and particularity, and focus on marginalized and peripheral voices and legalities. Whether enough attention has been paid to social transactions and social processes is less certain. Regardless of what others are doing, in this project I will emphasize specificity and particularity, focusing on the intricacies of legal pluralism in Samoa and using a metaphor arising from the sometimes marginalized and gendered work of weaving.[77] However, I will also pay attention to social processes and transactions via the weaving process of law, paying particular attention to relations of power and relations of communication as described by Foucault. Thus, in discussing

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[76] *Ibid* at 173.

[77] I would argue that there is a marginalization of weaving in the literature on South Pacific art and art more generally, as weaving is considered a craft rather than a true or 'high' art form, unlike painting, carving, dance. In addition, there has been very little written on the subject of the actual weaving *process*. Discussions of Samoan weaving in the literature generally relate to the importance of *'ie toga* (sacred mats) for political and ceremonial purposes rather than how they are created and the relations between women who are involved in the weaving process. For an excellent overview of the ceremonial meanings of *'ie toga*, see Penelope Schoeffel, " Samoan Exchange and 'Fine Mats': An Historical Reconsideration" (1999) 108 Journal of the Polynesian Society, Special Issue 117.

legal pluralism in Samoa through my two-part metaphor, my project will maintain a key feature of law and society scholarship, namely that of criticality.

# Chapter Three: Metaphors as Symbolic Features in Comparative Law and Law and Society Studies

As I indicated at the beginning of chapter two, a key feature of comparative law is the use of metaphor to describe processes of legal change. David Nelken points out that we find an array of metaphors used to describe 'legal transfers' or legal change and that each metaphor reflects and advances different approaches to the relation between law and society.[1] He breaks the metaphors into three general categories: the mechanical metaphor, the organic metaphor and the discursive metaphor. Mechanical metaphors reflect a vision of law as a working institution, an instrument and a technique of social engineering. Organic metaphors are described as reflecting a functionalist vision of law, where law is an interdependent part of a larger whole. Finally, discursive metaphors depict legal transfer as a process of translating or reformulating implicit meanings.[2]

So what is the purpose of using these different categories of metaphor to describe processes of legal change? Perhaps, as Nelken suggests, metaphors are a way to theorize something that is difficult to explicate, in this case legal transfer and legal change. On the other hand, metaphors may serve as an art form, in which the strangeness of the image or words used in the metaphor allows us to see law in new ways. It may simply be a way for comparativists to combine legal theory and literature in new and interesting ways. Whatever the reasoning for using metaphor to theorize legal transfer and change, there is

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[1] David Nelken, "Legal Transplants and Beyond: of Disciplines and Metaphors" in Andrew Harding and Esin Örücü, eds., *Comparative Law in the 21st Century* (London: Kluwer, 2002) 19 at 29-30. [Nelken, *Disciplines and Metaphors*]

[2] *Ibid* at 30.

no denying the ongoing debates within comparative law about which metaphor rightly describes how legal change takes place. Much of the discussion has centred on Alan Watson's metaphor of legal transplants: whether 'transplant' rightly characterizes processes of legal change. In response, comparativists such as Guenther Teubner and Esin Örücü have suggested their own metaphors: Teubner's metaphor of legal irritants and Örücü's metaphor of legal transposition.

Below, I will briefly discuss the metaphors of Watson, Teubner and Örücü and how they are used to explain legal change. I will then discuss their limitations, particularly in relation to my study of legal pluralism in Samoa. The goal of my critical analysis of the metaphors is not to discount the use of each metaphor as a valid heuristic device, but to suggest the limitations that these metaphors have due to their interconnection with other problematic features of comparative law that I have already outlined in chapter two. Once I have discussed these three metaphors, and the assumptions about law and legal change that they advance, I examine a more satisfying metaphor that has been used by Boaventura de Sousa Santos to explain legal mixité and legal pluralism.

## Alan Watson's Legal Transplants

In 1974, Alan Watson published a thin volume entitled *Legal Transplants*.[3] One of his stated goals was to move comparative legal studies beyond mere description and comparison of foreign legal systems and rules to a consideration of the relationship between, and development of, law(s) in different jurisdictions.[4] He argued that the best way to understand the relationship between laws was through consideration of how one

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[3] Alan Watson, *Legal Transplants* (Charlottesville: Univ. Press of Virginia, 1974). [Watson, Transplants]
[4] *Ibid* at 6ff.

law or legal system derives from, borrows from or is influenced by another throughout history. Watson referred to this process of legal borrowing, influence and reception as 'legal transplant' or 'legal transplanting'.[5]

Since Watson was skeptical of a systems approach to comparative law, much of his analysis centered on legal rules and more specifically what happens to a legal rule when it is transplanted from one geographical space to another. In chapter three of *Legal Transplants*, Watson highlights the centrality of legal rules in his analysis:

> Our first concern will be with the existence of the rule [in two different countries], not with how it operates within the society as a result of academic or judicial interpretation… It will interest us whether it can be moved unaltered or whether, and to what extent, it undergoes changes to its formulation.[6]

Watson then spends the rest of the volume introducing us to legal transplants, primarily through a discussion of case examples in both the ancient world and more modern times.[7] One issue for those trying to understand Watson's transplant metaphor is that his analysis of legal transplantation is almost entirely through the use of detailed case examples, such that there is very little theory regarding the 'how' of legal transplants, nor much of a theoretical discussion of how the movement of legal rules mirrors a 'transplant' or why the metaphor of transplant was chosen in the first place to discuss legal relationships and legal change.[8] However, through careful reading of Watson's volume, and his other articles on legal transplants, one can glean some insight into the metaphor.

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[5] *Ibid* at 19.
[6] *Ibid* at 20.
[7] For example, in introducing us to 'Legal Transplants' in chapter four, Watson discusses the similarity between the ancient Laws of Esnunna, the Babylonian Code of Hammurabi and the Hebraic text Exodus, with respect to the law against goring an ox. See Watson, *supra* note 3 at 22ff.
[8] Watson himself seems to accept that he has not provided an adequate theoretical account of legal transplants. In his article "Aspects of the Reception of Law" (1996) 44 Amer. J. of Comp. Law 335 [Watson, *Reception*], he states that building up a theory of legal borrowing seems to be an extremely complex matter. Unfortunately, this article also spends more time giving detailed examples than providing a more robust theorization of legal borrowing.

First, evidence of legal transplantation appears to involve more than just the existence of some similarity between a few, individual legal provisions.[9] What is required is something more, although it is never quite clear what constitutes such evidence. Perhaps one can infer, from the very use of the metaphor of transplants, that a significant mass of law (similar to a functioning organ with many cells and nerves) existing in more than one jurisdiction would be indicative of a legal transplant. Regardless of the evidence needed to prove the existence of a legal transplant, the fact that Watson is drawing upon medical transplants in constructing his metaphor is indicated later on in chapter four, where he gives us further clues as to how legal transplants work. He states that:

> A successful legal transplant- like that of a human organ- will grow in its new body and become part of that body just as the rule or institution would have continued to develop in its parent system. Subsequent development in the host system should not be confused with rejection.[10]

Here, Watson notes what happens after a legal transplant takes place. As with a medical transplant of a human organ, the host body can either reject the transplanted organ or it can accept it, in which case both the transplanted organ and the body will continue to grow and adapt over time. In the case of a legal transplant, one would assume there is the possibility of rejection by the host legal system (although Watson does not focus on this[11]), but it is the growth and change to the host legal system after a successful legal transplant that Watson draws our attention to. He argues that changes to the host legal system, post-transplant, do not reflect a rejection by that legal system, but simply that both the transplanted law or legal institution and the host legal system are adapting and growing, reflecting development that would have transpired anyway.

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[9] Watson, Transplants, *supra* note 3 at 25.
[10] *Ibid* at 27.
[11] He does discuss the possibility of the rejection of a legal transplant in Watson, Reception, *supra* note 8 at 339.

A third aspect of legal transplants relates to 'Voluntary Major Transplants' (VMT's).[12] Watson characterizes VMTs as the transplant of either an entire legal system or a large portion of a legal system from one jurisdiction to another. VMTs fall into three main categories: the first type of VMT occurs when "a people move into a different territory where there is no comparable civilization and takes its law with it;" the second type of VMT is when "a people move into a different territory where there is a comparable civilization and takes its law with it;" and the third type of VMT is when "a people voluntarily accepts a large part of the system of another people or peoples."[13] Other types of transplant are also possible and come in all shapes and sizes according to Watson. These include imposed reception, solicited imposition, penetration, infiltration, crypto-reception, inoculation and so on. Unfortunately, no explanation of the differences between these latter types of legal transplants is given, nor is there much elucidation of the workings of the three types of VMTs, other than brief reference to their explanation in the chapters following chapter four. One question that immediately arises from Watson's description of VMTs is the extent to which the first two types of transplants involve voluntariness, at least on the part of the host legal system or 'civilization'.

Other aspects required for successful legal transplants are respect for the donor system, authority, and creativity. What does Watson mean by authority? He appears to be referring to appeals to authority for the purpose of influencing the reception of unfamiliar law. Such appeals may take the form of a jurist's reliance on authority from within one's own legal system, via the act of precedent, or it can refer to the jurist's appeal to

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[12] Watson, Transplants, *supra* note 3 at 29. I will refer to these as VMT's.
[13] *Ibid* at 29-30.

authorities from foreign legal jurisdictions as the origin of new law.[14] In the case of placing high authority on foreign jurisdictions, Watson points out that it may be difficult to convince jurists in the host country to develop new law on the basis of irrelevant or non-existent sources. This is where creativity plays a role. The example he cites is Ulrich Huber's citation of, and subsequent search through, Roman law as a basis for his axioms regarding the conflict of laws. Huber cited Roman law, and specifically the *ius gentium*, as the authority for conflict of laws only after he created the field. Watson suggests that this source was non-existent but was created by Huber.[15]

Watson also uses the idea of authority to refer to the act of appealing to a religious or mythical figure or a cultural hero as a source of borrowing, in order to influence the reception of foreign law. Examples of appeal to a religious or heroic authority include Moses' appeal to the authority of Yahweh to persuade the Israelites to accept the Ten Commandments, the belief that Egyptians received their laws from Hermes through Mneves, and Zeus creating the laws of Crete.[16] The result of receiving law based on an appeal to an authoritative figure is that there is little examination of the quality or suitability of the legal transplant.

Another important part of Watson's theory of legal transplants is reception – reception referring to how transplanted law is received and accepted by the host state. As already mentioned, authority plays a role in how transplanted law is received by the host, but other factors that affect the reception of law include chance, nationalism, the strength of the legal system existing in the host state at the time of the transplant, and what

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[14] *Ibid* at 51-52.
[15] Watson, Reception, *supra* note 8 at 345.
[16] Watson, Transplants, *supra* note 3 at 88.

Watson refers to as 'Transplant Bias'. Although Watson cites each of these factors as important for determining reception, he focuses much of his discussion, in both his book and in journal articles, on the importance of chance. Thus, I will be discussing what he means by chance, as well as discussing Transplant Bias, since this term offers further indication of Watson's use of metaphor in his analysis of legal change.

Watson refers to chance as the "non-legal historico-political factors that affect the transplant."[17] He argues that although we may be able to discern patterns of legal development, future legal change cannot be predicted because chance, as well as mistake, plays too great a role.[18] The example he uses to explain the working of 'chance' in the reception of legal transplants is the reception of Roman law in Scotland. Watson argues that England would most likely have been the dominating influence on Scottish law due to its power and proximity, but because of the war in the early 14th Century between England and Scotland, and the subsequent hostility, the influence of English law was minimal.

He argues that 'chance' has also been a factor of legal transplants in other places, citing the reception of the Common law or Civil law system in modern African states as dependent upon whether they were British, French or Spanish colonies.[19] Of course, many legal scholars would likely disagree with the categorization of historico-political factors as 'chance', arguing that such factors can be theoretically analyzed and their effect can be determined. For other scholars, the idea of chance and indeterminacy would not be a problem with his theory, but they would be critical of his suggestion that law is

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[17] *Ibid* at 51.
[18] Watson, Reception, *supra* note 8 at 351.
[19] *Ibid*.

not part of the chance equation in legal transplants, along with political and historical factors.

In Watson's discussion of transplant bias, we are again reminded that Watson has been guided by the metaphor of medical transplants in his thinking about legal change. With respect to legal transplants, transplant bias refers to a system's receptivity to a particular outside law, not a receptivity based on an examination of all possible legal alternatives, but a system's readiness to accept certain legal rules because of the type of rules they are. As Watson puts it, "it means readiness to accept Roman law rules *because* they are Roman law rules or French rules *because* they are French rules."[20] Although his explanation is somewhat ambiguous, he is suggesting that some hosts are more receptive to certain transplants simply because of the law being transplanted.

Transplant bias will vary from host system to host system, but some of the extent of the bias will depend on things such as "a linguistic tradition shared with a possible donor, the prestige and accessibility of the possible donor and the training and experiences of the local lawyers."[21] The same is true of medical transplants, where a shared blood type is required between donor and host, where it is important that the donor and their organs are accessible to the patient receiving the transplant, and where it is important that the doctor has the requisite experience and training to perform the transplant. Of course, as in medical transplants, the receiver of the transplant can develop a resistance to a particular donor's organs, ultimately rejecting the proffered legal rule or legal system.

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[20] Alan Watson, "Comparative Law and Legal Change" (1978) 37 Cambridge L.J. 313 at 327. [Watson, Comparative]
[21] *Ibid.*

Although Watson makes several other points regarding legal transplants and how they operate, one of his principal arguments is that the transplantation of legal rules and in fact entire legal systems is extremely common both historically and in modern times, and that legal transplantation is the primary source of legal development in the world.[22] It is the commonality of legal transfers, both in the ancient and modern worlds, which Watson uses to argue against "correlating the developments in law with the internal evolution of the society in which it is found."[23] Whether one agrees with Watson's claim regarding the breadth of legal transplants in the world, or his attack on the sociological understanding of law, there is no denying the influence that his arguments have had on the study of legal change.

Arguments both for and against his thesis can be seen within the literature since his inception of the concept of legal transplants. Some scholars agree wholeheartedly with Watson's thesis, simply adding to his analysis by providing further case examples or adding to his theory of transplantation.[24] Others are more critical, suggesting that his initial ideas of legal borrowing and reception are valid to a certain extent, but that the metaphor of 'legal transplants' is too rigid and dichotomous.[25] Finally, other scholars reject outright the idea of legal transplants, arguing that his metaphorical framework is

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[22] Watson, Transplants, *supra* note 3 at 95.
[23] D. Nelken, "Towards a Sociology of Legal Adaptation" in D. Nelken and J. Feest, eds., *Adapting Legal Cultures* (Oxford: Hart Publishing, 2001) [Nelken, *Legal Adaptation*]
[24] D. Bradley, "Convergence in Family Law: Mirrors, Transplants and Political Economy" (1999) 6 Maastricht J. European and Comparative Law 127; Andrew Harding, "Comparative Law and Legal Transplantation in South East Asia: Making Sense of the Nomic Din" in D. Nelken and J. Feest, eds., *Adapting Legal Cultures* (Oxford: Hart Publishing, 2001) at 199.
[25] For example, see Guenther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences" (1998) 61 Mod. L. Rev. 11; John D. Jackson, "Playing the Culture Card in Resisting Cross-Jurisdictional Transplants: A Comment on Legal Processes and National Culture" (1997) 5 Cardozo J. Int'l & Comp. L. 51 at 63.

based on a formalist version of law, and that the metaphor of transplants gives legal rules too much 'life' and are suggestive of displacement rather than development.[26]

Those who have been critical of the metaphor of 'legal transplants', but still accept the premise that legal change and development takes place primarily through borrowing and reception, have suggested other metaphors that they believe more adequately capture the process of legal change. Two such scholars are Gunther Teubner and Esin Örücü, who have theorized legal change using the metaphors of 'legal irritants' and 'legal transposition' respectively, both of which I examine below.

## Guenther Teubner's 'Legal Irritants'

Guenther Teubner characterizes 'legal transplants' as a misleading metaphor for two reasons: first, because it suggests only two possibilities for legal borrowing, repulsion or interaction and second, because it suggests that the transferred material will remain identical in its function in the new legal organism. Instead of using the metaphor of legal transplants and all that this metaphor implies, Teubner argues that transferred legal rules should be thought of as 'legal irritants,' where the transferred legal rule "works as a fundamental irritation, which triggers a whole series of new and unexpected events… and irritates law's binding arrangements."[27] He then uses the transfer of the 'Good Faith' rule in British contract doctrine as his example of how legal irritation takes place, arguing that it is not whether 'Good Faith' will be rejected or accepted in British contract law, but rather, "what kind of transformations of meaning will the term undergo, how will its role

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[26] For example, see Pierre Legrande, "The Impossibility of Legal Transplants" (1997) 4 Maastricht J. European and Comparative Law 111. [Legrande, *Impossibility*]
[27] Teubner, Irritants, *supra* note 25 at 12.

differ, once it is reconstructed anew under British law?"[28] So how does Teubner construct the metaphor of legal irritation?

First, he argues that currently, an impasse exists between context and autonomy in discussions of legal change, which must be overcome if we are to better understand the dynamics of legal change. He takes up the categorical scheme of Otto Kahn-Freund, who argued that we must distinguish between legal institutions that are culturally embedded and those that are insulated from culture and society, and distinguish between legal transfers that are either very easy or mechanical, and those transfers that are organic, where transfer is difficult or even impossible.[29] Teubner suggests that the couplings articulated by Kahn-Freund, which Teubner refers to as the "law's binding arrangements,"[30] well capture the social ties of law, yet require reformulation in order to reflect the new and often indiscernible face of law and society.

Teubner conveys four theses as to how the new ties of law look and what this means for our understanding of legal transfer. The four theses are: "1) Law's contemporary ties to society are no longer comprehensive, but are highly selective and vary from loose coupling to tight interwovenness; 2) Law's ties are no longer connected to the totality of the social, but to diverse fragments of society; 3) where, formerly, law was tied to society by its identity with it, ties are now established via difference; 4) Law's ties no longer evolve in a joint historical development with the social but in the conflictual interrelation of two or more independent evolutionary trajectories."[31] Although Teubner expands on each of these theses and how they affect legal transfer, it is in his discussion of thesis

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[28] *Ibid.*
[29] *Ibid* at 17.
[30] *Ibid* at 12.
[31] *Ibid* at 18.

four, regarding the co-evolution of legal and social processes, where his metaphor of legal irritant is fully comprehended.

In his fourth thesis, Teubner makes the claim that law's binding arrangements are ultimately Janus-faced, that they have a legal face and a social face and that the two faces of Janus tend to change their minds in different directions. He argues that when there is a legal transfer, the legal face is changed and recreated in its new context. However, this involves a double transformation, a recontextualisation of the legal side but also the recontextualisation of the social side of the Janus face.[32] There is no unilateral determination of the direction in which the change on either side will take place. This is to say that:

> A binding arrangement, tying law to a social discourse does not develop in one single historical trajectory but in two separate and qualitatively different evolutionary paths of the two sides, which are re-connected via co-evolution. The legal side takes part in the evolutionary logic of law while the social side obeys a different logic of development. Their changes however interact insofar as, due to their close structural coupling, they permanently perturb each other and provoke change on the other side.[33]

It is this co-evolution of the legal side and social side, on different trajectories, that accounts for why a transferred legal rule can only serve as an irritation and never as a legal transplant. On the legal side of the receiving institution, the legal rule will be contextualised but may still be recognizable. On the social side, however, the legal rule will create perturbations in the social system and will trigger changes governed by the understandings of meaning in that social world.[34] This social change will then work back as an irritation to the legal side of the institution, creating a co-evolutionary dynamic until each side has reached relative stability in their sphere.

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[32] *Ibid* at 27.
[33] *Ibid* at 28.
[34] *Ibid*.

This co-evolution, Teubner argues, makes it "improbable that a legal rule will be successfully transplanted in a binding arrangement of a different legal context, rather it will either be rejected, destroy the binding arrangement or it will result in a dynamic of mutual irritations that alter its identity fundamentally."[35] Thus, borrowed legal rules are irritants to both the domestic legal and the social discourse, which results in a complex and chaotic process. [36] According to Teubner, this results not in a convergence of participating legal orders, as transplant theory suggests, but instead results in new cleavages in interrelations between closed social discourses.[37]

Teubner's analysis provides us with a much richer theoretical conception of legal borrowing and legal change, one which takes the idea of legal transfer seriously while remaining attentive to the criticisms of legal transplant theory by scholars such as Pierre Legrande, who argues that Watson's theory of legal transplants does not account at all for cultural context or for the interconnectedness of law and society.[38] Despite the complexity of his arguments, there continue to be some problematic assumptions in his analysis, some of which he shares with Watson's theory of legal transplants. I will attend to what I believe are the shared limitations of Teubner's and Watson's metaphorical construction of law and legal change, but first I want to outline one other metaphor used to explicate legal change, the metaphor of 'law as transposition' provided by Esin Örücü.

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[35] *Ibid.*
[36] *Ibid* at 32.
[37] *Ibid.*
[38] Legrand, Impossibility, *supra* note 26 at 112, 122.

## Esin Örücü's Transposition Metaphor

Esin Örücü believes, like Watson and Teubner, that law moves, changes, connects and disconnects. But, rather than applying the metaphor of legal transplant or legal irritant to these processes, she argues that the metaphor of transposition, tuning and fitting is more appropriate. [39] Her aim is to replace the concept of legal transplant with the metaphor of transposition since transposition offers a better explanation for instances of massive change where there are competing models and because it accounts for the role of legal actors in the act of 'tuning' the change.

Örücü takes her metaphor from music, where transposition refers to the process of moving a collection of notes up or down a pitch via a constant interval.[40] A common example of musical transposition is transposing a whole piece of music from one key to another. When music is transposed, each note takes the same relative place in the scale of the new key as in the old key, but is made to suit a particular instrument or voice range of a singer.[41] Örücü argues that legal change operates in the same way. Each legal institution or rule introduced into a new legal jurisdiction is used in the same way it was in the previous legal system. However, it is transposed to "suit the socio-legal culture and needs of the recipient."[42] In fact, a number of different transpositions of the rule or institution can take place since there is no single model of law that is used by any legal recipient.

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[39] Esin Örücü, "Law as Transposition" (2002) 51 Int'l. & Comp. Law Quart. 205 at 205. [Örücü, Transposition]
[40] For further discussion of transposition in music, see John Rahn, *Basic Atonal Theory* (New York: Longman Publishing, 1980).
[41] Örücü, Transposition, *supra* note 39 at 207.
[42] *Ibid*.

Once instances of transposition have taken place, there is 'tuning' by the actors of the recipient legal system. Such tuning is Örücü's way of accounting for human agency in the movement of law: that it is people who move law and operationalize it within the recipient legal host or institution.[43] She argues that, historically, most 'tuning' was done by imposers or exporters of law, such as the British, who codified the common law for its introduction into the Indian Continent. Such 'tuning' was not very sensitive as it "could not consider the new pitch in its entirety since the tuner was not an active player of the new instrument."[44] Although somewhat obscure, the point that Örücü seems to be making here is that the British imposers of the common law were not able to adapt it or ensure its internalization, in its entirety, in the Subcontinent because they were outsiders who had a limited understanding of the socio-legal culture existing there. Örücü argues that the most important 'tuners' are those who are within the recipient legal system, and that some of the most important tuners are domestic judges, who take foreign laws and adapt them to fit the local situation that comes before them.

In constructing her metaphor of transposition, Örücü draws inspiration from Teubner's metaphor and discussion of legal irritants, and particularly his notion that legal rules will undergo a transformation of meaning, and thus occupy a different role in the recipient legal host than it did in the original system. In addition, she agrees with Teubner's idea that a transfer will face the idiosyncrasies of the new legal culture and face "resistance external to the law, that being the social expectations of diverse social

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[43] *Ibid* at 208.
[44] *Ibid*.

environments."[45] By agreeing with such as position, Örücü appears to align herself with the idea that the legal and social worlds are separable.

Despite her sympathy with Teubner's arguments, Örücü does have some criticism of the term 'irritant' to describe the process of legal transfer. She argues that the term 'irritant' is not a neutral term, that it may imply a negative connotation, like the metaphor of 'legal contaminant', to legal transfers.[46] She argues that the way legal irritant has been defined and presented implies that legal transfers produce new and unexpected reactions, that there is an expectation of repulsion rather than interaction. In addition, the metaphor of legal irritant is more supportive of the idea that law moves in one direction, rather than the idea that legal relationships are relationships of reciprocal influences and cross-contamination.[47] As such, Örücü argues that the metaphor of irritant should be reconceptualized to account for such reciprocity, as well as become a neutral value term.

At this point in the article, Örücü asks the question: what happens after transmigration of law has occurred and different internal logics come together? She argues here, and elsewhere, that the transmigration of laws is happening on an ongoing basis; that "legal systems are constantly mixing, blending, melting and then solidifying into new shapes as they cool while transposition and tuning take their effect."[48] The result of legal transmigration can be viewed upon a spectrum, where at one end there is the rejection of the transfer because a genuine transposition has not occurred. In this case, Örücü argues that the legal system 'curdles' and becomes dysfunctional. At the other end, the

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[45] *Ibid* at 210.
[46] Legal contaminant has been another metaphor used to describe legal transfer. See P.G. Monateri, "The 'Weak' Law: Contaminations and Legal cultures" in *Italian National Reports to the XVT International Congress of Comparative Law* (Milano: Giuffre Editore, 1998) at 83.
[47] Örücü, Transposition, *supra* note 39 at 211.
[48] Esin, Örücü *The Enigma of Comparative Law: Variations on a Theme for the Twenty-first Century* (Leiden: Martinus Nijhoff Publishers, 2004) at 154. [Örücü, Enigma]

transmigration works well due to similarities in structure, substance and culture, as well as the 'fine-tuning' from various actors of the law.[49] In the middle of these two extremes are mixed systems, where elements from a variety of legal systems exist in either a simple or complex blended state.

The vital process for determining results of legal transmigration, wherever they fall on the spectrum, is the already mentioned 'tuning' by internal legal actors. As Örücü states, the "internalization of norms and standards by the people in the recipient system is crucial if there are to be fruitful developments. This is aided by the tuners."[50] Of course, Örücü acknowledges that structure and substance can be transposed with less difficulty than values and legal culture, which is a part of socio-culture. This point highlights one of the limitations of Örücü's metaphor, namely that she separates the legal (rules and structures) from the social (values and legal culture), seeming to suggest that transposition of the legal can occur without the social, on the one hand, but then also stating that there must be an internalization of norms and standards within the receiving society, on the other hand.

Are legal rules and structures separable from values and culture? In addition, how are tuners, which Örücü characterizes primarily as legal actors such as judges, able to aid in the internalization of norms and standards in the social world if the legal world and social world are distinct and separate? This separation of the legal and social follows in the tradition of Watson and Teubner, who characterize social worlds and legal worlds as distinct and separable. In Watson's case, he sees no need to recognize the social and cultural context at all in the discussion of legal change, and legal change is simply a

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[49] Örücü, Transposition, *supra* note 39 at 212.
[50] *Ibid* at 221.

transplant of one legal rule or form from one place to another regardless of social and cultural context. This is an argument I reject since law is created in a social and cultural context, arising out of the dialogue and relationships of various members in a community. As such, certain cultural meanings and values are intertwined in the very wording of the 'rules', in its forms and structures and in its very operation.

