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WHEN CUSTOM BECOMES LAW:
Re-approaching Land Tenure through Recent Anthropology and the Cook Islands Land Titles Court

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Contents

Abstract

This paper uses the current debate about the role of custom in determining the future of land tenure in the Cook Islands as an entry-point for a historiography of the recognition of indigenous land tenure by an imposed legal system. First, this paper develops a theoretical approach drawn from new developments in anthropology and its understanding of colonialism. Second, it argues for an alternative conception of Cook Islands cosmology as it relates to land and the natural world. Finally, it examines how this cosmology was subsequently circumscribed into a narrow framework of possibility by the establishment of a Land Court in 1902. Taken together, the paper aims to destabilize the coordinates of contemporary debates about the role of custom and tradition in the future of land law in the Cook Islands in the interests of opening up new possibilities and approaches.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 7430 words.

Subjects and Topics

Cook Islands-Land Tenure-Customary Law-Legal Anthropology-Legal History

> [I]n the 15th and 16th centuries a bunch of indigenous intellectuals and artists in Europe got together and began inventing their traditions and themselves by attempting to revive the learning of an ancient culture … which they did not fully understand, as for many centuries this culture had been lost…
>
> What else can one say about it, except that some people have all the historical luck? When Europeans invent their traditions – with the Turks at the gates – it is a genuine cultural rebirth, the beginnings of a progressive future. When other peoples do it, it is a sign of cultural decadence, a factitious recuperation, which can only bring forth the simulacra of a dead past.
>
> On the other hand, the historical lesson could be that all is not lost.
>
> \- Marshall Sahlins, 2002[1]

I Introduction

Proper recognition of customary practices in the practice of a formal, Courts-based judiciary is a problem that gets to the heart of the traditional tension between the descriptive and prescriptive functions of the law. The relationship between law and society has undergone a great deal of revision in recent years, and at the heart of that project has been the difficult problem of "the appropriate place or positioning of the normative within our current understanding of social life and its reproduction."[2] That is, how does one make rules that satisfy the needs of both the general and the particular?

This question is at the heart over contemporary debates regarding systems of land tenure in the Cook Islands. The Cook Islands are an archipelago of fifteen little islands scattered between Tonga and Samoa whose principal resources are the soil and the sea – due to the lack of any valuable mineral resources.[3] This meant disinterest from the great powers, which delayed formal incorporation into empire until 1888, when they became a protectorate of the British Empire to ward off the French, though missionary contact since 1823 had already began to fundamentally change the composition and characteristics of

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1 Marshall Sahlins, 2002, *Waiting for Foucault, Still* (Chicago: Prickly Paradigm Press) at 3-5.

2 Tim Murphy, 1997, *The Oldest Social Science* (Oxford: Clarendon Press) at 6.

3 Ron Crocombe, 1969, *Land Tenure in the Cook Islands* (Oxford: Oxford University Press) at 3-4.

culture and society on the islands.[4] From 1888 onwards, the Cook Islands were an on-and-off target of New Zealand imperial desires in the Pacific, the argument for which:[5]

> [G]enerally took the form of claiming at New Zealand's successful administration of the Maoris qualified her rulers to undertake the government of the Samoans, the Tongans and other Polynesian peoples.

This claim that New Zealand had developed successful techniques for governing native peoples at the turn of the century would incite a great deal of resistance from historians today. But nevertheless, a system of dealing with land tenure and disputes loosely modelled on the Native Land Courts of New Zealand was exported to the Cook Islands in 1902. Today, it is clear that:[6]

> [T]he Cook Islands have from the commencement of the court system in 1902 down to the present time made determinations on customary law in the absence of evidence as to what pre-Christianity indigenous customary law was.

Debates and disputes about land use and ownership today are tainted by this idea that the law has misinterpreted custom, and reformist agendas either advocate its abandonment or redefinition and yet still fail to build consensus on what customary rights to land are and mean. This paper is intended as an intervention into this debate.

At the core of this study's argument is that new theoretical directions in anthropology can bring to light tensions between the law and indigenous custom that have been hitherto unseen. Far from advocating the content of an authentic Cook Islands cultural program, this paper simply examines what may have been lost in translation in the introduction of a formal legal system to the Cook Islands at the turn of the century.

To do so, this study begins by examining the "invention of tradition" problem in the Cook Islands and links this to developments in social theory to suggest a new program for legal

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4 Dick Scott, 1991, *Years of the Pooh-Bah*, (Rarotonga: Cook Islands Trading Corporation Ltd), 13-22.

5 Conal McCarthy, 2016, 'Two branches of the brown Polynesians': ethnographic fieldwork, colonial governmentality, and the 'dance of agency' in Katie Pickles and Catharine Coleborne (eds) *New Zealand's empire* (Manchester: Manchester University Press) at 53.

6 Ron Crocombe and Ross Holmes, 2014a, *Pre-European Southern Cook Islands Customary Law, History and Society* Volume 1, (Rarotonga: The Cook Islands Library and Museum Society Incorporated; Auckland: Ross Holmes) at 15.

anthropological research into indigenous land tenure. Second, it examines the extant sources of evidence as to custom and suggests areas in which it may have been misinterpreted. Finally, it conducts a brief historiography of the birth of the Cook Islands Land Court in 1902, against the backdrop of the contemporary history of land registration elsewhere. Taken together, these elements suggest that this ground-up approach to the legal recognition of custom may allow for new approaches to law reform in the Cook Islands and elsewhere.

II Re-approaching the "Invention of Tradition" and Customary Land Tenure in the Cook Islands

A Customary law and land tenure in the Cook Islands: contemporary issues and challenges

At least since it gained its independence in 1965, interpretation of custom has been in many ways the defining legal issue in the Cook Islands. This is true most of all for land tenure; anchored by the Courts in a formalised, legal understanding of genealogical claims to title which has often resulted in the awarding of "title in common to all children of a previous owner, thus creating excessive fragmentation of ownership"[7] which only increases as each new generation succeeds. Fragmentation of title is so extensive today it no doubt seems ridiculous to the outside observer. As an illustration, a 2008 Australian Department of Foreign Affairs and Trade (DFAT) study investigated 6 plots of land in Avarua, Rarotonga, finding that – from the 38 original owners formally awarded the title in 1908 – there were 1019 owners registered in 2005, or roughly 170 per section.[8] The authors estimate that, given accurate records, this recognition of 'customary' title could mean up to 70 or more owners per household in the Cook Islands generally.[9] This problem of unrestrictedly tying title to cognatic descent is compounded by the fact that many owners are not resident in the Cook Islands, and in some cases aren't even aware that they have succeeded to land interests.[10]

Fragmentation of title is not the only grievance with the Courts' handling of land tenure. Throughout the last century, discontent with the Courts was palpable as the Cook Islands

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7 Ron Crocombe, 1987, 'The Cook Islands: Fragmentation and Emigration' in Ron Crocombe (ed) *Land Tenure in the Pacific* (Suva, Fiji: University of the South Pacific, 1987) at 60; this practice of equal succession for all children was formalised in 1957 by the Appellate Court, which sought to recognise 'the principle of Maori custom that all children inherit equally', being the New Zealand Maori custom: Appellate Court Minute Book 3 at 10.

