# Victoria University of Wellington– Te Herenga Waka

# Faculty of Law

## LAWS 546 Legal World of Small States

## Research Paper

Constitutional Rights and Custom:

How can law reform address the tension?

**Word Count**: 7,972 words (excluding footnotes and bibliography)

**Submitted**: 4 November 2021

# Table of Contents

## *I Introduction*

The current international society is filled with a colourful variety of states with different histories, cultures and systems which makes it easier to overlook that a rather surprising number of them are identified as small states. There is a lack of consensus around the definition of a small state, but the standards frequently used to classify a state as small are quantitative measures such as population size, territorial extension or gross domestic product (GDP). The World Bank classifies a state as small if the population size is under 1.5 million and those states in the World Bank form the Small States Forum consisting of 50 members (42 countries).[1]

On the other hand, small states can also be characterised by the challenges they face for being 'small'. Most states in the Small States Forum are small island developing states (SIDS) that are vulnerable to extreme weather events and negative impacts of climate change on top of other challenges such as vulnerability against economic shocks.[2] These challenges are mostly contextualised on an international scale where the capacity constraints of small states are felt more acutely in comparison to other larger states. Despite such limitations, small states strive to use their attributes as strengths to further their interests in a way larger states cannot.

However, small states have struggles on the national or domestic level as well. In the legal world of small states, their course of history and evolution of societies heavily influence the establishment of unique legislature and legal systems. The struggle is that they are not always in harmony with basic human rights enshrined in their constitutions. This uneasy relationship between constitutional rights and custom has been captured in judicial proceedings and interpretations which underlines how persistent but continuously evolving this issue is. A quote by a small states scholar has particular relevance to this legal issue:

*"A suitable law reform process for a small state must reflect the cultural context and the local realities of the small state. The unique features of each society determine the law reform process that is suitable for their needs." (Small States Scholar 2017)*

[1] The World Bank (Last Updated 5 October 2021) Country Group Small States Overview < https://www.worldbank.org/en/country/smallstates/overview#1>.
[2] The World Bank, above n 1.

This quote identifies law reform as a way for small states to address their needs and contains two key messages: first, reflecting cultural context and local realities is an essential condition for a law reform process to be suitable for a small state; second, this suitability refers to satisfying the needs of small states which can be done by law reform determined by the unique features of each society.

By using this quote as a hypothesis, this paper aims to apply and test these messages in the context of constitutional rights and custom. The paper will begin by contextualising the relationship between constitutional rights and custom through providing a selection of court cases in small jurisdictions that reveal their dynamics. Secondly, key concepts included in the quote – law reform or law reform process, reflection of the cultural context and local realities, and the needs of small states – will be unpacked in order to refine the hypothesis. After the hypothesis is refined and clarified, it will be tested against the context of constitutional rights and custom through a set of questions which involves studying Samoa's constitutional reform process in 2019 as a case study.

## *II Constitutional Rights and Custom in Small States*

### *A Dynamic between constitutional rights and custom*

Most small states today have a shared history of independence from colonial rule. Post-independence measures include establishing their own constitution while restoring and protecting their traditional culture, customs and identity that may have lacked acknowledgement in law. Most Pacific and Caribbean states have constitutions where only a handful of them have not been established at the time of their independence. But it is in the Pacific where traditional customs and values are most visibly reflected in the constitution. The scope of how much is acknowledged varies from stating custom as a source of law, like Samoa[3], or providing a layer of protection when in conflict, like Micronesia[4], to mentioning its importance in the preamble, like Fiji[5] or Kiribati[6].

[3] Constitution of the Independent State of Samoa 1960, art 111(1).
[4] Constitution of the Federated States of Micronesia 1975, art 5(2).
[5] Constitution of the Republic of Fiji 2013, Preamble.
[6] Constitution of Kiribati 1979, Preamble.

The idea that traditional custom is a critical element and source of authority for a small state's society manifests in their adoption of legal pluralism. Legal pluralism recognises not only state-based laws but also traditional customs and values including those not codified in law.[7] Based on this structure, both human rights and traditional cultures have standing in law but whether it is an equal standing is a question that sits at the centre of this issue. This is a highly sensitive and difficult question especially for those small states in the Pacific that have a strong legal recognition of customary values and traditions in their constitutions.

Therefore, the cases in the Pacific will be primarily investigated to contextualise the dynamic between constitutional rights and custom and further use its examples as a testing ground for the quote as a hypothesis. In comparison with other small states, the Pacific has been exceptional in maintaining traditions in individual countries as well as a regional identity throughout its modern developments of the legal world. Below are court cases that reveal the dynamics of constitutional rights and custom which can be at tension but also has potential to be complementary.

### *B Punitia v Tutuila*

The *Punitia v Tutuila* case[8] is a good example that illustrates the uneasy boundaries between constitutional rights and custom by discussing the customary practice of banishment in Samoan society. The practice of banishment has been a power held by the leader(s) of a village, a Village Fono, where the Fono's authority was acknowledged in co-existence with modern governance. But as the debates on the Village Fono Bill (later Act)[9] reveals, there was concern that the Fono's powers were excessive and had the potential to clash with fundamental human rights that was already resulting in decision-making by Fonos not being wholly acceptable.[10] Therefore, the purpose of the VFA was to protect the traditional standing of Fonos by affirming authority in relation to policing village matters but at the same time insert measures of checks and balances so that the authority cannot be used arbitrarily.

[7] Law Commission *Converging Currents: Custom and human rights in the Pacific* (NZLC SP17, 2006), at 42.
[8] *Punitia v Tutuila* [2014] WSCA 1.
[9] Village Fono Act 1990 (Samoa).
[10] Samoa Law Reform Commission *Village Fono Act 1990* (SLRC R9/12, 2012), at 7-8.