In this sense, Teubner's analysis is more difficult to reject, since he attends to the social side of legal transfer and change. As Nelken points out, Teubner is critical of the idea that legal rules and institutions can be torn from their context, arguing that law is bound to social discourses.[51] Despite this, the metaphor is limited in that it says very little about when transfers are made, where they are taken from or why they are introduced.[52] As well, Teubner continues the tradition of separating the legal and social, although suggesting that they are two co-evolving systems that irritate one another. Of course, we are never sure when certain communicative actions or binaries constitute the purely social and when they might be legal. His lack of accounting for how discourses move from social to legal is unhelpful, as is the underlying assumption inherent in separating the two—that law can be neutralized from socio-cultural influence, at least in cases where it is possible for the legal to deflect the social, which is one possibility that Teubner suggests.[53]

There are other limitations to Watson and Teubner's metaphors besides the ones already mentioned, one being the suggestion in their metaphors, and in their analysis, that law is a living organism, with anthropomorphic abilities to move, irritate, meet other law,

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[51] David Nelken, Disciplines and Metaphors, *supra* note 1 at 33.
[52] This is Nelken's criticism in Disciplines and Metaphors, *supra* note 1 at 34.
[53] Legrand provides this criticism of the legal transplant thesis. See P. Legrand, Impossibility, *supra* note 26 at 114.

etc. There is little discussion of human agency in the transfer of laws, other than Watson's brief discussion of the role of legal professionals in the transfer of certain legal rules. Örücü goes a little further, highlighting the importance of legal actors as tuners of the law in the process of legal transposition. However, beyond the mention of their importance, there is no mention of other types of tuners, nor does she elaborate on how these tuners really work or who they really are. Thus, one of the major points of my thesis is that, although it is valid to speak of law as an object using metaphor as a heuristic device as these authors have done, it is wrong to speak of law as an anthropomorphic entity, capable of movement, irritation, meeting, rejection, etc. Rather, we can discuss the object of law, how it appears via an examination of legal rules, texts, etc, but a discussion of how law in a particular place came to be, via legal change, requires a discussion of processes of human agency. Such a discussion will not only limit the propensity to give law human characteristics, which is a neutralizing and de-subjectifying exercise, but also prevent the separation of the legal from the social since any discussion of human agency in the role of legal change melds the two together.

Another limitation of the metaphors of both Watson and Teubner is that they focus almost exclusively on formal state law in their analysis of legal change. This accords with the traditional focus in comparative law, which Örücü called Variation II of micro-comparative analysis.[54] Watson would certainly view the idea of legal traditions outside of formal state law as not part of legal transplants, most likely relegating this to social life and beyond the purview of legal scholars. Teubner is more difficult to place, since he does define law more broadly than traditional legal comparative analysis. However, there

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[54] Örücü, Enigma, supra note 48 at 155.

is still a sense in his metaphor that the legal side of the Janus face is really referring to formal state law and that anything outside of this would be the social side of the Janus face, able to irritate and interact with the legal face but not *be* the legal face.[55]

Örücü is arguably more receptive to the idea of legal pluralism, since she not only suggests that legal pluralism is a valid theoretical orientation on more than one occasion, but moves her actual analysis closer to it through her discussion of mixed legal systems, which she categorizes as one of the results of the transmigration and transposition of law. Again, she uses metaphor to ground her analysis, this time using different types of food preparation as her metaphor to discuss different forms of legal mixité.

## Esin Örücü's Food Preparation Metaphors

One of Örücü's research interests has been the analysis of mixed legal systems. She argues that a majority of legal systems in the world have developed from mixed sources and that all modern legal systems are mixed systems to some degree. Determining the differences between the infinite variety of mixes, from what she refers to as simple mixes of two different systems, to more complex mixité involving both legal cultural pluralism and socio-cultural pluralism, can be a difficult task. Örücü outlines six difficulties that theorizing mixed legal traditions presents for the researcher. These range from the

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[55] Teubner does consider legal pluralism in an earlier article, agreeing that law is broader than just formal state law, yet disagreeing with the post-modern reading of legal pluralism in which law is broadly conceived. He argues that law must be defined in order to differentiate it from social life, yet we never really get a clear sense in his legal pluralism article or in his more recent metaphor of legal irritants which traditions would be legal and which are social. In fact, most of his case examples reflect formal state law so, although he gives the nod to legal pluralism, he hasn't actually operationalized legal pluralism in his autopoiesis theory. See G. Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism" (1991) 13 Cardozo L. Rev. 1443. Perhaps his failure to consider an example of legal pluralism reflects a limitation of his separation of the social from the legal through the mythological figure of the Janus face. Interestingly, in his legal pluralism article, he also suggests that the metaphor of interwovenness is obscure and should be replaced with a genuine theoretical construction. Of course, my goal is to attend to his criticism via genuine theoretical construction through the use of the weaving metaphor in chapters four and five.

constant transition which legal systems undergo, requiring the researcher to constantly review established categories of development, to the need for researchers to have a wide array of knowledge to understand legal mixture. Researchers must draw from legal history, sociology of law, legal anthropology, and comparative law materials in order to approach an adequate understanding of legal mixtures.[56]

Despite the obstacles, and the suggestion by some comparativists that it is unworkable to provide an overarching theoretical conception of mixed legal systems, Örücü draws together a variety of theoretical sources and case studies to create an 'explanatory grid' to understand complex legal mixtures.[57] One source of explanation of mixed legal systems comes from research on legal families, in which legal traditions are seen as having permanent characteristics that mark them as separate from others. If mixed jurisdictions form through contact between different legal traditions, then the legal comparativist must be aware of the characteristics, as well as the different internal logics of each of the different families, and what happens when these different characteristics and sets of assumptions meet and combine.[58] This will allow us to construct the internal logic of the different types of mixed jurisdictions.

However, this is not the end, since as legal systems transition, "moving from the internal logical pattern of one of the established legal families, a legal rule or institution may not move in a predictable manner or acquire the style of the second legal family which it has connected with…. and thus, the study of mixed and mixing legal systems

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[56] Esin Örücü, "Mixed and Mixing Systems: A Conceptual Search" in E. Örücü, et. al. eds., *Studies in Legal Systems: Mixed and Mixing* (The Hague: Kluwer Law, 1996) 335 at 336. [Örücü, Mixing]
[57] *Ibid* at 337.
[58] For further explanation of the internal logic of legal families or systems, see Esin Örücü "An Exercise in the Internal Logic of Legal Systems" (1987) 7 Legal Studies 310. [Örücü, Internal Logic]

and the study of legal change and legal transfer are two inseparable fields of study."[59] Thus, the need to combine the study of legal families with a study of the movement of law in order to assess what the end products of mixing and meeting will be, both in terms of the resulting legal-cultural diversity and the socio-cultural diversity. The various combinations resulting from the movement and mixing is captured in her metaphors of food preparation.

Her first metaphor is the purée, which can refer to two types of combinations occurring at opposite ends of her mixture spectrum. On one end of the spectrum is a purée that is the result of legal-cultural and socio-cultural affinity. At the other end of the spectrum, a purée is seen to exist where there is complete socio-cultural and legal-cultural diversity because of the pressure of colonial powers or a dominant, national elite class. Although this gives the appearance of a purée, there is a covert mixture underlying the system.[60] In cases of a purée where there is socio-cultural and legal-cultural affinity, the legal systems combine and form a new compound, with the blend being so thorough, and over such long period, that the constituent elements are indistinguishable and inseparable except perhaps to a legal sociologist.[61] A legal system which exemplifies this type of purée is the Dutch system, which is a blend of ingredients from the French, German, Dutch and Roman legal systems, and which have been blended over a long period of time so that it is difficult to determine where the ingredients of the Dutch system originated. An example of the second type of purée, where there is socio-cultural and legal-cultural diversity but an appearance of total blending, is Turkey. Örücü describes the Turkish

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[59] Örücü, Mixing, *supra* note 56 at 341.
[60] *Ibid* at 344-345.
[61] *Ibid* at 343-344.

system as having a covert mix of Swiss, French, German, Italian and religious and customary elements, which are obscured by the legalism of the dominant elite.[62]

The second metaphor is the mixing bowl. In this case, socio-cultural affinity exists but there is legal-cultural diversity. Örücü says that like ingredients being chopped and mixed in a mixing bowl, the ingredients are being blended but that a "knowledgeable cook can still see the bits and pieces surfacing and sinking."[63] The same is true in the legal system, where there are the same institutions but the legal elements from various systems remain distinct, surfacing in certain cases and then disappearing. A mixing bowl system is the Scottish legal system, where elements from the Civil law, Common law and Indigenous law are mixed together, but a legal scholar can point to the different origins of the legal rules and processes that are being used.[64]

The other types of mixes to which Örücü attaches metaphors are those where there is again both socio-cultural and legal-cultural diversity, but the result is a true mixture. The first kind of true mixture resembles an Italian salad bowl. This is different from a mixing bowl because the diversity of both the legal-cultural and socio-cultural results in co-existing, hybrid law. She describes this as an Italian style salad bowl because "though the pieces are distinct, looked at the through the glass of the bowl they are intermingled, above and below each other, a salad dressing covering each item."[65] In another discussion, she refers to mixes that are reminiscent of an Italian salad bowl as extraordinary or complex mixed systems, because a dressing or seasoning covering the

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[62] *Ibid* at 343.
[63] *Ibid* at 344.
[64] *Ibid* at 343.
[65] Esin Örücü, "A Theoretical Framework for Transfrontier Mobility of Law" in R. Jagtenberg, E. Örücü and A.J. de Roo, eds., *Transfrontier Mobility of Law* (The Hague: Kluwer Law International, 1995) 5 at 10.

different ingredients does give a cover of similarity, but that really the different legal elements are distinct once you look underneath the covering.[66] An example of an Italian salad bowl mix is in Algeria, where distinct legal elements and institutions of Religious law, French Civil law, Socialist law and Tribal law co-exist in a hybrid formation, at least on the surface.

The second metaphor representing systems of socio-cultural and legal-cultural diversity is the English Salad Plate. Here, the ingredients sit separately and often apart on a flat plate, leading to plural or dual legal institutions. Örücü argues that with these types of mixes, the elements co-exist in separate structures and do not mingle, thus the rules of conflict law apply. An example of this type of system is Zimbabwe or Sri Lanka, where the legal systems and social systems are incompatible, resulting in legal dualism or pluralism. Of course, these are loose categories because, as already stated, legal systems are always undergoing transition. For instance, the parallel development of two different systems, with a view to their harmonization, may change the type of mixture. New contact between systems due to migration of groups or resurgence of Indigenous law and culture may also change the mix in a variety of ways. Therefore, it will be an ongoing endeavor to categorize legal mixité in order to account for changes to structure and scope. Determining how various legal systems move from one type of mix to another and what the catalysts are to precipitate different movements, or in some cases the rejection of movement, is a difficult task and one which Örücü's metaphor cannot provide.

First, it is difficult to imagine the resultant dish of each food prep type being able to change and reflect another. For example, it is difficult for something that is purée to

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[66] Esin Örücü, Enigma, *supra* note 48 at 155.

become say, an Italian Salad. In the case of legal traditions, one can imagine a change from socio-cultural and legal-cultural affinity to diversity over time, such as in the case of a large, new immigrant population bringing a new legal system to a system that was previously a system of similarity, resulting in changes to the mix over the long term. In addition, we have no sense as to why some systems continue to have institutions that are closed to the influence of other systems, which her metaphor does not account for. This was one of the points of Teubner's work on legal irritants, which despite its limitations, did theorize openness and closure of systems in a much more robust manner.

The issue might be that Örücü's metaphors are built on the scaffolding of legal families, which has shown itself to be a precarious structure for building legal theory. The notion of legal families continues the modernist tradition of the theoretical meta-narrative, which offers a totalizing and universalizing understanding of law.[67] Such theorizing assumes it is possible to capture the multiplicity of difference in legal communities around the world with general abstract categories, and still retain richness of meaning. The question it begs is: is there only one articulation of Indigenous law or the Common law operant in a complex socio-political space, particularly if we move outside the formal state legal structure? In addition, what about other categories that do not fit into the family schema, such as global or transnational law or religious norms that have a multiplicity of sources rather than birth in a single family?

Secondly, such theorizing removes or subordinates localized and subjective meanings and understandings of law within the researcher's own theoretical schema, in this case the

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[67] For a critique of the modernist meta-narratives, see Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge*, trans. Geoff Bennington and Brian Massumi (Minneapolis: University of Minnesota Press, 1984, reprint 1997).

schema of families and then food preparation mixes. Although new articulations of meaning are appropriate, and in fact cannot be escaped if one is an outside researcher, it seems more appropriate to focus on mini-narratives (legal pluralism in one institution, or the law of one community in one country) and use metaphors that are more conversant to local populations.

Even if one wants to accept the theoretical paradigm that Örücü presents through her categorical scheme (which I do not), the notion of legal pluralism that her metaphor presents is problematic in itself. Legal pluralism, according to Örücü's metaphorical scheme, is likened to an English Salad Plate, where elements and institutions sit apart and require conflict of laws to mediate between them. However, I understand legal pluralism as different legalities and illegalities existing in the same socio-political space. These elements can exist both in harmony with one another as well as in conflict and I would argue that it is relations of communication and relations of power that determine the ways in which these different legalities are mediated, not simply the specific legal doctrine of the conflict of laws.

Although I agree with legal comparativists that legal change and adaptation are constitutive ingredients of legal pluralism, I will not analyze change in order to trace the historical origins of law in Samoa, nor to highlight similarities and differences with the 'original' or other legal traditions existent in other places. In addition, I will not engage in theorizing that aims to account for the success or failure of legal borrowing and how

this might affect the resulting legal system, which is the concern of many legal comparativists.[68]

Instead, I want to view law and legal pluralism through a post-modern lens, where legal change may be chaotic and without linear development or ordered depending on the context and circumstance, and where subjugated legal knowledges that are buried under layers of officiality and formalism are considered. In addition, I will not be providing a meta-theoretical framework to employ in all situations of legal pluralism, or make judgments as to whether legal pluralism in Samoa is a success or failure. Rather, I will be discussing one story of legal pluralism; centering my discussion around banishment cases in Samoa and providing analysis via a mixed theoretical framework that incorporates a locally understood metaphor, subject positioning theory, articulation theory and an understanding of power relations.[69] As I want to analyze legal pluralism from a post-modern perspective, I will be building off the work of Boaventura de Sousa Santos, who suggests a post-modern understanding of law and legal pluralism in his book *Toward a New Legal Common Sense*.[70] Thus, the last metaphor I will consider is Santos's geographical metaphor, which he employs to discuss legal subjectivities and legal pluralities.

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[68] For a discussion of the success/failure orientation to theorizing legal change and adaptation, see David Nelken, Legal Adaptation, *supra* note 23 at 46ff.

[69] As Vivian Grosswald Curran rightly points out we cannot perceive beyond the limits of our own perception or divest ourselves entirely of the categorizations of our own cultures of origin. Rather, the goal is to expand and alter our perceptual prisms, knowing that they cannot be replaced. See V. Grosswald-Curran, "Cultural Immersion, Difference and Categories in U.S. Comparative Law" (1998) 46 American J. Comparative Law 54 at 57. One way of expanding our prisms is through creative and imaginative use of linguistic devices such as metaphor, which is an act of translation and transmutation of an original plurality of discourses and realities. As Grosswald-Curran points out the classical Latin term for metaphor was actually *translatio*, which the Roman rhetorician Quintilian describes as 'shining forth with a light that is all its own'. See note 33 in "Cultural Immersion" noted above.

[70] Boaventura de Sousa Santos, "Law: A Map of Misreading: Toward a Postmodern Conception of Law" (1987) 14 J.L. & Soc'y 279 at 297. [Santos, Map of Misreading]

## The Mapping Metaphor of Boaventura de Sousa Santos

In *Toward a New Legal Common Sense*, Santos uses metaphor very literally, arguing that laws *are* maps and that our understanding of legal pluralism can be guided by an understanding of maps and from the science of cartography.[71] He argues that maps are "ruled distortions of reality, where the distortions establish orientation by creating credible illusions of correspondence."[72] According to Santos, although maps and laws follow different rules, both distort social realities, traditions or territories in order to establish exclusivity. In terms of laws, despite a plurality of normative orders in society, each wants to monopolize the regulation and control of social action within its territory. The quest of exclusivity leads to a double misreading of law because it suggests that only one type of law operates in a given social space when really a number of legalities exist, and because it suggests that there is an eradication of previous laws when a new legality stamps it out when in reality it still exists in the memories of things and people.[73]

Maps systematically distort reality through three mechanisms. The three mechanisms are scale, projection and symbolization and they create, according to Santos, a "permanent, dialectical tension between representation and orientation."[74] For example, too much representation in a map can hinder orientation, or alternatively, poor representation can allow for very good orientation, as is the case with the medieval maps

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[71] Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation*, 2nd ed. (London: Butterworths Lexis Nexis, 2002) at 420 and 426. [Santos, Common Sense] Santos is not alone in the practice of using cartography to theorize law. Annelise Riles has also made use of cartographic understandings of scale, projection and representation in her conception of law and legal pluralism, as has Susan Drummond. See Annelise Riles, "Wigmore's Treasure Box: Comparative Law in the Era of Information" (1990) 40 Harvard International Law Journal 221 and Susan Drummond, *Mapping Marriage Law in Spanish Gitano Communities* (Vancouver: UBC Press, 2006) at 13ff.
[72] Santos, *Common Sense*, *supra* note 71 at 419.
[73] *Ibid.*
[74] *Ibid* at 421.

of ports and coasts that were very useful for navigators at sea. Since law mimics the tension between representation and orientation that exists in maps, Santos argues that: "we should substitute a scale/projection/symbolization theoretical paradigm for the correspondence/non-correspondence (law in books/law in action) paradigm."[75] He then goes on to explain how the mechanisms of scale, projection and symbolization work in both maps and law. Unfortunately, his application of the scale/projection/symbolization paradigm to law is not as clear as it could be. This is partly due to the highly nuanced and intricate arguments he is making but also due to the fact that some concepts are poorly explained and in other instances, the examples he provides do not really operationalize the concepts in a clear way. Thus, the reader should be apprised that I am only outlining what I believe to be the salient points of the scale/projection/symbolization paradigm, first in terms of maps and then law.

Scale has to do with the amount of detail that can be included on a map based on its size. As Santos points out, large-scale maps are able to present more detail. Thus, mapmaking becomes about the amount of detail that can be included on a map and the level of accuracy that is required to make it useful for navigation. Scaling a map involves emphasizing some details and hiding or distorting others. The act of distortion, concealment and reflection are exercises of power because they allow different knowledges and social realities to be chosen by the person making the map.

In terms of law, Santos argues that different forms of law create different legal realities by using different criteria to determine the meaningful details and relevant features of activity to be regulated. This is known as the scale of law. Santos suggests that

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[75] *Ibid* at 422.

there are number of implications in a scale conception of law. The first implication is that it draws our attention to interlegality and its operations—interlegality referring to the fact that different legal spaces interact and relate to one another, so there is no one legality or law.[76] He then suggests that one can identify three scales of legality operant in a given social space: large-scale legality (local law), medium-scale legality (state law) and small-scale legality (global law). According to this categorical scheme, there are different socio-legal spaces, as well as different legalities within each socio-legal space, all of which can interact on one level or another.

The second implication of scale is that each scale of legality is associated with different regulation patterns and action packages. Regulation patterns refer to the ongoing tension between representation and orientation. For example, large-scale legality is rich in details and features and sensitive to distinctions while small-scale legality is poor in detail and features but makes accurate determinations regarding the positions between people and things.[77] An action package, on the other hand, is a connected sequence of actions structurally determined by pre-defined boundaries; in this case the boundaries of range and ethics in law.[78] Regulation patterns and action patterns are related to one another in that regulation patterns condition the kind of action packages that exist. The third implication of a scale analysis of law is that each scale of legality also has a regulation threshold, which determines what belongs to the realm of law and what does not.

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[76] *Ibid* at 427.
[77] *Ibid* at 428.
[78] *Ibid* at 429.

The second mechanism of mapping is projection. This refers to the representation and distortion of reality that is required if the curves of the earth are to be transformed into the planes required of flat maps, allowing the maps to be laid out, folded and rolled up. Santos makes a number of points about projection that apply not only to maps and mapmaking but also to projection in law. The first point is that projection does not distort reality at random; rather each projection "creates a field of representation within which forms and degrees of distortion are unequally but determinably distributed."[79] Different projections thus distort different features of space, some being conformal projections, which preserve areas but distort angles, shapes and directions, and others such as equivalent projections doing the opposite. We cannot present all the different features with the same degree of accuracy, meaning that as we increase accuracy of one feature, this causes the distortion in the representation of other features. Thus, Santos argues, every map projection is a compromise between distortion and accurate representation, with technical factors, the intended use of the map and ideology of the cartographers playing a role in determining the kinds of distortion.[80] The other aspect of projection that Santos draws our attention to is that each map is given a centre from which the rest of the map is oriented. The centre that is chosen as the orienting feature, around which the direction, meaning and privileged position of features are organized, relates to the historical and cultural period in which the map was constructed. For example, medieval maps used to put a religious site at the centre of the map, such as Jerusalem in European maps and Mecca in Arab maps.[81]

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[79] *Ibid* at 423.
[80] *Ibid*.
[81] *Ibid* at 424.

In terms of projection and law, Santos argues that each legal order uses techniques to define the limits of their operation and to create different legal objects in the socio-legal spaces they create and occupy. The type of projection adopted by each legal order is based on superfact or supermetaphor that characterizes the particular interpretive stance or perspective of the projection type, and ultimately determines the centre and periphery of the legal order. One implication of projection is that, at the core, the legal space is mapped in greater detail and uses more resources, while at the periphery the legal space is less mapped and uses fewer resources. A second implication is that legal theories, interpretive styles, etc., that are dominant at the centre tend to fit less well when they are exported to or imposed upon the periphery.[82] Santos argues that the centre/periphery projection in legal mapping highlights that distortion of social reality increases as we move from the centre to the periphery, but also that it is at the periphery where there is a greater degree of interpenetration of legal orders.

The second aspect of projection refers to the types of features of the social object that tend to be privileged regardless of whether they are at the centre or the periphery. There are two types of projection which privilege different features, geocentric projection and egocentric projection. The egocentric projection focuses on the particular, voluntary and consensual social action while the geocentric projection is more focused on objective and generalized features and patterned, bounded or conflictual social action. Depending on which is the dominant type of projection, there will be either an egocentric legality or a geocentric legality.[83] One argument, which Santos makes in regards to projection, is that it allows us to view conflicts expressed between different legalities as resulting from

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[82] *Ibid* at 431.
[83] *Ibid* at 432-433.

"two forms of law, anchored in two different types of projection of social reality."[84] Thus, he argues that although there are conflicting interests and power relations at work, these are played out through "the intermediation of specific projective devices and their hermeneutic logic, and thus legal forms have an autonomy and efficacy of their own that extends beyond the stakes of conflicting interests or power positions."[85] I disagree with this aspect of Santos's conception of law as projection because, although law is indeed a form as well as being a discourse and symbol with different projections, it can neither achieve autonomy nor efficacy on its own, which is what Santos seems to suggest here.[86] Law is animated through human relationships and is not an abstract, disembodied entity that can be a site of conflict without these relationships and the relations of power that are existent in them.

The third and final mechanism for representing and distorting reality in maps is symbolization. Symbolization refers to "the representation of selected features and details of reality in graphic symbols."[87] According to Santos, without either the symbols or an understanding of their meanings, maps would be useless. The study of cartographic symbols is increasingly drawing on the research of semiotics, which allows for an understanding of symbolic meanings and communication. Santos draws on the difference articulated in semiotics between iconic signs and conventional signs.

> Iconic signs are naturalistic signs that establish a relation of likeness with the reality represented (such as a few trees representing a forest) while conventional signs are far

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[84] *Ibid* at 433.
[85] *Ibid*.
[86] He does suggest that scale, projection and symbolization are not neutral procedures and choices but promote the expression of certain types of interests and disputes, and that when speaking of the autonomy of law he is only speaking of a specific way of representing, distorting and imagining reality based on procedures and choices, Santos, Common Sense, *supra* note 71 at 437. Yet, there is little clarity about who makes the choices and how law is able to obtain autonomy via these procedures and choices of projection.
[87] Santos, Map of Misreading, *supra* note 70 at 285.

> more arbitrary; convention holds that certain types of symbols are appropriate for certain types of phenomenon; for instance, linear symbols for roads and boundaries and graduated circles for cities and towns.[88]

Again, just as there is symbolization in maps, the same is true of law. In both cases, it is "the visible side of the cartographic and legal imagination of reality."[89] Santos distinguishes between two different, ideal-typical modes of legal symbolization comprised from research on semiotics, cultural anthropology and literary criticism. The two ideal-types that Santos discusses are the Homeric style of law and the Biblical style of law, as described by Auerbach in his account of different forms of representation of reality in Western literature.[90] I will not go into the descriptions of each here, but point to his argument that "the contrast between these two types of legal symbolization is most visible in those situations of legal pluralism in which social practice is a constant bridging between legal orders with different styles of symbolization."[91] In some cases, the social construction of reality in two legal orders can follow different sign systems, and require translation in order to create a momentary and unstable but complementary relation between them. In other cases, the two sign systems interpenetrate or superimpose on one another, or even complement one another, as is the case between democratic and revolutionary legality during the revolutionary crisis in Portugal.

Santos' cartography metaphor of scale/projection/symbolization is an important one, and deserves ongoing consideration. He provides a complex set of analytical tools for understanding law and legal pluralism via his construction of an "oppositional

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[88] Santos, Common Sense, *supra* note 71 at 425.
[89] *Ibid* at 438.
[90] *Ibid* at 434 ff.
[91] *Ibid* at 435.

postmodern conception of law."[92] One of the main features of his metaphorical analysis that I will use in my own conception of legal pluralism is his notion of interlegality. He argues that the point of providing a symbolic cartography of law is to reinforce a conception of legal plurality different from the traditional, legal-anthropological notion of legal pluralism, in which "different legal orders are conceived of as separate entities co-existing in the same political space." Rather, he suggests that legal plurality is:

> Different legal spaces superimposed, interpenetrated and mixed in our minds, as much as in our actions…where multiple networks of legal orders are forcing us to constant transitions and trespassing… where our legal life is constituted by an intersection of different legal orders, that is by interlegality. Interlegality is the phenomenological counterpart of legal plurality and a key concept in an oppositional postmodern conception of law. [93]

This expanded version of legal plurality, understood as multiple legalities forming complex networks, which force constant transitions and interactions, not between legal traditions or legal rules but between individuals and communities, will be used as a guide for my discussion of legal pluralism in Samoa.

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[92] *Ibid* at 437.
[93] *Ibid* at 437.

# Chapter Four: The Woven Object of Law in Samoa

> Metaphor is the dreamwork of language and, like all dreamwork, its interpretation reflects as much on the interpreter as on the originator. The interpretation of dreams requires collaboration between a dreamer and a waker, even if they be the same person: and the act of interpretation itself is the work of the imagination. So too understanding a metaphor is as much a creative endeavour as making a metaphor, and as little guided by rules.[*]

In the last three chapters, an overview of legal anthropology, comparative law and law and society studies highlighted a number of important theoretical contributions that each provides for thinking about law and legal pluralism. The focus on law and human interaction in legal anthropological studies and in law and society studies draws our attention to important factors such as agency, power, identity and subjectivity. In addition, legal anthropologists have been very influential in drawing attention beyond formal state law, particularly among legal theorists. They have done so through descriptions of different legal traditions and alternative forms of disputing, as well as providing insight into how law operates at the local level.

Despite these important contributions from legal anthropologists as to how law operates at local levels, via processes of human interaction, there are limitations to their analysis. Too often, legal anthropologists focus their attention too narrowly on non-state law, giving us little insight into the operation of formal state law and its intersection with non-state law. Also, their analysis fails to offer a deep understanding of different types of

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[*] Donald Davidson, "What Metaphors Mean" in Sheldon Sacks, ed., *On Metaphor* (Chicago: Univ. of Chicago Press, 1979).

law, such as family law or commercial law, nor of specific legal texts, rules or principles. In addition, the description of non-state law and legal pluralism, as a set of separate and closed legal entities, often does not account for moments of legal mixité or interlegality, where two legalities are intertwined together and new complex forms of legality might eventually be created.