8 Ron Crocombe, Makiuti Tongia & Tepoave Araitia, 2008, '8: Absentee landowners in the Cook Islands: consequences of change to tradition' in *Making Land Work* 2 (Canberra: DFAT) at 161.

9 Above n 8, at 162.

10 Today, the practice of the High Court tends to approach the problem of obtaining consent for matters relating to land from overseas landowners through an interpretation of 'consent being reasonably withheld' in cases where landowners cannot be contacted: see, for example, Isaac J in *Teaure Section 14B, Matavera* (2015) Cook Islands High Court (Land Division), [N.R.]. However, cases abound of the problems of service to absentee landowners, often achieved through New Zealand or Australian newspaper notices or by serving someone else on the Islands who is in regular contact:

transitioned into self-government but it did not translate into a serious agenda for land reform. This was due to differences of opinion arraigned across a number of axes. People of chiefly rank in the Cook Islands overwhelmingly "considered that their rights [to land] had been whittled away by the Court" while 'commoners' opposed any further increase in chiefly land rights.[11] More tellingly, the public debate over land reform is framed in terms of custom and tradition, with difficulties being assumed to arise from having 'left the old customs' and:[12]

> [A]s the public normally seek solutions to what they consider traditional precedents, those advocating reform phrase unprecedented changes in terms of hallowed aphorisms drawn from old Polynesian lore or from equally sacrosanct biblical sources.[n5]

Characteristic of this debate in the Cook Islands, and indeed elsewhere in the Pacific, are divergent interpretations of ancient customs and traditions. The work of eminent Pacific Studies scholar Ron Crocombe (which is authoritative and singular in its depth on this subject) takes the view that the lack of a comprehensive reformist approach to the problems revolving around land tenure in the Cook Islands is caused by this continual hearkening back to murky ideas of tradition:[13]

> It was widely felt that the existing problems would be relieved by a return to the traditional system of land tenure, but views about its nature were diverse and conflicting, and were, in most cases investigated, related to the gains that would accrue to the speaker by their adoption.

B The 'Invention of Tradition'

This is a light-touch edition of the scholarly trend which Marshall Sahlins mocked in the epigraph to this paper: the 'invention of tradition' critique. There are two strands to the double-helix of this 'invention of tradition' critique. The first is temporal, in that reference

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11 Crocombe, above n 2, at 61-62. In a 1995 parliamentary debate, Leader of the Opposition Dr Terepai Maoate remarked: "As soon as the Land Court was introduced here in the Cook Islands, particularly here in Rarotonga, the laws that were established on land slowly weakened the strength that the Ui Ariki used to have power over their lands. If we are not careful with things we do, sooner or later we will find that our traditional leaders will have no power on their lands or it will end up, they will have equal rights with the rest of the family" Cook Islands Parliamentary Debates Hansard Volume No 3, Tuesday 7th November 1995 (Avarua: Cook Islands Government, 1996).

12 Crocombe, 1969, above n 2, at 63.

13 Crocombe, 1969, above n 2, at 62.

to tradition causes social "stagnation, discord and conflict"[14] because it is regressive rather than progressive. Old rules do not apply to new situations. The second relates to the inauthenticity of summoning the past, the literal 'invention' of tradition, where the past is used to cynically endorse political action in the present. The classic conception is that of Eric Hobsbawm and Terence Ranger in the book *Invented Traditions:*[15]

> 'Custom'… has the double function of motor and fly-wheel. It does not preclude innovation and change up to a point, though evidently the requirement that it must appear compatible or even identical with the present imposes substantial limitations on it. What it does is to give any desired change (or resistance to innovation) the sanction of precedent, social continuity and natural law as expressed in history.

In sum, cultures are incoherent in that they are constantly changing, such that "one can never step in the same culture twice"[16] and therefore scepticism is warranted of any attempt to use the custom of the past to redefine the conditions of the present or the future.

Further, this critique presupposes that cultures are distinct from the material circumstances they inhabit and respond to; that is, they derive from and change in response to external circumstances. This stipulates that culture change is a pragmatic phenomenon that responds to challenges that spring out of resource allocation in an environment of scarcity – or, in other words, economic challenges. Of the usefulness of old customs for contemporary economic challenges in the Cook Islands, Crocombe wrote:[17]

> In fact, the pre-contact system was characterised by chronic land disputes and warfare involving land. […] There are indeed lessons to be learned, both positive and negative, from the past, but only a few of the leading politicians seem to be sufficiently aware that the problems of today and tomorrow have no earlier precedent, and that traditional models are of limited value in the context of radical political and economic changes.

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[14] Wolfgang Kasper, 2005, 'How to learn racial harmony?' *Fiji Old Farts* (blogspot, October 20) URL: <http://fijioldfarts.blogspot.co.nz/2005_10_01_archive.html>. Kasper is Emeritus Professor in Economics, UNSW. The full quote is: "If people want economic development and continuing social harmony, they cannot always cling to inherited institutions. Indeed, clinging indiscriminately to tradition condemns people to stagnation, discord and conflict — and no amount of foreign aid can remedy the self-inflicted hurt."

[15] Eric Hobsbawm and Terence Ranger (eds), 1992, *The Invention of Tradition* (Cambridge: Cambridge University Press) at 2.

[16] Sahlins, 2002, above n 1, at 7.

[17] Crocombe, 1987, above n 7, at 63.

The pragmatic focus of this critique is exemplified by the DFAT study, of which Crocombe was a co-author, which has the stated aim of "reconciling customary ownership and development".[18] It shapes its analysis of the problem of fragmentation under the land title system to the outcomes it produces in terms of land use and cultivation (in the sense of unused land being negative) and the barriers to investment that form when multiple owners have diminished returns for alienating their land purely by virtue of the number of times such revenue must be divided and shared.[19] This is an obvious effect of its location inside a development paradigm.

C The culture/nature debate and a new direction in anthropology

The material basis of culture ("culture/nature") has been the locus of a raging debate that has persisted in anthropology at least since the work of Franz Boas explicitly challenged cultural evolutionism of Louis Henry Morgan,[20] by advocating an approach where "the facts that may have been at work in shaping the culture of mankind" are found not in the "imposition of culture by a more highly civilized people upon one of lower culture" nor can they be aligned on a single spectrum, for "[e]ven the most cursory review shows that the same phenomena may develop in a multitude of ways."[21] To temper this to the culture/nature problem, the revelation of Boas was that although human beings have the same faculties and often operate in similar environments, they develop in different ways. What had been a project of arranging cultures on a universal spectrum between savagery and civilisation became, in a burgeoning school of thought, the enormous comparative project of cultural anthropology which explored cultural *difference* rather than *development*.

This change of approach had repercussions for the understanding of indigenous land tenure. As Richard Boast argues, this anthropological revolution which recognises the boundedness and independence of cultures meant that:[22]

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[18] Crocombe, 1969, above n 3, at 153.

[19] Crocombe, 1987, above n 7, at 60.

[20] The belief – closely aligned to modernisation theory – that cultures "evolve" through a series of stages towards civilisation and thus different cultures were evidence of different "stages" of evolution. See Richard Boast, 2016, 'Land, Custom, and Ideology 1870-1940: The New Zealand Case in Global Context' *Adelaide Law Review* 37, 325-368.