In this case, the respondent and her family have been subject to banishment by the Village Fono, the appellants, and undergone violence and damage to property following the banishment orders. Through several proceedings through the Land and Titles Court (LTC), the banishment order against the respondent was found unlawful and thus invalid.[11] Based on this finding, the respondent sought damages for the loss following the banishment order in the Supreme Court based on an argument that there was a breach of rights protected under article 13(1)(d) of the Constitution related to the freedom of movement[12] and was successful.[13]

The appellants did not accept the Supreme Court's decision and presented an argument among others that the banishment order was a lawful exercise of authority by the Fono because it was made not under the VFA but under customary law which has explicit standing as a source of law in the Constitution. However, the Court referred to two cases that extensively dealt with the issue of banishment – *Mauga v Leituala*[14] and *Italia Taamale v A-G*[15] – to conclude that it was impossible to say the authority of the Fono to banish is survived by customary law as to its meaning in the Constitution.

As mentioned above, and also highlighted in the judgement, the trade-off that was made between the authority of a Fono and constitutional rights was that banishment was exercisable insofar as it complied with restrictions that involved the Land and Titles Court. There is no denial that maintaining the original traditional indigenous governance by the Village Fono would have been counter to internationally recognised fundamental human rights, and that because the Constitution explicitly upholds both values, this trade-off has been made in the law and consistently respected throughout judicial decisions.

The Constitution expresses importance for both basic human rights and custom, but *Punitia v Tutuila* reveals that when they are in conflict, human rights can be weighed relatively heavier. However, this is not because custom is less regarded; custom found formal legal recognition in exchange for consideration for constitutional rights and it can only be sanctioned by a specialised court with exclusive jurisdiction on matters related to custom. When considering

[11] *Punitia v Tutuila*, above n 8, at [19].
[12] Constitution of the Independent State of Samoa, above n 3, art 13(1)(d).
[13] *Punitia v Tutuila*, above n 8, at [28].
[14] *Piteamoa Mauga & Ors v Fuga Leituala* [2005] WSCA 4.
[15] *Italia Taamale v Attorney-General* [1995] WSCA 1.

this trade-off, one must ask this question: has the authority of traditional structures and values been diminished because its power to violate basic human rights has been restricted? If the society held the view that arbitrary power was a problem, the very action of a village chief violating human rights due to that power will only diminish their authority. Reversely, are human rights not respected if traditional structures and authorities were legally recognised and protected? The point of asking these questions is to underscore the fact that the result and reasoning behind *Punitia v Tutuila* ultimately guides the reader to a conclusion that human rights and custom are not mutually exclusive. Furthermore, although it may not be perfect, a balance can be struck for situations where the two are in tension by absorbing the society's concerns into legislation.

### *C Penaia II v Land and Titles Court*

The *Penaia II v Land and Titles Court*[16] case is another one from Samoa, but one that speaks to a judicial system rather than practice embedded with custom: the exclusive jurisdiction of the LTC on matters of custom. Here, the appellant has gone through a series of petitions through the LTC in relation to his matai title (or inheritance of it) that ultimately did not render a satisfactory result. By way of appeal, the appellant argued that previous decisions made by the LTC were unlawful thus breaching his right to personal liberty under article 6[17] and right to fair trial under article 9(1)[18] of the Constitution of Samoa.

The Court concluded that it did not have the jurisdiction to hear the appeal on judgements made by the LTC because of its distinct status mentioned in sections 34, 70 and 71 of the Lands and Titles Act 1976[19]. Section 34 states that the LTC has exclusive jurisdiction over "all matters relating to Samoan names and titles"[20] and that it shall make orders or declarations and deal with all claims and disputes on customary land "in accordance with the customs and usages of the Samoan race"[21]. Sections 70 and 71 further support this; the Court explains more extensively on s 71 which provides that decisions and orders made by the LTC are not reviewable or questionable by any other court by way of appeal, prerogative writ or

[16] *Penaia II v Land and Titles Court* [2012] WSCA 6.
[17] Constitution of the Independent State of Samoa n 3, art 6.
[18] Constitution of the Independent State of Samoa n 3, art 9(1).
[19] Land and Titles Act 1976 (Samoa).
[20] Land and Titles Act, above n 19, s 34(1).
[21] Land and Titles Act, above n 19, s 34(b).

otherwise whatsoever.[22] Lastly, the custom that is applied by the LTC within its exclusive jurisdiction has basis in the constitution (art 111)[23] as a force of law which only further consolidates the status of the LTC.

Because the Court did not have the jurisdiction to review the decisions of the LTC, it was unable to discuss whether the appellant's rights to fair trial under art 9(1) of the Constitution was breached, as the appellant's argument was about questioning the decision itself rather than about being denied opportunity to have a fair and public trial. In the judgement, the Court acknowledged that courts of general jurisdiction may disagree with decisions made by the LTC, but that would be the price of the benefits of having a legal regime embedded with local custom.[24]

This case shows that given specific acknowledgement of custom as a legitimate source of law in the Constitution combined with a unique judicial regime, the courts can be limited in its power to discuss a breach of constitutional rights. Further to the *Punitia v Tutuila* case, this judgement points to another interesting way of dealing with tension between constitutional rights and custom – when they are forced to be judged against each other, they can be addressed in a compartmentalised fashion in the way they are applied in the judicial system. This approach is understandable from the viewpoint that favours custom being adjudicated by a special court with appropriate competencies. However, it also avoids the discussion of how constitutional rights and custom can be harmonised or an articulation of where and how an adequate boundary between the two can be set.