Comparative legal theory too has a number of important things to bring to understandings of law and legal pluralism. Comparative legal theorists generally provide a very detailed and complex view of formal law, both in terms of state law and international law, of different types of law such as family law or commercial law, as well as different legal rules and principles. This is often done through an extensive description of legal text and legal institutions. In addition, comparative legal theorists have provided us with insight into changes in law and legal institutions throughout history and in various locales. This has often been done through the imaginative and creative use of metaphor. In fact, the use of metaphor by comparative legal scholars, and by some law and society scholars, demonstrates how it is possible to think and write creatively about complex legal theory in order to make it more intelligible. Of course, as I pointed out in chapter three, many of the metaphors are limited in what they can reveal, which is often a reflection of the limits of comparative legal theory, although in some instances, the metaphors themselves are problematic.

One of the major limits to comparative legal theory, which is often reflected in metaphorical conceptions of legal change, is that too much life or agency is given to law. In much of the theorizing, it is law that is given the ability to move, to transplant, to irritate, to add zest, etc. On one hand, giving law agency seems to make sense for

comparative legal theorists because it is *laws* that are the unit of analysis and frame of reference. Yet, I would argue that focusing one's attention solely on laws, and not considering human interaction *with* and *through* the law (or as Tuebner suggests, the social side of law) is actually one of the major limits of comparative legal theory, especially for explicating legal pluralism. It is limited because there is no consideration of complex questions of human agency, subjectivity, and power in the negotiation of legal change and legal pluralism on the ground. One of the other limitations of comparative legal theory is that law, as the unit of analysis, is often a uni-dimensional conception that only considers formal state laws to the exclusion of other legalities existent in the same space. Recently, legal comparativists have moved toward describing legalities other than formal state law, but it remains limited.

So, it seems each discipline is able to offer some insights into law and legal pluralism, but that each also has some serious limitations. In order to address these limitations, certain theoretical features I have outlined in this work so far must be brought together to create a re-conceptualized theory of legal pluralism. This re-conceptualized theory will be one that: accounts for both human interaction with the law, and the subsequent issues this raises in regards to power, identity and subjectivity; while at the same time providing a deep description of laws and legal institutions in time/space. This requires conducting two inter-related analytical tasks in the final two chapters.

The first task, which is the basis of this chapter, builds upon the theoretical traditions in comparative legal studies by providing a deep description of laws and legalities in Samoa. The second analytical task, which is the subject of chapter five, builds upon traditions of legal anthropology and law and society studies by considering how humans

interact with and negotiate between legalities in Samoa. This second task of analyzing the creation of legal pluralism, via processes of human agency, will be limited and partial in this thesis since consideration of human agency in most contexts requires on the ground research and data collection through a method such as ethnography. However, as an initial starting point to considering human agency and legal pluralism in Samoa, I will examine a series of banishment cases, as heard in the land and titles court and the common law courts in Samoa, to highlight not only the existence of legal pluralism but also to suggest that identity, subjectivity and relations of power are important in the creation of legal pluralism and the negotiation of interlegality.

As a way of elucidating these analytical tasks, and making them more intelligible in the Samoan context, I employ a two-part metaphor, the *woven objects of law* and the *weaving process of law*, in a similar way to how legal comparativists and law and society scholars have employed metaphor in the past.

## The Object of Law

In her article, "Law as Object", Annelise Riles argues that in the current moment, anthropologists are engaged in objectifying law in much the same way that they objectified other practices and ideas in the past. Anthropologists have decided that there is a need to re-centre or foreground the law in their analysis, making law "an essential object of contemplation, critique or knowledge."[1] This is done, as Riles suggests, to find some respite from the "theoretical quagmires that now plague the discipline"[2] and allows anthropologists to treat law as an instrumental object, which can be used, critiqued or

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[1] Annelise Riles, "Law as Object" in Sally Engle Merry & Donald Brenneis, eds., *Law and Empire in the Pacific: Fiji and Hawai'i* (Santa Fe: School of American Research Press, 2003) 186 at 189. [Riles, Object]
[2] *Ibid.*

acted against in concert with Indigenous or subaltern "subjects-turned-collaborators."[3] She argues that previously, anthropologists tended to focus on the expressive dimension of law, where law was just another set of significations that were produced in colonial contexts, and that the distinctness of legal practice was backgrounded in the context of other social practices. This focus on the expressive dimensions of law could only be achieved by neglecting the instrumental side of law, which was always co-existent with its expressive dimension but not considered worthy of anthropological interest. However, the re-centering of law in legal anthropology, through foregrounding its instrumental side, has meant that anthropologists treat law as a concrete object that is capable of possession and use, and which puts them on the same plane as those they historically objectified through their anthropological practices.[4]

One consequence of treating law as an instrumental object is that there is not a sense of knowing the law, but rather working through it, which results in treating law as a given rather than something open to "ethnographic re-imagination."[5] I contend that the objectification of law, in which law is treated as a concrete object or set of objects for use, but also contemplation and study, is not just something peculiar to legal anthropology in the current moment. Comparative legal scholars also treat law as an object, having always recognized the instrumental side of law. In the case of comparative law scholarship, laws become objects not only for the purpose of using and possessing them in certain instances, as in the case of legal reform work, or working through them, but for differentiating between law(s) for the purpose of comparison. There is a sense in

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[3] *Ibid* at 210.
[4] *Ibid* at 208.
[5] *Ibid* at 210.

which legal comparativists treat the law as object(s) for the purpose of *knowing* the law, and not just working through it.

The impression that legal comparativists treat law as an object of knowledge rather than use comes from my own reading of the literature, where I had the distinct sense that law(s) were/are like objects in a museum: located out there in interesting socio-cultural environments, dug up and brought 'home' to the desk of the comparative law scholar, then displayed abstractly via extensive description and theorization in order to peruse and study how they reflect, in the museum case, the cultures from which they emerged and how they might be similar to other legal objects from other socio-cultural spaces. This objectification of laws, in both legal anthropology and comparative law, can offer insights into the workings of law in much the same way that objects in museums can potentially contribute to our knowledge of other worlds and processes. Both give us limited insights into worlds that are often unfamiliar by highlighting a key object or set of objects and making them accessible to our studying gaze. In addition, objects are suggestive of concrete limits to knowing, both as a condition of their materiality since one can point to the outlines and edges, but also because they make us aware that we are only observing a small portion of what exists from a particular socio-cultural space and that the meanings we derive from our observations are just as much creations of our own minds and interpretive frames as what exists in the real.[6]

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[6] Scholars in the field of museum studies offer important insights regarding the nature of objects, how they are interpreted and given meaning, as well as how they are used to produce and convey knowledge. One collection of essays that is useful for understanding the nature of objects and objectification in museums is *Objects of Knowledge* from the Series on New Research In Museum Studies (London: Athlone Press, 1990) edited by Susan Pearce. Of particular note is Edwina Taborsky's essay, "The Discursive Object" in which she describes two different paradigms for understanding objects: the discursive paradigm and the observational paradigm on pages 50-77 of her essay.

As an initial starting point into 'knowing' and describing legal pluralism in Samoa, I am treating law as a discrete and distinct set of objects that can be contemplated, studied and described via my own objectifying gaze. As I discussed in chapter two, in describing the object of legal pluralism in Samoa I want to follow the tradition of those comparative law scholars who provide a deep description of laws and norms, and legal institutions and actors. Thus, I will use formal legal texts, such as legislation and cases, historical monographs of songs, genealogies, oratory, as well as a variety of secondary materials in order to know and describe legal pluralism in Samoa – at least in certain moments according to the limits of my own gaze and the limits of those who have conducted the descriptive task previous to me. I will also treat law as an object in another sense, one that is entirely literal, by defining the different legalities existent in Samoa via a discussion of Samoan woven objects.[7]

## A *Papalagi* Objectification of the Woven Objects of Law[8]

If visiting Oceania today, one can see a wonderful variety of woven items and objects, in the marketplace, in tourist locales, in homes, in Museums and many other places. Many woven objects are used in everyday practice, as is the case with bags, baskets, mats, hats and fans. Other woven items, such as the fine mats, carry immense

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[7] Another scholar who draws upon a woven object as a metaphor or analogy for understanding a form of legality is Annelise Riles. She discusses the parallels between Fijian mats and the documents that are created in the process of international negotiations. In this work, she likens the action of creating mats and then assembling mats into bundles known as *vivivi* to the work of formulating and re-formulating intergovernmental agreements. For further discussion, see Annelise Riles, *The Network Inside Out* (Ann Arbour: Univ. of Michigan Press, 2001) at 70ff.

[8] *Papalangi* is the term used for European or White person – it has the connotation of outsider. I use this term to suggest that the woven objects described in this chapter, both pandanus objects and legal objects in Samoa, are based on my own outsider observances and objectifications – like viewing an object in a museum where one can observe from a distance or through closer inspection, but being peripheral to the creation of the objects.

cultural and social meaning; "representing wealth, *mana*, prestige and material representation of social relationships throughout the Pacific,"[9] and in the case of Samoa, "important aspects of the relationships and values of *fa'asamoa*."[10] Fine mats in Samoa, particularly the *'ie toga*, were/are given in ceremonial exchanges, presented as gifts at weddings, funerals, as well as given in thanks for service rendered and when extraordinary events occur.[11] Due to their importance in ceremonial exchange, they serve as historical records of alliances and exchanges.[12] Old, finely woven *ie toga* are especially prized, and are not seen very often, except in a museum or when a rare and special event occurs, where it will be displayed with elaborate ritual and ceremony. In contrast, modern *'ie toga* are readily available to any family which has the financial means, the amount of people to either weave or collect the mats, and aspirations for family prestige.[13]

Just as there are these different types of woven objects in Samoa, so too are there many different instances of legal pluralism existent in Samoa. Everyday moments of legal pluralism exist when certain legalities from different traditions are articulated and negotiated on a daily basis, as is the case with Christian norms and Indigenous laws. Thus, just as people may take the existence of baskets and mats as a given, without much

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[9] Pandora Fulimalo Pereira, "Lalaga: Weaving Connections in Pacific Fibre" in Sean Mallon and Pandora Fulimalo Pereira, eds., *Pacfic Art Niu Sila: the Pacific Dimension of Contemporary New Zealand Arts* (Wellington: Te Papa Press, 2002) at 77.
[10] Sean Mallon, *Samoan Art and Artists: O Measina a Samoa* (Honolulu: Univ. Hawai'i Press, 2002) at 75.
[11] Penelope Schoeffel, "Samoan Exchange and 'Fine Mats': An Historical Consideration" " (1999) 108 Journal of the Polynesian Society, Special Issue 117 at 119.
[12] Peggy Fairburn-Dunlop, *Tamaitai Samoa: Their Stories* (Suva: USP Institute of Pacific Studies, 1996) at 9.
[13] Schoeffel notes that with a larger number of Samoan families collecting *'ie toga* for ceremonial exchange, the markers of quality and prestige has moved from emphasis on fineness and pattern of weave to size of mat, with larger mats seen as more valuable. Despite these changes, they continue to hold immense ceremonial value. For further discussion of the contemporary uses and quality of *'ie toga*, see Shoeffel, *supra* note 11 at 119, 132, 136ff.

thought to their construction, so too can everyday moments of legal pluralism take on a conventional quality, making their significance less pronounced to those who interact with such legalities on a daily basis but also to those who study objects of legal pluralism.

In certain moments however, legal pluralism becomes more significant, at least to the outside observer; and therefore can be likened to '*ie toga* woven objects. In these moments, not only are different legalities operant in time/space, which is also the case in everyday moments of legal pluralism, but these legalities, and particularly the negotiation between them, become highly visible. Much like when '*ie toga* are paraded around a *malae*,[14] giving people a momentary glimpse at an object of extraordinary beauty and complexity, the richness and complexity of legal pluralism in Samoa becomes highly visible and on display to the outsider in the reported cases and scholarly discussion of banishment over the last thirty years. It is these cases of banishment that are the focal point for my theorizing about articulation, power and subjectivity in chapter five, and which set the limits for the description of the different legalities in this chapter.[15]

Although it is often the completed woven objects themselves, their functionality as well as their aesthetic, spiritual and social value, that first captures our attention as outside observers, if we are really interested in woven objects and weaving, we will want to know more about the kinds of materials used and more about the creative weaving process. In the case of Samoa, woven objects are made of strands of fibre. According to a

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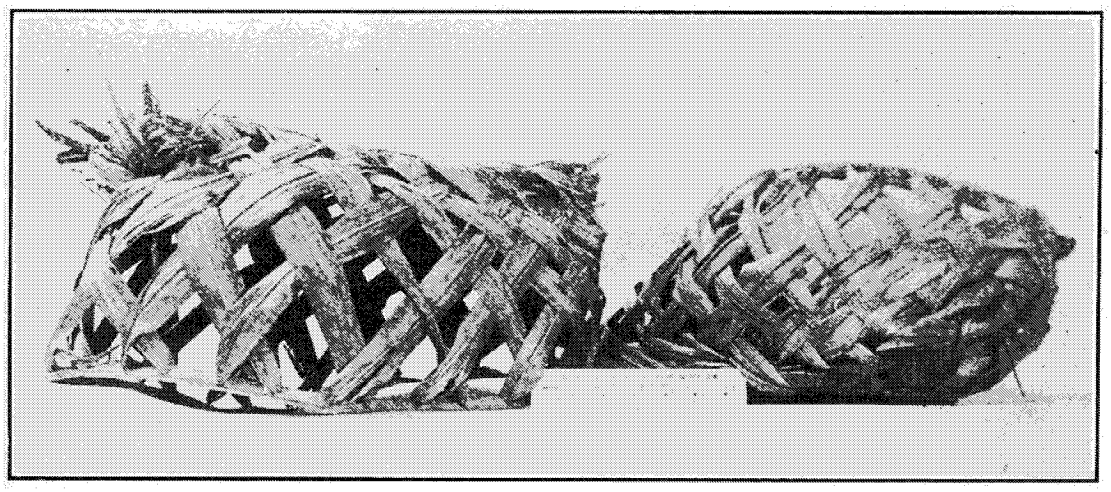
[14] In Samoa, *'ie toga* are presented at certain functions by women walking them around the *malae*, which is the central area between different *fales* (houses) within a village and is used for ceremonial purposes due to the sacredness of the space.

[15] In the cases of banishment, there is an intersection of elements of the Indigenous legal tradition, Christian norms, German Civil law, constitutional and criminal law as articulated in New Zealand, and human rights law.

number of texts on Samoan weaving,[16] everyday objects can be constructed of coconut leaf (fig. 2), pandanus (fig. 3), or in contemporary times, non-natural materials such as plastic.

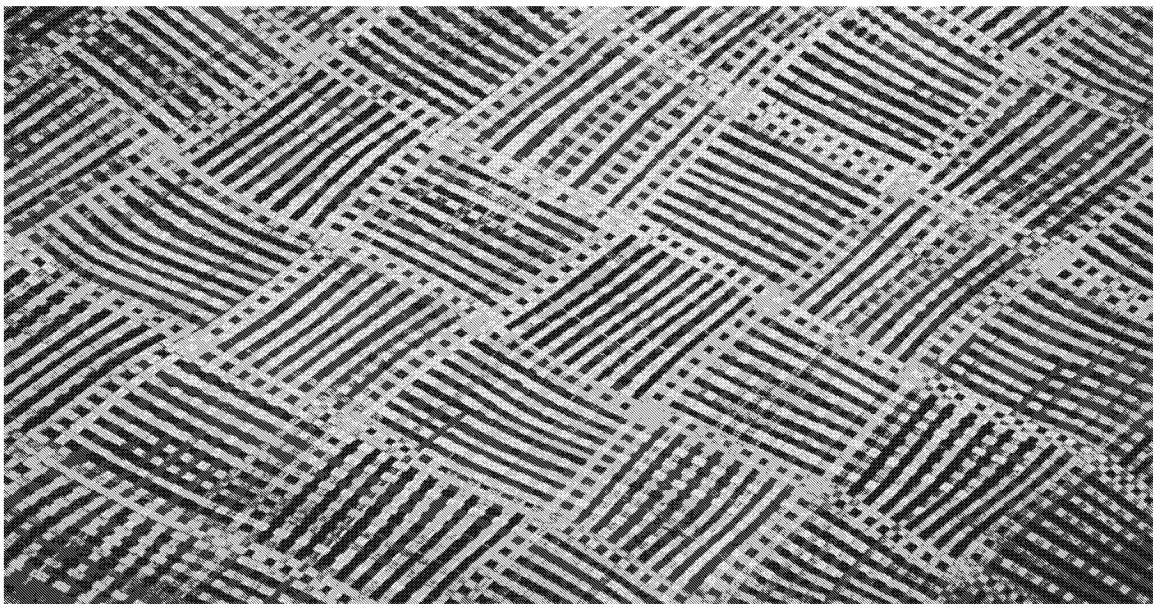
**Figure 2: Picture of Coconut Leaf Baskets from Tutuila, Samoan Group of Islands**



Source: Memoirs of the Bernice Pauahi Bishop Museum of Polynesian Ethnology and Natural History, Volume II (Honolulu, H.I. Bishop Museum Press, 1906-1907) 5.

[16] See Mallon and Pereira, *supra* note 9; Sean Mallon, *supra* note 10 and William T. Brigham, "Mat and Basket Weaving of the old Hawai'ians, With Similar Works From Other Parts of the Pacific" in *Memoirs of the Bernice Pauahi Bishop Museum of Polynesian Ethnology and Natural History, Vol. II* (Honolulu: Bishop Museum Press, 1906-1907) 1-105.

**Figure 3: Picture of Pandanus**

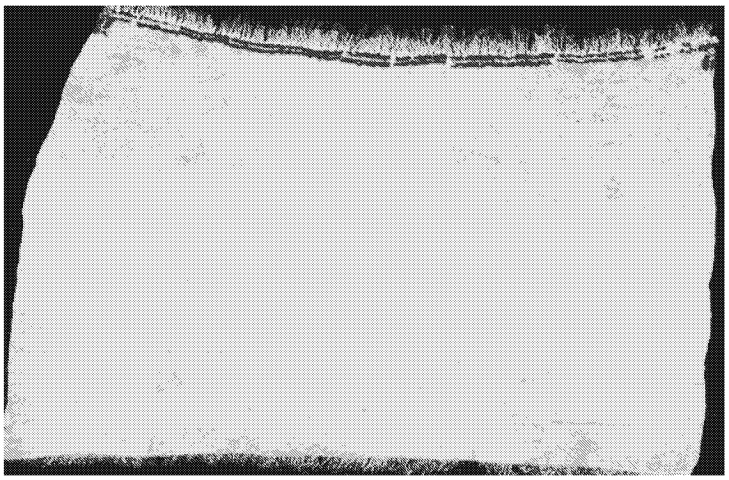


Source: Sean Mallon, *Samoan Art and Artists: O Measina a Samoa* (Honolulu: Univ. Hawai'i Press, 2002) at 12. Permission for use granted by © Craig Potton Publishing, Auckland: New Zealand/Aotearoa.

In the case of '*ie toga*, (fig. 4), the fibre used is pandanus leaf because it is durable and flexible, and because it is capable of being processed into very fine strands and woven extremely tightly. This was especially true of *'ie toga* woven in the past, where the finest grade of pandanus (*lau ie* or P. *Freycinetia*) was used and the texture of the *'ie toga* was that of silky linen.[17]

[17] Schoeffel, *supra* note 11 at 118.

**Figure 4: Picture of *'ie toga***



Source: Sean Mallon, *Samoan Art and Artists: O Measina a Samoa* (Honolulu: Univ. Hawai'i Press, 2002) at 12. Permission for use granted by © Craig Potton Publishing, Auckland: New Zealand/Aotearoa.

What is interesting about the natural fibres used in Samoan woven objects is that, on the one hand, they are the same as those used in woven objects in other parts of Oceania, and indeed other parts of the world, since coconut and pandanus are found in many places and make ideal weaving materials regardless of place. Thus, one can observe similarity between the woven objects of Samoa and the woven objects of other places. However, at the same time that one can observe similarity in weaving fibres across socio-cultural spaces, differences are also observable. First, since no two plant leaves are ever the same, every natural fibre used in Samoan weaving is unique, which becomes apparent if one looks closely. Second, the strands of fibre in Samoan weaving take on a distinct appearance due to the fibre-processing techniques used in Samoa, and ultimately due to the way the fibres pass through the weavers' hands.

The same is true of legal pluralism in Samoa. Just as there are multiple strands of fibre that go into the creation of woven objects in Samoa, so too are there multiple legalities in Samoa are part of complex moments of legal pluralism at different times and

in different places. These legalities can, on the one hand, bear similarities to legalities in other parts of Oceania and other parts of the world, due to similarities in Indigenous ways of life, and due to similar effects of colonialism and globalization. However, just as there are observable similarities, there are also differences in the legalities existent in Samoa. This is due to history, environment, socio-cultural factors, but also because each legality takes on a distinctly Samoan aesthetic as it is articulated by those in Samoan communities.

## Strands of Samoan Indigenous Law

Although all law in Samoa takes on a Samoan aesthetic, certain laws and legal institutions are Indigenous to Samoa and represent the ongoing articulation of Indigenous ways of being and knowing despite the effects of colonialism and globalization. Indigenous law in Samoa, like any legal tradition, was/is a complex entity made up of many different inter-related aspects. From my partial and limited view, it appears that there are laws and norms relating to one's relationship to the land, sea and the animal world, others relating to one's relationship with gods, the spiritual realm and with one's ancestors, as well as laws that are specific to ordering relations between those still living – between family members, between *matai*, between villages and districts, to outsiders, and so on.

Although each area of law is important for understanding the Samoan legal tradition, I cannot account for all of them here. Rather, I will focus my discussion on three inter-related dimensions of Samoan Indigenous legality: (a) the different forms through which Indigenous law was and is articulated, including genealogies, decrees, honorifics, parables, etc.; (b) the main institutions through which Indigenous laws were and are

exercised, including the family and the village *fono* (*saofaiga*); (c) those laws and sanctions that relate specifically to managing conflict and ordering human relationships, particularly relationships between *matai*/non-*matai*, the *feagaiga* relationship of brother/sister and relationships between *'aiga*.

Indigenous law in Samoa starts with the creation of Samoa by the god *Tagaloaalagi* (or *Tagaloa*), as cited in several published accounts of oral history. According to such accounts, *Tagaloa* is an *atua*, or high god, while other types of spirits are refered to as *aitu*, which were either spirits created by *atua* or were human ancestors. *Atua* have been described as being remote from human affairs and are believed to reside in *Pulotu* (the afterworld) or in *Lagi* (the heavens). As creator, *Tagaloa* was responsible for not only creating other deities, the land, sea and life forms within it, but was also responsible for establishing the rules and institutions ordering human relationships. For example, Malama Meliesia recounts one oral history, in the form of a song, where *Tagaloa* creates the world and all that is in it, and then creates the chiefs and establishes the *fono* (*saofaiga*), which is one of the primary decision-making institutions in the Samoan Indigenous legal tradition.[18]

*Tagaloa*, however, was not just responsible for creating the relational system known as *fa'amatai* and establishing the *fono* (*saofaiga*), he was also responsible for bestowing upon them institutional authority. This was done via appointment, which according to Saleimoa Va'ai is a core principle of Indigenous law in Samoa and is captured in the expression *O Samoa ua uma ona tofi*, meaning the "institutions of Samoa have been

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[18] Unknown, "Chaos and Strife" in Malama Meleisea and Penelope Schoeffel Meleisea, eds., *Lagaga: A Short History of Western Samoa* (Suva: University of South Pacific, 1987) 7-10. [Meleisea, Lagaga] For another account of *Tagaloa* and creation see Tuiatua Tupua Tamasese, "In Search of Harmony: Peace in the Samoan Indigenous Religion", *infra* note 35.

appointed."[19] The first narrative of appointment that Va'ai cites in his discussion of the authority of Indigenous law is the "appointment by *Tagaloaalagi* in the beginning,"[20] which is then followed by other appointments such as those by "Atiogie, whose sons drove out the Tongans and began the Malietoa lineage, those by Lealali the principal settlers of Savaii, the appointments by Muagututia that originated the Tupua lineage, the appointments by Galumalemana which established the offices of *aloali'i* or paramount descendants, and so on."[21]

In order to understand the exercise of legal authority in the Indigenous legal tradition and the governance of human relationships through this authority, it is necessary to have an understanding of the social structure in Samoa and of the meaning of *fa'asamoa*. *Fa'asamoa* refers to "the essence of being Samoan…and is an amalgamation of being Samoan, Samoan culture and much more."[22] *Fa'asamoa* is thus central to the way that a Samoan views him or herself, and views their relations with the world. The core of the *fa'asamoa* is the *'aiga* (extended family) and one is judged by what *'aiga* they belong to, and conversely, an *'aiga* is judged according to the actions and behaviours of the individuals who belong to it. *'Aiga* is a generic term used to describe the different groupings of extended families.

The values and norms of *fa'asamoa* are partly a reflection of the Samoan social structure, which was and is *fa'amatai*. *Fa'amatai* sets out every person's 'place' in

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[19] Saleimoa Va'ai, *Samoa Fa'amatai and the Rule of Law* (Apia: National Univ. of Samoa, 1999) at 29.
[20] *Ibid.*
[21] *Ibid.*
[22] Leilani Tuala-Warren, "A Study in *Ifoga*: Samoa's Answer to Dispute Healing" *Te Mātāhauariki Institue Occasional Paper Series No. 4* (Hamilton, NZ: Te Matahauariki Institute, 2002) at 11.

Samoa, and the rights and duties of each 'place'.[23] There are five main, interdependent groups that make up the *fa'amatai*, and each traditionally had specific political, economic and legal functions in the *fa'amatai* system, as well as each having their own organizational structure with particular rules, practices and conventions. Although some of the functions of each group have changed, the *fa'amaitai* structure is still a central aspect in Samoan society.[24] The *fa'amatai* groupings exist both at the level of the *'aiga* and are repeated at the level of the *nu'u*.

*Nu'u*, which generally refers to a group of *'aiga* living together in one area and is often equated with a village or settlement, is defined more specifically as "a geographical entity having a prescriptive and descriptive identity, it encompasses all cultural values and practices, and it is an autonomous polity which functions as an independent governing entity."[25] Before describing the five major groupings, their functions and their relationships to one another primarily at the level of the *nu'u*, it is important to set out that all relations in Samoa, including those of the *fa'amatai*, are governed by the principle of *va tupuia*. As Va'ai describes it, "at the heart of *fa'amatai* is the fundamental principle of *va tapuia*, which are norms of behaviour giving rise to other norms such as *va feloai*, mutual respect, *tofa mamao ma le faautaga loloto*, meaning wisdom in the exercise

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[23] Peggy Fairburn-Dunlop, *supra* note 12 at 5.

[24] Many of the ongoing changes within the *fa'amatai* social structure are due to urbanization and out-migration. For example, Elizabeth Roach notes that in some villages the *aulauma*, which was traditionally the daughters of *matai*, no longer functions or is only symbolic. See E. Roach, "Transformation of Christian Ritual in the Pacific: Samoan White Sunday" (1988) 16 Missiology 173 at 181. However, as other authors have noted, the *fa'amatai* is still central to organizing relationships in Samoa, as well as abroad, and therefore the different groups within *fa'amatai* need to be briefly discussed. See Leilani Tuala-Warren, *supra* note 22 at 15.