[21] Franz Boas, 1896, 'The Limitations of the Comparative Method of Anthropology' *Science* IV(103) pp. 901-908, URL: <https://collections.nlm.nih.gov/ext/dw/101484863/PDF/101484863.pdf> at 2-3.

[22] Boast, 2016, above n 20, at 336.

> Legal policies designed to facilitate groups to move from lower to higher stages on the evolutionist scale, the Native Lands Acts [NZ] and *Dawes Act of 1886* [US] being clear examples, no longer seemed to make any sense.

For New Zealand, where historical developments in indigenous relations and politics had put custom and tenure at the forefront of issues in law, any international "revalorisation of indigenous cultures and tenures" undoubtedly had an effect on policy.[23]

There is a major current debate in anthropology which goes beyond the revelations of a relativist approach to culture and postulates that the natural world itself may be a construction of a particular cultural viewpoint. This idea came out of the historiography of science and its role in structuring Western culture, conducted by a school of sociology now referred to as Science and Technology Studies (STS). In short, it was recognised that at a certain point in the history of the West, the human sciences shifted entirely away from "ontological" questions, towards "epistemological" ones.

The origins of this shift are often attributed to Descartes, whose establishment of soul/body and mind/matter dualisms led to a turning away "from questions about the nature of the world, which were increasingly relegated to science, and toward questions about the possibility of knowledge."[24] In short, anything considered to be finite "matter" was consigned to the objective "hard" sciences, and human action, which rose from interaction with this inert matter but was superfluous to it, was considered the realm of philosophy and the social sciences. David Graeber, following Viveiros de Castro[25] in critique, explains this as a pacification of objects and a proliferation of subjects:[26]

> The simplification of ontology accordingly led to an enormous complication of epistemology. After objects or things were pacified, retreating to an exterior, silent and uniform world of "Nature," subjects began to proliferate and to chatter endlessly: transcendental Egos, legislative understandings, philosophies of language, theories of mind, social representations, logic of the signifier, webs of signification, discursive practices, politics of knowledge – you name it.

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23 Boast, 2016, above n 20, at 346.

24 David Graeber, 2015, "Radical Alterity Is Just Another Way of Saying 'Reality': A Reply to Eduardo Viveiros de Castro", *HAU: Journal of Ethnographic Theory* 5 (2), at 17.

25 Graeber, 2015, above n 24, at 17.

26 Graeber, 2015, above n 24, at 17.

Thus, another arm of anthropology has turned itself back to those ontological questions. Philippe Descola, a student of Claude Lévi-Strauss who inherited his chair at the College de France, sees the challenge of contemporary anthropology as fundamentally bound up with divergent perspectives on the interaction between humans and "non-humans"[27]. In his words:[28]

> The main task of anthropology is to bring to light how beings of a certain kind – humans – operate in their environment, how they detect in it such or such property that they make use of, and how they manage to transform this environment by weaving with it and between themselves permanent or occasional relations of remarkable, but not infinite, diversity.

This sets up a program for anthropology that is historically distinctive in its direction: the task now is not to understand how divergent cultures have formed from their interactions with nature, but to understand how different cultures fundamentally structure the worlds they inhabit. Following this:[29]

> To carry through this task, *we need to map these relations*, to better understand their nature, to establish their modes of compatibility and incompatibility, and to examine how they become actualized in styles of action and thought that appear immediately distinctive.

In sum, the objective should be to understand the building blocks upon which the patterns of action that make up distinct "cultures" are based. This search for these "predicates" of cultural difference is framed as a revival of "ontological" questions; in another formulation, how the cosmology of a culture is built on understandings of being. This dissolves the separation of culture and nature – the founding principle in how we organise the distinction between the physical and human sciences – and allows for a more full-bodied conception of human difference, which had been the original impetus for Boas's anthropological project. It thus can be seen as a kind of *full bloom* of Boasian anthropology.

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[27] "Non-humans" has become the preferred term for what we might have otherwise call "natural" phenomena – preferred because it somewhat abrogates the speaker from separating culture and nature.

[28] Philippe Descola, 2013. Beyond Nature and Culture. Translated by Janet Lloyd. University of Chicago Press, at 273-274.

[29] Descola, 2013, at 274. (Continued from above.)

D The ontological turn and (post)colonialism

The idea that indigenous peoples may have had fundamentally different ontological presuppositions about the world than their European colonisers has had a lively recent history. This has stemmed directly from the direct intervention of anthropologists in debates about colonial history and land, especially in New Zealand. The Whanganui River Report of the Waitangi Tribunal remarked:[30]

> It is one thing for a Maori to give evidence in terms of their customs and quite another thing again to give evidence that explains them. It is how customary evidence is interpreted that is the more crucial matter. The Tribunal uses expert evidence, Maori or Pakeha, for that purpose. Today, we have the benefit of anthropologists who provide just that. Anthropology was but a fledgling discipline in 1958, and Maori studies had still to receive independent recognition in universities. Moreover, today there are Maori who are able to clarify the meaning behind the symbols and to impart knowledge of their customs in terms comprehensible to Europeans.

The counterpoint between the testimony of experts and that of Maori at the Waitangi Tribunal that this passage outlines is emblematic of the deep diplomatic project of translating meaning across cultures. Of particular note to the ontological-bent of today's anthropological project is the phrase "comprehensible to Europeans", which implies that historically the communication of customs has been conducted at what Anne Salmond has called "ontological cross-purposes."[31] In a 2010 submission to the Waitangi Tribunal on how the Maori might have understood the Treaty of Waitangi ("Te Tiriti"), Salmond found:[32]

> …the term *tuku* – to release or give – was used throughout [the Maori version of Te Tiriti], as indeed it was in early land transactions in Northland. This was the term used in gift exchange [for] exchanges that were *tapu* (i.e. involve ancestral presence).

As such, Te Tiriti implied a deeply spiritual relationship of gift-reciprocity which included the forging together of Maori persons and "their lineages with those of the Queen and her

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30 Waitangi Tribunal, 1999, *The Whanganui River Report*, Wai 167, <URL: https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68450539/Whanganui%20River%20Report%201999.pdf> at 279.

31 Anne Salmond, 2012, 'Ontological quarrels: Indigeneity, exclusion and citizenship in a relational world' *Anthropological Theory* 12(2), at 115.

32 Salmond, 2012, above n 31, at 116.

descendants."[33] Subsequent protests to colonial governance not living up to this conception of the relationship thus often took the form of *rangatira* travelling "to London to meet with British monarchs, asking them to uphold their ancestors' promises and seeking their personal intercession."[34] This was two fundamentally different worldviews approaching the concepts of sovereignty and governance with entirely different building blocks relating to what the world was and what the roles of humans are in it. This creates an obvious problem of justice when it comes to making and enforcing laws, and conducting transactions across worlds. It is unsurprising, perhaps, that this problem of justice has plagued the history of colonialism for far longer than we have been aware of it.

