

Critique of Hart's Concept of Law in Samoa.

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Abstract

Hart's "Concept of Law" has gained widespread recognition in legal philosophy by proposing that a legal system is best understood as a combination of primary rules that impose obligations and secondary rules that grant the authority to create, modify, and interpret those primary rules. One aspect in Hart's concept concerns the prelegal or primitive system, consisting of a society governed solely by primary rules of conduct without secondary rules. Thus, it proceeds to assert that such a system exists in a small, stable community bound by shared beliefs and kinship. This article illustrates that upon closer scrutiny within legally intricate and bijural contexts – such as the case of Samoa, where both primary and secondary rules co-exist – the argument proves to be fundamentally flawed. Moreover, this critique highlights the limitations in the standard application of Hart's Concept of Law in other post-colonial contexts, including Aotearoa New Zealand and South Africa. The article further argues that more critical and nuanced perspectives are needed to examine the legal reality of Hart's theory in modern post-colonial contexts.

I. Introduction

HLA Hart's contributions to jurisprudence are foundational, particularly in distinguishing law from morality and providing a framework for understanding legal systems.¹ Hart critiqued earlier positivist theories, notably John Austin's "command theory of law", which reduced law to commands issued by a sovereign, enforced by sanctions.² While influential, Austin's theory oversimplified law and failed to address the complexities of modern governance. Hart responded by introducing a more sophisticated model, differentiating between primary rules (governing conduct) and secondary rules (regulating how primary rules are recognised, amended and adjudicated).

* Law Lecturer, School of Law, Auckland University of Technology.

1 Herbert LA Hart, *The Concept of Law* (2nd ed, Oxford University Press, Oxford, 1994) at 92.

2 Collin Tapper "Austin on Sanctions" (1965) 23(2) Cambridge Law Journal 271–287; and Hart, above n 1, at 116.

Arguably, Hart's concept of secondary rules marked a pivotal advancement in legal philosophy. Hart identified three key secondary rules: the rule of recognition (determining the validity of legal rules), the rule of change (outlining how laws are amended or introduced), and the rule of adjudication (providing mechanisms for resolving disputes). These secondary rules are essential for understanding legal systems as flexible and institutional frameworks, not just coercive structures.

Note that Hart's model in non-Western legal systems presents challenges. Samoa's legal system, for example, integrates *fa'asamoa* (customary law) with a formal system based on British common law, creating a pluralistic legal environment.³ While primary and secondary rules exist, they do not align neatly with Hart's model when examined in legally pluralistic customary contexts.

This article examines Hart's theory in the context of Samoa's legal system, focusing on the three secondary rules and their operation in a legally pluralistic environment. It will highlight the limitations of Hart's model when applied to non-Western contexts. Comparisons with post-colonial societies of Aotearoa New Zealand and South Africa offers a broader socio-legal perspective on the challenges of applying Western legal theories to diverse cultural settings.

II. Samoan Legal System

Before I expand on the "standard" theoretical approach in which Hart's concepts operate, it is necessary to begin each section of this article with a brief discussion of Samoa's position, at customary and state level.

A. Fa'asamoa in Pre-Colonial Samoa

Prior to colonisation in the late 19th century, Samoa was governed by *fa'asamoa* (the Samoan way of life), a customary legal system that structured all aspects of

3 Interview with Nanai Agaiava (6 May 2009) in Margaret Smith "*Samoanizing*" *Human Rights: A Generational Comparative of Views on Human Rights in Contemporary Samoa*" (Independent Study Project (ISP) Collection 635, 2009); Interview with Asofou So'o (27 May 2009) in Smith, above; and Unasa Va'a "Samoan Custom and Human Rights: An Indigenous View" (2009) 40 *Victoria University of Wellington Law Review* 237, at 237–250 for a more comprehensive discussion of *fa'asamoa* values in the context of custom and human rights.

the *fa'asamoa*.⁴ As Samoan custom dictates, all Samoans can trace their genealogy to the *Atua* (Supreme God/Creator), *Tagaloalagi*.⁵ Thus, the *fa'asamoa* is not merely a customary legal framework; it represents an entire way of life, encompassing social, spiritual, political and familial relationships.⁶

Central to *fa'asamoa* is the *fa'amatai* (chiefly) system, wherein authority is vested in *matai* (Chiefs), responsible for governing their families (*aiga*) and villages (*nu'u*). The *matai* exercise legislative, executive and judicial authority through the village *fono* (council), making decisions that affect the welfare of the entire village.⁷ Thus, Samoan custom is recognised as a source of law where it serves to resolve disputes over customary land and *matai* titles, while also recognising the significance of village governance and customary mechanisms for dispute resolution.⁸ The power of the village *fono* and *matai* was based not on statutory authority but on deeply rooted cultural norms.⁹

Fa'asamoa operates on principles of collective responsibility, respect for authority, and the prioritisation of communal well-being over individual rights. Core relational values are embedded in the *fa'asamoa* principles of law. In line with this reasoning, the obligation to do things the *fa'asamoa* way is further reinforced by values which guide social and interpersonal relations: *usitai* (obedience), *fa'a'aloalo* (respect), *alofa* (love) and *tautua* (service).¹⁰ The village *fono* is the primary decision-making body in Samoan *nu'u*, composed of one or more *matai* representing each

4 Malama Meleisea *The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa* (University of the South Pacific, Fiji, 1987) provides a more comprehensive history of *fa'asamoa* than is permitted in this article due to word constraints; Interview with Nanai Agaiava (6 May 2009) in Margaret Smith 'Samoanizing' Human Rights: A Generational Comparative of Views on Human Rights in Contemporary Samoa (635 2009); Malama Meleisea and Penelope Schoeffel "Samoan Custom, Individual Rights, and the Three 2020 Acts: Reorganizing the Land and Titles Court" [2022] *Journal of Pacific History*; see *In re the Constitution, Pita v Attorney-General* [1995] WSCA 6; 07 1995 (18 December 1995) for full discussion on flexible nature of custom and Samoa's *fa'amatai* system; and Va'a, above n 3.