### *D Teonea v Pule of Kaupule of Nanumaga*

The *Teonea v Pule of Kaupule of Nanumaga* case[25] reveals a clash between constitutional rights and custom where it weighed the freedom of religion against the orders of the chiefly body of the island of Nanumaga (Kaupule) in Tuvalu. The Kaupule had issued three resolutions proclaiming new religions other than those stipulated in the resolution were not to be proselytised in public, including those that were declared later on in response to the activities of the appellant.[26] When the appellant did not adhere to these resolutions, violence

[22] *Penaia II v Land and Titles Court*, above n 16, at [16].
[23] Constitution of the Independent State of Samoa, above n 3, art 111.
[24] *Peania II v Land and Titles Court*, above n 16, at [25].
[25] *Teonea v Pule of Kaupule of Nanumaga* [2009] TVCA 2.
[26] *Teonea v Pule of Kaupule of Nanumaga*, above n 25, at [77].

was inflicted on the appellant who subsequently sought remedy through the courts and argued that his constitutional rights were breached. On hearing this case, the Tuvalu High Court found that resolutions by the Kaupule did not amount to law under the Constitution.[27] In the Court of Appeal, Tompkin J went further to explain that the actions of the appellant had amounted to a situation where s 29(4) was correctly applied to justify the resolutions thus denying that there was a breach of the appellant's constitutional rights to freedoms of belief, expression and assembly and association.[28]

Ultimately, however, the Court of Appeal concluded differently. In contrast to Tompkin J, Fisher J in the majority viewed that the resolutions of the Kaupule had the status of law under the Constitution and thus subject to the justifiable standards of checks and balances in the law.[29] Especially, Fisher J referred to the Preamble of the Constitution pointing out how custom changes over time to support his conclusion that Tuvalu's society is changing towards recognising a larger role for universal human rights rather than always favouring its culture and customs.[30]

There are three observations regarding this case. First is that it challenges the assumption that all judges will always favour constitutional rights when they are at heads with custom. Tompkin J went to extensive length in the judgement to build on the reasoning of the Supreme Court case to interpret the Constitution in a way of preserving custom over constitutional rights. Second, court judgements can function as a litmus test for the society to realise where they stand on embracing rights and traditional customs. As the international society converges toward the protection of universal rights, the societies of small states could be in the process of their gradual reception, or reversely realise that it may cause disruption to their traditional ways of life. The final decision had the effect of the latter which triggered almost an immediate response of constitutional amendments by the Tuvalu Parliament regarding freedom of religion and legislating the Religious Organisations Restrictions Act 2010.[31]

[27] *Teonea v Pule of Kaupule of Nanumaga*, above n 25, at [39].
[28] *Teonea v Pule of Kaupule of Nanumaga*, above n 25, at [35] to [38].
[29] *Teonea v Pule of Kaupule of Nanumaga*, above n 25, at [93].
[30] *Teonea v Pule of Kaupule of Nanumaga*, above n 25, at [132] to [134].
[31] Natalie Baird "Judges as Cultural Outsiders: Exploring the Expatriate Model of Judging in the Pacific" (2013) 19 Canta LR 80 at 93.

Finally, the judgement made an important point when mentioning how preserving Tuvalu custom is important but that it is subject to change over time. When customary practices, principles and tradition are codified in law it may acquire an explicit legal recognition which is even more fortified when that codifying document is a supreme constitution. But at the same time, such codification can separate the custom in law and the custom's actual meaning or practice in real life.[32] In that sense, the reasoning behind the Court of Appeal's judgement hits at the heart of how law can be disconnected with the local realities.

However, the narrative used in the judgement implying that some traditional notions are worth moving on from, deciding on how "Tuvaluan culture is not frozen in time"[33] or "Tuvaluans went out of their way to accept fundamental rights"[34] as well as the point on how this case was a matter of whether Nanumaga were to have four or five (or more) foreign-imported religions seems to miss the point of what Tuvaluans hoped to preserve by explicitly embedding in their constitution the protection of their values, culture and tradition to maintain social stability.

## *III Unpacking the quote*

The quote by the small states scholar is making a statement about what makes a law reform process suitable for small states considering their unique cultural and local settings that will ultimately cater for their needs. It is enveloping layers of important concepts that must be unpacked in order to apply it as a working hypothesis within the context of constitutional rights and custom. This section will uncover these important concepts and refine the quote to flesh out a hypothesis to test against the context.

The important concepts included in the quote are identified as 1) law reform, 2) reflecting cultural and local realities, and 3) the needs of small states. It is critical to understand the definition, character and scope of these concepts in order to create a hypothesis that can be appropriately applied to the discussion.

### *A What is law reform?*

[32] Law Commission, above n 7, at 43.
[33] *Teonea v Pule of Kaupule of Nanumaga*, above n 25, at [132].
[34] *Teonea v Pule of Kaupule of Nanumaga*, above n 25, at [133].

Law reform is a legal endeavour that is not exclusive to any state that is small or large, and often a key element in either driving or buttressing social change within societies. There is no settled definition for law reform but in essence is a process of improving the law in a substantive manner across various fields and subjects.[35] In this sense, law reform refers to activities that change the meaning of the law rather than changing its form through revision or consolidation.[36] In other words, changing or repealing a legal provision that is no longer applicable or impossible to apply because of its disconnect with the social realities would fall under law reform while combining provisions scattered across different pieces of legislation into a new Act would fall under consolidation.

For most states including small states, an independent law reform commission (LRC) dedicated for this task is established by law to lead the research and suggest recommendations on law reform. This form is described as a standard model for law reform and has been adopted by various small states including a number of small states that are part of the Commonwealth.[37] Small island states in the Pacific and the Caribbean have established independent law reform commissions with statutory basis to produce recommendations for law reform on a wide range of legal issues.[38] It is not, however, the only approach to law reform; it can take varying forms depending on the states' unique political or legal environment leading to either choose a statutory agency or an in-government option. But within the Pacific region, small states have chosen to adopt the standard model of having an independent statutory agency.

The recommendations of these independent law reform commissions aim to improve, clarify and develop the law for it to be effectively interpreted and applied to societies that are constantly evolving. Commissions undertake extensive legal research, consultations and policy work in order to provide the best available recommendations. Small states also often engage in comparative legal research to identify provisions that are desirable or in line with international best practices.

---

[35] Commonwealth Secretariat *Changing the Law: A Practical Guide to Law Reform* (Commonwealth Secretariat, London, 2017).
[36] Commonwealth Secretariat, above n 35, at 12.
[37] Commonwealth Secretariat, above n 35, at 29.
[38] Pierre Rosario Domingue (2019) "Institutional Law Reform in Small Commonwealth Jurisdictions" in AH Angelo, J Corrin (eds) *Small States: a collection of essays Volume XXIV* (New Zealand Association of Comparative Law, 2019) 3 at 5.