[25] Va'ai, *supra* note 19 at 39. In a further explanation, Bradd Shore states that *nu'u* is a generic Samoan term for settlement. It is most often used to refer to a village, although as is pointed out, it is not simply a geographical description. If *pito* is added to *nu'u*, it refers to a segment or subsection of a village, and can refer to a case where there is more than one household group together which is considered to have a distinct identity in relation to the *nu'u* in which the group resides. See Bradd Shore, *infra* note 56 at 51.

authority,"[26] as well as (according to Mageo) "*fa'aaloalo* or respect for status."[27] Albert Wendt, a Samoan novelist, defines it this way: "our *va* [*va tapuia*] with others defines us, we can only be ourselves linked to everyone and everything else in the *Va*."[28] If *va tapuia*, or the norms of behaviour guiding inter-relations, is a fundamental principle permeating all relationships in Samoa,[29] or is at least the ideal to be obtained, then we may gain some insight into why certain laws and norms exist to govern behaviours and relationships, why certain penalties or sanctions are imposed when norms or laws are broken, and why certain legal institutions have developed in the way that they have.

Within the *fa'amatai* system, *matai* are the central and most prominent group. Due to the centrality of *matai* in the *fa'amatai* system, and their importance for understanding how other groups within the *fa'amatai* system sit in relation to one another, I will briefly discuss the *matai*. However, due to their importance in governance and legality, I will return to a discussion of the *matai* after I have outlined the other groups in the *fa'amatai* system. Each *'aiga* is associated with a particular *matai* title, with the *matai* acting as the leader of the *'aiga*, ensuring proper conduct of those associated with it as well as acting as authority over the *'aiga's* land and property.[30] According to Malama Meleisia, *matai* titles were of two kinds: *ali'i* and *tulafale*. *Ali'i* titles were those that traced sacred origins

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[26] Va'ai, *supra* note 19 at 54.
[27] Jeannette Marie Mageo, "*Ma'i aitu*: The Cultural Logic of Possession in Samoa" (1991) 19 Ethos 352 at 353. [Mageo, Possession]
[28] Albert Wendt, *Ola* (Aukland: Penguin Books, 1991) at 301.
[29] In describing the relationships of *va tapuia*, Va'ai quotes Aiono Le Tagaloa, a professor of Samoan Studies at the Samoan National University in Apia, who states that *va tapuia* is the relationship between brother and sister, between parent and offspring, between male and female, between males, between females, between host and guest, between *matai*, between the dead and living, between man and his environment and between the created and the Creator. See Va'ai, *supra* note 19 at 54. See also Tuala-Warren, *supra* note 22 at14.
[30] The meaning of *matai* may have developed from combining the words '*mata'* (eye) and '*iai'* (to or toward), suggesting the concept of looking toward or up to another. Alternatively it may have developed from '*mata i ai'*, which connotes 'being set apart or consecrated'. See Saleimoa Va'ai, *supra* note 19 at 30.

through genealogies which begin with *Taglaloa-a-lagi*, the creator, and are linked to major aristocratic lineages. *Tulafale* had the role of rendering service to and oratory on behalf of the *ali'i*. The power of high-ranking *ali'i* was legitimised by the *mana* (supernatural power) of his/her aristocratic antecedents and ultimate descent from a god.[31]

*Tulafale* derived their authority (*pule*) to act from the *ali'i* and acted in the name of an *ali'i* or his *nu'u*.[32] Although the *ali'i* were accorded more honour than *tulafale*, in the day-to-day politics of the *nu'u* and through membership of groups such as *Tumua* and *Pule*, *tulafale* exercised the greater authority.[33] In addition, from the 16th Century onward, after the occupation of Samoa by Tonga, the system of titles gave great power to the *tulafale* who, acting in groups, collectively bestowed the highest *ali'i* titles.[34] Although the *matai* had authority over the property of his *'aiga* and the authority to allocate land and other resources, if this power was abused, the *'aiga* could replace him by consensus.[35]

In addition to the *matai*, four other groups form the *fa'amatai* system. The first group that Va'ai describes is the *tamaitai* or daughters of *matai*.[36] This group includes daughters who are unmarried or widowed, as well as those who are no longer at school. This group was generally responsible for creating the wealth of the village in the form of mats and *tapa* cloth, and today they still contribute in this way, as well as contributing through

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[31] Malama Meleisea, *The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa*. (Univ. of South Pacific: Institute of Pacific Studies, 1987) at 8. [Meleisea, Making]
[32] *Ibid* at 15.
[33] *Ibid* at 19.
[34] *Ibid* at 15.
[35] *Ibid* at 20.
[36] Fairburn-Dunlop uses the term *aualuma*, *supra* note 12 at 7.

wage employment in Samoa or other places such as New Zealand. *Tamatai* act as peacemakers and mediators of disputes in the family and in the village, often by presenting '*ie toga* in a forgiveness ceremony known as *ifoga*.[37] *Tamaitai* are also responsible for hospitality and learned songs, poetry, dancing and etiquette in order to entertain visitors from other villages. Traditionally, there was a ceremonial virgin chosen for each village, which was given a *taupou* title. The *taupou* titleholder represented the Samoan ideal of the feminine and was protected and served by the other *tamatai*.[38]

Within this group are the sisters of the special brother-sister relationships, referred to as a *feag'aiga*. The brother-sister relationship is particularly important in the Samoan social structure and is a distinguishing cultural feature.[39] Sisters were, and are, extremely valued in the village and are believed to hold and transmit sacred power or *mana*, while brothers hold *pule* or secular power.[40] Penelope Schoeffel describes that a sister was of higher rank than her brother, given better sleeping quarters and precedence in seating arrangements for the reception of food.[41] Brothers and sisters are bound in a sacred covenant called *feag'aiga*, and there are several laws that relate specifically to their relationship, including the brother sister incest *tapu*.

The next group is the wives of *matai*, who are considered foreigners in the village and thus, traditionally had less formal participation in the affairs of the *nu'u*. The wives of

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[37] *Ibid* at 7. Tamasese notes that the *tamatai*'s role as conciliator and mediator stemmed from their status as representatives of family gods, and thus they were expected to intercede as such representatives. Tamasese, Harmony, *infra* note 39 at 6

[38] Fairburn-Dunlop, *supra* note 12 at 7.

[39] Tuiatua Tupua Tamasese, "In Search of Harmony: Peace in the Samoan Indigenous Religion" (Paper, Centre for the Contemporary Pacific Research School of Pacific and Asian Studies, Australian National University, March 2005) Sunday Special Features Story, *Samoa Observer* (13 February 2005) at 6, online: Samoan Observer <http://www.samoaobserver.ws/news/ssfeatures/ssf0205/1305ssf004.htm>. [Tamasese, Harmony]

[40] Fairburn-Dunlop, *supra* note 12 at 7.

[41] *Ibid*.

*matai* are expected to serve their husband's family and his sisters, as her husband does. As Fairburn-Dunlop notes, the literal meaning of the term used for wives, *faletua* (back of house) and *tausi* (caregiver) outline the role that wives were expected to play.[42] Upon the breakup of a marriage, the wife of *matai*, as a 'foreigner', has no rights in her husband's village and is expected to return to her home village, where she resumes status as, and has the rights of, sister. With the advent of colonialism, there have been increased roles for the wives of *matai*, particularly with the taking of paid work outside the village. As with the *tamatai*, the structure of the group followed a hierarchy, with the most senior *matai*'s daughter and wife being the leader of the groups.

The third additional group described by Va'ai is the *aumaga-o le malosi o le nuu*, known as "the strength of the village."[43] This group consists of untitled men, sons of *matai*, as well as untitled foreign male spouses, also known as *faiva*. Traditionally, as well as today, this group conducts agricultural labour in the village, cooks certain foods in the outdoor oven (*umu*) for both the family and for celebrations, and performs other activities that require physical strength. Historically, the military power of the village was determined by the abilities and courage of the men in this group.[44] This group also contains future *matai*, so they learn how to be *matai* by attending village council meetings or *fono*, learning history, how decisions are made and the precedents for them, as well as carrying out the decrees of *matai* and the village *fono*. Again, the leader of this group is the son of the most senior *matai* titleholder in the village.

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[42] *Ibid* at 8.
[43] Vai'a, *supra* note 19 at 40.
[44] *Ibid*.

Another group in the village are infants or children too young to be in the *tamatai* or *aumaga*. Since colonialism, the majority of this group attend either village schools or schools in Apia or even outside the country. Although children do not act as a group in the same way that the other groups do, they are recognized as a group that has rights and responsibilities in relations to others in the *nu'u*.[45] One of the functions of children is to run errands and to serve their elders, even at a very young age.[46]

Returning to a discussion of the *matai*, Va'ai gives us his insight into *matai* titles and the respective authority that *matai* titleholders have in relation to one another, as well as their influence in Samoan ways of living and being. According to Va'ai's analysis, the *matai* system operates as set of hierarchal networks with *matai* forming the governing elements of districts, villages and family units, as well as today governing the state of Samoa. *Matai* titles can be divided into two categories. First, there are paramount titles, either called *papa*, *ao*, and *tama'aiga*. These titles have supra-village spheres of influence.[47]A paramount title holder is the most respected in its own territory of recognition and is given respect because of his or her special status, which is captured by the Samoan phrase *E le toe iai seisi o i sili*, meaning "there is no other superior being."[48] Although they may have had more roles previously, today paramount titleholders do not have governance powers over village affairs, which is under the power of village *matai*, and their status is ceremonial and their purpose is to consult and influence in their area.[49]

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[45] *Ibid.*
[46] Jeannette Marie Mageo, "Ferocious is the Centipede: A Study of the Significance of Eating and Speaking in Samoa" (1989) 17 Ethos 387 at 398. [Mageo, Centipede]
[47] Va'ai, *supra* note 19 at 30.
[48] *Ibid* at 31.
[49] *Ibid* at 31. There is indication that the paramount title holder may have had other functions previously, but that this eroded over time. Va'ai states that since the introduction of the Land and Titles Court, the

The second category of *matai* titleholders are chiefs and orators, known as *ali'i* and *tulefale* respectively, which operate largely at the family and village level. *Ali'i* and *tulefale* comprise the majority of titleholders and "are the main participants in the *fa'amatai* system."[50] As already outlined in my discussion of Meleisea's analysis, *ali'i* and *tulafale* were interdependent, with each complementing the other. According to Va'ai, the *ali'i* are responsible for guarding the honour and dignity of the family, and act as the peacemakers and mediators when there is family strife. They also act as a source of knowledge and wisdom, and like paramount titleholders, are to be venerated. The role of the *tulafale* is the custodian and protector of family genealogies and history (*uputuu*). They are considered the workers because they employ their oratorical skills in debate, speaking on behalf of and venerating the *ali'i* in social and cultural interactions. In return for their services, the *ali'i* provide the *tulafale* with goods and materials; particularly fine mats (*ie'toga*), considered the most valued property in Samoan cultural exchange.[51]

There are a number of *matai* of various ranks within each *'aiga* or family, with one senior *matai* at the head of the family. This *matai* is referred to as *sao* and he is acknowledged as the founder of family. The *sao* possesses all governing authority and has a multiplicity of functions over the family estate and family members. The running of the family is at the discretion of the *sao*, with the purpose to promote the social and economic welfare of the group. Although the *sao* has ultimate discretion in decisions affecting the *'aiga*, he is obliged to consult and seek advice from other members of the family and particularly other *matai*. *Matai* members of the *'aiga* and the *sao* generally

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paramount titles play a more symbolic role, although they do still retain influence in matters of reconciliation in their associated area and at the national level, *Ibid* at 32.
[50] *Ibid* at 30.
[51] *Ibid* at 36.

form a body within the family, formulating and implementing important family projects.[52]

As mentioned, *matai* are leaders not only of the *'aiga* but also the *nu'u* or village. The *matai* of the village form a council or assembly of *matai*, known as *saofaiga*. Va'ai says this about the *saofaiga*:

> the *saofaiga* is the governing authority which exercises the powers necessary to regulate the daily lives of its inhabitants according to established practices and conventions. Assemblies may take different forms depending upon the purpose of the gathering, with *fono tu tootoo* (meeting through key spokespersons) conducted outdoors, *fono fuaila* or meeting of division, *fono fale* or meeting of the whole council indoors, *fono manu* or special meeting and *fono ma aitu* meeting with ancestors.[53]

The *saofaiga* makes laws and regulations for the *nu'u* or village, as well as making executive decisions with respect to village governance, which are then carried out as per their instructions.[54] However, the legislative, executive and judicial functions are carried out by the *saofaiga* as a somewhat undifferentiated process,[55] although according to Shore, different committees are often formed to carry out the actual work. For instance, in the village of *Sala'ilua*, there are several ad hoc committees that do the work of the *saof'aiga* but also more permanent committees like the judicial committee, which is referred to as the *komiti*. The *komiti* enforces village regulations through inspections and patrols, and levies fines for breaches of regulations. Junior chiefs in the committee, who meet on Sunday evenings to discuss infractions of village regulations during the week

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[52] *Ibid* at 42-43.
[53] *Ibid* at 41. One should note that Va'ai refers to the 'council or assembly of *matai*' as *saof'aiga*, and the term *fono* is used to connote 'meeting'. Other commentators have generally used the term *fono* to refer to the council or assembly of *matai*, and Va'ai uses this term for the council in his discussion of law in Samoa from the colonial period onward. I will follow Va'ai's lead and refer to the council as *saof'aiga* in this section on Indigenous legality but will use the term *fono* in the sections following and in chapter five.
[54] *Ibid*.
[55] See Va'ai, *supra* note 19 at 41.

and consider fines, often carry out this work. The junior chiefs then carry their decisions to the body of senior chiefs for approval.[56]

The decisions made by the *saofaiga* are achieved through discussion, deliberation and consultation, which are essential requirements before any decision is made. An example of the role that discussion and negotiation play in the meetings of *saofaiga* is discussed by Shore in relation to the levying of fines. He states that fines, like laws, are open to manipulation and testing within meetings of *saofaiga* through a formalized process. At the meeting where a fine is announced, a chief or today a pastor will officially ask that the fine be lessened, with such a request being expected and often acceded to.[57]

Whatever discussion takes place in the *saofaiga*, the essential principle in determining issues and problems is "*soalaupule*, balancing of authority, with wisdom and fairness, *tofa ma le faautaga*."[58] The authority that is exercised by *saofaiga* or village governments can be divided into a number of types. There is constitutive authority (*pulefaavae*), distributive authority (*pulefaasoa*), exploitative authority (*pulefaaoga*) and protective authority (*pulefaamalumalu*).[59] Constitutional authority is vested in the founders or founding entity of the *nu'u* or in the whole village. All village property and inhabitants are subject to the exercise of *pulefaave* by the village council, and any alienation of property or banishment of villagers is via an exercise of *pulefaave*.[60] Distributive authority or *pulefaasoa* is exercised by *matai* of each family in relation to land and family property, and also is exercised by the village council in the admission of new *matai* to the

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[56] Bradd Shore, *Sala'ilua: A Samoan Mystery* (New York: Columbia Univ. Press, 1982) at 100.
[57] *Ibid* at 120.
[58] Va'ai, *supra* note 19 at 41.
[59] *Ibid* at 42.
[60] *Ibid* at 48.

council. The authority to exploit the resources of the land is given to those who have been allocated that land by the family *matai*.[61]

The council of *matai* also exercises protective authority, protecting the village estate and the village's welfare. One important demonstration of the protective authority of a *matai* is when a member of an '*aiga* does an illegal or wrongful act that may have retaliatory implications, threatening the lives of other members of the *'aiga*. Here, the *sao* exercises his or her protective authority by means of *ifoga* (literally meaning to bow down).[62] The practice of *ifoga* involves the family, with the *sao* or other *matai* leading, sitting outside the residence of the *matai* of the injured person's family with fine mats ('*ie toga*) over their heads. They offer themselves as objects to the victim's family, humbling themselves so that the victim's family may vent their anger and revenge, or as is most often the case accept the act of humiliation. Those under *ifoga* are at the mercy of the aggrieved family and expose themselves to serious harm and possibly death.[63] *Ifoga* once took days before they were finally accepted, although the usual waiting period today can be half day from dawn to midday, or even shorter.

When and if the victim's family accepts the *ifoga*, speeches of reconciliation are made, accompanied by the presentation of '*ie toga* and food as offerings.[64] The practice of *ifoga* is an important element in Indigenous legal tradition. It is used to start the process of reconciliation when a harm or offence has been committed.[65] However, it is only the beginning of judiciously dealing with the harm. Next will be a meeting of the

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[61] *Ibid* at 42.
[62] *Ibid* at 50.
[63] *Ibid* at 51.
[64] *Ibid*.
[65] Tuala-Warren, *supra* note 22 at 16.

*saofaiga*, with dialogue in regards to the nature of the wrongdoing, who is to blame and decree of punishment issued for the offender and his or her family. In serious cases, the punishment given is often banishment of the offender and his family from the *nu'u*, along with fines.

The other type of authority that Va'ai names as fundamental to the office of the *matai* or groups of *matai* and relating specifically to governance and administration of family and village affairs is *pulefaatonu*, or administrative authority.[66] It is through this authority that specific laws or rules are made for the village. This is consistent with Shore's analysis of law in the village of *Sala'ilua*, on the island of Savai'i. Here, local, Indigenous law is recognized as the particular rules and regulations made by the village council, captured by the term *tulafono*.[67] However, *tulafono* is also used to describe laws made by the central government in Apia, which is seen more as "an entire body of prescriptive statements made by a central and unified institutional complex."[68] Through discussion with his informants, Shore was able to construct four categories of *tulafono* that are existent at the level of the village or *nu'u* of *Sala'ilua*. The four categories are: moral law, explicit legislation made by the *saofaiga*, important principles of propriety, and public etiquette.[69] Shore also describes a number of 'sanctions' or penalties meted out by the village council, which form part of the Indigenous legal tradition. The first type of law that Shore categorizes is moral law, which covers prohibitions against certain kinds of behaviour such as murder or theft. Moral laws are recognized as being offenses against both village law (*solitulafono*) and against God, and thus considered sins

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[66] Va'ai, *supra* note 19 at 48.
[67] Shore, *supra* note 56 at 110.
[68] *Ibid*.
[69] *Ibid* at 112.

(*agasala*).[70] Moral laws are viewed as implicit beliefs held by everyone and therefore are not translated into explicit laws by the *matai*. Upon breaking these laws, the villagers of *Sala'ilua* believed that not only would fines and other punishments be handed out, but that an offender would face supernatural sanctions such as illness, death or misfortune.

The belief in supernatural sanctions is an important element of the Indigenous legal tradition. Several authors have cited that in addition to formal, judicial institutions, there are also those institutions that are more covert. These institutions include spirit possession and curing, and satirical comedy performances, where conflict or wrong behaviour is mediated via sickness, through spirits known as *aitu* and through comedic performances of norm reversal. [71] For instance, illness is considered to be punishment by ancestral gods for previous actions that dishonoured the family and thus is an incentive against certain kinds of behaviour. As well, rules associated with respecting the elderly are also persuasive because it is believed that if an elderly relative dies while angry at their families, they would return as *aitu* and punish their families. Observance of the special *feagaiga* relationship between brother and sister is also achieved through the threat of spiritual sanctions. It is believed that if a brother makes his sister angry, the family *aitu* would cause misfortune on him or his family.[72]

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[70]Prior to Christianity, the prohibition against murder was also evident, not necessarily because it was a sin against God but because it might insight the wrath of gods and *aitu*, and result in reprisal killings from the victim's family, and perhaps even war. See George Turner, *Samoa: a Hundred Years Ago and Long Before* (London, 1884; reprint Suva: Institute of Pacific Studies, 1984) at 178.

[71] Bradd Shore, "Ghosts and Government: A Structural Analysis of Alternative Institutions for Conflict Management in Samoa" (1978) 13 Man 175 at 195. [Shore, Ghosts] I will not be discussing the role of comedic performances in mediating conflict but see the above work by Shore as well as Jeannette Marie Mageo, "Samoa, on the Wilde Side: Male Transvestism, Oscar Wilde and Liminality in Making Gender" (1996) 24 Ethos 588; Jeannette Marie Mageo, "Male Transvestism and Cultural Change in Samoa" (1992) 19 American Ethnologist 443.

[72] All the examples noted are described by Meleasia, Making, *supra* note 31 at 37. Also see Mageo, Possession, *supra* note 27.

The second form of law that Shore describes as operant in Samoan villages are regulations, which he terms legislation. These are specifically decreed by *matai* in the *saofaiga* and deal with such things as disrespectful behaviour to chiefs, adultery, land boundaries and fighting within the village. According to Shore, when these types of laws are broken, they are viewed as crimes and not as sins. Curfews are one type of regulation made by *saofaiga*. In *Sala'ilua*, an evening curfew was imposed each day at six o'clock p.m., requiring that all villagers leave the public areas for their homes. Then every family must conduct family prayers until a conch sounds and people can go back to the public areas until the final curfew is called. Disobeying the curfew results in a fine. There are also curfews associated with Sundays, as well as requirements that all villagers attend church. Again, disobeying these results in the levying of fines, or in repeated cases, other forms of punishment.[73]

Other regulations made by the *saofaiga* deal with how villagers conduct themselves in public areas and with villagers' personal appearance. For example, raising one's arm over the head or yelling a kind of war cry (*ususu*) in the centre of the village is forbidden. These were once seen as challenging the *matai* of the village, and today are viewed as serious forms of disrespect to the village and to its *matai*. Regulations made with respect to public appearance include women refraining from wearing inappropriate clothing such as miniskirts to men not having long hair or beards. In *Sala'ilua*, the fine for not adopting a conservative appearance after several warnings was $1.40 in the late 1970's.[74]

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[73] Shore, *supra* note 56 at 108.
[74] *Ibid* at 109. It should be noted that regulations that were made in *Sala'ilua* during the time that Shore was there are not entirely Indigenous, as the call to evening prayers and regulations regarding certain kinds of conservative dress have only appeared since the adoption of Christianity. Early writers, for instance,

The third type of law that Shore describes consists of the important principles of propriety. These are acts which are disapproved of because they are *mataga* or repugnant to community members. Acts are *mataga* when they suggest disorder and pollution and include acts such as drunkenness, cursing or causing a disturbance in the village centre, and incest.[75] The prohibition against acts that are *mataga* have always been part of the Indigenous tradition, particularly the prohibition against incest, which is subject to *tapu*, and whose ill effects are outlined in a variety of songs, parables and genealogies. The final type of law that Shore mentions is public etiquette. These are acts which are also repugnant to members of the community, but that are less serious. Examples include eating while walking (*ai savali*) or sitting in a formal gathering with one's legs stretched out. Those who behave in this manner are reprimanded and are described as ill taught or thoughtless and lacking in judgment.[76]

As previously mentioned, there are a number of punishments used to ensure proper behaviour in the Indigenous legal tradition. Some are still in existence, while others are no longer practiced. In certain instances an individual may be punished while in other cases the entire *'aiga* is punished. Punishments pronounced upon an offender may once have included death, particularly when a *matai* was murdered, or physical disfigurement, as was sometimes the case when adultery was committed. In other cases, offenders were trussed up naked on a long pole and carried to the family who was offended, as an offering. An individual could also be hung by his feet from a tree or forced to kneel for

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discuss forms of dress that were much different from current expectations, although these early types of dress may also have had significance attached to them and may even have been regulated.

[75] *Ibid* at 112.

[76] *Ibid* at 113.

hours in the sun, as a form of humiliation.[77] Some authors, such as Turner, described other punishments such as having an offender chew on pungent roots that could kill or cause serious pain, beating their own head with stones or having to play catch with a sharp, prickly sea urchin.[78] Today, many of the punishments involving the physical abuse of individuals are no longer ordered, although there are still forms of public humiliation, as well as personal fines of food or money and burning of crops, and occasionally retribution killings.

The other types of punishment in the Indigenous legal tradition are those that were directed toward the family or *'aiga*. Communal punishments included the burning of *'aiga* houses and crops, taking livestock, banishment and levying of food fines. Stair discusses how, in one case, a *saofaiga* ordered a punishment in which the family's breadfruit trees were ringed above the stump causing them to be barren for two to three growing seasons. Once the family abandoned their compound, the crops were burnt.[79] The punishment of banishment is still handed out in certain cases, and involves the *saofaiga* pronouncing, after discussion in the *fono*, that a family will be banished from the village. The family is then warned and expected to vacate their family compound immediately. Sometimes, the terms of the banishment are negotiated and the family may only be banished for a certain period or the order will never be carried out. At other times, banishment is permanent.[80]

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[77] These are some of the punishments that Shore outlines in Shore, *supra* note 52 at 114.
[78] Turner, *supra* note 70 at 179-180.
[79] J.B. Stair, *Old Samoa: Flotsam and Jetsam from the Pacific Ocean* (London: The Religious Tract Society, 1897) at 91-92.
[80] Shore, *supra* note 56 at 114.

A further discussion of banishment will be carried out in chapter five, but the other form of communal punishment that is worth noting is the ordering of fines. Fines, both traditionally and today, often involve foodstuffs, which are then distributed among the village households. Heavy fines could range from a single sow, or for more serious cases involve fifteen to fifty sows. In order to meet this fine, the offender's family would need to approach other members of their extended family and thus be indebted to them. Another type of food fine involves uprooting the *'aiga*'s entire garden and distributing the mature crop among the village. Less serious fines involve giving taro root and money, as well as imported foodstuffs such as canned fish.[81]

The laws, norms and punishments that Shore outlines, and which I have discussed above, are just some of the Indigenous laws that govern human relationships and prevent conflict within the *nu'u*. However, I would suggest that along with the laws and sanctions mentioned by Shore, there exist other laws that mediate relationships in the *fa'amatai* and are a source of governance. These include genealogies, honorifics, parables and *tapu*. I cannot go into a detailed account of each of these forms of law and their operation in Samoa, partly due to space constraints but also due to the fact that many of them are considered sacred, not to be discussed in the presence of outsiders. Thus, I only give a brief description of each.

Genealogies, and knowledge of the ramified lineages, can be considered a form or perhaps source of Indigenous law because it is through them that authority is established and relationships are maintained. Va'ai suggests why genealogies and lineages form part of the Indigenous legal tradition, stating that it is "knowledge of the ramified lineages

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[81] *Ibid* at 115.

that enables one to identify authority for conducting dialogue at the inter-village and inter-district level"[82] and "knowing or not knowing a genealogical connection can make the difference between life and death, sharing or not sharing in a distribution or being allowed to marry in Samoa."[83] The custodians of family genealogies are *matai* and *tulafale*, and the importance of genealogy is underscored by the fact that public discussion of them is *tapu* or *talagafa*. According to Va'ai, village constitutive laws impose heavy penalties on those who discuss genealogies in public (this includes the courtroom) and offenders may even be banished from village affairs for breaching *talagafa* in some cases.[84]

Honorifics could also be considered a source of law in Samoa since they provide important information about villages and titles, including knowledge of status, rank, authority, lineage, as well as geographic locations. According to Va'ai, honorifics are not just a form of address but they provide essential insight into *fa'amatai* relationships and the network of authority in the village, district and national sphere.[85] Thus, they could be regarded as a source of law that governs human relationships, much like constitutions in western law set out legal authority and establish specific relationships between different spheres of government.