5 Va'a, above n 3.

6 Meleisea and Schoeffel, above n 4. Meleisea (Samoan Historian, former Land and Titles Court Judge) and Schoeffel (Samoan Gender and development specialist) argue that there is insufficient customary and common law evidence to support the existence of customary law in Samoa. Instead, they argue that an intricate system driven by customary protocols, while not legal by nature, are embedded in many aspects of the *fa'asamoa*.

7 Craig Land "One Boat, Two Captains: Implications of the 2020 Samoan Land and Titles Court Reforms for Customary Law and Human Rights" (2021) 52 *VUWLR* 537 at 507–540.

8 Meleisea, above n 4; and Sue Farran "Pacific Perspectives: *Fa'afafine* and *Fakaleiti* in Samoa and Tonga: People Between Worlds" (2010) 31 *Liverpool Law Rev* 13.

9 Meleisea and Schoeffel, above n 4.

10 Pio Mailo *Palefuiono* (Tofa Enterprises, Pago Pago, American Samoa, 1992); Melani Anae, Eve Coxon and others *Pasifika Education Research Guidelines: Report to the Ministry of Education* (Auckland UniServices, Auckland, 2001); Richard P Gilson *Samoa 1830 to 1900* (Oxford University Press, Melbourne, 1970); Bradd Shore "Sexuality and Gender in Samoa: Conceptions and Missed Conceptions" in Sherry B Ortner and Harriet Whitehead (eds) *Sexual Meanings* (Cambridge University Press, New York, 1981), at 192; and Meleisea, above n 4.

aiga with continued residence in the *nu'u*.¹¹ The village *fono* is tasked with making decisions on a wide array of issues, including land use, family disputes and resource allocation.

Land in pre-colonial Samoa was held communally, with the *matai* acting as trustees who managed the land on behalf of their families.¹² The concept of land ownership in *fa'asamoa* differs fundamentally from Western conceptions of individual property rights.¹³ Under *fa'asamoa*, land is not privately owned by individuals; instead, the decisions regarding land use are taken collectively under the leadership of the *matai*. This communal ownership of land continues to be a key feature of Samoan society and has important implications for the legal system, particularly when disputes arise over land use or ownership.

In pre-colonial Samoa, customary law was unwritten but collectively practised.¹⁴ The absence of formal written laws did not imply the absence of structure but rather reflected the integration of law within the social fabric of everyday life.¹⁵ What is indisputable is that the village *fono* authority: (1) comprised of a collective of *matai*; (2) independently maintained customary law and order in the rural parts of Samoa, where the majority of Samoans reside; and (3) continued to do so without any formal recognition in the legal system.¹⁶ The enforcement of these laws relied principally on social pressure and the authority of the *matai*, whose leadership was derived from kinship ties and social hierarchies embedded in the *fa'asamoa*. This system, while effective in ensuring social cohesion and resolving disputes within the community, was flexible enough to accommodate changes in social dynamics, making it resilient and capable of evolving with the needs of the community surviving colonisation.

B. Fa'asamoa in Post-Colonial Samoa

In 1899, Samoa was divided between Germany and the United States, with Germany assuming control of Western Samoa and the United States taking control of the eastern islands, which became known as American Samoa.¹⁷ Under German

11 Va'a, above n 3.

12 Jennifer Corrin "Land, Law and the Fa'a Samoa" (49–50) 46 *Lawasia Journal*; and Land, above n 7.

13 Iati Itai "Customary Land Rights and Pacific Islands Security and Stability" (2018) *Asia Pacific Bulletin* 19; Meleisea and Schoeffel, above n 4; Jennifer Corrin "The Language of Land and the Language of the Common Law" (2008) 37 *Common Law Review* 305; and Sue Farran and Don Paterson *South Pacific Property Law* (Cavendish, London, 2004).

14 Meleisea, above n 4.

15 Meleisea and Schoeffel, above n 4.

16 *Commission of Inquiry Freedom of Religion* [2010] WSOM 1 (15 May 2010) ("Commission of Inquiry"); and James W Davidson *Samoa mo Samoa: The Emergence of the Independent State of Western Samoa* (Melbourne, Oxford University Press, 1967) at 391.

17 Meleisea, above n 4; Guy Powles "The challenge of law reform in Pacific Island states." in Brian Opeskin and David Weisbrot (eds) *The Promise of Law Reform* (Federation Press, Sydney, 2005) 404; and Corrin, above n 12.

rule, elements of German civil law rather than common law were introduced, but the German administration recognised that *fa'asamoa* continued in the rural areas, governed principally under customary law. The German authorities recognised the significance of *fa'asamoa* in maintaining social order and sought to integrate customary practices into the colonial legal system where possible. The Land and Titles Court (LTC) was established under the German Colonial government to adjudicate customary land and title disputes.¹⁸

Following Germany's defeat in World War I, Samoa was placed under New Zealand administration as a League of Nations' mandate.¹⁹ The New Zealand administration introduced British common law, further transforming Samoa's legal landscape. Similar to the German approach, New Zealand authorities acknowledged the importance of *fa'asamoa* and permitted it to continue operating in rural areas, particularly in relation to land and family matters.²⁰ This period of colonial administration laid the groundwork for the bijural legal system that would emerge following Samoa's independence from New Zealand in 1962.