Based on the description, form and purpose of law reform elaborated above, its meaning in the hypothesis will correspond with a substantive change in law that is led and reviewed by an independent LRC with the intention to improve and develop the law so that it interacts with the society in a healthy way.

### *B What does "reflecting cultural context and local realities" mean for law reform?*

Cultural context as well as political, economic and social realities of a state are inseparable to its laws and legal system. This closely intertwined relation is not an exception for small states. Small states have shown that their unique features are embedded into the fabric of their legal systems. Samoa and the Solomon Islands, for example, have a separate Land and Titles Court and Customary Land Appeals Court that deals with legal disputes on customary land (and matters of custom in general for Samoa). The examples of these two small island states will continue to be used to illustrate how reflecting cultural context and local realities manifest in the law reform process in real life.

There are two ways cultural context and local realities can be reflected into the law reform process. First, LRCs are mandated by law to reflect the cultural context. In both cases of the Solomon Islands and Samoa, as well as other small jurisdictions that have LRCs, the Commissions are mandated by law either directly or indirectly to reflect and respect the local customs in performing its duties. For example, one of the required competencies for Commissioners in the LRC for the Solomon Islands is their understanding of Solomon Islands culture.[39] In Samoa, the Law Reform Commission Act 2008 includes a mandate to consider the custom and traditions of Samoa.[40] By doing so, LRCs not only target legal issues that are in need of reform due to its flaws, inappropriateness or ineffectiveness but also those that require reform because it does not adequately address the cultural context or fill the gap between the law and reality in terms of customary practices. In the Solomon Islands, its LRC reviewed the legal position on true ownership of land below the high water mark, rights of such land based in custom, and if in need of reform, how to change the law "to reflect the true aspirations of the people of Solomon Islands."[41] In Samoa, the review on legislating for the

[39] Law Reform Commission Act 1994 (Solomon Islands), s 3(3)(c).
[40] Law Reform Commission Act 2008 (Samoa), s 4.
[41] Solomon Islands Law Reform Commission *Review of the law that applies to the land below high water mark and low water* mark (SILRC Report, 2012), at 9.

VFA (which was briefly discussed in the second section) is another example that was conducted by the LRC of Samoa which aimed to reflect the evolving meaning and importance of traditional values against international human rights standards.

Another way to add such reflection in the law reform process, especially on issues that sits on the borderline between constitutional rights and traditional values, is public consultation. Given the importance of societal ties and cultural values for Pacific small states, the consultation stages are critical.[42] It is a chance for the LRC to investigate any inconsistencies between the law and how it is implemented on the ground, and an effective avenue for members of the society to register their opinions into the formal process. Consultation is also important for the law reform process in general because it entails civil rights, enables the commission to acquire information about the law in action on the ground and confers legitimacy as well as enhancing the reputation of the commission.[43]

Public consultations in the Solomon Islands' LRC report on land below the high water mark revealed mistrust against government at the local level in regard to dealings with traditionally established land.[44] Furthermore, its LRC found through the consultation process that the term 'customary land' does not fit with the general understanding of traditionally owned land that is below the high water mark and low-water mark which formed the recommendation that the legal term should be revised to 'tribal land' to reflect such social realities.[45]

In the example of the Samoa LRC's report on the VFA, consultation was an opportunity to hear about local realities that revealed critical discrepancies in the laws of the time. The LRC consulted with Village Fonos of all constituencies, women's committees, church communities and youth as well as receiving individual submissions when it reviewed the VFA in relation to freedom of religion.[46] Through consultations, the LRC identified among others that a lack of clarity on the scope of the Fono's authority to punish misconduct has led to arbitrary decisions; there were varying levels of punishment among villages on the ground which begged the need for a standard set of rules.[47]

[42] Domingue, above n 38, at 25.
[43] Commonwealth Secretariat, above n 35, at 108-109.
[44] Solomon Islands Law Reform Commission, above n 41, at 88-89.
[45] Solomon Islands Law Reform Commission, above n 41, at 17-18.
[46] Samoa Law Reform Commission, above n 10, at 10.
[47] Samoa Law Reform Commission, above n 10, at 24.

Examples of the Solomon Islands and Samoa reveal socio-legal issues that function as foundations for the traditional and cultural rules of small states' societies are exactly the issues that LRCs are tasked with and that they are mandated to do. This speaks to two parts of the quote. First, the concept of reflecting cultural context and local realities in the hypothesis refers to an LRCs purview to consider custom-related issues with cultural sensitivities and competencies, and involving the process of public consultation that discovers inconsistencies between the law and local realities as well as connecting with how the law is felt in the society in order to factor them in to its recommendations. Secondly, the unique feature of a society that places custom at its heart may determine its law reform through this exact process of mandating the LRC to consider customary values in its review.

### *C The needs of small states*

The final piece of the quote is related to the needs of small states; the quote describes that the unique features of each society will determine a law reform process that is suitable to the needs of small states. It would be critical to identify what the needs of small states are in order to test whether a law reform process determined by their unique circumstances would satisfy it or not. In order to begin delving into what small states need, their unique challenges are a good place to start as challenges can be a useful indicator that reveals their priorities for improvements across the political, economic, social, cultural and legal spheres.

Across the board, small states experience difficulties stemming from their constraints in size. Especially for most states that are categorised as small, they are small island developing states (SIDS) that are not only small in physical size but also in terms of political and economic scopes, and located in the remote regions in the Pacific and Caribbean.[48] Common challenges they face include susceptibility to natural disasters and climate change[49] as well as vulnerability to external economic shocks due to their dependence on exports.[50] Small states

[48] Among 50 members in the Small States Forum within the World Bank, two-thirds are consisted of island states compared to only five land-locked states.
[49] Carina Alcoberro Llivina "Small States and Regional Dispute Resolution Mechanisms: The Caribbean and Pacific Experiences" in P Butler et al. (eds) *Integration and International Dispute Resolution in Small States, The World of Small States 3* (Springer International Publishing AG, 2018), 27 at 37.
[50] Suzi Nandera "Small states, big trade challenges" (2017) 1 Int'l Trade F. 26 at 26-27.

also experience limited resources such as human and financial resources, expertise and corruption which build barriers for policymaking in small states.[51]

In terms of law reform, the challenges of small states are not very dissimilar. Domingue illustrates the challenges of law reform for small states as lack of financial and human resources, local expertise as well as limited capacity to develop a responsive law reform processes and foster trust among stakeholders.[52] It is evident that the general challenges of small states caused by their constraint in size affects other critical domestic legal activities such as law reform. Especially if the law reform agency were struggling to come up with a law reform process that is reflective of cultural and local settings, these challenges could be a significant barrier to its ability to produce a suitable result in law reform for small states as the quote suggests.