A recent paper by museum studies scholar Conal McCarthy has pointed out that postcolonial theory is criticised for "back-projecting the concerns of the present on to a flattened and simplified past" which occurs alongside calls for "a more rigorously historicised analysis of anthropology, ethnology, museum collecting, and their complex interactions with empire on the one hand and indigenous people on the other."[35] What McCarthy attempts is a re-evaluation of "the links between Maori and Pacific Islanders, and scientific activities such as fieldwork anthropology on the one hand, and colonial governmentality on the other" to make the general argument that the formal investigation and performance of indigenous cultures in the Pacific through anthropology and museums played into the imperial project.[36]

This was through the nebulous Foucauldian idea that power expresses itself through "the 'conduct of conduct', in other words self-regulation of Natives by themselves."[37] In New Zealand, McCarthy argues that this manifested as an effort by the state to facilitate Maori[38]

> …assimilation through the self-regulating field of the social, using institutions and practices that drew on discourse of the 'old time Maori' produced by ethnology, museums, books, and other public discourses.

In New Zealand's own imperial endeavours in the Pacific, McCarthy argues it exported this idea of turning indigenous custom and culture into a colonising tool. It did this through

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33 Salmond, 2012, above n 31, at 116-117.

34 Salmond, 2012, above n 31, at 117.

35 McCarthy, 2016, above n 2, at 53.

36 McCarthy, 2016, above n 2, at 53.

37 McCarthy, 2016, above n 2, at 52-53; citing Michel Foucault, 1994, *Dits et ecrits IV* (Paris: Gallimard) at 237.

38 McCarthy, 2016, above n 2, at 53.

an ethnological project that linked Pacific island cultures to New Zealand Maori, and McCarthy traces it through the correspondence of Sir Apirana Ngata and Sir Peter Buck on the latter's studies in the Cook Islands:[39]

> When Premier Richard Seddon abandoned the Monroe doctrine and annexed the Cook and other Islands in 1900, Buck noted, the scheme had the effect of forming a link 'between two branches of the brown Polynesians'. The Cook Islands were 'more nearly allied by dialect, history and pedigree' to the Maori of New Zealand. 'Imagine therefore the feelings of the latter branch on visiting the Cook Group with all its historic associations,' he wrote, 'It was a pilgrimage to a holy land.'

Pervading Sir Peter Buck's writings are a sense of the adoption of the good from European society with the good of the indigenous culture. This was a peculiar kind of nativism that was undoubtedly influenced by the heavy investigation of "material cultures" that characterised the anthropology of the day.[40] McCarthy's point in unearthing this is that reassurances of the recognition and protection of the strengths of indigenous customs pervaded this period of radical culture change and was a particularly strong feature of New Zealand's approach to its empire in the Pacific.

The same can be argued for law, where there was an emphasis on the uptake and recognition of custom in the formal legal system being developed in the Cook Islands at the very end of the 19th Century. What was ignored in this process was that these "customs" were often built on radically different ontological premises than the legal system in which they were being configured. The unhappy marriage between law and custom in the Cook Islands is not something that has been comprehensively studied.[41] This paper argues that the allegations of authenticity and inauthenticity that circulate in the "invention of tradition" debates about land tenure require a more precise idea of how traditions may have been "re-invented" by the imposition of a land court system – and all that came with it – which was rooted in a radically different, Western ontological scheme.

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39 McCarthy, 2016, above n 2, at 51; citing Peter Buck (Te Rangi Haroa), 'Rarotonga ramblings': various MSS re journey to Rarotonga, ATL MS-Papers-0189-078.

40 Eg Peter Buck (Te Rangi Haroa), 1927, *The Material Culture of the Cook Islands (Aitutaki)* (New Plymouth: Thomas Avery & Sons Ltd).

41 Ross Holmes, 2014a, 'The need for a resource on Southern Cook Islands customary law' in above n 6, 15-21.

III Cook Islands Customs Outside and Inside the Courts

E The problem of evidence

Reconstructing an idea of what indigenous ideas about land and land tenure were in the Cook Islands prior to European contact is a daunting task. A large amount of material appears to have been lost over the last century, partly through scholarly and governmental disinterest arguably generated by the very assumptions this study is working against. Documentation of custom and culture in the Cook Islands at the turn of the 20th century is unfortunately too thin to provide grounds for a big picture analysis. In 1957, the ethnologist Ernest Beaglehole wrote:[42]

> No full record has survived of the culture of Rarotonga and Aitutaki before white contact… The total picture [of what remains], however, is only sufficient to indicate the main outlines of aboriginal culture and does not allow for any understanding of detail.

This claim appears to have been made with knowledge of an exhaustive bibliography composed by Sir Peter Buck in 1945 which includes the early writings of several missionaries[43] and sporadic submissions to the *Journal of the Polynesian Society* between 1894 and 1928 (including several by colonial administrators).[44] The reality is that most of these materials do not offer a great depth of insight, as Beaglehole noted. Where they do, they are not unaffected by the refraction of these customs through the lens of an outsider.

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42 Ernest Beaglehole, 1957, *Social Change in the South Pacific: Rarotonga and Aitutaki*, (London: Allen and Unwin) at 11.

43 Aaron Buzacott, 1866, *Mission life in the islands of the Pacific*, (London); W. Wyatt Gill, 1876, *Myths and songs from the South Pacific*, (London); W. Wyatt Gill, 1876, *Life in the southern isles*, (London); W. Wyatt Gill, 1880, *Historical sketches of savage life in Polynesia*, (Wellington); W. Wyatt Gill, 1894, *From darkness to light in Polynesia*, (London); John Williams, 1939, *Missionary enterprises*, (London).

44 F. J. Moss, 1894, 'The Maori polity of the island of Rarotonga' *Journal of the Polynesian Society* vol. 3, pp. 21-26; Te Ariki-tara-are, 'History and traditions of Rarotonga', *Journal of the Polynesian Society* vol. 8, pp. 61-88, 171-178, 1899; vol. 27, pp. 178-198; vol. 28, pp. 55-78, 134-151, 183-208, 1919; vol. 29, pp. 1-19, 45-69, 107-127, 165-188, 1920; vol. 30, pp. 1-15, 54-70, 129-141, 201-226, 1921.; W. E. Gudgeon, 1904, 'Phallic emblems from Atiu Islands' *Journal of the Polynesian Society*, vol. 13, pp 210-212; W E Gudgeon, 1905, 'The origin of ta-tatau or heraldic marks at Aitutaki Island' *Journal of the Polynesian Society* vol. 14, pp. 217-218; W. Wyatt Gill, 1912, 'A word about the original inhabitants of Pukapuka Island' *Journal of the Polynesian Society* vol. 21, pp. 120-124; W. Wyatt Gill, 1915, 'The origin of the island of Manihiki' *Journal of the Polynesian Society* vol. 24, pp. 144-151.; Peter Buck (Te Rangi Hiroa), 1928, 'Fish poisoning in Rarotonga' *Journal of the Polynesian Society* vol. 37, pp. 55-66.; H D Skinner, 1935, 'Notes on pearl shell pendants in the Cook Islands' *Journal of the Polynesian Society* vol. 44, pp. 187-189.