Under the presumption of continuity, Samoa inherited British common law which led to tensions between customary law and introduced law.²¹ Thus, in the legally pluralistic context of Samoa, customary laws were recognised by common law, until repealed or amended by introduced legislation.²² The integration of British common law and *fa'asamoa* created a unique bijural system, in which Western legal traditions coexisted with customary law. Therefore, while the formal courts applied British common law, many disputes, particularly those related to land and family matters, were resolved through the village *fono*, with decisions being made according to *fa'asamoa*. This recognition of the importance of customary law helped maintain social stability during the colonial period. Christianity, which was introduced to Samoa in the 1830s, relied heavily on the endorsement of the village *fono*.²³

Samoa gained independence from New Zealand in 1962, becoming the first Pacific Island nation to achieve full sovereignty.²⁴ The bijural legal system that developed following Samoa's independence is an example of legal pluralism, in which multiple

18 Land, above n 7.

19 Meleisea, above n 4; and Powles, above n 17.

20 Meleisea, above n 4; and Powles, above n 17.

21 Peter Fitzpatrick "Terminal legality: imperialism and the (de)composition of law" in Diane Kirby and Catharine Coleborne (eds) *Law, History, Colonialism* (Manchester University Press, Manchester, 2001) 9 at 21.

22 The presumption of continuity is generally attributed to: *Campbell v Hall* (1774) 1 Cowp 204, 98 ER 1045 (KB) at 895–896; and Paul McHugh *Māori Magna Carta* (Oxford University Press, Auckland, 1991) at 83–87. As Samoa is part of the commonwealth jurisdiction, it follows common law precedent from England and New Zealand which is important to understand.

23 Commission of Inquiry, above n 16.

24 Meleisea, above n 4.

legal systems coexist within the same jurisdiction.²⁵ Following independence, the principal challenge for Samoa was to establish a legal system that balanced the need for modernisation with the preservation of Samoan cultural traditions. The 1960 Constitution of Samoa sought to reflect this balance, establishing a parliamentary system of government while also recognising the importance of customary law.²⁶ Article 100 of the Constitution guarantees the recognition of customary land and the authority of the village *fono* in matters of customary law, thereby ensuring that *fa'asamoa* remains an integral part of Samoa's legal framework.²⁷ Reflecting this, Samoa's legal system recognises "customary law" as "law", as observed in art 111 of Samoa's Constitution, recognising the pre-colonial authority of the *fa'asamoa*. The new constitutional definition of "law" encompasses customs as defined by statutes or court rulings, meaning that customs acknowledged by the new LTC hierarchy are regarded as legal.²⁸ The LTC's functions are constitutionally grounded, with jurisdiction over *matai* titles and customary land and the authority to hear appeals from village *fono* decisions.²⁹

In December 2020, Samoa's Parliament passed three laws: the Constitution Amendment Act 2020, the Land and Titles Act 2020 and the Judicature Act 2020. These laws created a bifurcated court system and an independent LTC system, giving the LTC courts equal status to the Samoan Supreme Court and Court of Appeal. This sparked ongoing debate: one side supports integrating Samoan customs into the legal system, while the other side argues that the reforms could weaken human rights and the rule of law.³⁰ Following the 2020 constitutional reforms, the new LTC system now functions with its own legal standards and procedures that are not open to judicial review.³¹ There is ongoing concern that the customary courts may extend their interpretation of "custom", possibly expanding their jurisdiction beyond its current legislative boundaries.³²

One of the primary areas of tension between the two legal systems is in the regulation of land. Customary land, which constitutes approximately 80 per cent of the land in Samoa, is governed by *fa'asamoa*.³³ Unlike freehold land operating

25 Teleiai Lalotoa Mulitalo Ropinisona Silipa Seumanutafa ("*Mulitalo*") *Law Reform in Plural Societies* (Springer, Cham, Switzerland, 2018).

26 Constitution of the Independent State of Samoa 1960 ("*Samoa Constitution*"). The Explanatory Memorandum to the Constitution Amendment Bill 2020 was drafted "by Samoa to respond to the challenges of 'legal pluralism', a legal theoretical framework with features prevalent in most post-colonial societies".

27 Land, above n 7; and Meleisea and Schoeffel, above n 4.

28 Land, above n 7.

29 Meleisea, above n 4; and Land, above n 7.

30 Land, above n 7.

31 Land and Titles Act, s 57 (Samoa 2020).

32 Land, above n 7.

33 Land, above n 7; and Meleisea and Schoeffel, above n 4.

under state law, the treatment of land under customary law differs. Customary land cannot be sold or transferred outside of the *aiga*, and decisions regarding land use are made collectively under the authority of the *matai*. However, as Samoa's economy has become increasingly integrated into the global market, there has been growing pressure to commercialise land, particularly for tourism and other development projects.³⁴ This has led to conflicts between customary landowners and the state legal system, which seeks to regulate land use in the interests of national development.