An element that can significantly influence a law reform agency's capability to effectively deal with such challenges is funding. Funding is an important issue for law reform agencies in general but one that is magnified in small states. Funding for government activities in small states are often dependent on foreign development aid which could be a double-edged sword – aid allows law reform agencies to do their job in improving the law but at the same time could fall into the trap of being used by governments to attract aid rather than acknowledging the role of the agency for its independent work.[53] As this funding usually goes through the approval of parliaments, the LRC is under several layers of pressure: from overseas, the parliament (which includes the government) to the public, they are all sources of feedback that the LRC is a recipient to. This creates an increasingly difficult working environment when combined with limited staffing and expertise to rely on.

Applying these challenges to the tension between constitutional rights and custom, limited financial resources and local expertise could be a painful barrier to develop the necessary skills to compare and weigh the two as well as engage in effective public consultation. This would not only have potential to alter the law reform process but also affect the quality of the recommendations of the LRC in its attempt to harmonise constitutional rights and customs or

[51] Stacy-ann Robinson "Mainstreaming climate change adaptation in small island developing states" (2019) 11 Climate and Development 47 at 53-54.
[52] Domingue, above n 38, at 6-9.
[53] Commonwealth Secretariat "Law reform in small states" (2018) 44 CLB 721 at 723, 728.

bridge the gap between relevant laws and local realities. To mitigate or overcome such challenges, small states would need innovative ways for an optimal utilisation of given resources as well as resilience to the multiple layers of pressure to retain its independence.

To combine with what has been unpacked, the hypothesis will incorporate the following underlying caveats:

- *A law reform led by an independent agency*
- *Determined by unique features of that society*
- *Would achieve optimal utilisation of given resources and resilience against multi-layered pressure to retain its independence*
- *By reflecting cultural context and local realities in its law reform process.*

## *IV Application (Analysis)*

Unpacking the important concepts of the quote in the previous section has enabled a more in-depth understanding of what the message it implies and allowed a calibrated hypothesis to be formed. The hypothesis can be broken down into two parts:

- *A suitable law reform process must reflect the cultural context and local realities of the small state; and*
- *The unique features of each society determine the law reform process that is suitable for their needs.*

In order to test the hypothesis, this section will use a set of questions:

- *Is law reform an adequate way to address the tension between constitutional rights and custom? If so, can only the unique features of each society determine a law reform process that suit the needs of small states?*
- *By addressing the tension between constitutional rights and custom through a law reform process that reflects cultural context and local realities, are the needs of small states satisfied?*

### *A Is law reform an adequate way to address the tension between constitutional rights and custom? If so, can only the unique features of each society determine a law reform process that suit the needs of small states?*

Legal tension between constitutional rights and custom are revealed mostly through cases that are brought before the courts. And when the ruling is out, these cases may function as litmus

tests to see where the society stands over the course of time among the uneasy balance between human rights and custom. In that sense, court cases are a good opportunity to pick up legal tensions that are potential areas in need of reform. It also provides an opportunity for the courts to compare and contrast with foreign jurisprudence in order to clarify where the law is unclear.

But there are limitations to the role of the courts in dealing with issues of constitutional rights and custom for mainly two reasons. First, the courts can only apply existing laws. Tension between constitutional rights and custom or inconsistencies between the law and local realities may be brought to light by court cases but it is not the role of courts to fix them.[54] Second, it is common to have a bench of foreign judges in the highest courts of small island states, especially in the Pacific, where these cases are heard. The issue with foreign judges in the context of constitutional rights and custom is that they often lack the cultural competencies to weigh the two appropriately and could end up putting weight on either constitutional rights or custom out of proportion.[55] Moreover, foreign judges tend to bring standardisation that may support their impartiality but risk disregarding traditional customs which may produce judgements in disconnect with the society's understanding of the law.[56]

Although it cannot be said all circumstances where constitutional rights and custom do not harmonise require law reform but leaving the issue to the courts alone is not an adequate way to deal with this uneasy relationship, especially if customary values are codified in the Constitution and can be left insulated from the changes on how the society is accepting them.

In this regard, law reform as to the meaning refined in the third section – institutional law reform – has potential to make positive contribution. The New Zealand Law Commission report points out how LRCs in the Pacific specifically refer to custom in their statutes which clearly shows that custom in their legal systems is a key issue.[57] It also suggests that activities by LRCs into matters of custom could improve situations in some Pacific small states where societies are less inclined to engage more with the state legal system.[58] As a

[54] Peter MacFarlane and Chaitanya Lakshman "Law reform in the South Pacific" (2005) 9 JSPL 1 at 1.
[55] Baird n 31, at 93.
[56] Anna Dziedzic "Foreign judges of the Pacific as agents of global constitutionalism" (2021) 10 GlobCon 351 at 365.
[57] Law Commission, above n 7, at 228.
[58] Law Commission, above n 7, at 229.

result, law reform by an LRC can be understood as one of the most prospective options to find a desirable balance between constitutional rights and custom.

Then if law reform *is* an adequate way to address the tension between constitutional rights and custom, are the unique features of each society the only factors that can make the law reform process suitable for the needs of small states? It has been noted through the examples of the Solomon Islands and Samoa that unique features may have a determining effect on law reform. But does that mean only such law reform is suitable to the needs of small states?