A more comprehensive survey of the available primary materials was conducted by Ron Crocombe in 1968, uncovering five sources of evidence in an effort to discern the utilisation and role of land in Rarotonga specifically.[45] The first of these are the physical features of Rarotonga itself, among which Crocombe argues an archaeological record is discernible between "*marae* and house-sites, boundary marks and roadways, irrigation works and terracing."[46] It is not entirely clear how systematic such an archaeology was. His second source is the first-hand accounts of Cook Islanders who had "actively participated" in the pre-contact tenurial system but who could not record it "until the art of writing had been introduced and the process of change had begun" – a body of writing which totals "[o]ver a hundred manuscripts by more than a score of indigenous authors".[47] The third source is the evidence of external observers, much of which was captured by Buck and Beaglehole as discussed above.[48] Fourth are contemporary research and investigative efforts, including by anthropologists but most importantly the records of the Land Court from 1902 onwards, which amounts "to more than 20,000 pages of evidence and decisions, including many claims which go back to the pre-contact era."[49] The fifth source of evidence is more recent field studies (to 1969) into land tenure.[50] The unfortunate fact about Crocombe's corpus is that it is by and large not readily accessible either electronically or through the libraries and archives of New Zealand, and so for present purposes it is only useful insofar as Crocombe has used it himself to substantiate arguments.

The largest scholarly effort to that effect is the recent multivolume collaboration between Ross Holmes and Ron Crocombe on the Southern Cook Islands.[51] It is significant because it represents a targeted attempt to reconstruct and understand customary law as it changed

[45] Crocombe, 1969, above n 2, 5-7.

[46] Crocombe, 1969, above n 2, 5.

[47] Crocombe, 1969, above n 2, 5-6.

[48] Crocombe, 1969, above n 2, 6; however, Crocombe also speaks of the "general observations" of warship commanders, traders, whalers, and other travellers.

[49] Crocombe, 1969, above n 2, 6.

[50] Crocombe, 1969, above n 2, 6.

[51] Ron Crocombe and Ross Holmes, 2014a, *Pre-European Southern Cook Islands Customary Law, History and Society* Volume 1, (Rarotonga: The Cook Islands Library and Museum Society Incorporated; Auckland: Ross Holmes); Ron Crocombe and Ross Holmes, 2014b, *Pre-European Southern Cook Islands Maori Society* Volume 2, (Rarotonga: The Cook Islands Library and Museum Society Incorporated; Auckland: Ross Holmes); Ron Crocombe and Ross Holmes, 2014c, *The Impact of Europeans upon Southern Cook Islands Maori Society, Customary Law and Land Tenure* Volume 3, (Rarotonga: The Cook Islands Library and Museum Society Incorporated; Auckland: Ross Holmes).

from pre-contact, to mission, to colonial eras. Early in the study, Holmes wisely cites the Waitangi Tribunal in relation to the caution required when interpreting custom:[52]

> …in considering the evidence, we should bear in mind that both Maori and Pakeha brought their own prejudices and interests to interpretations of custom and ownership in the land, and that even within Maori society there was not necessarily a universally accepted view as to exactly what customary principles applied.

While it does not add any general sources of evidence to Crocombe's original list, it does bring together a wide variety of material that attempts to understand the process of culture change in the Cook Islands – most often related to Rarotonga, and with a scope extending right back to the settlement of the islands. It is intended as a resource, though it does contain a broad line of argument: that culture-change has been the process of an unfortunate loss of tradition[53], and that the customs and traditions that it investigates "Southern Cook Islands oral traditions (some of which have been accepted for generations without critical analysis) and considered whether they are invented traditions."[54] The manuscripts have been assembled in response to a project generated by Crocombe and subtly reformulated over his career; the first in the 1960s, the second in the 2000s just before his death.

This project was about a kind of historical justice to alter the possibilities of the present; for any "study of change" what was required was a determination of "the cultural situation as it was at the temporal baseline of the study – in this case the moment of contact with European civilisation."[55] Crocombe's studies in 1961, 1969 and 1989 were all in a way attempts to resurrect or excavate the pure pre-contact cultural baseline from which to base a theory of change. Evidence, as explained above, was a key stumbling block. The pretext for Ross Holmes's book, which interfaces with the work of Crocombe enough to mean a co-authorship, is that there is now enough evidence to construct an idea of pre-European Cook Islands culture and therefore to trace its changes. In 2000 he filed an affidavit in the Cook Islands High Court case *Te Puna* announcing something of a breakthrough:[56]

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52 Waitangi Tribunal, *Te Tau Ihu O Te Waka a Mauil, Preliminary Report on Customary Rights in the Northern South Island,* Wai 785 at [2.2], quoted in Holmes and Crocombe, 2014a, above n 6, at 44.

53 Holmes and Crocombe, 2014a, above n 6, at 142.

54 Holmes and Crocombe, 2014a, above n 6, at 46.

55 Holmes and Crocombe, 2014a, above n 6, at 19.

56 Affidavit of Ron Crocombe, 25 February 2000, in *re Te Puna* [2000] App 125/97 (Cook Islands High Court)

> Much evidence has become available since the Land Titles Court decision of 1908 [title determinations for the *Te Puna* block by Gudgeon CJ] and since the appeals [in 1949]… I reviewed much of this evidence when completing my book on land tenure in the Cook Islands and from time to time since then. In my view, we now have a clearer picture of customary title in the Cook Islands than the Land Titles Court had in 1908.

This is an extraordinary claim by any measure. The idea that the scholars of today have a "clearer picture of customary title" than the actors of the day, over a century later based on a tangle of evidence that is self-confessedly incomplete, of a pre-contact tenurial system that by 1958 Beaglehole had claimed was effectively lost to history[57], seems entirely unfeasible. And yet, Crocombe's claim may less be about the evidence and more about ideology.

F The Te Puna *decision*

Among the *Te Puna* cases in which Crocombe's interventions occurred was a 2010 decision that involved 51 applications made under special legislation called the Te Puna Lands Act 1980 ("Te Puna Act"). The Te Puna Act had opened the door to re-hearings of title orders made by Gudgeon CJ in 1908 to "[a]ny person claiming to be prejudicially affected by any order of the Cook Islands Land Titles Court made on investigation of title into the Lands."[58]

In the judgment Hingston J acknowledged Crocombe's contributions on custom, but also appeared to include consideration of a submission from Ross Holmes, which appears to be an early manuscript of the multivolume study on custom. Hingston J wrote:[59]

> I am aware of Mr Holmes' manuscript, from which he quotes extensively, but recognise as mentioned by Mrs Carr and Mr Karika, it is unpublished and uncritiqued as well he is counsel for parties seeking title to this land. … I agree with other claimants' view that Mr Holmes' exposition appears to follow what is the law vis-à-vis Maori land in New Zealand. I do not accept this proposition in its entirety in relation to the Cook Islands.

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[57] Beaglehole, 1957, above n 42.

[58] Te Puna Lands Act 1980 (Cook Islands), s 1.

[59] *Te Puna Sections 50A and 50B Blocks, Takitumu* [2010] Cook Islands High Court (Land Division), 29 March [N.R.], Hingston J at 5.

What ended up being determinative in the case was less an awakening to a revived, evidenced conception of custom, but rather the acknowledgment that Gudgeon CJ, in 1908, was wilfully ignorant to custom:[60]

> The desire to develop the land commercially appeared to have influenced Gudgeon C.J. in his determination of titles to ariki when custom dictated these persons were not the owners because history shows that Ariki were easier to deal with.