The tensions between these two systems became particularly pronounced in the post-independence period, as the Samoan government sought to modernise its legal and economic systems. The challenge for Samoa has been to balance the needs of economic development with the preservation of traditional cultural values, particularly in relation to land ownership.³⁵ The role of *fa'asamoa* in land ownership remains a point of contention, as the communal ownership model clashes with the demands of a market economy that prioritises individual property rights and commercial development.³⁶

Customary law forms part of Samoa's village governance system and the Village Fono Act 1990 (VFA 1990) legally empowers the village *fono* to impose village fines in accordance with "custom and usage of their villages".³⁷ In this regard, the village *fono* may impose punishments in accordance with the custom and usage of the village. These may include fines of money, mats, animals, food or work on village land. The amended VFA 1990 came into effect in 2017 and recommended transparency and accountability with respect to promoting village governance based on principles of natural justice and fairness, to prevent the abuse of village *fono* power.³⁸

Village *fono* decisions are also appealable to the Land and Titles First Court (LTFC), renamed after the 2020 constitutional amendments, which may allow an appeal, dismiss it, or refer it back to the village *fono* to reconsider.³⁹ This has no doubt led to tensions between customary practices, the exercise of power, fundamental breaches of constitutional human rights as well as ongoing debates about the definition, interpretation and scope of "customs and usages".⁴⁰

34 Land, above n 7; and Meleisea and Schoeffel, above n 4.

35 Land, above n 7; and Meleisea and Schoeffel, above n 4.

36 Corrin, above n 12; and Iati, above n 13.

37 Corrin, above n 12.

38 Samoa Law Reform Commission *Pule a le Matai Sa'o* (Government of Samoa, Apia, Samoa, 2016).

39 Land, above n 7; and Meleisea and Schoeffel, above n 4.

40 Samoan Constitution, art 111 (Provides the definition of "law" which includes "any custom or usage which has acquired the force of law in Samoa or any part thereof under the provisions of any Act or under a judgment of a Court of competent jurisdiction").

III. Hart's Legal System

Hart introduced two rules, upon which, he argues, constitutes the legal system – a departure from John Austin's positivist theory of command, where orders or commands are backed by threat of sanction or punishment.⁴¹ Hart's notion of a legal system comprises of the union of both primary rules of conduct and secondary rules. According to Hart, law can be divided into primary and secondary rules. In his words: "Legal control is primarily ... control by directions."⁴² On this view, primary law directs by creating or imposing duties. As such, primary law comprises of duty-imposing primary rules or directives, issued by the relevant authority, that create or impose duties on people that "constitute standards of conduct".⁴³ The primary rules are validated according to the principal criteria of validity that all rules must be obeyed. The example Hart provides is a pre-legal primitive system based solely on primary rules of conduct. Further to this, secondary laws, Hart contends, "are all about such rules in the sense that while primary rules are concerned with the actions that individuals must or must not do these secondary rules are all concerned with the primary rules themselves".⁴⁴ There are several fundamental secondary rules that Hart describes as the rule of recognition, the rule of change and the rule of adjudication.⁴⁵

However, it would be unwise to proceed to a full Hartian analysis of the Samoa legal system without acknowledging first the complexities to analysing non- Western customs, practices and laws within a framework of Western discourse and ideology. Several Samoan political and history scholars acknowledge the Western/ non-Western divide.⁴⁶ I argue that modern positivist legal scholars have made assumptions about the Samoan legal system and have, of course, been reluctant to engage in analyses using modern positivist legal theory.

The challenge to address lies in adopting Hart's legal theory as the principal frame of reference for legal analysis. To use Western legal theory to analyse non-Western law must be done with balanced consideration to avoid risk that it may undermine non-Western worldviews. It is also instructive in the analysis of Samoan customary practices within a frame of Western legal theory and discourse to not adopt cultural extremism in either polarised side of the spectrum.

41 Tapper, above n 2; and Hart, above n 1, at 116.

42 Hart, above n 1, at 21 as cited in Allan Beever *Law's Reality* (Edward Elgar Publishing, UK, 2021), at 134–135.

43 Beever, above n 42, at 135.

44 Hart, above n 1, at 94; and see critical analysis of HLA Hart legal system in Beever, above n 42, at 153.

45 Hart, above n 1, at 79–99.

46 Interview with Nanai Agaiava and Interview with Asofou So'o in Smith, above n 3; and Va'a, above n 3.

Arguably, to claim that the Samoa legal system should never be examined using “Western tools of analysis” strengthens cultural extremism,⁴⁷ and the argument that cultural differences may invalidate any comparative legal analysis between Western and non-Western worldviews.⁴⁸ On this view, several Samoan political historians assert that the laws, customs and human rights pertaining to Samoan society, should be “Samoanized” or contextualised according to Samoa’s local realities.⁴⁹ This argument may be framed as culturally extreme but it is silent with respect to ruling out all Western frameworks of analysis. It is also important to note that Samoan customary practices referred to in this article are discussed in reference to early colonial forms which have survived and currently exist in contemporary Samoa of 2024 (though the extent to which they have survived is not examined further here).

I point out two things: (1) there is merit in arguing that one must primarily employ a non-Western framework of analysis when seeking to examine non-Western worldviews or in this case, adopting a Samoan lens through which to analyse Samoan laws. However, this argument leans more towards cultural extremism when objecting to the use of Hart’s theory to analyse the Samoa legal system. This, then, points to the rationale that primarily adopting a Samoan cultural lens for legal analysis should only serve as a useful starting point for further legal analysis. This is dependent, after all, on the proposed research questions under examination; and (2) I propose that modern theorists (including modern theorists of Samoan and non-Western descent), should engage in critical legal scholarship, explore new pathways to elevate the voice and lived experience of diverse communities, while seeking to unravel and transform laws. On this view, to use Hart’s theory to analyse the Samoa legal system may deepen our understanding and offer deeper insight to Samoan society and the critical application of Hart’s theory in non-Western indigenous contexts.