Finally, *tapu* can be considered a form of law since they are defined as a set of sacred rules that, if breached, have serious spiritual, legal, political and social consequences for a person, their *'aiga*, and their *nu'u*. In terms of spiritual sanctions, it was/is thought that *Atua* would punish those who broke *tapu*, those who declared the *tapu*, as well as those

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[82] Va'ai, *supra* note 19 at 37.
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid* at 38.

who profited from a break of *tapu*. Punishment might be extended to include a family, the village or an entire district. Father Theodore Violette, a missionary in Samoa, wrote of *tapu* in his diary in 1847, saying: "the people attached a very high importance to the observation of tabu. All were implicated in it; for the *atua* punished sacrilege rigorously…not only the guilty, but those who had declared the tabu, and those for whose profit it had been established, be it the family, the village or the district."[86] One example of *tapu* was the marriage between children of brother and sister. This *tapu* is described by Tuapa Tamasese in regards to the origin of the name of Mata'utia Faatulou (in which Tamasese interestingly breaks *tapu* himself by telling the story since he is publicly relating a secret genaology):

> For political reasons Mata'utia's sponsors, Leifi and Tautolo, persuaded their reluctant ward to marry his high-ranking first cousin Levalasi. Before indulging in his husbandly duties, Mata'utia had to say tulou (excuse me) because he was breaching the consanguinity *tapu*, thus becoming Mata'uita Faatulou. When Levalasi gave birth to a clot of blood, Leifi and Tautolo assumed a curse because of a breach of *tapu*. They determined to assassinate Mata'utia and replace him as husband of Levalasi with another husband from Atua. They murdered Mata'utia but Levalasi was inconsolable. Fearful of reprisals from Levalasi's family, Atua built a pyre where Leifi and Tautolo were burnt alive. Satisfied by the *taulaga* (human offering) Levalasi's brothers Tupa'I and Tauiliili did not exact reprisals and Levalasi returned to Leulumoega where Salamasina became her adopted daughter and heir.[87]

Tamasese also shares with us the history of the *papa* Gatoaitele, which refers to the kingship title Gatoaitele and is recorded orally through the use of naming, words and honorifics. The history is instructive for learning about the *tapu* of brother-sister incest, and thus, gives us insight into a source of legality in the Indigenous legal tradition.

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[86] T. Violette as quoted in Andrew Hamilton, *infra* note 97 at 166.
[87] Tuiatua Tupua Tamasese,, "The Riddle in Samoan History: The Relevance of Language, Names, Honorifics, Genealogy, Ritual and Chant to Historical Analysis" (1994) 29 The Journal of Pacific History 66 at 73. [Tamasese, Riddle]

> The origins of this title begin with the breach of the brother-sister incest *tapu*, which resulted in the pregnancy of Gatoloai. In order to avoid public disgrace, the father offered his daughter in marriage to Malietoa Itualagi. The child which was born, Laauli (meaning 'a step into the dark night'), was willed by Malietoa Itualagi to succeed him as Malietoa. When Malietoa Laauli married, he bore only daughters. His first born daughter was Gatoaitele. Since Malietoa Laauli bore only daughters he adopted Falefatu. Gatoaitele and Falefatu argued, and Falefatu insulted Gatoaitele by referring to her incestuous grandparents and the fact that Gatoaitele was not even an heir of Malietoa. The quarrel became a pretext for war and the village of Tuamasaga was divided, with Malie leading the Falfatu faction and Afega the Gatoaitele faction. Gatoaitele asked for the assistance of her grandsons, Tupa'I and Tauiliili, to redeem the family honour, and they responded in the name of the war goddess Nafanua. Falefatu was defeated and by way of taking status away from Malietoa and Malie, the title Tupa'I was imposed. The new papa Gatoaitele was named after the grandmother and the residence of the new papa was in Afega. Malie, the seat of Malietoa, and Afega, the seat of Gatoaitele share the honours anomalously as Tumua.[88]

Other forms of *tapu* define the relationship between humans and the environment and between humans and animals. In Samoa, certain birds and fish were/are considered as sacred because they were/are "earthly manifestations of village gods, such as the *matu'u* (sea heron) in the village of Manono or the *lulu* (owl) in Saleimoa."[89] *Tapu* associated with each of these animals protected them from being eaten and killed, or created some very specific regulations about how they could be killed for food. There are also many other types of *tapu* that have legal and normative influence, defining people's behaviour and relationships. However, such a discussion will have to be left for another day.

## Strands of Christian Legality

In Samoa, introduced religions, particularly various strands of Christianity, have gained enormous importance in daily life, such that a large majority of the population

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[88] Ibid at 73.
[89] Tamasese, Harmony, *supra* note 39 at 4.

considers itself Christian.[90] The 1991 census showed that 84.3 percent of the population considered themselves to belong to the Christian tradition, with the majority of those belonging to mainline denominations including the Congregational Church, the Roman Catholic Church and the Methodist Church.[91] The introduction of Christianity in Samoa began in the 19th Century. The first Western missionaries to arrive, Reverend John Williams and Reverend Charles Barff, came in 1830 representing the London Missionary Society (LMS). They were accompanied by Fauea, a Samoan who had been travelling among the islands of Tonga and Fiji in native canoes.[92] Fauea introduced Williams and Barth to Malietoa and there was an exchange of gifts between the missionaries and Malietoa.

Although many cite this as the first instance when Christianity was introduced to Samoa, others make the point that beachcombers, Tahitians on passing ships, Tongan missionaries, and Samoans who had gone on whaling ships and then returned to Samoa had already introduced Samoans to Christianity.[93] For example, a Samoan chief Teoneula and another Samoan Sio Vili, spent time at the Wesleyan Mission in Tahiti in 1827, where they learned Tahitian, about *lotu taiti* and about the local Mamaia religious movement. In 1829, "Sio Vili returned to Samoa and became a visionary and prophet,

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[90] Ernst Manfred states that there is no other Island group where the society and the mainline churches are so closely knit together and where the church has had and still has such an impact on nearly every aspect of life, *infra* note 91 at 171.

[91] From an unpublished but official printout from the Western Samoa Department of Statistics as published in Ernst Manfred, *The Role of Social Change in the Rise and Development of New Religious Groups in the Pacific Islands* (Hamburg: Lit Verlag, 1996) at 168. I have chosen not to include the Church of the Latter Day Saints or the Jehovah's Witnesses within the Christian tradition as their doctrines differ quite significantly from the other denominations in terms of doctrines and belief. See Manfred, *Ibid* at 10.

[92] Derek Freeman, as quoted in Peter Hempenstall, "On Missionaries and Cultural Change in Samoa: Derek Freeman Preparing for a 'Heretical' Life" (2004) 39 The Journal of Pacific History 2 at 244.

[93] See Rhys Richards, "The Decision to *Lotu*: New Perspectives from Whaling Records on the Sources and Spread of Christianity in Samoa" (1994) 17 Pacific Studies 29.

starting a new Indigenous religion that synthesized certain Christian beliefs with traditional Samoan customs and practices, along with Cargo cult expectations of material wealth."[94] *Lotu Sio Vili* received support throughout Upolo, Savai'i, and on Tutulia, with about six thousand members at the height of its popularity. It presented a strong challenge to the spread of *lotu taiti* until its significance waned.

Other Samoans also traveled to Tonga to learn about Christianity. Mosese Nusitonga is reported as returning to Samoa in 1829 to spread *lotu tonga* while in the same year another Samoan who had visited Tonga persuaded two villages on Savai'i to *lotu.*[95] Indigenous missionaries from Tahiti and the Cook Islands also accompanied Williams on his first voyage and stayed in Samoa, initially under the protection of Malietoa, to evangelize the islands. When Williams returned in 1832, the Christian message had been spread to other islands in the Samoan group and many had chosen to follow the Christian God.[96] Thus, the religion became known as *lotu taiti*. In 1836, six LMS missionaries from England arrived in Samoa and more systematic mission work took place, including the opening of schools and chapels in many villages. In 1844, an LMS theological seminary was established to train Samoan teachers in the work of evangelism. The LMS has now become known as the Congregational Church in Samoa.

*Lotu pope*, or Catholicism, was introduced into Samoa in 1845 by French Marists. Fathers Roudaire and Violette were the first Catholic missionaries to Samoa. They arrived from Wallis in 1845 and used their Wallisian connections to meet with chiefs in

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[94] *Ibid* at 35.
[95] *Ibid.*
[96] It should be noted that the work of such Indigenous missionaries has not been considered much in scholarly literature. This is interesting considering that in many of the islands, they were often the first individuals to present the message, which would have impacted the way the message was communicated and how it was received.

Samoa. On Savai'i, they first sought out a Wallisian who held chiefly rank at a village there, as well as sought out the relatives of the Wallisians who had accompanied them to Samoa. Through these Wallisian connections they were able to gain an audience with the Samoan high chief, Mata'afa. The Catholic missionaries also were also received by the leading chief Tuala in the northern Savai'i village of Lealetele.[97] One source of Catholic converts were adherents of the syncretistic *Siovili* sect, who had not converted to either *lotu taiti* or *lotu tonga*. Hamilton notes a pattern among Samoans who converted to Catholicism: often individuals resisted conversion to *lotu taiti*, then embraced *lotu tonga* (Methodism) out of a search for a different *lotu*, often for political reasons, before finally embracing Catholicism. Mata'afa Fagamanu, Catholicism's high chiefly patron had followed this pattern, having first been an adherent of the *siovili* sect, then an adherent of *lotu tonga*, before finally embracing *lotu pope*.[98]

Part of the success of Catholicism in some areas may have been due to the way that priests appealed to, or conducted themselves according to, certain aspects of *fa'asamoa*. For example, LMS missionaries wrote of the 'voluntary humility' of the first missionary Priests, particularly Father Violette. They wrote, "the priest at Lealatele refused to live in the large house and has taken a back house. When a chief enters they sit on the ground and if a mat is spread for them, they lift up the corner and sit on the ground. If the chiefs are gathered together in a house, the priests stoop down while passing them…"[99] When the Bishop Bataillon made his first visit to Samoa, he conducted a chiefly ceremonial progress (*Malaga*) and also made use of Samoan fine mats in ecclesiastical ceremonies.

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[97] Andrew Hamilton "Nineteenth-Century French Missionaries and *Fa'a Samoa*" (1998) 33 The Journal of Pacific History 163 at 167.
[98] *Ibid* at 176.
[99] *Ibid* at 171.

The priests also recited a list of St. Peter's successors, attempting to appeal to the Samoan use of genealogy and succession.[100]

What is significant about the growth of *lotu taiti*, as well as *lotu tonga*, is that it often occurred through the conversion of *matai*[101] and primarily through the work of Indigenous teachers. For instance, LMS missionaries sought out chiefs for conversion in order to establish a base for further missionary efforts as well as for protection and sustenance. For the *matai*, adoption of Christianity offered opportunities for prestige, new wealth, education and a new genealogical interpretation of the cosmos.[102] Once *matai* and the village *fono* decided which sect of Christianity to adopt, others in the *'aiga* and *nu'u* were expected to do the same. Despite the influence of missionaries generally, through their relationships with certain *matai* and establishment of schools, the early church in Samoa was not a strict reflection of western missionary ideals but much more Indigenous in its articulation. According to one commentator, the decentralized nature of Samoan governance and the diversity of villages, as well as a lack of finances by the missionaries, meant that individual western missionaries had less direct influence over congregations than in other places. They simply could not travel to each village and thus, Indigenous teachers were employed to carry out Christian instruction.[103] Indigenous teachers were subject to the authority of the *matai* and the *fono* in each village and were only allowed to speak when Indigenous laws and norms permitted. However, they soon began to gain

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[100] *Ibid*.
[101] Derek Freeman, *supra* note 92 at 244.
[102] K.R. Howe, *Where the Waves Fall: A New South Seas Islands History from First Settlement to Colonial Rule* (Honolulu: University of Hawaii Press, 1984) at 239.
[103] *Ibid* at 241-242.

influence in the community such that a *matai* could raise their status at times through association with a good teacher.

Such a widespread adoption of Christianity has added another strand of legality to the complex weave of legal pluralism in Samoa. In some cases, laws and institutions that once existed disappeared from view as legalities of the Christian tradition have been superimposed in the weaving process. In other instances, Christian strands exist alongside other legalities in a complex pattern. For example, the pastor and the church have now become important institutions in family and village governance alongside other institutions and Christian laws and norms are now viewed as an authoritative source of law along with other sources of law. In order to capture some of the complexities of Christian legality in Samoa, it is instructive to look at how the overlay of Christian laws and norms has obscured certain aspects of Indigenous legality, as well as the ways in which both sets of laws and norms have been brought together, adding new dimensions to both. It is also useful to consider the role of the pastor and the church as institutions of governance in *fa'amatai* relations.

Some aspects of Indigenous legality that are now obscured due to the adoption of Christian norms and values are noted by Leilani Tuala-Warren in his discussion of *ifoga* as a form of restorative justice. Justice is no longer entirely equated with revenge, in the sense of the victim's *'aiga* getting revenge against the offender or in terms of the using of *ifoga* or banishment as a means of preventing revenge killings of the offender's *'aiga*. The "seeking of forgiveness is now the main motivation behind the performance of *ifoga* in Christian Samoa, and has replaced the fear of revenge motivation."[104] Now, justice is

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[104] Leilani Tuani-Warren, *supra* note 22 at 13.

most often seen to be done when the village *fono* hands down a punishment to an offender and their *'aiga*, and when the victim's *'aiga* offer their forgiveness in response to *ifoga*.[105]

Justice is also now seen as reserved for the afterlife, when *Le Atua's* justice will prevail. This is captured in the Samoan phrase "*e taui mai lava e le Atua*" (God will pay back either a person's goodness or evilness).[106] The adoption of Christianity, primarily a form of Christianity which emphasizes forgiveness, has also translated into less violent forms of punishment given to individual offenders. As mentioned earlier, some punishments given to individual offenders prior to Christian influence involved extreme physical violence, often resulting in death. These practices were discouraged by missionaries and are either no longer practiced, or seem to be hidden from view.[107]

Indigenous understandings of marriage have also been partly obscured with the adoption of Christian norms and principles. Prior to Christianity, marriage between the high born was quite fluid, with temporary unions being sought to produce heirs to an important title or to build alliances between villages. This often translated into certain *matai* practicing polygamy. However, missionaries, and particularly Catholic missionaries, taught that polygamy, adultery and divorce were against ecclesiastical standards, and thus could not be sanctioned by the church. [108] In addition, marriages between persons baptized and non-baptized and between Catholics and non-Catholics

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[105] Tuani-Warren notes that it has become all but obligatory for an offended person to accept the *ifoga* and the compensation that comes with it as a sincere act of Christian humility, and therefore sufficient to heal a wound or breach caused by an offence. *Ibid* at 21.
[106] *Ibid* at 12.
[107] Shore, *supra* note 56 at 114. There are still cases where an offender experiences physical violence as punishment. In some cases, these punishments are carried out by members of the victim's *'aiga* or are carried out by the village *aumaga*, on orders by the village *fono*. I will be discussing some of these instances in chapter five.
[108] Hamilton, *supra* note 97 at 172.

were prohibited under ecclesiastic law, except in special circumstances. However, there was some leniency if the marriage was considered "durable and not a polygamous union."[109] Eventually, the practice of polygamy was woven out as Christian doctrine achieved normative force, and adultery and divorce have now come to the fore in the moral law of Samoa.

In other cases, the adoption of Christian norms and laws has not obscured earlier forms of Indigenous legality, rather both strands exist together in a pattern of mutuality. For example, offending and wrongdoing is now judged not only according to Indigenous principles of respect and *fa'asamoa* but also according to Christian principles and norms, either straight from the bible or based on ongoing articulations of the first teachings of Christianity from Indigenous teachers or *Papalagi* missionaries. For example, murder is considered an offence against Indigenous law, but is also considered an *agasala* (sin) or offence against *Le Atua's* law, as found in the Ten Commandments in Exodus Chapter 20.[110] Another example of the mutual co-existence of Indigenous legality and Christian legality is in the prohibition against abortion. Abortion is considered against the law of *Le Atua* (moral law) and against Indigenous norms of valuing children and large families, and where alternatives are provided for through Indigenous laws of in-family adoption and Indigenous norms around familial care of children unwanted by their biological mothers.[111]

Another case where Christian legality exists alongside Indigenous legality is in the laws relating to church governance. For instance, in LMS congregations, only titled men

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[109] *Ibid* at 175.
[110] Shore, *supra* note 56 at 112.
[111] Barbara Reid, "Weighing up the Factors: Moral Reasoning and Culture Change in a Samoan Community" (1990) 18 Ethos 48 at 59-60.

were allowed to hold the office of deacon,[112] which builds an Indigenous element into biblical notions that deacons are "to be men who are reverent, hold the mysteries of the faith in good conscience, and who manage their children and household well."[113] As well, certain laws were specific to church governance but did not necessarily lead to laws and norms for governing the everyday life of believers. One example of the functioning of different strands of legality for different institutions is the regulations formulated by Catholic missionaries that prohibited Samoan adherents from wearing garlands at mass.[114] Protestant churches also made regulations that covered all members of the *Ekalesia* (inner church), which forbade things such as theft, drunkenness, adultery and murder as well as tattooing in some cases.[115]

Although there was/is mutual co-existence of both legalities in many cases, there are also moments when Christian norms and laws and Indigenous legalities are so tightly woven together that taking apart the different strands would jeopardize the integrity of each strand. One example of tightly woven legalities is the laws around evening and morning prayers. Howe quotes one missionary who stated that: "having been accustomed to take everything of importance into their own hand and legislate accordingly, the *matai* in my district made a law that every man that did not appear at the six o'clock morning-school for reading and prayer should be fined in a quantity of cooked taro, fish and other eatables."[116] Thus, Christian norms were, and continue to be, articulated as law through the offices of the Indigenous legal tradition and are not considered separate. Shore notes a

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[112] Freeman, *supra* note 92 at 247.
[113] 1 Timothy 3: 8-10, 12.
[114] Hamilton, *supra* note 97 at 174.
[115] Shore, *supra* note 56 at 111.
[116] George Turner, *Nineteen Years in Polynesia: Missionary Life, Travels and Researches in the Islands of the Pacific* (London, 1861) at 31 as quoted in Howe, *supra* note 102 at 239.

similar blending of legalities in the village of *Sala'ilua*, where the *fono* have legislated that everyone must go to their homes for evening prayers after blowing of a conch shell by a *matai*, as well as laws that all must be in church every Sunday and on time or face the threat of fine.[117] Village *fono* have also used their authority to legislate against the establishment of more than one church in the village, and have used banishment, a sanction originating in the Indigenous tradition, as punishment for breaking this law.[118]

The final aspect of Christian legality that I will cover here relates to the institutional role of the *faifeau* or pastor and churches in governance of relationships in the *fa'amatai*. The pastor has become a prominent person in the *fa'amatai* social structure, being one side of the *feagaiga* relationship with worshipers of his congregation or with all villagers in cases where only one congregation exists in a village.[119] As part of a *feagaiga* or covenant relationship, there are norms such as *va tupia* and *ma* (shame) which ensure respectful relations between pastor and worshippers. In some villages, the covenant relationship begins when the village *fono* appoints the pastor from among candidates from the theological school.[120] Once chosen, the pastor takes on a position of authority in the village, ensuring adherence to moral law and respectful relationships between villagers.

In many cases, the *faifeau* is the other main source of authority in the village besides the *matai*. Thus, they help in running village affairs, and will often play a complementary role to the *matai* in the adjudication of serious matters.[121] For example, the pastor may

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[117] Shore, *supra* note 56 at 107-108, 109.
[118] *Sovita v Police* [2000] WSSC 2 (PacLII).
[119] Shore, Ghosts, *supra* note 71 at 190; Tamasese, Harmony, *supra* note 39 at 60.
[120] Freeman, *supra* note 92 at 249.
[121] Shore, *supra* note 56 at 107.

work to bring about reconciliation between the offender and victim or may prevent the victim's *'aiga* from seeking revenge when a wrong has been committed. Pastors also urge the victim's family to forgive once remorse and apology have been given through *ifoga*. Despite the complementary roles that *faifeau* and *matai* play in village life, there are times when their authority overlaps and conflict arises.[122]

The church itself has also become an important institution in the majority of Samoans' lives, with each "congregation forming a distinct village group in Samoa."[123] As a distinct village group, congregations have formed their own councils that replicate the village *fono*, and are generally referred to as *fono a tiakono*.[124] The church, as an institution, continues to be a place where Christian norms and laws are maintained, and in many cases, where the norms and values of *fa'asamoa* are cultivated. This is not only true for those living in villages in Samoa where there are other institutions of governance operating, but also true for Samoans living abroad. For many Samoans living in New Zealand, the church is an essential aspect of being Samoan,[125] such that they have started their own congregations "to control the theological and political organization of the church after feeling constrained by European rules and conventions that controlled their religious activity."[126] For Samoans living in Seattle, the moral code of the church is a

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[122] *Ibid* at 107.
[123] Shore, *supra* note 56 at 106. Several authors note that the church acts as an urban village for Samoans, particularly those living outside Samoa. See Macgrath, *infra* note 127 at 329.
[124] Cluny Macpherson, "From Moral Community to Moral Communities: The Foundations of Migrant Social Solidarity Among Samoans in Urban Aotearoa/New Zealand" (2002) 25 Pacific Studies 71 at 75.
[125] Macpherson notes that members of Samoan church congregations in Aotearoa/New Zealand increasingly have the church, rather than their home village, as the focus of their political and social lives. *Ibid* at 73.
[126] *Ibid*.

binding mechanism with other Samoans and upholds the norms and values of *fa'asamoa*.[127]

## Strands of German Colonial Law

Samoan experience with German colonial law began with the arrival of commercial interests in Samoa, particularly German merchants who began as traders and soon moved into agricultural production. The first firm to be established was J.C. Godeffroy and Sohn, who by the 1860s had a network of traders on Savai'i, Tutuilia and Manu'a.[128] By 1865, German firms had established agricultural plantations on both Upolu and Savai'i and there was increasing influx of European settlers living in Apia. With land being annexed through occupation, alienation and through the threat of German gunboats, German settlers and firms began to assert that Germany had the right to govern and administer in the Samoan islands.

During this period, a number of regulations were made to facilitate trade and maintain law and order. For example, in the 1850s, the settlers formed a Foreign Residents Society in Apia and made regulations and appointed a court to maintain certain laws. Va'ai notes that it operated more as a court of equity, with few rules other than what was deemed "just, necessary and enforceable at the time."[129] In 1857, efforts were made to create a joint government involving settlers and Samoans in the Apia area. A mixed court was set up at this time to deal with feuds between different populations in Samoa and to

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[127] Some Samoan migrants in Seattle stated that church was a place where *fa'asamoa* was meaningful and where *fa'asamoa* was preserved since traditional rituals are enacted, proper behaviour is rewarded and Samoan values are reinforced. Barbara Burns Macgrath, "Seattle *Fa'asamoa*" (2002) 14 The Contemporary Pacific 307 at 329.
[128] Stewart Firth, "German Firms in the Pacific Islands, 1857-1914" in John Moses & Paul Kennedy eds., *Germany in the Pacific and Far East, 1870-1914* (St. Lucia: University of Queensland Press, 1977) at 3-4.
[129] Va'ai, *supra* note 19 at 58.

administer laws independently for each. However, this weaving together of distinct and separate strands of law proved unworkable and the mixed court was abandoned in 1863-1864 after a number of issues arose.

In 1879, Germany signed a friendship treaty with the Samoans, which "initiated a twenty year period of informal, quasi colonial influence on the islands."[130] The European influence became more formalized in the area surrounding Apia through the formation of the Municipality of Apia, which allowed the infrastructure of trade to be 'protected' and where the relationships between Europeans and Samoans, as well as indentured labour, were regulated. Within Apia, several consuls existed, representing American, British, and German interests and there was a substantial rivalry between them as they attempted to control the municipality and influence *matai* from various districts of the islands. This rivalry also influenced the wards and rivalries that were taking place among Samoans over attainment of the Tafa'ifa titles. Different consuls supported different *matai* based on whether they seemed amenable to European style governance, particularly a central monarchical regime.[131]

In 1884, the German Consul Stuebel forced Malietoa Laupepa to sign a treaty designed to give Germany influence in governing Samoan affairs, but Malietoa ignored the treaty and Stuebel forced him from the seat of government at Mulinu'u and raised the German flag to indicate German control. The German Chancellor, Otto von Bismark, circumvented this move by Stuebel, hoping to gain control of Samoa through external negotiations with other powers involved in the area. However, the Americans declined to

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[130] George Steinmetz, "The Devil's Handwriting: Pre-colonial Discourse, Ethnographic Acuity, and Cross-Identification in German Colonialism" (2003) 45 Comparative Study of Society and History 41 at 55.
[131] Peter Hempenstall, *Pacific Islanders Under German Rule* (Canberra: Australian National University Press, 1978) at 29.

negotiate and the Bismark ordered war upon Malietoa Laupepa, who was deported on a German warship. The Germans installed Tamasese Tupua in the seat of government at Mulinu'u. He accepted the seat on the basis that it would prevent Mata'afa Josefo from gaining the Tafa'ifa titles. However, Mata'afa Josefo, with a large group of supporters including an American, revolted in 1888, killing a number of Germans. This incident precipitated moves to negotiate a resolution among the three Western powers as to governance in Samoa.

In 1889, Germany, Britain and the United States signed the Berlin Agreement, which "was to enshrine Samoan custom as the centerpiece of future governments."[132] Despite such an agreement, in reality the colonial powers were keen on governing in Samoa themselves, and did not include Indigenous Samoans in the negotiation of the Agreement. In the Berlin Agreement, it was stipulated that the three consuls and a European Chief Justice would administer the port city of Apia and advise the Samoan 'King', who would rule the rest of the country. Western style law and judicial institutions were to be imposed to deal with issues related to settlers, to deal with land disputes and kinship struggles, and to ensure ongoing security for commercial interests and to promote the orderly civilization of the Samoan people.[133] This was the first instance of a Supreme Court operating in Samoa, and it would have sole jurisdiction to deal with civil suits concerning real property, disputes among Samoans relating to kingship, crimes committed by Samoans against foreigners and those who were not under consular jurisdiction. Punishment for crimes was to be established by laws of the United States or Germany, or

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[132] Peter Hempenstall and Noel Rutherford, *Protest and Dissent in the Colonial Pacific* (Suva: Institute of Pacific Studies- Univ. South Pacific, 1984) at 23.
[133] The Berlin Agreement as quoted in Va'ai, *supra* note 19 at 72.

according to Samoan laws if the offender was Samoan. Practices and procedures of the Supreme Court were to be based on common law, the law of equity and the law of admiralty.

The Berlin Agreement did not last long however, because Samoans continued to resist colonial rule and because of the ongoing intervention of the three powers in the Samoan struggles over the Tafa'ifa titles. Eventually another civil war broke out between Mata'afa Josefo and his allies, who were supported by Germany to some extent, and Malietoa Tanumafili I and his allies, who were supported by the American Navy. Again, in order to stabilize the situation in Samoa, in terms of the rivalries between the different Western powers and their support for different rivalries in Samoa, a Three-Power Commission went to Samoa to establish a cease-fire.[134]

Eventually, through negotiations between Britain, Germany and the United States, it was agreed that Upolu, Savai'i and Manono would be annexed to Germany while Tutuila would become an American dependency. In 1900, the German Emperor annexed the islands by Imperial Proclamation and the German flag was raised at Mulinu'u peninsula (near Apia). This brought a more formal system of colonial rule to the western islands of Samoa. The German colonial administration consisted of a small group of staff and a Governor. The Governor's office was able to exert quite a bit of control in how Western Samoa was governed due to the undemocratic nature of the administration, which consisted of a consultative body of European councilors, and because there was little oversight from the Colonial office in Berlin. This allowed the Governor to pass regulations on a wide variety of issues almost single-handedly.

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[134] Hempenstall, *supra* note 131 at 30.

Wilhelm Solf was the first German governor, starting in 1900. His thoughts and ideas on colonial rule became extremely influential in determining the substance of 'native' policy[135] in German Samoa, the types of laws and regulations that were passed, and the types of institutions that existed. [136] In terms of native policy, Solf firmly believed that the extreme measures that had characterized German colonial rule in Southern Africa (in the area that is now Namibia) were unnecessary. He and other colonial administrators constructed Samoans as 'noble savages', and the overarching goal of German governance was to "stabilize Samoan culture around a codified version of *fa'asamoa* and Samoan custom."[137] As Steinmetz points out, Solf's goal of preserving what he deemed to be tradition often resulted in an opposition to modernization. For example, the Samoan Chief Justice Su'atele tried to introduce the western practice of a written will instead of the traditional *mavaega* (the dying wishes of a *matai* concerning the succession to a title). Schultz-Ewerth, who was the Imperial Chief Judge at the time ruled against this, holding up the *mavaega* as the proper law.