This inflection, when seen against the evidentiary difficulties of piecing back together Cook Islands culture at 1823, gives this paper the trajectory of its argument. In essence, that attempt to pick up the thread of an ancient, authentic version of the Cook Islands culture – Crocombe's ground zero – is riddled with not only evidentiary, but theoretical dilemmas. Instead, if we wish to understand disputes over custom today we need to reapproach "custom" not as something coherently expressible in law, but as something that has been *reconfigured* by its incorporation into a Western-style legal system.

G Concepts associated with land in the Cook Islands: a distinct ontology?

Before embarking on a targeted historiography of the Land Titles Court, it is necessary to tentatively suggest ontological patterns which may underpin how Cook Islanders conceptualised the land itself. Given the problems of evidence discussed above, the safest method of doing this is to examine the primary sources written prior to the imposition of the Land Titles Court and try and draw what is significant from those writings.

A manuscript of some 194 pages, detailing Rarotongan history and mythology, was composed by Te Ariki-tara-are likely "some time in the mid-19th century"[61] and subsequently published in several instalments in the *Journal of the Polynesian Society* between 1899 and 1920. Te Ariki-tara-are was described by his translator, S. Percy Smith, as "the last of the high priests of Rarotonga [who have] always performed the function of anointing and consecrating the Ariki or Ruling Chief of Rarotonga at the sacred *marae*" and by the missionary Wyatt Gill as "the last to offer human sacrifices… a final authority on Rarotonga antiquities".[62] Though there is some dispute as to the veracity of the author's

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60 Hingston J, *Te Puna sections* [2010], above n 59, at 4

61 Jeffrey Sissons, 1989, 'The seasonality of power: the Rarotongan legend of Tangi'ia-nui' *Journal of the Polynesian Society* 98, at 336.

62 Te Ariki-tara-are, 1899, above n 44.

real identity.[63] However, these writings were described by their translator at their time of publication as characteristic of "the native method of thought as embodied in narrative."[64] They included a "principal (*upoko*) *karakia*" called "Ka-uraura":[65]

> O disclose, disclose, disclose the source,
> (Disclose) the very origin.
> A dedication, a god-like dedication
> (By) the gods, Rongo and Tane.
>
> 'Tis right then, O Rongo and Tane; in the beginning—
> In the growing, sprung up the land,
> In the growing, sprung up the land,
> In the growing, rose up and spread.
>
> Inspirited was Atia, the original land; in the beginning—
> It grew, sprung up the land,
> It grew, sprung up the land,
> It grew, rose up and spread.
>
> Inspirited was Avaiki-te-varinga, an original land; in the beginning—
> In growing, sprung up the land,
> In growing, sprung up the land,
> In the growing, increased and spread.
>
> Inspirited was Iti-nui, an original land,
> It grew, and then sprung up the land;
> In growing, there grew up the land,
> In growing, increased and spread.
>
> Inspirited was Papua, an original land,
> It grew, and sprung up the land,
> It grew, and sprung up the land,
> It grew, increased; it spread.
>
> Inspirited was Enua-kura, an original land,

[63] Ross Holmes notes that Walter Gudgeon, the British Resident at the time, had discovered "that the real Tara'are is the wife of a mission student who has been ousted from all of her Avarua lands" though this is presumably just as difficult to verify, above n 6, at 61.

[64] Te Ariki-tara-are, 1899, above n 44.

[65] Te Ariki-tara-are, 1899, above n 44.

> It grew, and sprang up the land,
> It grew, and sprang up the land,
> It grew, increased, it spread.
>
> Inspirited was Avaiki, an original land,
> It grew, sprung up the land,
> In growing, sprung up the land,
> In growing, rose and spread.
>
> Inspirited was Kuporu, an original land,
> In growth, grew up the land,
> In growth, grew up the land,
> In growth, rose up and spread.

There are several things of note about this *karakia*. The most obvious is the massive power of the gods Rongo (agriculture and vegetation) and Tane (forests), who are children born of the Skyfather (Ātea) and the Earthmother (Pāpā). Most important is how the springing gup and spreading of the various lands is marked by the verb "inspirited", which is footnoted in the translation as:[66]

> Possibly a better translation than "inspirited," is the old English word "informed," to animate, to actuate with vital power. "Who fills, surrounds, informs, and agitates the whole." —Thompson's "Castle of Indolence."

These beings who inspirit the geography of the world form part of the ancient papa'anga (genealogies) which, according to Sir Peter Buck:[67]

> Genealogy swallowed up history and made law a field of its own. … Every family kept its genealogy secret to protect itself from imposters and all members of the family united to keep it pure.

Or, as a later study by Baltaxe put more fully, papa'anga were spiritually, physically and socially binding phenomena:[68]

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[66] Te Ariki-tara-are, 1899, above n 44, at 63.

[67] Sir Peter Buck, 1926, *The Value of Tradition in Polynesian Research* [N.R.] quoted in Ross Holmes, 2014a, above n 6, at 86.

[68] James Baltaxe, 1975, *The transformation of the rangatira: A case of the European Reinterpretation of Rarotongan Social Organisation*, (?) at 70, quoted in Holmes 86.

> [T]he aka papa'anga related the sequence of ancestors through whom the mana of the founding ancestors was transmitted to succeeding generations and this chain could not be broken without grave danger to the future of the ngāti.

Beyond these intertextual references, which are complicated by the histories and interlocutors through and in response to which they have been recorded, it is difficult to assert definitive claims as to the context of Cook Island ontological forms. Comparison to the wider Pacific is thus instructive and this configuration of papa'anga seems to fit alongside other conceptions. Speaking of Polynesian cultures generally, the work of Marshall Sahlins posited that kin networks are only properly understandable in ontological terms:[69]

> Descent in Polynesian thought is a logic of formal classes: the ancestor to his descendants as a general class is to its particular instances. The offspring are tokens of the parent type. The system, then, is a veritable ontology, having to do with commonalities and differentiations of substance. Relations logically constructed from it – e.g., heavens are to earth as chiefs to people – are expressions of the essence of things.