The needs of small states will be discussed more in detail by answering the next question, but to give a short answer, it is answered in the negative mainly because although such unique features do play a significant role in shaping the ways of life and understanding of their laws, commonalities of the LRCs in small states can be more important than their variances.[59] It has been noted in the 2000s that Pacific LRCs were established in law but had little presence in their actual activities;[60] but this has changed. The LRCs of Fiji, the Solomon Islands, Vanuatu, Papua New Guinea and Samoa have been actively reviewing their laws in order to connect the law to the realities of their societies.[61] As the argument for a regional approach goes[62], exchange of findings on their recent activities will not be of little value.

On this note, it should be mentioned that this paper will not explore further into the regional approach because the hypothesis sets the scope for institutional law reform reflecting cultural context and local realities of small states in their domestic settings thus placing the second question squarely into focusing on a domestic law reform process that can address the needs of small states.

### *B By addressing the tension between constitutional rights and custom through a law reform process that reflects cultural context and local realities, are the needs of small states satisfied?*

This question is the most critical in terms of testing the hypothesis as it touches upon the key concepts in the quote and its answers will challenge whether the quote as a whole is

[59] Domingue, above n 38, at 29.
[60] McFarlane and Lakshman, above n 54, at 2; Law Commission, above n 7, at 228.
[61] Domingue, above n 38, at 32-35.
[62] McFarlane and Lakshman, above n 54, at 4.

applicable to the context of constitutional rights and custom. Recalling that the needs of small states are to discover innovative ways to overcome challenges through optimal utilization of limited resources and resilience to protect its independence, this paper argues for the answer that a law reform process that reflects cultural and local elements *can* achieve this in the context of addressing the tension between constitutional rights and custom.

The process of law reform is an opportunity to add legal expertise with the engagement of the public to improve the law and legal system of a country. The relationship between human rights and custom is an issue that is directly linked to the evolution of society and its values which is particularly a delicate issue for the law reform process. If the law reform process observes its mandate to adequately harnesses responsiveness to such societal changes, it has full potential to become a solution for small states to strengthen resilience against not only the pressure of government or foreign donors but also in harmonising foreign or evolving concepts and values with traditional measures that are fundamental to their societies. However, if it falls short in any of the two conditions – the law reform process itself or how cultural and local contexts are reflected – while the society continues to evolve, the result could be disastrous.

The constitutional reform process of Samoa in 2020 will be used as a case study to show where the law reform process and reflecting cultural and local elements do not meet the level as described in the hypothesis, it not only fails to address their needs but also result in social disharmony and controversy that is neither helpful for the preservations of constitutional rights nor custom.

*Background*

In March 2020, then Prime Minister Tuilaepa Malielegaoi introduced three bills in Parliament that would amend the Samoan Constitution and reform the court system. The Constitution Amendment Bill 2020, Land and Titles Bill 2020 and the Judicature Bill 2020 proposed changes particularly around the LTC and constitutional arrangements regarding the LTC. Key changes proposed by the bills were to create a new appellate court with "supreme authority over the subject of Samoan customs and usages"[63] transforming the LTC into a three-tiered

[63] Constitution Amendment Bill 2020 (Samoa), cl 6.

system, require all courts of Samoa to consider custom in their judgements and the Court of Appeal to have at least two Samoan judges.

At the time, the LTC was a two-tiered system, with an appellate body that heard original cases from the LTC but enabled cases to be moved up to the Supreme Court if constitutional rights were deemed to be involved in its decisions. It also has exclusive jurisdiction over custom and its usage including matters of customary land and matai titles which are explicitly mentioned in the Constitution. The *Peania II v Land and Titles Court* case in the second section is one of the cases that were originally reviewed by the LTC but moved on to be reviewed by the Supreme Court, and later the Court of Appeal, because of its relevance with constitutional rights.

*2019 Samoa Law Reform Society Report*

The reason the government initiated these reforms was because of signs that the LTC system was inadequate coupled with its view that customs did not have the standing in the Constitution as it deserved. The government in commissioned in 2016 a special parliamentary committee to look into the rules and procedures of the LTC. The committee's report found that the reasons for public frustration against the LTC were mostly related to the performance of judges such as bias caused by judges' connection to cases, unprepared judges, as well as other issues such as adjournment of cases and continuous requests of appeals.[64]

But it was in 2019 when custom was discussed as a key component in reviewing the LTC. The Samoa Law Reform Commission (SLRC) was directed by the government to review and research on how custom and its usage can be recognised and protected under the Constitution, and how the LTC can be an autonomous court apart from formal courts.[65] In the review, the SLRC stated that it found the Constitution mentions too little about Samoan custom[66] and "western principles and values prevail over customary principles and values" leading to "very little recognition of customary context and laws of Samoa" in court judgements.[67] The report concluded with recommendations such as elevating the status of the

[64] Special Inquiry Committee on Lands & Titles Court *Report of the Special Inquiry Committee: Land & Titles Court Matters* (2016), at 14.
[65] Samoa Law Reform Commission *FETUUNAI MUNIAO LIPOTI O SUESUEGA GALUEGA FAATINO 1* (2019), at 3.
[66] Samoa Law Reform Commission, above n 65, at 7.
[67] Samoa Law Reform Commission, above n 65, at 12.

LTC and its president to be equal to the Supreme Court and the Court of Appeal[68], and appointing Samoan judges at the Court of Appeal to prevent a bench of only foreign judges having the final say on cases involving Samoan values[69]. It also hints at an amicable reception to an idea of establishing a new judicial framework that puts the LTC as the final court of review for cases concerning custom among others to set up the LTC as independent from other formal courts.[70]

Such findings and recommendations were largely picked up by the government. In December 2020, the amendment bills were passed. However, these amendments drew severe public backlash and criticisms as well as social division.