To examine Samoa’s legal system in light of Hart’s theory, it may be useful to identify whether such rules exist or if there are conditions for the application of Hart’s legal system in contemporary Samoa.

The Samoan legal system would have met Hart’s criteria of pre-legal or primitive law. Hart’s idea of a legal system would also fit within the ambit of the Samoa legal system. Adopting Hart’s framework as a tool for legal analysis in non-Western cultures highlights how Samoan customary practices and laws may offer critical

47 Māmari Stephens “Māori Law and Hart: A Brief Analysis” (2001) 32 VUWLR 853–864.

48 Ann Mayer *Islam and Human Rights* (Pinter Publishers, London, 1995) at 4–11.

49 Interview with Nanai Agaiava and Interview with Asofou So’o in Smith, above n 3; and Va’a, above n 3, at 237.

understandings as to why a uniquely Samoan legal system may not fit neatly into the primitive theoretical construct, as Hart originally proposed.⁵⁰

IV. Hart's Rule of Recognition

HLA Hart introduced the rule of recognition to modern positivist jurisprudence.⁵¹ Leading legal and political philosophers, such as Thomas Hobbes, have emphasised the centrality of the rule of recognition.⁵² Hart's rule of recognition is a secondary rule that establishes the criteria for determining which rules are valid and binding within a legal system. In modern legal systems, the rule of recognition is often codified in formal legal documents such as constitutions or statutes, which outline the authority of lawmakers and the procedures for creating laws.

A. Critique

There is a mismatch in Hart's characterisation of pre-legal primitive societies as alluded to earlier. Hart points to a rather Western idea of a pre-legal primitive legal system, synonymous to Western legal systems, featured by certainty and efficiency, although his anthropological sources reveal a stark contrast to this description.⁵³

One significant defect in the pre-legal primitive system, based on primary rules, is one of *uncertainty*, leaving doubt as to what the rules are and the scope of the rules.⁵⁴ Recall, the uncertainty in this sense points to the need for a mechanism to help determine and understand the extent to which some feature or features of primary rules constitute part of the law. This led to the emergence of a secondary rule to dispel or mitigate against this uncertainty in the legal system, known as the rule of recognition.⁵⁵

The simplest form of remedy for the uncertainty of the regime of primary rules is the introduction of what we shall call a "rule of recognition". This will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.

⁵⁰ Stephens, above n 47.

⁵¹ Hart, above n 1.

⁵² Richard Tuck (ed) *Thomas Hobbes: Leviathan* (Cambridge University Press, Cambridge, 1991).

⁵³ Karl N Llewellyn and Edward A Hoebel *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (University of Oklahoma Press, Norman, 1941) as cited in Hart, above n 1, at 291; and Stephens, above n 47, at 853–864.

⁵⁴ Hart, above n 1, at 92.

⁵⁵ At 92.

B. Customary Recognition in Fa’asamoa

In Samoa, the rule of recognition is deeply embedded in the social and cultural structures of *fa’asamoa*. The *matai* and the village *fono* serve as the primary authorities responsible for recognising and enforcing customary rules.⁵⁶ These rules, although unwritten, are collectively practised by the Samoan community. Thus, the rule of recognition in *fa’asamoa* is not based on formal legal procedures but on cultural values and social expectations.⁵⁷ The collective acceptance of long-standing cultural norms and practices reinforce the collective recognition of these customary rules, passed down through generations, thus solidifying their validity as determined by the community’s acceptance of them as binding. The decisions of the *matai* and the village *fono* are respected and followed by the community, reflecting the deep-rooted nature of the rule of recognition in *fa’asamoa*.⁵⁸ For example, in matters relating to land disputes, the village *fono* applies customary principles to determine who has the right to use or control the land, and their decisions are considered final and binding by the community.⁵⁹

The concept of *fa’asamoa* may satisfy the rule of recognition because it serves as the principal criterion of validity which underpins Samoa’s legal system comprising of both state law and customary law. Samoa customs operate outside the formalised state legal system and are not legal in nature.⁶⁰ An example of this is Samoa’s customary or village context, where the rights and duties are built into *fa’asamoa* and ranked with respect to status and social hierarchy. Thus, the practical way to resolve whether rights, customs, practices and laws are compatible with *fa’asamoa* is thus characteristic of Hart’s rule of recognition.

C. State Recognition and the Constitution

In the formal state legal system, the rule of recognition is enshrined in the Constitution of Samoa, which establishes the authority of Parliament to create laws and outlines the procedures for doing so. The Constitution also explicitly recognises

56 See discussion on a Samoan “customary rule of recognition” in Bridget Fa’amatuaianu “Samoa Law Reform and Legal Pluralism: Critical Challenges to Achieving Legal Recognition of *Fa’atama* and SOGIEC Representation in the Law” (2023) 30 *Canterbury Law Review* 97 at 102–103, 105 and 107; Bridget Fa’amatuaianu “Samoa Law Reform and Recognition of *Fa’atama*: A *Talanoa* Approach” (PhD thesis, School of Law, Auckland University of Technology, 2024) (“Fa’amatuaianu 2”) at 152, 205–206 and 211.