Genealogy was cosmologically aligned to deities and to land, a rather unique example visible in a diagram of Mangaian cosmology drawn in 1876 by the missionary W. Wyatt Gill:[70]

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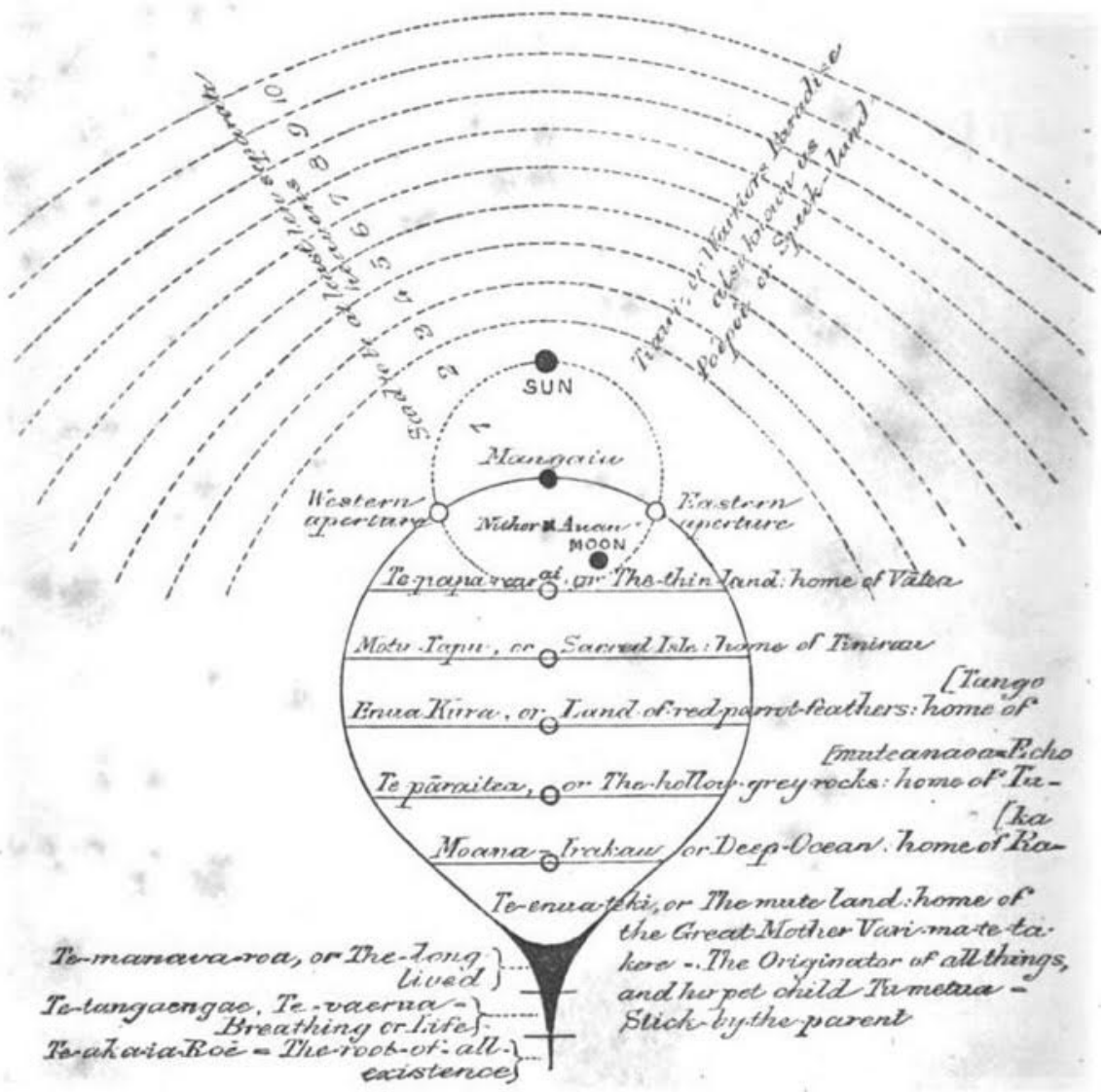
69 Marshall Sahlins, 1985, 'Hierarchy and humanity in Polynesia' in A Hooper and J Huntsman (eds) *Transformations of Polynesian Culture* (Auckland: The Polynesian Society), at 195.

70 W. Wyatt Gill, 1876, *Myths and Songs from the South Pacific*, (London: Henry S. King & Co.) at 2.



This diagram will suit the mythology of many other islands; substituting, for instance, "Tahiti" for "Mangaia," as the land where egress and ingress to Avaiki exist.

Gill explains the Mangaian conception of the universe as "the hollow of a vast cocoa-nut shell" with the upward apex, the "aperture communicating with the upper world" being where the Mangaians (humans) live.[71] Below this, the various levels of the coconut are the "lands", which emanate upwards from a single stem which is "a spirit or a demon, without human form, and is named Te-aka-ia-Roē, or *The-root-of-all-existence*" and it is this living being that sustains the "entire fabric of the universe".[72]

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71 Gill, 1876, above n 70, at 1.

72 Gill, 1876, above n 70, at 1-2.

Once again, it is difficult to extract an entire ontological program from so brief a review – let alone an archival one. The easy conclusion to make, however, is one that supports Crocombe's observation that, at the very least, in Cook Islands custom "[l]and was not regarded as a capital good and there was no conception of the sale of land or its produce."[73] A legal system that converted sacred lines of descent into ownership arrangements was therefore bound to have a dramatic effect on local custom.

H When custom becomes law: annexation and a court system for the Cook Islands

In a history of the reception of the English legal system in the colonies, the Australian judge Bruce McPherson QC wrote:[74]

> It is wrong to suppose from what has been said about native title in settled colonies that English conceptions of land law were received or superimposed on all territories under British rule. It is completely true only of places of settlement that were uninhabited at settlement, or where the indigenous people were wholly or largely displaced from the land. In most of the British African, Asian and Pacific territories, existing systems of land tenure were not disturbed.

While it is true that the legal recognition of customary land tenure in the Cook Islands is based on succession and an ownership structure that loosely represents customary tribal hierarchies, these have become vessels for legal constructs that are wholly imported and ontologically unsettling. In most general terms, this imposition was an ethnocentric property relation, which altered "title to land", which altered the concept of succession, which changed the significance and application of sacred papa'anga themselves, and so forth.

There was a remarkable urgency to establish a court system in the Cook Islands at the turn of the 20th century, to the extent that failure to achieve the passing of a High Court Bill in the House of Ariki seems to have ended the career of the British Resident Frederick Joseph Moss in 1898.[75] When he was replaced on 11 September of that year by Walter E Gudgeon,

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73 Crocombe, 1969, above n 2, at 19.

74 Bruce H McPherson, 2007, *The Reception of English Law Abroad* (Brisbane: Supreme Court of Queensland Library) at 2.

75 Elsdon Craig, 1985, *Destiny Well Sown: Biography of W.E. Gudgeon, Settler, Soldier, Diplomat* (Whakatane: Whakatane & District Historical Society, 1st Ed.), 78-83.

the ship's captain escorting the new Resident stepped ashore and read a proclamation from the Governor:[76]

> That Her Majesty has learned with much displeasure of their (the natives') refusal to obey her wishes in regard to the enactment of the Federal Court Bill, and of the ingratitude they had displayed in their treatment of Mr Moss, who had laboured so hard in their interests and has done so much for them… Her Majesty expects that the officer who succeeds him will receive more of their confidence and support … and that Her Majesty expects that they will … enact the Federal Court Bill.

Re-proposing the Bill became Gudgeon's first official act as British Resident and his primary mission was to win over the legislature, a House composed of the Ui Ariki of the Cook Islands.[77] As his grandson and biographer Elsdon Craig points out, Gudgeon "saw the High Court Bill as being a preliminary to providing a Land Court, to modify the customary entitlement to land in the islands."[78] This was a prerequisite of Gudgeon's larger ambitions in the Pacific, and he saw his appointment as British Resident "as my destiny."[79] His appointment was also made to facilitate New Zealand Premier Richard Seddon's own ambitions of a Pacific empire to match the Australian Commonwealth. As Dick Scott writes of Gudgeon's tactics to bring about annexation of the Cook Islands to New Zealand:[80]

> He aimed at winning ariki support by promising restoration of powers they had lost to the federal and island parliaments under the Moss reforms: '… my chief aim must be to obtain from the arikis a request for annexation … I decided to adopt the cause of the arikis as m own.' After annexation, with power concentrated in ariki hands, he then planned to seize that power for himself.