*Criticism*

Pushback on the amendments were mainly around four areas: lack of protection for constitutional rights, executive overreach, failure to address systematic problems of the LTC and limited public consultation. By creating a supreme appellate court in the LTC system, it effectively removed the Supreme Court's role in reviewing the involvement of constitutional rights in custom-related cases. Rights to fair trial, right to personal liberty, freedom of religion are the most frequently argued constitutional rights in appeals from the LTC[71] – but through the amendment, the Supreme Court effectively loses its ability to review constitutional rights in any case viewed by the LTC.[72]

What this also means is that there will be no apex court to have the final say. Then Chief Justice Vui Clarence Nelson, all other Justices of the Supreme Court and judges of the District Court co-signed a letter addressed to the Prime Minister stating grave concerns that "[a]ny structure that separates the interpretation and protection of Constitutional rights between two Court systems is in our respectful view flawed, unworkable and carries significant inherent risks".[73] The New Zealand Law Society also expressed its concern for the

[68] Samoa Law Reform Commission *FETUUNAI MUNIAO LIPOTI O SUESUEGA GALUEGA FAATINO 2* (2019), at 10.
[69] Samoa Law Reform Commission, above n 68, at 17.
[70] Samoa Law Reform Commission, above n 68, at 26.
[71] Samoa Law Reform Commission, above n 68, at 15.
[72] Constitution Amendment Bill, above n 63, cl 4.
[73] Radio New Zealand "Judges warn Samoan govt about judicial reform" (13 April 2020) RNZ Pacific < https://www.rnz.co.nz/international/pacific-news/414135/judges-warn-samoan-govt-about-judicial-reform>.

rule of law and the hierarchy of courts which are at risk by the proposed changes to the LTC.[74]

Secondly, a transfer of authority to remove judges to the Judicial Services Committee where a majority of its members are appointed by the executive is seen as a concerning issue. The Australian Law Society pointed out how the government can use stronger leverage over the judiciary which also went hand in hand with other criticisms accusing the LTC of becoming a "fourth branch of government".[75] Moreover, it failed to address systematic problems raised from the beginning such as the frustrating backlog, high level of appeals or the performance of judges.[76]

Lastly, the lack of open consultation about the changes was an acute point of criticism. The report was about strengthening custom and traditional values in Samoa's legal environment, except that it was done without adequate procedures to reflect what was actually felt by society. The 2019 report only interviewed a small number of unnamed members of the judiciary and public consultation mandated by the Law Reform Commission Act 2008 was not conducted[77]. The Samoan Law Society (SLS) led a strong public response on demanding a public consultation process which resulted in a parliamentary select committee process in May 2020; despite making progress, the SLS pointed out that it was a secretive process that lacked transparency.[78]

*What went wrong?*

Samoa's constitutional reform initially aimed to improve the status and efficacy of the LTC through law reform with a particular focus on strengthening custom in its laws. The government saw that the fundamental reason for the lack of performance of the LTC was deriving from the weak standing of custom in Samoa's legal system and tasked the law

[74] Tiana Epati "Serious concerns raised about constitutional law changes in Samoa" (4 May 2020) New Zealand Law Society Legal News <lawsociety.org.nz/news/legal-news/serious-concerns-raised-about-constitutional-law-changes-in-samoa/>.
[75] Anna Dziedzic "Debating constitutional change in Samoa" (5 May 2020) The Interpreter <https://www.lowyinstitute.org/the-interpreter/debating-constitutional-change-samoa>.
[76] Dziedzic, above n 75.
[77] Law Reform Commission Act 2008 n 40, art 6(d).
[78] Radio New Zealand "Samoa govt approach to dialogue on bills "secretive" says Law Society" (21 May 2020) RNZ Pacific <https://www.rnz.co.nz/international/pacific-news/417135/samoa-govt-approach-to-dialogue-on-bills-secretive-says-law-society>.

reform commission to make recommendations. However, a juxtaposition of the quote and questions in this section with Samoa's case reveals that none of the conditions were adequately met. The law reform process was not adequately set up, it was unresponsive to local circumstances and thus ended up failing to address the needs of Samoa as a small state.

Main reasons why constitutional reform drew an unwelcomed result come down in three characteristics. First, the reform was by-and-large government-led. The 2019 SLRC report was based on a government directive that handed down specific terms of reference on custom and the LTC. The aim of having a statutory agency dedicated to law reform is to increase the independence of the agency as well as to maximise the benefit from research conducted by legal experts. Despite the SLRC having that ability to conduct such independent research, this constitutional reform was largely overtaken by the executive and its intentions for seeking reform. Following these terms, the SLRC focused its research on *how* to enhance the legal status of custom rather than *why* this is a solution to the problems of the LTC and how a reformed framework could harmonise with other courts of general jurisdiction.

The law reform process also was unresponsive to local realities. There is a difference from *knowing* the cultural and local contexts and *considering* them. Samoa's case illustrates not that the executive or the SLRC was short in knowledge of Samoa's custom or its usage but that it did not open an adequate avenue for their input. As mentioned above, the reform process was critically lacking in responding to public feedback and conducted a low-key parliamentary select committee review only after it was publicly criticised. Problems found at the local level and mentioned in the 2016 report remain unaddressed. Considering that 80% of the land in Samoa is customary land, the reform process did not put in place necessary measures to hear local grievances for laws that has widespread consequences.

There are three observations that can be drawn from Samoa's case. First, the law reform process should first and foremost strive to be as independent as possible. Maintaining its independence is not an easy task structurally (terms of reference and implementing recommendations are decided by the government) or logistically (lack of financial and human resources) but should be a goal constantly on the minds of LRCs. Second, *how* cultural and local elements are reflected is as important as the process itself. Although consultation

defining the law reform process may not be desirable[79], the purpose of public input cannot be properly satisfied by simply having the process in place. Lastly, presenting constitutional rights and custom as conflicting, and that protecting or enhancing one will diminish the other as the likes of a zero-sum game, risks disregarding the chance to find an alternative that promotes both. If a 'marriage' between human rights with indigenous customs has effected once before[80], there is plenty possibility it may happen again.

These observations lead to the conclusion that if law reform does not adequately reflect cultural and local elements in its processes, the consequences will include major disruption not only in the society but also in achieving its needs – building resilience against the pressures from scarce resources and external forces as well as finding a way to best use the given resources. Therefore, to return to the question, it would be possible to answer that a law reform process that does not reflect cultural context and local realities will not satisfy the needs of small states.