57 Fa’amatuaianu, above n 56, at 102–103, 105 and 107; and Fa’amatuaianu 2, above n 56, at 152, 205–206 and 211.

58 Fa’amatuaianu, above n 56, at 102–103, 105 and 107; and Fa’amatuaianu 2, above n 56, at 152, 205–206 and 211.

59 Iati, above n 13; Meleisea and Schoeffel, above n 4; Corrin, above n 13; and Farran and Paterson, above n 13.

60 Meleisea and Schoeffel, above n 4.

the role of customary law in areas such as land and *matai* titles. Article 100 of the Constitution guarantees the recognition of customary land and the authority of the village *fono* in matters of customary law, ensuring that *fa'asamoa* remains a central part of Samoa's legal system.⁶¹

This bijural rule of recognition – one for state law and one for customary law – creates a complex legal framework in Samoa. In rural areas, *fa'asamoa* continues to govern most aspects of daily life, while in urban areas and in matters of national concern, the formal legal system operates according to Western legal principles.

This bijural recognition reflects the broader phenomenon of legal pluralism in post-colonial societies, where indigenous customary law coexists with formal state law.⁶²

The coexistence of these two forms of legal recognition has led to tensions, particularly when customary practices conflict with state law or individual rights guaranteed by the Constitution.⁶³ For instance, in cases where state law seeks to regulate land use in ways that may conflict with *fa'asamoa*, there is often resistance from customary landowners who view the authority of the *fono* as paramount. These tensions ground the challenges inherent in managing legal pluralism, where different legal systems operate in parallel and sometimes come into conflict.

One notable example of this tension is the application of human rights principles, particularly those related to individual property rights.⁶⁴ The Constitution of Samoa guarantees certain individual rights, including the right to own property. However, these individual rights often clash with the communal ownership model of *fa'asamoa*, where land is collectively owned and managed by extended families rather than individuals.⁶⁵ This conflict highlights the difficulty of applying universal human rights principles in a context where customary law prioritises communal over individual rights.

Consider also the example of case law. In a matter before Samoa's Court of Appeal, one of the issues concerned the disinterment of the parents' graves from family freehold land. The appellate judges ruled in favour of the Clarke J unreported Supreme Court decision, in that the Appellant had no legal basis for injuncting the family from considering to disinter their parents' graves. Further to this, the appellate judges argued that Clarke J had carefully considered the *fa'asamoa* values of *aiga* and sensitivity, and therefore ordered that the parents' graves must be disinterred before the property could be sold.⁶⁶ Here, the rule of recognition

61 Land, above n 7.

62 Land, above n 7.

63 Iati, above n 13; Meleisea and Schoeffel, above n 4; and Corrin, above n 13.

64 Farran and Paterson, above n 13.

65 Iati, above n 13; and Meleisea and Schoeffel, above n 4.

66 *Ah Kuoi v Ah Kuoi* (Unreported Decision of Justice Clarke delivered on 18 January 2019) in *Ah Kuoi v Ah Kuoi* [2019] WSCA 1 (15 April 2019).

enabled the appellate judges to authoritatively settle matters in line with normative considerations, well-settled precedents on law and *fa'asamoa*.

The rule of recognition offers the principal criteria to determine the validity of all other rules.⁶⁷ Samoa's Constitution sets out the content of Samoa's constitutional code or framework, and it takes the form of legislation, as determined by Parliament, which is Samoa law's rule of recognition. This is the embodiment of the principal criteria to assess the validity of Samoa laws.

The challenge for the Samoan legal system, therefore, is to reconcile these two systems of recognition.⁶⁸ On the one hand, there is a need to uphold the principles enshrined in the Constitution, particularly those related to individual rights and the rule of law. On the other hand, there is a strong desire to preserve the traditional values and practices of *fa'asamoa*, particularly in relation to land ownership and governance. This tension between state law and customary law is a defining feature of Samoa's legal system and reflects the broader challenges faced by legally pluralistic societies in balancing the demands of modernity with the preservation of tradition. On this view, the core values and beliefs that underpin the customary obligations embedded in Samoa's legal system, must satisfy the criteria set by *fa'asamoa*. In this regard, the concept of *fa'asamoa* contains the content of the laws in Samoa's legal system while providing the principal criteria of validity against which all rules and actions may be assessed or judged.

In the next part, I briefly examine role of the customary rule of recognition as it relates to Māori practices in Aotearoa New Zealand, and in South Africa as a way to illuminate how Hart's rule of recognition was realised outside Samoa.

D. Customary Rule of Recognition in Aotearoa

In New Zealand, the rule of recognition operates at two levels: one for state law and one for tikanga (Māori system of practices, principles, processes and procedures, and traditional knowledge). The New Zealand legal system is based on British common law, but it also recognises the significance of tikanga in certain contexts, particularly in relation to land disputes and family law. Tikanga is not codified in formal legal documents, but it is recognised as a legitimate source of law within Māori communities.⁶⁹ The decisions of Māori authorities, such as iwi

⁶⁷ Hart, above n 1, at 116.

⁶⁸ Fa'amatua'ina, above n 56.

⁶⁹ *Takamore v Clarke* [2012] NZSC 126 (SC) at [94] per Elias CJ: "Māori custom according to tikanga is therefore part of the values of the New Zealand common law"; Philip A Joseph *Constitutional and Administrative Law in New Zealand* (5th ed, Thomson Reuters, Wellington, 2021); and Jacinta Ruru, Paul Scott and Duncan Webb *The Aotearoa New Zealand Legal System: Structures and Processes* (7th ed, LexisNexis, Wellington, 2022).