Despite Solf's belief that he was shoring up *fa'asamoa*, through what George Steinmetz calls a "program of enforced radical alterity,"[138] in reality Solf and the German administration were imposing their own understandings upon Samoan traditions and culture and imposing colonial models of governance and oversight in Samoa. In terms of governance, Solf set up a body called *Taimua*, which consisted of *tama'aiga* or

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[135] Steinmetz defines native policy as all interventions by the colonial state aimed at transforming Indigenous ways of life. It is a distinguishing feature of colonial governance, even if it is not its only activity, *supra* note 130 at 44.
[136] *Ibid* at 55. Solf's influence was felt even after he had left Samoa, since his successor Erich Schultz-Ewerth had been mentored by him and thus continued a similar approach to colonial rule in Samoa.
[137] *Ibid* at 56. Steinmetz reaches this conclusion based on his reading of Solf's, and later, Schultz-Ewerth's, own statements in government archives.
[138] *Ibid* at 63.

representatives of *tama'aiga*, and a body called *Fono a Faipule* which consisted of twenty-eight *faipule* from various districts of the islands. These bodies were to act as advisors to Solf and were very much under the administration's control since members could be removed at Solf's discretion. In 1905, after the Oloa movement, Solf did away with the institution of *Taimua* and replaced the entire body of the *Fono* a *Faipule* with new members.

The German administration also continued the dual system of legality that had begun prior to official German rule. Non-natives were governed by German metropolitan law, as modified by the *Consular German Act* 1879, with respect to matters of private law, criminal and procedural law, and in terms of the Administration of Justice.[139] The 'native' community (which included Samoans and other Pacific Islanders) was governed by the Samoan administration, which operated at the discretion of the Governor and the colonial office. Under this dual system, Samoan judges were responsible for minor criminal offences and civil disputes among Samoans that had not been dealt with either by village *fono* or by the newly appointed district representatives. Parties dissatisfied with the decisions of judges could appeal to the Governor, in what was known as the Governor's Court.

At the same time that these colonial institutions were created, Solf was attempting to curtail the power of the matai and the village *fono* and attempting to exercise authority over Indigenous laws and practices. For instance, although the village *fono* still had power to lay down their own rules and regulations, they now had to be submitted to the Governor for approval, or alternatively, the validity of the rules was determined by the

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[139] Va'ai, *supra* note 19 at 83.

Governor when a dispute arose.[140] Solf also abolished the right of the village *fono* to banish and declared himself the sole authority that could exercise such power, which he did in several instances of Samoan resistance to colonial rule.[141] The power of the *fono* to exercise authority over food presentations (*ta'alolo*) and mat distributions (*taliga toga*) was also limited by Solf, who banned both activities except under his permission.

Of the institutions that were created during the German colonial period, the Land and Titles commission, which later became the Land and Titles Court, has had a substantial and enduring impact on law and governance in Western Samoa. Since the court continues to be a site where different strands of law are woven together and negotiated between, and where instances of banishment have been appealed and decided, I will focus the rest of my discussion of legality in the German colonial period around this institution and its rules and procedures. In 1903, the Colonial administration approved an Ordinance providing for a temporary Land and Titles Commission to determine disputes regarding Samoan land and titles according to a codified version of customary law, as prepared by Schultz-Ewerth.[142] The Commission was comprised of an Imperial District Judge, who was the chairman of the commission, and two honorary European members. These three members made binding decisions with regards to Land and Titles disputes, and each had an equal voice on the commission. A Samoan advisory commission was also created to assist the three members of the commission. However, they only had advisory functions and were not given the right to make decisions or take part in deliberations.

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[140] *Ibid* at 85.
[141] *Ibid* at 86.
[142] Meleisea, *Making*, *supra* note 31 at 76.

In addition to establishing the structure of the Commission, the 1903 Ordinance also laid down a number of rules and procedures. Claims were initiated by completing a form and giving it to a Commission secretary, who then referred it to the Governor for a determination of whether the claim was reasonable. The Commission heard claims that were found to be reasonable as long as the hearing fee of 50 marks was paid within three months of the registration date. Decisions were made by majority vote among the Commission's members. Once a decision was made, a file containing the reasons for the decision, and details of the parties, was kept with the registrar as well as given to the parties.[143] The commission was given wide powers of investigation when it came to claims, thus modeling an aspect of the Civil Law system in which the judge or members of the judiciary play an investigative role in disputes. In terms of the hearing itself, it was set up on an inquisitorial model. The proceedings were conducted through written records and through verbal question and answer. Agents and lawyers were not allowed before the commission but the Court could appoint advisors to help the parties. In an attempt to interweave Samoan strands of legality into the Commission, parties were encouraged towards reconciliation or *faaleleiga*, and when reconciliation was achieved it would be noted in the claim file. In addition to making decisions about who should be granted certain lands and titles, the Commission was also given the power to order fines up to 300 marks and in certain circumstances to impose prison sentences up to three weeks in lieu of fines upon infringement of the Ordinance provisions.[144]

In 1911, the Land and Titles Commission (LTC) was restructured under a new Land and Titles Commission Ordinance. Part of the restructuring was in response to a German

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[143] *Ibid* at 65.
[144] Va'ai, *supra* note 19 at 90.

Imperial Order issued in 1908, which stated that African and South Seas protectorates should establish native administration and native jurisdiction. The 1911 Ordinance extended the scope of the LTC to include all legal matters relating to land law, family law and inheritance law, and other matters that were deemed to be similar to land and title disputes.[145] In addition to the expanded areas of jurisdiction, the LTC became a permanent institution in the native administration rather than something temporary. In 1913, another LTC Ordinance was passed which again brought a number of changes to the functioning of the institution. Under the 1913 Ordinance, the LTC became primarily an appeals tribunal while the primary jurisdiction to hear land and titles disputes was transferred to officials of the office of native administration. The colonial officials who now had the responsibility to hear customary disputes were district officers on the islands of Upolu and Savai'i. In addition to this change, the Chief Judge was removed from chairmanship of the LTC and replaced by the Governor, who could now veto any decision of the district officers. The Ordinance also stipulated changes to the rules and procedures regarding lands and titles, stating that decisions of district officers could be appealed to the LTC and that the LTC would continue to have Samoan assessors.[146]

One significant change under the 1913 Ordinance was a provision stating that in certain situations, the relationships deriving from customary matters could be recognized as 'legal' relationships under German civil law as long as certain procedures were followed. Under the new provision, a legal relationship would be established if notice in regards to land, titles and last wills were published in the *Savali*, an official government publication, or by public announcement, and if no objections to the notice were launched

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[145] *Ibid* at 97.
[146] *Ibid* at 100.

within the specified time period.[147] This change is significant for two reasons. One, it is the first formal presentation of a new series of patterns in the woven object of law in Samoa, where Indigenous laws, European formulations and understandings of Indigenous laws, and civil law strands are woven together for public presentation, through the form of written publications and notices. Second, the patterns of legal pluralism established during this period, as well as the objects of law produced and presented in written documents at this time, become the dominant objects of law for study and articulation in future generations, with earlier forms of law and legal pluralism fading from our gaze, at least until recently.

German colonial rule, and thus German formulations of law and policy, continued until 1914 when New Zealand expeditionary forces landed and occupied the islands. The New Zealand military administration continued to follow German Ordinances and policies and the Land and Titles Commission continued to operate, with the 1913 Ordinance acting as a guide, and the only change to law and governance was that the New Zealand Military Administrator took over the position of Governor and new people were appointed to colonial offices.[148] However, in 1919, New Zealand formally became the colonial power in Samoa, and the common law legal tradition was introduced into the woven object of legal pluralism in Samoa.

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[147] *Ibid* at 101.
[148] *Ibid* at 104-105.

## Strands of British Statute Law and Common Law: The Period of New Zealand Colonialism and Law Since Independence

In 1919, at the end of World War One, the Supreme Council of the Allied Powers conferred on the British Crown, to be exercised by New Zealand, the mandate for the administration of Western Samoa. New Zealand began its administration by passing the *Samoa Act 1921*,[149] which made provision for a civil administration to replace the military administration that had governed since 1914. The governance system set up under the Act consisted of: a New Zealand Administrator, who was responsible for the administration of the Executive government in Western Samoa; a Deputy Administrator who was also to be the Chief Judge of the High Court; a Samoan Legislative Council. The Administrator was to make laws (known as Ordinances), with the advice and consent of the Legislative Council, for the peace, order and good government of the territory unless they were repugnant to the laws of New Zealand or the laws of England.[150] The Legislative Council was made up of official members, who were appointed by the Governor General of New Zealand from the Samoan Public Service, and unofficial members, who the Governor General could appoint at his pleasure. According to the Act, a person who was not a natural-born British subject, or a Samoan, could qualify for appointment to the Legislative Council.[151]

In 1923, after ongoing pressure from Samoans, New Zealand formally recognized the institution of the *Fono* a *Faipule*. The *Samoan Amendment Act 1923* provided for the appointment, by the Administrator, of Samoans to be *Faipule*, according to Samoan

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[149] *Samoa Act 1921* (N.Z.), 1921/16, 41. Brought into force April 1, 1922. [hereinafter *Samoa Act*]
[150] *Samoa Act*, *supra* note 149, ss. 5 & 46(1).
[151] *Samoa Act*, *Ibid* at s. 46(2).

custom and usage.[152] Those Samoans chosen as *Faipule* were to be a Council of Advisors to the Administrator and the Council was to be known as *Fono of Faipule*, as they were under the German administration. According to s. 4(5) of the 1923 Amendment, the *Fono of Faipule* was to: "consider matters relative to the welfare of the Samoan people as of their own initiative, they think proper, or as submitted to them by the Administrator, and to express opinions and make recommendations to the Administrator."[153] This governance structure was changed in 1947, when the New Zealand Mandate over Samoa under the League of Nations ceased to operate and Samoa was established as a New Zealand Trust Territory under the United Nations.

At this time, New Zealand passed another amendment to the *Samoa Act*, which replaced the Administrator with a High Commissioner, who was to administer the executive government, and formed a Samoan Council of State (where members were known as *Fautua*) which the High Commissioner was required to consult in regards to proposed legislation, in all matters relating to Samoan custom and matters relating to the welfare of the Samoan people.[154] The Act also abolished the Legislative Council set up under the *Samoa Act* and created a Legislative Assembly, which was given the power to make Ordinances for the peace, order and good government of Samoa, except as provided under provisions of the 1921 *Act* still in force, or under any previous amendments.[155]

The *Samoa Act* not only set out the workings of New Zealand's administration in Western Samoa; it also was the first formal application of the common law legal tradition

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[152] *Samoa Amendment 1923* (N.Z.), 1923/24, 105, ss. 4(1) & 4(3).
[153] *Samoa Amendment 1923*, *Ibid* at 106, s. 4(5).
[154] *Samoa Amendment 1947* (N.Z.), 1947/48, 428, ss. 4 & 5.
[155] *Ibid* at 430, s. 8.

in Western Samoa. The *Samoa Act* stipulated that the law that was to apply in Western Samoa was: (a) the law of England existing on 14 January 1840 (which was the date that British jurisdiction was established in New Zealand) including British Statutes that were in force in New Zealand when the Samoa Act came into force; (b) New Zealand Statutes that were given force in Western Samoa under the *Samoa Act 1921*; (c) laws contained in the *Samoa Act* itself, including a Criminal Code, as well as laws relating to marriage, divorce, certification and treatment of those with unsound mind, the control of liquor and provisions regarding the ownership and control of land.[156]

A common law model of judicial and court organization was also established under the *Samoa Act*. Part III of the *Act* provided for establishment of a High Court to administer justice in the territory. The High Court was to consist of a Chief Judge, and any other Judges, Commissioners or *Fa'amasino* (Native Judges) that the Minister of External Affairs in New Zealand thought necessary. Section 73 of the *Act* gave the High Court jurisdiction over civil and criminal matters unless exclusive jurisdiction was given to another court by regulation or Ordinance. As well, section 213 of the *Act* gave the High Court jurisdiction to try all criminal offences in the *Act* unless jurisdiction was given to another court via regulation or Ordinance. The *Act* also extended the civil and criminal jurisdiction of the Supreme Court of New Zealand to Western Samoa, with the court applying the laws of New Zealand in Samoa just as they would in New Zealand. Section 81(1) of the *Act* specifically gave the Supreme Court criminal jurisdiction in Western Samoa. It was restricted to offenders who, having committed an offence in Samoa, were found in New Zealand, and where the Attorney General of New Zealand

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[156] Report from the Department of Island Territories: Western Samoa, 1951 at 20.

gave leave to prosecute. The Supreme Court also acted as the Court of Appeal for Samoa. For criminal matters, a person could appeal a conviction if the sentence was more than six months imprisonment, a fine of not less than one hundred pounds, or where, in the opinion of the High Court, the question involved was of general public importance.[157] The court could also hear stated cases from the High Court on substantive questions of law. Of course, as with all commonwealth countries and territories at this time, parties could launch a final appeal to the Privy Council when leave was given.

This court structure continued to operate until Samoa achieved independence, except for a minor change in 1953 when the Legislative Assembly was given power to create Ordinances for the operation of inferior courts of justice having limited civil and criminal jurisdiction. When Western Samoa achieved independence in October 1960, Part VI of *Constitution of the Independent State of Western Samoa Act 1960*[158]provided for a new Court Structure. The highest court would be the Samoan Court of Appeal, a superior court of record that would hear appeals arising from the Samoan Supreme Court, either as provided by act on substantive questions of law regarding the interpretation and effect of the Constitution, or on any decision relating to fundamental freedoms as contained in the Constitution and decided by the Supreme Court. The Supreme Court would have original, appellate and revisional jurisdiction as provided in the *Judicature Ordinance*.[159] The *Constitution* also stated that subordinate courts would be set up according to act, in this case the *Magistrates Courts Act*,[160] and that the Land and Titles Court would continue to

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[157] *Samoa Act*, *supra* note 149 at 59, s. 83.
[158] (W.S.) 1960, RS 1920-1977, 41. [hereinafter *The Constitution*]
[159] *Judicature Ordinance 1961* (W.S.), 1961/26, RS 1978-1996 (Paclii).
[160] *Magistrates Courts Act 1969* (W.S.), 1969/2, RS 1920-1977 (Paclii).

operate according to a prescribed act.[161] The *Land and Titles Act 1981* is the primary act which now governs the operation and jurisdiction of the Land and Titles Court.

As mentioned, within the *Samoa Act* was a criminal code, which provided a new set of laws for regulating and governing human relationships in Samoa. Some of the offences contained in the 1921 criminal code included treason, homicide, rape, bigamy, incest, keeping a gaming house, playing Chinese games of chance, perjury, theft and burglary, breach of peace, as well as a variety of minor offences. The code also provided rules of criminal procedure, including provisions regarding sentencing, defences at common law, parties to offences, when assessors of the court were necessary, and terms of imprisonment. In terms of sentencing provisions, section 211 of the *Samoa Act* stated that any person who was not a Samoan, and who was convicted of an offence with a term of one year's imprisonment or more, could be banished or exiled from Samoa for a term not exceeding fifteen years. Although this provision did not apply to Samoans in the 1921 Act, it did provide a basis for future banishment provisions in which anyone, including Samoans, could be banished from the territory. Such a provision was passed in 1922, and again in 1927, which I will briefly discuss below.

Section 46 of the *Samoa Act* provided that the New Zealand Administrator, with the advice and consent of the Samoan Legislative Council, could make laws (in the form of Ordinances) for the peace, order and good government of the Territory as long as they were not repugnant to the *Samoa Act* or an Act in force in New Zealand or the United Kingdom.[162] One such Ordinance was the *Offenders Ordinance 1922*,[163] part of which set

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[161] *The Constitution, supra* note 158, Part IX.
[162] *Samoa Act, supra* note 149 at 53; confirmed in *Tagaloa*, *infra* note 166.
[163] *Samoan Offenders Ordinance* 1922.

out the punishment of Samoans who acted against the peace, order and good government of the territory. The clauses in the *Offender Ordinance* worth mentioning, due to their significance for ongoing understandings of banishment, are clauses 3, 4 and 5. Clause 3 states:

> If the Administrator is satisfied that the presence of any Samoan in any village, district, or place is likely to be a source of danger to the peace, order and good government thereof the Administrator may, by order signed by him, order such Samoan to leave any village, district or place in Samoa and remain outside such limits for such time as the Administrator shall think fit, and by the same and any subsequent order the Administrator may order such Samoan to reside in any place specified in such order.[164]

Clause 4 supplements this with a power to authorize the arrest of a Samoan against whom the order has been or is being made and Clause 5 provides for the punishment of disobedience to the order by imprisonment for a term not exceeding one year.[165]

The legality of banishment orders made under the *Offenders Ordinance 1922* was considered by the New Zealand Supreme Court in *Tagaloa v Inspector of Police*.[166] In this case, two Samoans were appealing a sentence of imprisonment for breaching a banishment order made by the New Zealand Administrator in Samoa. The appellants argued that the *Offenders Ordinance* was *ultra vires* because it did not allow for a formal inquiry into whether banishment was an appropriate sentence, and because it was repugnant to the *Samoa Act* 1921, which already provided a variety of punishments. They also argued that it was repugnant to the common law of New Zealand and the United Kingdom, specifically the right to a trial when indicted for a criminal offence.

A majority of the court found that clause 3 of the *Ordinance*, giving the Administrator the power to banish without a formal inquiry, was not enacted for the

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[164] As quoted in *Tagaloa*, *infra* note 166 at 898.
[165] *Ibid.*
[166] *Tagaloa v. Inspector of Police* [1927] N.Z.L.R. 883 at 893 (S.C). [*Tagaloa* cited to N.Z.L.R.]

purpose of punishing a crime but as a political precaution (it was 'preventative not punitive').[167] They reasoned that if the Administrator was bound to give notice and hold an inquiry, it would defeat the very purpose of the legislation, that being the power of the Executive to maintain the peace, order and good government in the territory through an order of banishment. The Court also stated that it was the Administrator who should judge the necessity of banishment, and that the question of whether his opinion is justified or not or what materials should satisfy him or not, is not examinable by the courts.[168]

Just prior to this case being heard, New Zealand passed the *Samoan Amendment Act* in August 1927, which provided for the banishment of Native Samoans to other parts of Samoa when those persons prevented or hindered the Administrator from performing his duties in the governance of Samoa.[169] The person could not be banished for more than two years and they were given the right to appear before the Administrator to state why the provision should not apply to them. Enacting this amendment, and providing a right to appear before the administrator, basically removed the potential for further challenges to clause 3 of the *Samoan Offenders Ordinance*. However, the right of the Administrator to banish Samoans and non-Samoans under the 1927 Amendment and under section 211 of the *Samoa Act* respectively was repealed in a 1938 amendment to the *Samoa Act*. The effect of the repeal was that it removed certain patterns of interwoven legalities- in this case the weaving of banishment, a strand of Indigenous law, with New Zealand statute law and British common law, from the *papalangi's* gaze. In chapter five, I will discuss

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[167] *Ibid* at 888.
[168] *Ibid* at 889.
[169] *Samoa Amendment 1927* (N.Z.), 1927/7 R.S. 18 Geo. V., 19, s. 2.

further how and why these strands of law are woven together by different subjects in certain moments, creating new patterns of legality.

The 1921 criminal code continued to apply, with various amendments, until 1961, when the *Crimes Ordinance 1961*[170] was brought into force. This was one of the first Acts brought into force after Western Samoa achieved independence in 1960, and although it contains many of the same offences as the 1921 code in the *Samoa Act*, it also reflects many of the changes in the criminal law that had taken place between 1921 and 1961. Thus, criminal law, based on a common law model inherited from New Zealand and Britain, continues to be one of the strands of legality governing human relationships in Samoa.

The final legal text that I will explore in this discussion of strands of the statute law is the *Village Fono Act 1990.*[171] What is interesting about this act is that the text itself is an act of legal pluralism, bringing strands of Indigenous legality, as articulated in Samoa in the 1990's, together with strands of the common law legal tradition.[172] The *Village Fono Act* was passed in 1990 after consultations were held across the country. The purpose of the *Act* is to "validate and empower the exercise of power and authority by Village *Fono* who meet in accordance with the custom and usage of each village."[173] Section 5 of the *Act* gives village *fono* power to make rules for the maintenance of village hygiene, the development and use of village land for the betterment of the village, and the power to direct any person to do work related to these things. The Act also validates the power of

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[170] *Western Samoa Crimes Ordinance* (W.S.) 1961/13 (PacLII).
[171] *Village Fono Act 1990* (W.S.), 1990/3 (PacLII).
[172] Included in the Common law legal tradition are statutes as created by Parliament after a certain number of readings, and open to interpretation by common law courts.
[173] *Village Fono Act*, *supra* note 171, s. 2.

the village *fono* to impose punishments for village misconduct. The punishments they are allowed to impose include fines in money, fine mats (*'ie toga*), animals or food, and orders to work on village land.[174]

Two other provisions of the act weave in other strands of criminal law, in regards to sentencing provisions, as well as strands of common law and constitutional law, both of which give individuals the right to appeal decisions to higher courts. Section 8 of the Act states that courts in Samoa shall take into account a punishment imposed by a Village *Fono*, for acts of village misconduct, if that person is convicted of a crime or offence in respect to the same matter. In these cases, the punishment of the village *fono* should be taken into account in the mitigation of sentencing. Section 11 allows for a right of appeal to the Court (referring to the Land and Titles Court), with the appeal being commenced by the written petition as set out in section 44 of the *Land and Titles Act 1981*. Under section 11(5), the Land and Titles Court has the power to allow the appeal and declare the decision of the village *fono* null and void, dismiss the appeal or refer the decision back to the *fono* for further consideration.

## Strands of International Human Rights Law

In December 1946, the United Nations General Assembly approved an International Trusteeship Agreement that changed the relationship between New Zealand and Western Samoa from one of guardianship to one of trusteeship. One of the stated goals of the *International Trusteeship Agreement* was to "encourage respect for the human rights and fundamental freedoms without discrimination as to race, sex, language or religion and to

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[174] *Ibid*, s. 6.

ensure equal treatment in social, economic, and commercial matters… and… in the administration of justice."[175] Between 1946 and 1960, Samoa moved toward independence and a committee was formed to consider different governance models and constitutional structures for an independent Samoa.

The committee drew upon a variety of materials to create a draft constitution, including the constitutions of recently independent states and United Nations documents such as the Draft Declaration of Human Rights and the United Nations Charter. C.C. Aikman, who was the New Zealand Government representative on the committee and a Constitutional Law professor, advocated that Samoa be governed by the 'rule of law' with "a representative government, an independent judiciary and liberty for the individual and equality before the law."[176] He also emphasized the importance of the *United Nations Declaration of Human Rights*, in constitutional information hearings throughout Samoa in 1952, pointing out the importance of those articles relating to fundamental human rights and freedom from discrimination. A draft constitution for Samoa was completed in 1960 and is comprised of twelve parts. Part II of the *Constitution of the Independent State of Western Samoa*[177] is entitled 'Fundamental Freedoms' and includes Articles 3 through 15. Article 3 defines the meaning of the 'State' for the purposes of Part II as including the Head of State, Cabinet, Parliament and all local and other authorities established under any law. Article 4 sets out that any person may apply to the Supreme Court to enforce the rights under Part II of the Constitution, and that the Supreme Court may make orders necessary to ensure the enjoyment of the rights under Part II.

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[175] *Trusteeship Agreement for the Territory of Western Samoa*, sch. 1 of the *Samoa Amendment Act 1947, supra* note 154, art. IV.
[176] *Ibid* at 144.
[177] *The Constitution Act*, *supra* note 158 at 451.

Articles 5 through 15 set out specific fundamental freedoms including: right to life (article 5); right to personal liberty, with particular reference to rights after being arrested (article 6); freedom from inhuman treatment and torture (article 7); freedom from forced labour except under sentence of a court, in lieu of military service, in the case of an emergency, or for work or service required by Samoan custom or which forms part of normal civic obligations (article 8); right to a fair trial (article 9); rights concerning criminal law (article 10); freedom of religion (article 11); rights regarding religious instruction which allows a person attending an educational institution to refrain from religious instruction, ceremony or worship if it differs from their own(article 12); rights to freedom of speech, expression, peaceful assembly, association and movement except where an existing law or a law made by the State imposes reasonable restrictions in the interests of national security, economic well-being, public order, health or morals (article 13); rights regarding property (article 14); and freedom from discriminatory legislation, which makes all persons equal before the law and entitled to equal protection under the law(article 15). Since the *Constitution Act* came into force in 1960, there have been a number of cases where the courts have considered the breach of fundamental freedoms as guaranteed in Part II of the *Constitution*.

In addition to the fundamental freedoms found in the *Constitution*, strands of human rights laws and norms are woven into the objects of legal pluralism in Samoa through the adoption of international human rights treaties and through the consideration of human rights treaties and conventions by courts in Samoa. For example, Samoa has ratified the Convention on the Rights of the Child (CRC), bringing it into domestic law, as well as acceding to the Convention on the Elimination of Discrimination Against Women

(CEDAW). International treaties and conventions have also been considered by the courts in several of the cases above, which has been important for introducing these strands of legal pluralism into Samoa since they have not ratified or acceded to any other treaties or conventions other than the CRC and CEDAW.

Finally, strands of international human rights norms are now part of the woven objects of legal pluralism in Samoa not only due to legal texts and cases, but due to educational initiatives of NGO's and civil society organizations. The work of the Regional Rights Resource Team (RRRT) offers one example of how education can be a technique of legal weaving, introducing new strands of law into the object of legal pluralism in Samoa. It conducts training workshops with policy makers, government leaders, and regional and civil society organizations to "build a culture of human rights in the Pacific."[178] One of its ongoing programmes is to train community based advocates, who learn about the legal system of their country, constitutions, democracy, government, good governance, family law, poverty and development, international human rights law, and about the United Nations system and the core conventions (UDHR, ICCPR, ICESCR, CEDAW, CRC, CAT, CAMW and Optional Protocols). Participants also learn skills in lobbying, advocacy and strategies for change, and how to run national campaigns to bring about structural change but provide human rights to individuals.[179]

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[178] P. Imrama Jalal, "Using Rights-Based Principles to Claim Rights: The Regional Rights Resource Team (RRRT) Project in the Pacific Islands" (Fiji: Report prepared for OHCHR/UNDP/Jurist (Bangkok), May 2005) at 4.
[179] *Ibid* at 12.

# Chapter Five: The Weaving Processes of Law: Legal Pluralism in Samoan Banishment Cases

In the last chapter, I described some of the strands of legality existent in Samoa. I began by suggesting moments of legal pluralism can be likened to certain kinds of woven objects. There are everyday moments, which attract little notice from outside observers, and there are other moments where the multiplicity and complexity of legalities existing together become highly visible. These moments of legal pluralism can be likened to ceremonial woven mats in Samoa, known as *'ie toga*, which are made with intricately woven strands of pandanus and have significant cultural and social importance.

However, describing the different strands of legalities existent in different moments is only the first step in understanding legal pluralism. As some scholars have noted, it is important to analyze *how* particular norms, legalities and institutional elements are intertwined, as well as understand the processes by which these norms and legalities emerge in complex ways.[1] In this chapter, I discuss how certain strands of legality in Samoa can be woven into complex patterns. I believe that such an analysis is done, not by

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[1] See Franz von Benda-Beckmann, "Comment on Merry" (1988) 22 Law and Society Review 5. In discussing legal pluralism and its meanings, legal anthropologist Franz von Benda-Beckmann builds off the work of Sally Engle Merry, who argues that the re-conceptualization of the law and society relationship starts with questions of what co-existence, intertwining and interdependence mean. Benda-Beckman argues that legal pluralism can be considered analytically, as the co-existence of two or more sets of normative conceptions within the same process, or in aggregates of processes, of structuration. Benda-Beckmann's argument also builds off the work of Sally Falk Moore who, although she did not classify her work as 'legal pluralism', discussed the ways in which, through everyday relations and interactions, networks of people generate their own rule systems which are then influenced by a plurality of rules and institutional elements which have been and continue to be generated and maintained in other interaction settings. Jeremy Webber takes the point further, arguing that legal pluralist writings tend to speak in descriptive mode, and that the failure to capture that active dimension significantly impairs many legal pluralist theories. What is required is an acknowledgement that law is consciously created, emerging from the desire to make a normative order. See Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44 Osgoode Hall Law Journal 167 at 168, 174.

giving law agency- the ability to transplant, irritate, move or add spice- but through an analysis of human agency: how individuals and groups interact with different strands of legality (particularly if we consider legality as information) and produce moments of legal pluralism through subjectivity, via articulation and as a consequence of relations of power and communication. These are what I refer to as processes of legal pluralism.