## *V Conclusion*

The issue of constitutional rights and custom is a long-term issue for small states. Custom is a record and reflection of how these small societies have lived and survived throughout history – giving a sense of belonging and identity – but a constitution is a symbol of the choice that is made by that society to rebuild their nation in a changing world. Because both constitutional rights and custom are deeply embedded in everyday lives of everyone in the society, a friction between them can cause an amplification of challenges that small states already suffer from. These challenges do not discriminate the legal sphere from other political, economic or social spheres.

The selection of judicial proceedings in this paper provides a glimpse of the legal side of how these societies are in the process of finding a path that embraces both sides. For now, they may manifest in the shape of conflict or tension – but this does not define the core of the relationship. Constitutional rights and custom are not mutually exclusive and can be promoted in the same direction when given a chance.

---

[79] Commonwealth Secretariat, above n 35, at 110.
[80] *Piteamoa Mauga & Ors v Fuga Leituala*, above n 14, at 10.

The purpose of law reform is to change the law where it is no longer befitting of the direction a society is evolving. This process is independent but receptive to the cultural norms and realities of society and how law affects the lives of that society's members. This makes law reform a desirable tool in driving an approach that aims to harmonise constitutional rights and custom. It would be critical to ensure that the law reform process remains independent, reflective of cultural context and local realities in a principled and faithful way in order to deal with both the challenges of small states the long-term problem of tension between constitutional rights and custom. If these conditions are not met, the result can lead to social polarisation and sub-optimal use of valuable resources small states cannot afford in an already burdensome environment.

## VI Bibliography

### *A Cases*

*1 Samoa*

*Italia Taamale v Attorney-General* [1995] WSCA 1.

*Penaia II v Land and Titles Court* [2012] WSCA 6.

*Piteamoa Mauga & Ors v Fuga Leituala* [2005] WSCA 4.

*Punitia v Tutuila* [2014] WSCA 1.

*2 Tuvalu*

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

### *B Legislation (including Bills)*

*1 Samoa*

Constitution Amendment Bill 2020 (Samoa).

Constitution of the Independent State of Samoa 1960.

Land and Titles Act 1976 (Samoa).

Law Reform Commission Act 2008 (Samoa).

Village Fono Act 1990 (Samoa).

*2 Kiribati*

Constitution of Kiribati 1979.

*3 Federated States of Micronesia*

Constitution of the Federated States of Micronesia 1975.

*4 Republic of Fiji*

Constitution of the Republic of Fiji 2013.

*5 Solomon Islands*

Law Reform Commission Act 1994 (Solomon Islands).

## *C Articles*

Natalie Baird "Judges as Cultural Outsiders: Exploring the Expatriate Model of Judging in the Pacific" (2013) 19 Canta LR 80.

Commonwealth Secretariat "Law reform in small states" (2018) 44 CLB 721 at 723.

Pierre Rosario Domingue (2019) "Institutional Law Reform in Small Commonwealth Jurisdictions" in AH Angelo, J Corrin (eds) *Small States: a collection of essays Volume XXIV* (New Zealand Association of Comparative Law, 2019) 3.

Peter MacFarlane and Chaitanya Lakshman "Law reform in the South Pacific" (2005) 9 JSPL 1.

Suzi Nandera "Small states, big trade challenges" (2017) 1 Int'l Trade F. 26.

Stacy-ann Robinson "Mainstreaming climate change adaptation in small island developing states" (2019) 11 Climate and Development 47.

## *D Texts (including Chapters in Books)*

Commonwealth Secretariat *Changing the Law: A Practical Guide to Law Reform* (Commonwealth Secretariat, London, 2017).

Carina Alcoberro Llivina "Small States and Regional Dispute Resolution Mechanisms: The Caribbean and Pacific Experiences" in P Butler et al. (eds) *Integration and International Dispute Resolution in Small States, The World of Small States 3* (Springer International Publishing AG, 2018), 27.

## *E Reports*

Law Commission *Converging Currents: Custom and human rights in the Pacific* (NZLC SP17, 2006).

Samoa Law Reform Commission *Village Fono Act 1990* (SLRC R9/12, 2012).

Samoa Law Reform Commission *FETUUNAI MUNIAO LIPOTI O SUESUEGA GALUEGA FAATINO 1* (2019).

Samoa Law Reform Commission *FETUUNAI MUNIAO LIPOTI O SUESUEGA GALUEGA FAATINO 2* (2019).

Solomon Islands Law Reform Commission *Review of the law that applies to the land below high water mark and low water* mark (SILRC Report, 2012).

Special Inquiry Committee on Lands & Titles Court *Report of the Special Inquiry Committee: Land & Titles Court Matters* (2016).

## *F Internet materials*

Anna Dziedzic "Debating constitutional change in Samoa" (5 May 2020) The Interpreter <https://www.lowyinstitute.org/the-interpreter/debating-constitutional-change-samoa>.

Anna Dziedzic "Foreign judges of the Pacific as agents of global constitutionalism" (2021) 10 GlobCon 351.

Tiana Epati "Serious concerns raised about constitutional law changes in Samoa" (4 May 2020) New Zealand Law Society Legal News <lawsociety.org.nz/news/legal-news/serious-concerns-raised-about-constitutional-law-changes-in-samoa/>.

Radio New Zealand "Judges warn Samoan govt about judicial reform" (13 April 2020) RNZ Pacific <https://www.rnz.co.nz/international/pacific-news/414135/judges-warn-samoan-govt-about-judicial-reform>.

Radio New Zealand “Samoa govt approach to dialogue on bills "secretive" says Law Society” (21 May 2020) RNZ Pacific <https://www.rnz.co.nz/international/pacific-news/417135/samoa-govt-approach-to-dialogue-on-bills-secretive-says-law-society>.

The World Bank (Last Updated 5 October 2021) Country Group Small States Overview < https://www.worldbank.org/en/country/smallstates/overview#1>.