(tribe) leaders, are respected as legally binding within the community, much like the decisions of the *matai* in Samoa are respected in Samoan society.

The recognition of tikanga in New Zealand reflects the broader trend towards integrating indigenous legal traditions into state legal frameworks.⁷⁰ The Treaty of Waitangi, signed in 1840 between Māori chiefs and the British Crown, serves as the foundational document that recognises Māori rights and responsibilities.⁷¹ Although the Treaty is not a constitution in the formal sense, it has been incorporated into New Zealand's legal system through legislation and judicial interpretation.⁷² As a result, tikanga plays a significant role in legal decision-making, particularly in cases that involve land, family, or other matters of cultural importance to Māori communities.

The recognition of tikanga in New Zealand highlights the broader challenges of legal pluralism in post-colonial societies, where indigenous legal traditions must coexist with state law. Like *fa'asamoa* in Samoa, tikanga represents a set of values and principles of kaitiakitanga (guardianship), mana (authority, control, influence, prestige and power leading to leadership) and whanaungatanga (extended family, relationships and responsibilities) that are deeply embedded in the social and cultural fabric of Māori communities. However, integrating these values into a modern legal system is a complex task, particularly when they conflict with the principles of Western legal systems.

Historically, colonial courts viewed customary law with a sort of scepticism and, thus, only the customs that were certain, well-established or did not threaten to undermine the morality and justice of the legal system remained.⁷³ Thus, the New Zealand courts have grappled with this issue in several high-profile cases, where they have had to balance the rights of individuals with the need to uphold the principles of tikanga. In some cases, the courts have been criticised for not giving sufficient weight to Māori legal traditions, while in others they have been praised for their efforts to integrate tikanga into the broader legal framework. Glazebrook J, in the recent Supreme Court case of *Ellis v R*, touched on the rules of recognition in the judgment. Glazebrook J then refers to tests of recognition used to recognise custom, as evident in *The Public Trustee v Loasby*.⁷⁴ Glazebrook J argues that certain conditions required the recognition of local custom, such as local tikanga, which

70 Ruru and others, above n 69.

71 Ruru and others, above n 69; and Joseph, above n 69.

72 Joseph, above n 69.

73 For a discussion of the certainty requirement see *Takamore v Clarke*, above n 69, at [28]–[32] per Glazebrook and Wild JJ; For a more detailed discussion see *Takamore v Clarke*, above n 69, at [22]–[37] per Glazebrook and Wild JJ, and “The common law in other jurisdictions” at [121]–[142].

74 *The Public Trustee v Loasby* (1908) 27 NZLR 801 (SC) at 806. Customs were deemed unreasonable if they were contrary to principles at the “root” of the colonial legal system; see *Takamore v Clarke*, above n 69, at [124]–[127].

forms law specific to a particular area.⁷⁵ In Glazebrook J’s summary of Cooper J’s criteria for recognition, as adopted in *Loasby*, it is noted that the custom must be part of a general Māori customary practice, must not conflict with state law, and must be reasonable.

Further to this, Elias CJ affirmed in the Court of Appeal case of *Takamore v Clarke*, “Māori custom according to tikanga is ... part of the values of the New Zealand common law.”⁷⁶ In this context, Glazebrook J supported the remarks and reasoning of Williams J in the Supreme Court case, *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, where it was highlighted that the Pākehā perspective should also be considered alongside others in the statutory interpretation of tikanga.⁷⁷ Williams J further affirmed that tikanga’s relational values of kaitiakitanga, mana and whanaungatanga are, in fact, legal principles that existed in Aotearoa before the introduction of common law.⁷⁸ This is comparable to Samoa, where a customary system also pre-dates colonisation.

In light of the evidence of modern case law in New Zealand, it affirms the colonial recognition of customs in modern case law.⁷⁹ Thus, New Zealand’s legal system provides a valuable comparison to Samoa, particularly in terms of how both countries integrate customary law into their formal legal frameworks. In New Zealand, *tikanga* plays a significant role in shaping legal decisions, particularly in areas related to land, family and community matters. Like *fa’asamoa*, tikanga is deeply embedded in Māori culture and serves as a primary source of law for Māori communities.

75 *Halsbury’s Laws of England* (5th ed online ed, 2019) vol 32 Custom and usage at [1]; *The Case of Tanistry* (GB (1608) Dav Ir 28, 80 ER 516 (KB) at 32); *Ellis v R* [2002] NZSC 114 at [92], per Glazebrook J.

76 *Takamore v Clarke*, above n 69, at [94] per Elias CJ.

77 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801, at [297], although Williams J wished to note that he did not see the reasons of William Young and Ellen France JJ reflecting that shortcoming. Glazebrook J also agreed with this point at [237] n 371 of the reasons.

78 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above, at [297] per Williams J.

79 For example, *R (on the prosecution of McIntosh) v Symonds* (1847) NZPCC 387 (SC); *Re the London and Whitaker Claims Act 1871* (1872) 2 NZCA 41; *The Public Trustee v Loasby*; *Arani v Public Trustee of New Zealand* [1920] AC 198 (PC), commonly cited as *Hineiti Rirerire Arani v Public Trustee*; *Baldick v Jackson* (1910) 30 NZLR 343 (SC); and *Tamaki v Baker* [1901] AC 561 (PC) commonly cited as *Nireaha Tamaki v Baker* at 577). More modern cases referencing customary law and tikanga include: *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC); *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC); *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA); *Sweeney v The Prison Manager, Spring Hill Corrections Facility* [2021] NZHC 181, [2021] 2 NZLR 27; and *Ngawaka v Ngāti Rehua-Ngātīwai ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1.