Below I discuss these processes, using a series of banishment cases to illustrate their operation, and again, using a metaphor—the metaphor of weaving *'ie toga* in Samoa, to make that theory more intelligible. I recognize that there are limitations to using court cases as a means for theorizing human agency and legal pluralism. First, the cases only provide a partial view since only those factors that the judge, and to some extent legal representatives, feel are germane to the case and which meet rules of evidence and procedure will be included. Thus, the context of the dispute, including the beliefs, attitudes, and the actions of individuals and communities may be lost in the consideration and recording of the case. This then limits what we can know about the process of legal pluralism. Secondly, the information in the cases has gone through layers of judicial interpretation, as decision makers use their own frames of reference and knowledge to understand and interpret what is going on. Their interpretation will not capture the totality of what is happening in a particular case, and their interpretations may obscure our view of the processes of legal pluralism.

That said, the cases can and do reveal different legalities existing in Samoa, and are suggestive of the ways in which individuals and communities interact with various legalities. In addition, judicial decision-makers are creators of legal pluralism in Samoa in

these banishment cases, as they themselves consider various strands of legality in their interpretation and discussion; thus the processes apply to them as much as to anyone.

To begin, I will be discussing legality as forms of information that individuals and groups possess and interact with. I then discuss social positioning theory and articulation theory in order to explain how strands of legality are produced, circulated and reproduced in various contexts, reflecting the voices of different individuals' and groups' subject positions, as well as how their struggles across the terrain of difference and continuity produce legal pluralism. Finally, I will discuss the ways that relations of power and relations of communication influence how these strands are intertwined in different moments.

Weaving will serve as a useful metaphor for thinking about the processes of legal pluralism since it is an activity that requires human agency, and because divergent strands of fibre, like legalities, are tightly woven together at different moments to create both useful and ceremonial objects. Weaving also involves the articulation of knowledge and technique from one generation to the next, which is also true of legalities, where knowledge and technique is passed between generations in various ways. Finally, weaving is arguably carried out through relations of power and communication since it involves human interactions, particularly when it is carried out communally in the Samoan *fale lalaga* (weaving house). Similarly, legal pluralism emerges as a consequence of relations of power and relations of communication.

## The Weaving Process of Legal Pluralism in Samoa

Weaving is the most widely practiced art form in Samoa. It is an art form that is practiced almost exclusively by women, both as a solitary activity and as something done

with other women, either with women in one's immediate family or with the women of the village. Although women may weave baskets or everyday objects on an ongoing basis, weaving *'ie toga* is a much more intensive process. *'Ie toga*, for instance, may take years to complete and a single mat may be woven by one weaver or by several women in the same family over time. I am interested in the process of weaving when it is carried out not only by individual women but also by groups of women in Samoa.

Weaving, as both an individual and group activity, is noted by some of the women who share their stories in the book *Tamatai Samoa*. Anthropologists and those studying Pacific art forms also discuss the individual and communal aspects of weaving in Samoa. In *Tamatai Samoa*, Olive Sopoaga Momoisea shares the story of weaving *'ie toga* for her wedding in 1952. For her wedding, the women of *Sa'anapu* village wove about 1000 fine mats for the traditional exchange of marriage goods. In addition, her sisters collectively wove *'ie tu*, *'ie avaga*, *fala lauie* and *pupugi siapo*, which are all woven objects for a traditional wedding in Samoa.[2] Another woman, Tiresa Lesatele Va'ai, discusses learning to weave with other women through her involvement with the Sataua Women's Committee, which is located on the island of Savai'i. According to Tiresa Va'ai, "Sataua women grew *laufala* for weaving, and were very good weavers. The older women in Sataua taught weaving to younger women when the committee met together."[3] Va'ai believes it is important for Samoan women to master these skills since families always need fine mats for *fa'alavelave* (ceremonial exchange) and it is only Samoan

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[2] Peggy Fairburn-Dunlop, *Tamaitai Samoa: Their Stories* (Suva: USP Institute of Pacific Studies, 1996) at 90.
[3] *Ibid* at 105.

women that produce the *'ie toga* that are needed. She points out that today, it is women's committees in Samoa that are reviving the art of weaving in Samoa.[4]

Shore talks about the communal aspects of weaving, describing the existence of the *fale lalaga* (weaving house) in the sub-villages of Sala'ilua in the early 1980's, when he conducted his ethnographic fieldwork. According to Shore, the weaving house appears to be a pre-contact institution, used for instructing girls in the art of weaving '*ie toga*. Older women also attend the weaving house, and participate in the communal enterprise of weaving, not so much for instruction but for social engagement. Shore suggests that chiefs' wives may have met in their own weaving house on different occasions, again not only to weave but for social engagement.[5]

Each weaving house has its own rules, authority structure, as well as the power to impose fines upon those who break the rules. According to Shore, there are two positions of authority in the weaving house; the *matua u'u* and the *latu o faiva*. The *matua u'u* is the resident weaving expert and teaches the younger women. Traditionally the woman who occupied this position was the wife of a ranking *ali'i* (*matai* who trace their descent to a certain title and are not orators) although skill and experience were/are the essential requirements for the position. The *latu o faiva* is a ceremonial position, and the woman who holds this position was/is responsible for the distribution of food during meals in the weaving house, as well as organizing the ceremony once a set of *'ie toga* is complete.[6]

A traditional greeting gives us more specific insight into the different positions that women occupy in the *fale lalaga*. For instance, in response to a welcoming by a group of

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[4] *Ibid* at 106.
[5] Bradd Shore, *Sala'ilua: A Samoan Mystery* (New York: Columbia Univ. Press, 1982) at 105.
[6] *Ibid* at 105-106.

women gathered to weave fine mats, one greeting by those approaching the weavers might be:

> Afio pea ia le Afioga a le matua-a-'u'u, ma le 'au se'e-papa; fa'a pea fo'i le mamalu a faletua ma tausi, ma le sa'o ao. [Translation] *May the Presence of the scraper-elder, and the group of board-slippers, continue present; likewise also the dignity of housebacks and tenders, and the capital right.*[7]

According to Wainwright Love, the greeting first addresses the women according to their position as weavers in the *fale lalaga*. Then, the women are addressed again according to their social position. The *matua-a-'u'u* is the scraper-elder, and she is in charge of the weaving project. The *matua-a-'u'u* is one of the oldest artisans present and has extensive experience and is extremely skilful. The *'au se'e papa* (board slippers) refers to the rest of the weavers in the weaving house. In terms of the second part of the greeting, the housebacks (*faletua*) are weavers who are the wives of *ali'i*, the tenders (*tausi*) are wives of orators, and the capital right (*sa'o ao*) are the assembly of unmarried women, which includes those who have never married, the divorced and widowed.[8]

Regardless whether an individual or a collective weaves *'ie toga*, the weaving process requires a number of steps. As mentioned in the previous chapter, pandanus is one of the most widely used plant fibres in Samoan weaving, particularly for mats of various qualities. There are floor mats (*papa laupaogo* and *papa laufala*) and sleeping mats (*fala moe*) made from different varieties of pandanus. Pandanus is usually planted in groves and carefully tended to produce healthy leaves suitable for the weaving process. There are several ways of processing pandanus leaves, depending on what type of woven object

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[7] Jacob Wainwright Love, *Samoan Variations: Essays on the Nature of Traditional Oral Arts* (New York: Garland Publishing, 1991) at 8.
[8] *Ibid.*

the leaves will be used for. Of particular interest is the processing of *lau'ie*, the leaves used in '*ie toga*.[9]

*Lau'ie* require a more thorough processing to create the highest quality of weaving fibres. After the *lau'ie* has been harvested, the spines of the pandanus leaf must be removed. Then the leaves are made into parcel-like lots and placed in a container of boiling water for five to ten minutes. The top layer of the leaf is carefully peeled away from the dull underside, which is discarded. The leaves are then tied to a stick in bundles and bleached in the sea for three to five days until they turn a lighter colour and take on a smooth shiny appearance. They are then washed in cold water and dried in the sun before being split down the midrib and rolled. Once the leaves are required for weaving, they are split again into extremely thin strips. During the weaving process they are woven together so that the smooth side of the leaf appears on both sides of the mat. The fineness of the woven strips and shiny and highly processed appearance of the mat add greatly to its value.[10]

## The Process of Weaving Legal Pluralism: Legalities as Compilations of Information, Subjectivity and Articulation

Just as woven objects in Samoa are made of different types of pandanus (such as *lau'ie* for *'ie toga*), passing through weavers hands to form different patterns and different woven objects, so too are legalities made up of different compilations of information, which is exchanged and transmitted between different individuals and

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[9] Pandora Fulimalo Pereira, "Lalaga: Weaving Connections in Pacific Fibre" in Sean Mallon and Pandora Fulimalo Pereira, eds., *Pacfic Art Niu Sila: the Pacific Dimension of Contemporary New Zealand Arts* (Wellington: Te Papa Press, 2002) at 74.
[10] *Ibid.*

groups through time.[11] Below are two cases where different strands of legality are brought together, with an exchange of legal information through the technique of judicial reasoning and exposition.

In *Tuivaiti v Fa'amalaga*,[12] the plaintiff Tuivaiti was an untitled man who, along with his family, was banished from his village by four elderly *matai*, who were leaders of the village. The reason for the banishment was Tuivaiti's failure to attend church. As part of the banishment order, villagers were also told not to ride on Tuivaiti's buses and a threat was made that if Tuivaiti did not follow the order, he would be tied up and placed in the middle of the road. The effect of the banishment was that Tuivaiti lost the use of his house, his workshop, his tools, and his land. The plaintiff sued the four *matai* for negligence, intimidation, trespass of land, and civil conspiracy. The judge found in favour of the plaintiff, awarding him damages for the causes of action and reversing the banishment order.

In this case, we see four strands of legality existent, bringing together different compilations of information. There is a Christian norm, the requirement that all villagers attend church. Tuivaiti broke this norm and banishment and loss of property and business were the consequence. These punishments reflect strands of Indigenous legality because the request for all villagers to treat the offender in the same manner (by not riding his buses) emphasizes values of collective action and obedience, and the order of banishment is an Indigenous form of punishment given to offenders. In addition, the decision was

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[11] This idea is taken from H. Patrick Glenn, who argues that legal traditions ought to be conceived of as loose, incomplete compilations of information, with different forms of legal knowledge being organized around basic themes. He refers to this loose collection of information as the conceptual bran-tub. See H. Patrick Glenn. *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford: Oxford Univ. Press, 2000) at 12-14.

[12] *Tuivaiti v Fa'amalaga* [1980] W.S.S.C. 2 (17 December, 1980).

reached through discussion and consensus by the village *matai*, which reflects an Indigenous form of decision making in Samoa. The villager appealed to strands of British and New Zealand common law to overturn the banishment order and provide a remedy for his lost profits, thus weaving in other strands of legality.

During the trial, the judge articulated a fourth strand of legality—that of International Human Rights, which is articulated as a fundamental freedom in Samoa's constitution. Judge St. John referred to Article 11 of the Samoan constitution, which gives all Samoans the right to freedom of religion. The judge points out that since the constitution came into effect, councils of *matai* do not have the power to force anyone to attend church or choir practice, or to be punished for not attending.

*Re the Constitution, Taamale v Attorney General*[13] is another case reflecting the existence of legality in Samoa, producing moments of legal pluralism. In this case, the *Ali'i* and *Faipule* of Sapunaoa Falealili petitioned the Land and Titles Court to hand down an order of banishment to Taamale Toelau for failing to comply with village obligations and for allegedly insulting conduct. The Land and Titles Court, which is composed of senior *matai*, made the order of banishment based on the facts presented in the written petition of the *ali'i* and *faipule*. The defendants appealed the banishment order to the appeals division of the Land and Titles Court, but before that appeal was heard, they were charged with disobeying the banishment order, which under section 75 of the *Land and Titles Act 1981* would result in a $500 fine or imprisonment for sixth months. Before a hearing could be held in regards to disobeying the order, the Attorney General asked for a reservation case in order for the Supreme Court of Samoa to give its opinion.

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[13] [1995] W.S.C.A. 1, C.A. 2/95 B (PacLII).

There are many strands of legality tightly woven together in this case, via the exchange of various kinds of information. First, the sanction of banishment is representative of the Indigenous strand of legality in Samoa, as is the form of the decision emanating from the *ali'i* and *faipule*. However, unlike the previous case, the *ali'i* and *faipule* ask the Land and Titles Court to make the decision of banishment. They do so by written petition, reflecting German colonial legality in Samoa, in which the Land and Titles Court was set up according to Civil-Law court procedures including written submissions to the court rather than verbal legal arguments.

Referring the case to the Supreme Court, using section 111(5) of the *Criminal Procedure Act 1972*, reflects laws brought to Samoa during the New Zealand colonial period, as well as strands of International Human Rights since the reference asks whether an order of banishment made by the Land and Titles Court infringes an individual's right to freedom of speech, freedom of assembly and freedom of association, movement and residence. In considering the case, the judges articulate other strands of information, particularly community understandings of banishment. They do so by referring to a report prepared in 1975, which consulted with Samoans on the role of custom in Samoa and in the Land and Titles Court. The report stated that *ali'i* and *faipule* viewed banishment to be an important sanction, vested by custom in the village *fono*. They believed that to take away the threat of banishment would weaken traditional authority. The Judges hearing the *Tamale* case also consider how banishment was used by German colonial administrators, and by the New Zealand administration under the *Samoan Offenders Ordinance 1922*, thus articulating strands of German and New Zealand colonial legality.

They also consider a case from New Zealand common law, *Tagaloa v Inspector of Police*, which I discussed in chapter four. In this case, the New Zealand Supreme Court dealt with the question of whether an order of banishment of a Samoan, under the *Samoan Offenders Ordinance 1922*, could be made by the New Zealand administrator for the peace, order and good government of the island. The other common law case that is woven into the judgment is *Attorney-General v Saipa'ia Olomalu and Others*[14] in which the Chief Justice of Samoa, who is Samoan, discusses the different forms of banishment.

According to the Chief Justice, one form of banishment is where an individual is ostracized from the affairs of the village but may continue to reside there, as well as attend church. This type of banishment is imposed for less serious misconduct or disobedience. The second type of banishment involves the expulsion of an individual, or his/her entire family from the village. This is done when there is serious misconduct, or when earlier forms of discipline have not been obeyed. Non-compliance with previous orders can mean forcible removal by the village *aumaga*, and the destruction of property. An order of banishment does not preclude the person from returning to the village. If remorsefulness is displayed and the village is over its ill feelings towards the offender, the offender can often return. Remorsefulness may be shown by *ifoga* and by making amends to the village, and to those who have been wronged. According to the Chief Justice, banishment applies not only to the untitled but to *matai* as well.[15]

Just as different objects emerge from the weaving process, transmitting the information of legalities can lead to a number of different outcomes. The exchange can simply be a recitation of the information with no significant changes to the information

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[14] [1982], (1980-1993) W.S.L.R. 41.
[15] *Ibid.*

exchanged, resulting in legal pluralism. This type of exchange would resemble a loose weaving pattern, in that different strands of legality overlap but remain distinct. However, the exchange of information may lead to a more complex form of mixing, resembling a tightly woven object, where differences between strands are more difficult to discern. Individuals and groups may also resist new forms of information being mixed with older compilations of information. In order to understand why different strands of legality remain composed of certain compilations of information on the one hand, due to individuals' and groups' resistance to legal change, and when new compilations result from alterations made to legal information, we must consider how information becomes persuasive, such that individuals and groups adhere to it.[16]

According to Glenn, one way in which information becomes persuasive is through comparison with other information. Through comparison, adherents to one particular strand of legality want to show others that the information they adhere to is more persuasive. The way in which adherents to strands of legality go about persuading others is dependent on the adherents themselves. For instance, in some cases where adherents to the common law were convinced of its persuasiveness, they used force and domination to persuade those adhering to other forms of legality. In this case, the information itself is not a domineering authority, but the method that is used to persuade individuals of the information can be.[17]

The persuasiveness, or lack thereof, of information from various legalities can be seen in many of the banishment cases. In a series of recent sentencing decisions, judges in the Supreme Court recognize banishment, as issued by a village *fono*, as a legitimate form of

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[16] Glenn, *supra* note 11 at 20.
[17] *Ibid* at 37-41.

punishment and as something that should mitigate the judges' sentences. For example, in *Police v Vaa*, the accused pled guilty to sexually assaulting a girl under the age of 12. In deciding the sentence, the judge took into account that the village *fono* had fined the man, and when this was not met, banished him and his family from the village for a short time. The judge was persuaded that other aspects of Indigenous legality, including the presentation of fine mats to the village *fono* and performance of *ifoga* by the offender's family, were enough to lessen the sentence he would receive under Samoan statute law. The judge was also persuaded to lessen the accused's sentence after a report by a catechist from his church, who reported that the accused was humble and served his church. This suggests that following Christian principles of humbleness and respect are considered important within Samoa.

A similar case is *Police v Toto*,[18] where the accused (a *matai*), pled guilty to willfully causing grievous bodily harm by hitting another man with a bush-knife. The village *fono* punished the offender by requiring him to supply a fine mat, sows, herring and a cow. He was also banished from the village for one year. In sentencing, the judge ruled that the village *fono*'s punishments were severe enough to reduce the offender's sentence. He also considered reconciliation between the families as persuasive in moderating the types of sentences normally required for this type of crime. Again, Indigenous strands of legality are considered persuasive in an exchange of information between it, statute law, and the common law.

In a different sentencing case, banishment, as part of Indigenous legality, is considered less persuasive than the common law. In determining sentencing in *Police v*

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[18] [2006] W.S.S.C. 12 (PacLII).

*Sione*,[19] the judge points out that "although the accused has been banished by the village *fono*, a sentence of imprisonment would have been made in this case in any event, which meant that the accused would still have been excluded from his village and his plantation by the operation of the criminal law."[20] Thus, banishment is not given the same weight in mitigating the offender's sentence as it is in previous cases, with similar facts.

Conceiving legalities as compilations of information expands the boundaries of what can be included in our analysis of the law and legal pluralism. We can include laws, norms, legal-institutional elements and other forms of information that are persuasive in a particular context. We can also consider the ways this information co-exists and is intertwined via persuasion and through articulations in the past and in the present—a process that Clifford Geertz deems as the "intellectual process of transforming the specific, or moral and relational, into the general, or legal and the rule-governed."[21] Viewing legalities as compilations of information, which when combined result in complex moments of legal pluralism, also answers those critics of legal pluralism who argue that the concept of legal pluralism is faulty because: (a) its focus on the 'legal' may "serve to reproduce the legality-centered misconstructions of earlier forms of study" [22]; (b) it does not account for those places where legality "constitutes an undifferentiated repertoire, ranging from standards of polite behavior to rules whose breach is taken extremely seriously, but for which there is not a specialized *corpus juris*."[23]

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[19] [2006] W.S.S.C. 40 (PacLII).
[20] *Ibid* at 3.
[21] As quoted in Chris Fuller, "Legal Anthropology, Legal Pluralism and Legal Thought" (1994) 10 *Anthropology Today* 9 at 12.
[22] *Ibid* at 10.
[23] *Ibid*.

Understanding legalities as compilations of information also emphasizes the role that individuals and groups play in the continuous transmission and circulation of information, requiring an understanding of subjectivity, articulation and relations of power and communication. I will return to the issue of power and processes of legal pluralism later on, but for now I will discuss subject positions and articulation in the processes of legal pluralism. Individuals and groups interact with different strands of legality, creating complex patterns of legal pluralism through various processes. Individual subjects formulate and articulate different understandings of legalities and norms in different moments, circulating and re-circulating knowledge of the legality from past to present and influencing the patterns of legality that exist in different times and spaces. How can the role of such individuals and groups be conceptualized? We can gain some understanding of how the strands of legality are woven together, and how complex patterns of legal pluralism are created and re-created, at least in part, through subject positioning theory and through theories of articulation.

Critical social theorists argue that we can no longer view social agents, such as individuals who interact with strands of legality, as totally 'rational' and 'self-knowledgeable' subjects. Rather, as Jukka Torronen has noted, if we want to understand why an individual touches and is touched by a specific cultural text (which in this case is the different strands of legality I discussed in chapter four) we need to consider what kind of cultural competencies are linked to certain subject positions.[24] For the purposes of this thesis, I am narrowly conceiving of cultural competencies as a combination of skills, knowledge, attitudes, and demeanors that are exercised through different subject

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[24] Jukka Torronen, "The Concept of Subject Position in Empirical Social Research" (2001) 31 The Journal for the Theory of Social Behaviour 313.

positions in relation to cultural texts as well as to other subjectivities. For example, the cultural competencies of the different weavers in the *fale lalaga* is what influences the patterns, as well as the quality and quantity of *'ie toga* produced. In particular, the competencies of the elder scraper are important for the articulation of weaving knowledge from generation to generation, and for the way that the weaving is carried out by the other women.

A consideration of different subjects' cultural competencies can help us understand how certain patterns of legal pluralism emerge in banishment cases. For instance, formal oratory is considered an important cultural competency of *matai*, particularly *tulafale*. Different forms of oratory emerge in the decision-making process of the village *fono*, as well as in decision-making among *aiga*. The ability to use oratory to reach consensus, even if there is ongoing disagreement, is considered a valuable skill- particularly since achieving consensus is articulated by many Samoans as a central feature of Indigenous legality and reflective of *fa'asamoa*.[25] In Elise Huffer's and Asofou So'o's interviews with Samoans, a number of respondents viewed consensus as a system which emphasizes respect and which has a protocol to which all members of the community abide. Consensus was considered a requirement for preventing disruption in the community and for resolving conflict through consultative talks. According to respondents, a good leader or *matai* is a person who knows how to attain consensus.[26]

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[25] The Samoan words for consensus are *autasi*, which literally means 'many in one' or *tasi*, meaning 'one or united'. The concept of *soa'laupule* underpins the Samoan understanding of consensus, and means 'partnership to your authority', and suggests being part of a decision – making a process where everyone is able to discuss issues. *Soa'laupule* also implies recognition and respect, as well as *alofa* (love), meaning that consensus comes from thinking of others when representing one's family or village and not one's own ambitions or self-interest. Elise Huffer and Asofou So'o, "Consensus versus Dissent: Democracy, Pluralism and Governance in Samoa" (2003) 44 Asia Pacific Viewpoint 281 at 288.

[26] *Ibid* at 288.

Shore also discusses how *matai* build consensus, using oratory as a tool for mediating between consensus and dissent. While Shore was conducting his ethnographic fieldwork in the village of Salu'ilua, one *matai* shot and killed another *matai*. Shore records how the victim's son attempts to avenge his father's murder by attacking the offender with a machete. The son wounds him and is arrested by the police. At the same time this is happening, the offender's family holds an *ifoga* to seek reconciliation. After the *ifoga* is accepted, the *ifoga* party is invited by the village *fono* to meet with the victim's family to move toward reconciliation. This meeting begins with a formal speech by the pastor, who uses a particular pronunciation to highlight 'we-plural-inclusive' language forms.

According to Shore, this is a linguistic tool to indicate fragmentation of the group has occurred, which the speaker is then trying to mask through his oratory.[27] The pastor then uses biblical proverbs to both direct and deflect blame, softening the impact of the confrontation. The senior chief then gives a long speech, in which he emphasizes "a spirit of love and reconciliation and assuring continued peace in this part of the district."[28] Just as closing remarks are being made, a *matai* representing the offender's family interrupts, pointing out that he/they feel like prisoners in the village due to the behavior of their kinsman. He makes sure to give the proper honourific greetings, and then goes on to make a speech that looks for forgiveness from the *matai* speaking on behalf of the victim's *aiga*. There is discussion back and forth, with assurances of forgiveness, dignified thanks and finally, "mutual recognition of the ranks of all *matai* that are present at the meeting."[29] Despite the public show of reconciliation, in more private discussions,

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[27] Shore, *supra* note 5 at 20.
[28] *Ibid.*
[29] *Ibid.*

Shore notes that many people agree with the retaliatory act carried out by the victim's son, and that there is ongoing tension in the village.

The next meeting to be held was a secret meeting of the senior orators (meaning that the blinds of the meeting *fale* are drawn and that the conversation is carried out in a whisper). This meeting was held so that "senior orators of the village would arrive at the *fono tauati* (the public meeting where they would announce the punishment of the murderer and his family) with a common voice, with any major disagreements being worked out beforehand and in private."[30] The next day the entire village met in four different houses surrounding the *malae*, which is the outside area in the centre between the houses. While people waited in the other houses, long discussions took place between the senior orators and the *ali'i* in one of the houses. A representative of the senior orators, named Tuiatua, presented their conclusions to the village *fono*. He began by highlighting the newness of such incidents in the village, comparing the past glory of the village to what had just happened. He then went on to question the authority of the *ali'i* for letting the incident happen, but then speaking of the wisdom of the *ali'i* and how the victim and offender were not actually reflective of the *ali'i* or the village since they received their title not through service, but through genealogical connections, education, political savvy and ambition. Finally, he announces the sentence of banishment, saying,

> Without any further hedging, I present our decision. For Tolova'a and his children who inspired this trouble. The plan we have made is as follows. Tolova'a and all those who spring from him, that is his children and his descendents, are cast eternally out from this village… this means his family will be swept away from here, and the decision passes on to his descendants who shall spring from him…In addition, we have decided on a fine of ten sows as punishment for this day. This is relatively light in view of the other punishment, the banishment from the village…We shall all sign a petition and send it to

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[30] *Ibid* at 24.

> the [government authorities] in Tuasivi. The speech is thus concluded. This is our complete decision."[31]

Shore describes how this speech is met with outrage by the *ali'i* since they had not been consulted on the decision. Thus, a new series of speeches began, made by members of the *ali'i*, highlighting the importance of proper consultation, and the need for the authority and wisdom of the *ali'i*. Tuiatua responds with apologies and recognition of the need for *ali'i* in making decisions. He goes on to say that these procedural issues should be dealt with at a later time, and that a punishment should be given so the *fono* speaks with one voice to the village. Again, there is a speech in response but eventually there is consensus among the *fono* that the punishment is appropriate for the incident that has occurred. Tuiatua finally goes out onto the *malae* and announces the decision of the *fono* to the entire village. What this incident points to is how *matai* use oratory, including the acknowledgement of honourifics, rank, history, as well as denunciation and praise, to smooth over conflict and build consensus, thus preserving consensus as a form of information in Indigenous Samoan legality.