His political machinations ran alongside a radical agenda of land reform, through which he planned to transform the Cook Islands into a productive agrarian and trading economy. By October 1899, the *Auckland Star* reported that, alongside the first sitting of the High Court in Aitutaki:[81]

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76 Quoted in Elsdon Craig, 1985, *Destiny Well Sown: Biography of W.E. Gudgeon, Settler, Soldier, Diplomat* (Whakatane: Whakatane & District Historical Society, 1st Ed.) at 80.

77 Craig, 1985, above n 75, at 83.

78 Craig, 1985, above n 75, at 85.

79 Dick Scott, 1991, *Years of the Pooh-Bah: A Cook Islands History*, (Rarotonga: Cook Islands Trading Corporation Ltd) at 71.

80 Scott, 1991, above n 79, at 73.

81 *Auckland Star*, 1899, 'Rarotongan News' Volume XXX, Issue 248, (19 October).

> All lands having now to be surveyed for the correct and permanent fixing of boundaries. Mr H. M. Connal, a civil engineer of undoubted ability, has been appointed to do all the necessary surveying. This important work is to be started forthwith.[82]

This was a precursor to the 1902 establishment of the Land Titles Court whose formal aim was to, per the *Auckland Star:*[83]

> … have the title to all lands ascertained in order that every man, woman and child may know which lands they own, and when we have accomplished that much we shall find some means to make people fence or improve the lands.

Earlier that year, Gudgeon himself had made the statement that:[84]

> The land-holders of this island have yet to learn that the possession of land brings its own responsibility – that is, that if they own land that they can not cultivate they are injuring the island, and must expect to have such land taxed unless they lease it.

The broader goal of granting Europeans access to the land to make it profitable was attacked with a remarkably simple stratagem: simply recognise and secure customary title through the Courts. In a communication to the Minister administering the Islands in Wellington, Gudgeon spoke of how land was customarily vested in the Ariki "who hold lands for the benefit of the tribes or sub-tribes who lived under their mana" and whom are elected by their constituents on the basis of whoever was "the most capable man" within the senior lineage of a Kopu Ariki.[85] He noted how securing the tenure of Ariki had been successful in encouraging leases, and believed that he had "followed closely the old laws of this island."[86] In short, the operation of the Land Titles Court was an effort to modernise and commercialise the Islands, but it was believed that this could be worked to be compatible with customary tenure in a way that safeguarded the best of both worlds – much in the same way as the ethnology and museums of McCarthy's study.[87]

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82 See Appendices A-G for the complete Cook Islands land surveys of 1905-6.

83 The Evening Star, 1902, 'The Cook Islands Bill' *Auckland Star* Volume XXXIII, Issue 231 (29 September).

84 *Auckland Star*, 1902, 'Cook Islands', Volume XXXII, Issue 117 (19 May).

85 W E Gudgeon, 1905, 'No. 61', Rarotonga, Cook Islands, 11th September, in *Cook and other islands : in continuation of a Parliamentary Paper A.-3, 1905 / Presented to both Houses of the General Assembly by command of His Excellency* (Wellington: John Mackay, New Zealand Parliament), at 22.

86 Gudgeon, 1905, above n 85, at 22.

87 McCarthy, 2016, above n 2, at 53.

The ontological quality of this scheme and its reconfiguration of custom is unsaid in these exchanges, and likely unnoticed. In its historical context, the relationship between title to land and proof by registration "emerged from a transformation in [the] association between techniques of documentation and understandings of ownership" in Europe throughout the 18th and 19th Centuries.[88] Because title is "an abstract quality" basing itself on the "interpretation of rights rather than the identification of physical facts" it has the unusual status of being suspended ontologically between a purely cultural "status indicator" and the "reality towards which [it] points."[89] Far from recognising the organic ancestral mana of the ariki class as they relate to land, Gudgeon's Land Court transformed these relationships into leasehold arrangements which have since poisoned the social well. As Crocombe observed:[90]

> The fact that lessees make profits has engendered widespread hostility… because a lessee tends to be conceived of as a landless, dependent person who should consistently acknowledge the superior status of the lessor, it is considered inappropriate for a lessee to be richer than a lessor.

This misconfiguration also clearly applies when it comes to succession to title. Beyond the growing problem of fragmentation discussed earlier, it is also true that the "paradigm of ownership" represented by the handing down of estates is rooted in the "aristocratic strict settlement, which bound the devolution of land to the career of the family and its fortunes."[91] The rigid recognition of genealogical descent has effectively transformed organic tribal dynamics into a landed aristocracy that has not changed in over 100 years. Prior to the imposition of a court, the number of ariki "fluctuated from time to time" and included times when islands had no ariki.[92]

The point to be made is that formal recognitions of indigenous custom do not necessarily preserve the preconditions that underlie them. It has been the contention of this paper that reviewing the legal history of the Cook Islands with sensitivity to the "ontological turn" in social theory allows us to better understand why it is that customs have such a hard time

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88 Alain Pottage, 1998, 'Evidencing Ownership' in Susan Bright and John Dewar (eds.) *Land Law: Themes and Perspectives* (Oxford: Oxford University Press) at 130-131.

89 Pottage, 1998, above n 89, at 133.

90 Crocombe, 1987, above n 7, at 65.

91 Pottage, 1998, above n 89, at 135.

92 Crocombe, 1969, above n 3, at 25.

being useful in new circumstances. Because, the argument goes, they have been largely devoid of agency by removal from the ontological contexts in which they made sense.

IV Conclusion

The idea that cultures have been fundamentally transformed by the law's effort – however genuine – to recognise them is not only true of the Cook Islands. The cadastral scheme of the Panjab in India was formalised by the British in 1853 as a triumph in cultural adaptation, however:[93]

> … the genealogical accounts of entitlement which accompanied the 1853 Settlement imposed a model of kinship, status, and social reciprocity which supplanted local understandings with a new understanding of land and its social value.

Indeed, the British experience of tenurial change in India has been argued to have been crucial in the settler-colonialism of the Pacific.[94] If similar techniques exist across contexts, then this adds impetus to the research agenda that this paper has suggested with a limited example. New studies of land tenure must be sensitive to the ontological qualities of legal formalism, and the rigid categories upon which it is based if they are to open up new ways of thinking about cultural revival. In the Cook Islands, as in the Panjab, it is remarkable how customary 'law' is absorbed by what seem like "mere technicalities of the new system – the fixing of boundaries, the absolute measurement of area and the classification of soils – entailed the most radical change in the concept of land."[95]

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[93] Pottage, 1998, above n 88, at 144.

[94] Graeme Whimp, 2008, 'Writing the Colony: Walter Edward Gudgeon in the Cook Islands, 1898 to 1909.

[95] Richard Smith, 1996, *Rule by Records: Land Registration and Village Custom in Early British Panjab* (New Delhi: Oxford University Press), at 241.

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