The agency exercised by individuals, in relation to all forms of information including legal information, is not simply an outcome of the cultural competencies an individual possesses. Individual agency must also be seen as "the multiplicity of representational systems, heteronymous practices and conflicting social relations that exist, and through which a variety of different and conflicting subject positions evolve for the individual to identify with and use."[32] Of course, the adoption and use of multiple subject positions in the engagement with legal information and discourses does not mean any choice is

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[31] *Ibid* at 29.
[32] Stuart Hall as quoted in Torronen, *supra* note 24 at 313.

available, or necessarily leads to a schismatic sense of self. The multiplicity of subject positions are grounded or held together by one's "experiences with identity, the physical grounding of the subject in a body, and the historical continuity of the subject."[33] Thus, our task is to "analyze what kind of intensities and mechanisms one situationally identifies with, the subject positions circulating around us and how subject positions are used as resources in concrete dialogues."[34] To consider the construction of subject positions, in light of the limits placed via identity, physicality and historical continuity, it is useful to engage subject positioning theory and articulation theory. Subject positioning theory suggests that two dimensions frame the construction of subject positions: distinguishing oneself or ourselves from others (difference/rupture) and positioning oneself or ourselves and others in history (continuity/retelling the past).[35] Articulation theory tells us something about these two dimensions. Like meaningful discourse, where there is a cutting up and combining of linguistic elements from an always greater array of possibilities, the constant struggling across the terrain of us/them and across the terrain of continuity results in ongoing assembly of social and cultural formations, with an always wider array of possibilities for combination and recombination.[36]

One way of understanding these struggles in Samoa, and the social and cultural formations that result from these struggles, is to consider them in terms of weaving of *'ie toga* in *fale lalaga*. As the traditional greeting of weavers in Samoa suggests, women occupy different subject positions in the weaving house. One subject position relates to

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[33] Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: Univ. of Chicago Press, 2006) at 184.
[34] Stuart Hall as quoted in Torronen, *supra* note 24 at 315.
[35] *Ibid* at 316.
[36] For a discussion of articulation theory, see James Clifford, "Indigenous Articulations" (2001) 13 The Contemporary Pacific 468.

one's weaving abilities. The other relates to one's position in the social hierarchy of the Samoan village. As women seek to differentiate themselves, both in terms of their weaving skills (scaper elder versus board slipper), age (older women versus younger women) and social position (wife of *ali'i* versus wife of orator), they produce new *'ie toga*. Their *'ie toga* will bear some aspect of the struggles for differentiation, as the women may not exactly follow the instructions of the scraper elder and may therefore create a different pattern. The *'ie toga* may bear the struggle for continuity, since the women may be seeking to show the village and others who see their *'ie toga* that they continue to be fine weavers.

Individuals and groups also formulate and reformulate different patterns of legal pluralism as part of the ongoing struggle to define difference and to suggest continuity or a re-telling of history. Examples of these types of struggles are reflected in several of the banishment cases, as well as in other theorists' analyses of legal pluralism in Samoa. In Huffer and So'o's discussion of the changes to Samoan understandings of consensus and dissent, they describe how money, technological changes, levels of education, human rights and the influence of new church groups leads to struggles over the meaning and value of consensus. This struggle in turn leads to new moments of legal pluralism. For example, the growth of evangelical Christianity, where "everyone is allowed to stand up and express themselves regardless of age or status leads youth and church members to view *matai* just like everyone else,"[37] influences people's perceptions of consensus and

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[37] Huffer and So'o, *supra* note 25 at 290. Serge Tcherkézoff also discusses how the emergence of the evangelical church in Samoa, with its discourse on individual relationship between God and the believer's soul, has affected the *fa'amatai* system in "Is Aristocracy Good for Democracy? A Contemporary Debate in Western Samoa" in J. Wassman, ed., *Pacific Answers to Western Hegemony: Cultural Practices of Identity Construction* (Oxford: Berg Publishing, 1997) at 417.

of the role of *matai*, which as I have already noted are important elements of Indigenous strands of legality.

The emphasis on open expression of opinion, regardless of rank, and emphasis on individual relationship to God in evangelical Christianity are different from the doctrines and practices of more established strands of Christianity in Samoa, where emphasis is placed on communal worship and service to God as an expression of the unity and dignity of the *aiga* and *nu'u*, and where the pastor is considered to be central to maintaining the faith of believers and upholding village standards, since he holds authoritative knowledge of God and biblical law.[38] In many villages, the council of *matai* have ruled that all villagers should attend the same church, which is generally the one that has been in existence since the introduction of Christianity in Samoa. It is argued that this keeps the unity of the village, and that it maintains the sacred covenant between the village and the church that has existed historically. Thus, there is a combining of strands of Indigenous legality with Christian norms and information.

The struggle over difference/continuity in terms of different Christian doctrines and practices is illustrated in the banishment case *Sovita v Police*.[39] In this case, Levao Lamese, a resident *matai* of the village, and his family were banished from the village of Salamumu for starting a new religion in the village. The village of Salamumu has a long-standing rule that the Methodist church is the only religious denomination permitted in the village. If a member wanted to worship in a different religion, they were free to attend a church in another village. According to the judge in the case, the rule that only the

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[38] The importance of the pastor in the *fa'amatai* system is illustrated in the speeches that Shore captured in the aftermath of the murder in Salu'ilua. The pastor was the first to speak after the *ifoga* ceremony, when the families were brought together to reconcile.
[39] *Sovita v Police* [2000] W.S.S.C. 2 (PacLII).

Methodist denomination could exist in the village was regarded with "high sanctity by the villagers."[40] Lamese had been a member of the Methodist church but joined the Gospel of Jesus religion and started bible studies/prayer services at his house in the village during the week, while attending Sunday services at another village. The bible studies grew to the point that 40 people were attending them. Singing, accompanied by electric guitars, was a prominent part of the study, as was a discussion where questions were asked freely and views shared by all in attendance.

The villagers and particularly the *ali'i* and *faipule* saw the bible studies as forming a new denomination in the village contrary to the rule that the Methodist denomination be the only religion in the village. They also found the singing disturbing to village life. At a meeting of the village, in which Lamese was present, he was instructed to stop the bible studies as he was in contravention of the rule of having only the Methodist denomination in the village. However, Lamese argued that he was only holding bible studies and continued to meet. The village met again, in order to decide what to do. The village *fono* decided that Lamese and his family should be banished.

However, Lamese and his family refused to leave the village. Members of his bible study joined him at his house and supported his decision not to leave. On the morning of October 17, *matai* and untitled men approached the Lamese's house and made a speech regarding his refusal to leave the house. A response was given by Lamese but things escalated and the *matai* ordered that Lamese's house be burned, which was carried out by the untitled men. As people were leaving Lamese's house, untitled men and *matai*

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[40] *Ibid.*

assaulted them, with four of the people being tied to sticks and carried to the roadside of the village, which reflects earlier forms of punishment in Samoa.

Not only does this case give us insight into the struggles existent in villages between different expressions of faith, and how this conflict manifests itself in law, but also how those struggles lead to a new moment of legal pluralism, where strands of Indigenous legality, Christian legality, the common law, and human rights are woven together. In an appeal to the Supreme Court, the untitled men argued that their sentence should be lessened due to a number of factors, including the fact that they were provoked and that they were following the Indigenous law that "*aumaga* or untitled men are bound to carry out an order given by the village council-as a matter of customary duty and allegiance to the authority of the village council."[41] In terms of the common law defence of provocation, the Judge points out that the *matai* did not have the right to evict Lamese from the village in the first place due to the constitutional freedom of religion, and that Lamese's refusal to leave was not therefore provocation. The judge highlights that under the current statute law in Samoa, all parties to an offence are treated the same as the person who carried out the offence.[42] However, he is persuaded by the argument that the *matai* do hold a higher level of responsibility due to the nature of relationships between the *matai* and the *aumaga*, which had also been cited by the lower level court judge as a mitigating factor.

One of the important points of subject positioning theory is that it makes explicit the dialectical relationship existing between the adoption of a subject position and the content

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[41] *Ibid.*
[42] He cites the *Crimes Ordinance 1961* (W.S.) 1961/13 (PacLII), s. 23(1) and *Criminal Procedure Act 1972* (W.S.) 1972/14 (PacLII), s. 33.

that one is communicating. This relationship is apparent in processes of legal pluralism, where an individual's or group's subject position influences both how and what legalities are woven together. At the same time that subject positions are influencing the content of communication, content that is 'legal' or 'normative' influences the adoption of certain subject positions.

This is especially relevant when we consider that legal or normative information has particular characteristics that differentiate it from other types of information communicated in social relations. These legal or normative characteristics may restrain certain subjectivities or make certain subjectivities more prominent or more valuable in moments of interaction and communication.[43] This in turn would influence the content and articulations of information in future interactions. Thus, the very legality or normativity of information is essential to how different strands of legality and legal pluralism are produced and reproduced in various contexts.

We can liken this to the weaving process, where the material and techniques that one is able to weave determines the type of subject position one occupies among other weavers, as well as the position the weavers hold among other women in Samoa and in the community. For instance, some women may be able to weave everyday objects such as baskets but not weave *lau 'ie* into *'ie toga*. The inability to work with a certain type of pandanus, and use certain weaving techniques, means they cannot hold the subject position of serious or expert weaver. As one Samoan weaver notes, "Nowadays many

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[43] A wonderful example of how interactions with legal discourse and practices act as both a restraint as well as an encouragement to the adoption of certain subject positions is provided by Merry in her discussion of women's interaction with the law when they have been victimized by violence. See Merry, *supra* note 33 at 185ff.

weavers don't take their weaving seriously."[44] Those women not able to weave *'ie toga* might also be considered unable to engage in traditional activities and in an important aspect of *fa'asamoa*. The same weaver also states: "It's the *matafaioi* (duty/purpose) of the Samoan woman to weave. Women are not teaching their children to weave. We are becoming very lazy."[45] Another woman, a Niuean weaver living in New Zealand, highlights the loss of an expert weaving subjectivity, stating that: "my sister, she went to school in New Zealand, got a teaching certificate to hang up on the wall, but what is she going to put her food in? She can't make the *kato kautaha*, the traditional food basket to put cooked food in. So she'll have to be satisfied with a *kato tapola*, a course coconut leaf basket often made on the spot,...and if you put your food in a *kato tapola* it tells a lot about you."[46]

The dialectical relationship between the adoption of subject positions and the content of legalities and legal pluralism is evidenced in the case I discussed earlier, *Tuivaiti v Fa'amalaga*. In this case, the plaintiff adopted a certain subject position, that of modern, western businessman who is able to choose to have no religion at all and sue those who would banish him for such actions. He is attempting to influence the content of the Indigenous and Christian legality in his village—where it will be acceptable to have no religion and not against the law to refrain from religious activities. He is also influencing new moments of legal pluralism by using laws and legal-institutional elements from the common law, and by invoking human rights standards, to influence the already woven strands of Indigenous legality and Christian legality. However, the plaintiff is not able to

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[44] Vivealava Vaepae as quoted in Sean Mallon, *Samoan Art and Artists: O Measina a Samoa* (Honolulu: Univ. Hawai'i Press, 2002) at 84.
[45] *Ibid* at 85.
[46] Matafetu Smith as quoted in Pereira, *supra* note 9 at 89.

adopt just any subject position, as he is constrained by strands of Indigenous legality in Samoa, which has particular rules regarding the treatment and social location of untitled men.

A further example of the dialectical relationship between subject position and the content of legal pluralism is evidenced in the case *To'ailoa v Sapolu*.[47] Although this is not a banishment case, it is important for our understanding of how subject position influences the ongoing content of legal pluralism in Samoa, and vice versa. This case was an appeal to Samoa's Court of Appeal, on the issue of whether the Supreme Court of Samoa has the power to review a decision of the Land and Titles Court on any matter, or whether that power is limited to where there is an alleged breach of fundamental rights.

Three judges of the Court of Appeal, all of whom are not Samoan, decided not to answer the question for a number of reasons. The reason they cited as most important for *not* determining the issue was that the case concerned the jurisdiction of the Land and Titles Court, which raised matters of crucial concern to Samoa and Samoans. They stated that:

> it is essential that such matters be considered by a Samoan Judge sensitive to such concerns before coming to an appellate court consisting of Judges from a different culture. We regard it as of the utmost importance that an issue so central to Samoan tradition and culture should be the subject of consideration first by a Judge immersed in such culture. The findings of the Supreme Court will be of enormous assistance to the Court of Appeal should the matter ultimately come to court.[48]

## Continuing to Weave Legal Pluralism through Relations of Power

In the previous section, consideration was given to how subject position, articulation and legal information that is communicated and circulated among individuals and groups

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[47] [2006] W.S.C.A. 1 (PacLII).
[48] *Ibid* at para. 14.

create moments of legal pluralism. However, individuals are not just free to enter into any subject position that fits a particular situation, nor are they able to articulate just any pattern of legal pluralism in particular interactions. Rather, articulations of legal pluralism are mediated through various kinds of relations, such as relations of power, relations of morality, etc., and through categories and patterns arising out of relations of communication. To understand relations of power, how power is exercised and the link between power and communication in creating moments of legal pluralism, the work of Michel Foucault is particularly useful.

Foucault was primarily guided by two ideas in his work: first, that power is productive and second, that subjectivity is constituted through power relations. By the productivity of power, Foucault meant that "power relations are integral to modern social productive apparatus and are linked to active programs for the fabricated part of the collective substance of society."[49] In suggesting that subjectivity is constituted by power relations, Foucault argued that the "individual impact of power relations does not limit itself to pure repression but also comprises an intention to teach, to mold conduct, to instill forms of self-awareness and identities."[50] In "The Subject and Power," Foucault suggested that what characterizes power is that it brings into play relations between individuals and/or between groups. Thus, Foucault refused to treat power as a substantive entity, institution, or possession that was independent of the set of relationships in which it is exercised.[51] If one is speaking of structures or mechanisms of power, it can only be in terms of certain persons exercising power in relation to others. Accordingly, 'power'

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[49] Colin Gordon, "Introduction" in James D. Faubian, ed., *The Essential Works of Michel Foucault: Volume 3 Power* (New York: The New Press, 1994) at xix.
[50] *Ibid* at xix.
[51] *Ibid* at xxiv-xxv.

designates relationships between partners, not with any fixed rules but in an ensemble of actions that induce others, as well as follow from one another.[52] The exercise of power is the way in which some act upon the action of others; thus power relations are rooted deep in the social nexus and are not a supplementary structure over and above society.[53]

Foucault believed that power comes from below, that "global and hierarchical structures of domination within a society depend and operate through local, low-level and capillary circuits of power relationships."[54] According to Foucault, what defines a relationship of power is that it is "a mode of action that does not act directly and immediately on others, but acts upon their action: an action upon an action or upon possible and future actions."[55] This is differentiated from a relationship of violence. In a relation of violence, which he also refers to as a relation of domination, the only response is passivity since the subject is never recognized as being able to act. As I mentioned in chapter two, what is different about a relation of power, as opposed to a relation of violence, are two indispensable elements: (a) the other (the one over whom power is exercised) is recognized and maintained as a subject who acts; (b) faced with a relationship of power, there is a whole field of responses, reactions, results and possible inventions that may open up.[56]

These two indispensable elements of power relations are also indispensable for an understanding of the weaving of legal pluralism. When power is exercised over another in the process of producing and weaving strands of legality, as well as when one is

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[52] Michel Foucault, "The Subject and Power" in James D. Faubian, ed., *The Essential Works of Michel Foucault: Volume 3 Power* (New York: The New Press, 1994) at 337. [Foucault, *Subject*]
[53] *Ibid* at 343.
[54] Gordon, *supra* note 49 at xxiv-xxv.
[55] Foucault, *Subject*, *supra* note 52 at 340.
[56] *Ibid* at 340.

persuading another to adhere to a particular pattern of legal pluralism (which means acting upon one's action or conducting the conduct of these others), there is always a recognition and maintenance that those whom one is trying to persuade, or the one who is producing and circulating knowledge from different legalities, is a subject who acts. Thus, an other is never in a position of passivity in relation to either the legal information that is produced and circulated, nor to those who are acting to persuade them to consider a particular strand of legality or a certain pattern of legal pluralism.

What the second element implies is that when one is in a relationship of power, there is a whole manner of responses and reactions a subject can have toward other subjects, discourses, or in this case, compilations of legal information, with a whole range of results and innovations emerging. This helps explain the complexity, as well as possibility of indeterminacy of legal pluralism, as subjects respond to and interact with one another and to different legalities, formulating new patterns of legal pluralism. Foucault describes this exercise of power and the range of responses as a 'permanent provocation' or 'agonism'. He defines agonism as a relationship where there is at once mutual engagement and mutual incitement and struggle.[57] Thus, we can view the ongoing production of legalities and legal pluralism as emanating from agonism—the mutual engagement, as well as mutual incitement and struggle between subjectivities over strands of legality in Samoa.

*Tuivaiti v Fa'amalaga* (the case of the bus-owner banished because of a failure to attend church) is illustrative of how relations of power impact upon the adoption of certain subjectivities, as well as the articulation of legalities and legal pluralism in

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[57] *Ibid* at 342.

Samoa. As mentioned previously, the plaintiff in *Tuivaiti v Fa'amalaga* case was an untitled man who was banished by four *matai*. *Matai* are able to exercise power in relation to others in the village and conduct their conduct through a variety of means, particularly when the others are untitled men and women. This can be a relation of violence, but also a relation of power. The other, in this case an untitled man, was recognized as being able to act. One *matai*, in presenting evidence at court, said that he recognized that the constitution allowed the plaintiff to not attend church and that he tried to convince the other three *matai* who ordered the banishment of that principle.

This statement by a *matai* suggests that there is recognition of the plaintiff's ability to act. In addition, the plaintiff had a number of possibilities open to him for action. He could comply with the order and leave the village or, as in this case, he could choose another response, to have the judge question the authority of the *matai*. His response resulted in a moment of legal pluralism, as strands of Indigenous legality, including the sanction of banishment and the decision-making procedure of the *matai*, strands of Christian legality and strands of the common law were woven together. In this case, compilations of information articulated as part of Indigenous legality were not persuasive to the judge, an expert in the common law legality, provoking further engagement and struggle between subjectivities in Samoa, and their ongoing articulations of legality and legal pluralism.

The other relevant aspect of Foucault's discussion of relations of power is his differentiation between relations of communication and relations of power – relations of communication being those goal-oriented activities which produce power effects but also draw on power; and relations of power being local, capillary-like circuits in which some

act upon the actions of others, but always in a way that the other is recognized and maintained as being able to act, and always resulting in a wide array of possible actions. Although distinct, each of these relations overlaps, "supporting one another reciprocally and mutually."[58] This echoes what I was discussing earlier concerning the content of legalities and subject positions being in dialectical relationship.

Relations of communication transmit information and knowledge, such as the knowledge of weaving technique or knowledge of a certain legal procedure, by means of a language, a system of signs or other symbolic medium. According to Foucault, the production and circulation of elements of meaning, through a language and system of signs, can have as their objective or consequence certain results in the realms of power. However, power is not simply an aspect of communication. [59] Rather, "relationships of communication imply goal-directed activities that, by modifying the field of information between partners, produce either effects of power or alternatively draw upon power. Thus, power relations are exercised, at least to some extent, through the production and exchange of signs and meanings, and are scarcely separable from goal-directed activities that permit the exercise of power."[60] This overlap is not uniform or constant, but rather there are "diverse forms, diverse places, diverse circumstances or occasions in which the interrelationship between systems of communication and power relations are established to a specific model."[61] The overlapping of relations of communication and relations of power might be one of the defining features of legal pluralism, particularly if we view

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[58] *Ibid* at 338.
[59] *Ibid* at 337.
[60] *Ibid* at 338.
[61] *Ibid*.

legal pluralism as the articulation of various strands of legality by differing subjectivities across the terrain of difference and continuity.

An example of congruence of relations of power and relations of communication is in *Sovita v Police*, where the villagers appear to adopt different subject positions at different times. In one moment, they denounce Lamese at the village meetings, adopting the subject positions of 'tradition-holders' and 'followers of authority', but they adopt other positions, that of evangelical, dissenter, non-traditional, when some attend Lamese's bible studies. Their changing positions are impacted by the relations of communication in the *fono*, where certain capacities for oratory and the content of the information – that disobedience results in sanctions – modifies information and produces power effects.

In addition to relations of communication, there are also relations of power that constitute the subject positions of both the villagers and Lamese and his followers. The villagers and the *matai* are acting upon the action of Lamese. They are meeting together to discuss Lamese, then suggesting ways to curtail the bible studies he is enacting. During the first two interactions, the villagers and the *matai* recognize that Lamese is able to act or resist in response to their exercise of power, with a number of possible outcomes. However, in the last interaction, the relation becomes one of violence, as being tied up to sticks results in the ultimate passivity, physical bondage, and it is no longer maintained that Lamese can act. It is the relations of violence that ultimately lead to a moment of legal pluralism, where strands of Indigenous legality and Christian legality come under scrutiny of the common law, through the auspices of criminal charges laid against the *matai* and *aumauga* of Salamumu.

In light of these banishment cases, we can see how legal pluralism emerges in certain moments and spaces due to human agency, and is influenced by complex interactions between individuals and groups. Although moments of legal pluralism in different contexts will contain unique constituting features, any attempt to conduct an analysis of the multiplicity of legalities in a particular time/space ought to be attentive to four considerations: (a) the subject positions that are adopted by various individuals and groups, giving rise to certain capacities and practices which impact upon the way information within different strands of legalities is transmitted, as well as the content of the legalities themselves; (b) how struggles across difference and continuity, and the subject positions adopted in each, result in certain strands of legality being woven together—creating moments of legal pluralism; (c) the dialectical relationship between the content of the legalities articulated and the subjects who speak about that content; (d) the relations of power and the relations of communication that influence the subject positions that individuals and groups occupy, and how this influences the patterns of legal pluralism.

# Conclusion: The Object Created and the Strands to Be Woven

The objective of this thesis was to develop an interdisciplinary, theoretical framework for considering situations of legal pluralism in different socio-political spaces where there is substantial legal diversity. In the first three chapters, I critically analyzed several prominent features from the disciplines of legal anthropology, comparative law and law and society studies, highlighting how certain theoretical forms, discourses and practices from within each could be used to advance our understandings of legal pluralism, by combining them together in new ways.

In the case of legal anthropology, the theoretical forms, discourses and practices that I combined together for analyzing legalities in Samoa were legal anthropologists' attention to local contexts and practices and the use of ethnography to discuss law in specific contexts. I also considered the critical stance towards ethnography within the discipline, which has resulted in a consideration of the positioning of legal anthropologists in relation to their subjects and objects of analysis, as well as important discussions regarding the role of Indigenous knowledge and authorship in legal anthropology. The other discourse from legal anthropology that I considered was power, discussing the ways in which Foucault's analytics of power have been employed in legal anthropology, as well as in anthropology more generally.

By taking a critical stance toward legal ethnography, I emphasized the limitations of using only ethnographic accounts of law in Samoa, as well as the importance of drawing upon other materials, particularly those written by Indigenous Samoan scholars from a variety of disciplines. In discussing the limits of ethnography, I was able to consider the

effects of using previous ethnographic accounts of law and society in Samoa, as well as to interrogate my own subject position as an outsider with a limited and partial view.

The need to pay attention to local contexts and processes, in addition to the movement of legal information outside local spaces, is a significant strength of legal anthropology. This was important both in terms of drawing upon local understandings of legality in Samoa and also in terms of choosing the metaphors to represent legal pluralism in Samoa. The metaphors chosen to represent and analyze legal pluralism in Samoa were a locally significant object and process: woven objects and weaving. Choosing a localized metaphor allows the discourse of legal pluralism to become more accessible and understandable due to its familiarity and significance in the Pacific. In addition, employing the local metaphors of woven *'ie toga* and the processes of their weaving captures the concept of legal pluralism as both a constructed object that is studied and used, and a creative process that involves human agency.

In chapter two, I considered several theoretical forms, discourses and practices from comparative legal scholarship, including: the differentiation of legal traditions for the purpose of comparison and corresponding discussions of legal change, and the intersection and dispersal of legalities in a given context. I followed some of these practices by paying attention to the details of legalities, including the attention given to legal rules and texts in comparative legal scholarship and by describing those legalities characterized as formal and state/interstate legalities. In addition, I drew upon the idea that we can differentiate legalities, considering moments of their creation and recreation. I was not interested in differentiation for the purposes of comparison, nor to highlight legal uniformity, but rather to highlight that different legalities exist in the same socio-

political space, and that each of these legalities are complex entities created from a multiplicity of legal rules, texts, institutions, as well as created via a multiplicity of human interactions and articulations. In chapter two, the idea of criticality in legal scholarship, as evidenced in certain strands of law and society scholarship, was also discussed. In creating my theoretical conception of legal pluralism, I emphasized specificity and particularity, and suggested that a theory of legal pluralism requires consideration of social processes and transactions, particularly relations of power and subject positioning—both of which have been identified with critical law and society scholarship.

Beyond these features, the other form and practice that I drew upon in creating an interdisciplinary theory of legal pluralism was metaphor. The subject of chapter three was a discussion of the use of metaphor in both comparative legal scholarship and law and society studies to represent the complexities of legal change and legal pluralism. I argued that each of the metaphors considered were inadequate for illustrating legal pluralism in Samoa because: (a) they suggested that law had agency rather than emphasizing the creation of law and legal pluralism through processes related to human agency including subjectivity, articulation and power; (b) they lacked the specificity needed to emphasize the complexities of legal pluralism; (c) they did not provide an appropriate tangible representation of the intricacies of legal pluralism in Samoa. The metaphors of woven objects and weaving processes overcome these limitations, and provide an opportunity to use metaphors that were/are culturally significant to the context I am considering.

After outlining the discourses, forms and practices that are needed for an interdisciplinary theoretical conception of legal pluralism, I used this framework to

explain moments of legal pluralism in Samoa, as evidenced in a selection of banishment cases. Using the metaphor of woven objects, I outlined the difference between everyday moments of legal pluralism, which may go unnoticed both by the outside observer and by those creating and living with different legalities, and moments where legal pluralism becomes highly visible and significant, much like when *'ie toga* mats are woven for ceremonial occasions and paraded around the *malae*. The moments of legal pluralism that I likened to the *'ie toga* mats were cases of banishment, where the different strands of legality existent in Samoa, at least with respect to governance of certain relationships, became visible. The different strands of legality woven together in banishment cases include different aspects of Indigenous legality, different Christian norms, strands of German and New Zealand colonial legality, strands of Common Law in Samoa since independence, and finally strands of human rights' legality.

In the last chapter, I emphasized that a description of different legalities is only a first step toward understanding complex instances of legal pluralism. In addition to description, one must study how people create moments of legal pluralism through processes of human interaction. This can be theorized by drawing together salient aspects from Foucault's power analytics, articulation and subject positioning theories. Just as an explication of the weaving process helps us understand how different types of woven objects are created, with different patterns and uses, a consideration of certain processes of human agency and interaction enriches our understanding of complex moments of legal pluralism. To this end, I argued that laws are a form of information, and how individuals and communities articulate laws through ongoing constructions of subjectivities and identities, and through exercises of power.

Although my thesis has addressed several of the shortcomings in contemporary theories of legal pluralism, my discussion of the processes of legal pluralism is only a starting point for understanding legal pluralism in Samoa. Future research is needed on how subjectivities negotiate between legalities and articulate them in different moments, and how power is exercised via these articulations, both at the capillary level of power and via modes of governmentality.[1] Such questions can only be addressed through conducting process ethnography in different communities in Samoa. In addition, parallel ethnographic research regarding the practice and art of weaving in Samoa would also provide additional material to develop the weaving metaphor.

Beyond the need to do further ethnographic research into the processes of legal pluralism, several other questions have been raised by this work. Are there any differences in how decision-makers articulate and negotiate legal pluralism within Samoa, and what constitutes the differences that might exist? In particular, how are moments of legal pluralism created and articulated by *matai* in the village *fono* and at the Land and Titles Court, and how are they created and articulated by decision makers in the common law courts in Samoa? Do people recognize the existence of multiple legalities in everyday life and, if so, how are moments of everyday legal pluralism created and articulated? Finally, how is the existence of legal pluralism and substantial legal diversity addressed in current legal and judicial reform work, and are there ways that legal reform initiatives can address the ongoing articulation and negotiation of legal pluralism in different contexts?

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[1] See Michel Foucault, "Governmentality" in Graham Burchell et. al. eds., *The Foucault Effect: Studies in Governmentality* (Chicago: Univ. of Chicago Press, 1991) at 87.

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