1. Comparative analysis with other post-colonial legal systems

The challenges of integrating customary law with state law in legally pluralistic societies are not unique to Samoa or New Zealand. Other post-colonial societies, such as South Africa, also face similar issues in balancing the recognition of indigenous legal traditions with the requirements of state law. This comparative example provides valuable insights into the complexities of managing legal pluralism in diverse cultural contexts.

2. South Africa

South Africa provides another example of a post-colonial society that has sought to integrate customary law into its legal system.⁸⁰ The South African Constitution recognises the importance of customary law and guarantees its protection, provided it is consistent with the principles of the Constitution, including the right to equality.⁸¹

This has led to conflicts between customary law and the constitutional principles of gender equality, particularly in cases involving inheritance and marriage.⁸²

To address these challenges, legislative reforms were aimed at aligning South African customary law with constitutional principles. For example, the Recognition of Customary Marriages Act of 1998 was introduced to ensure that customary marriages are legally recognised and that the rights of women in such marriages are protected.⁸³ Similarly, reforms to inheritance law have sought to ensure that women and children have equal rights to inherit property under customary law.⁸⁴

80 Marius Pieterse "It's a Black Thing: Upholding Culture and Customary Law in a Society Founded on Non-Racialism" (2001) 17 South African Journal on Human Rights 364–403.

81 Cathi Albertyn and Beth Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 South African Journal on Human Rights 248 at 249.

82 Aubrey Manthwa "Towards an Afrikan Approach in Resolving the Conundrum Between a Civil and Customary Marriage" (2023) 38 (2) Southern African Public Law 19. In specific countries of the South Pacific – Samoa, Solomon Islands and Vanuatu – there is specific statutory and customary law recognition of customary marriage. In Samoa, a polygamous marriage entered into in accordance with custom has been recognised as valid by the Courts in *The Samoan Public Trustee v Annie Collins* [1961] WSLR 52. Reflecting on this, in *Tautalafua v Public Trustee* [2010] WSSC 182, Justice Slicer stated at [53] that: "There is a further contention that even if Fiti and Levao had never married in church or been registered as husband and wife, they had nevertheless married in accordance with Samoan but there is no evidence of 'customary marriage' simply cohabitation."

83 Pieterse, above n 80; Victoria Bronstein "Confronting Custom in the New South African State: An Analysis of the Recognition of Customary Marriages Act 120 of 1998" (2000) 16 SAJHR 558 565–567 and 572–573; and Elsje Bonthuys and Marius Pieterse "Still Unclear: The Validity of Certain Customary Marriages in terms of the Recognition of Customary Marriages Act" (2000) 63 THRHR 616 617–621.

84 Pieterse, above n 80.

The experience of South Africa in integrating customary law into its legal system offers valuable lessons for other post-colonial societies, such as Samoa and New Zealand.

V. Hart's Rules of Change

Hart's rule of change is a secondary rule that provides the mechanism by which legal rules are created, amended, or repealed. In modern legal systems, the rule of change is typically codified in legislative processes, where formal institutions, such as parliaments or legislative bodies, are responsible for creating and modifying laws. Hart argued that primitive legal systems lack a formal rule of change, leading to legal stagnation as there are no mechanisms for adapting to new circumstances.

Arguably, in Samoa's legally pluralistic system, both formal and customary rules of change exist. One of the overriding features of primitive law in pre-legal societies, which Hart struggled to articulate, is the problem of "uncertainty, stasis and inefficiency".⁸⁵ This problem does not recognise a process of change to primary rules, beyond gradual change with time. The defects of primitive law are resolved in Hart's legal system by the introduction of rules of change. For Hart, the rules of change are remedies for the inflexible system of primary rules which then empowers the legislature or lawmaker (that is, an individual or body) to introduce new primary rules, effectively removing old rules, to confer authority to make law, amend law and repeal law, for an individual or group.⁸⁶

They are part of the rule conferring authority to legislate
 . . . [L]egal limitations on legislative authority consist . . . of
 disabilities contained in rules which qualify him [the lawmaker]
 to legislate.

What is unclear is whether Hart's idea of constitutional provisions that authorise or limit the making of law equates to a legal system's rule of recognition or the rule of change. As we saw above, each rule serves a different function on Hart's account. If Hart regards the constitutional provisions as constituting the legal system's rule of change, then it leaves open the question about the role of the rule of recognition.

⁸⁵ Keith Culver and Michael Giudice "Legal officials, the rule of recognition, and international law" in *Legality's Borders: An Essay in General Jurisprudence* (online ed, Oxford Academic, New York, 2010) 31 <<https://doi.org/10.1093/acprof:oso/9780195370751.003.001>>.

⁸⁶ Hart, above n 1, at 69, 70; and Jeremy Waldron "Who Needs Rules of Recognition?" in Matthew D Adler and Kenneth Einar Himma (eds) *The Rule of Recognition and the US Constitution* (Oxford University Press, Oxford, 2009) at 327–350.

Waldron offers three possibilities:⁸⁷

We might say (1) that, given the operation of the rule of change, there is no need for a rule of recognition. Or we might say (2) that a system with such a rule of change also needs a separate rule of recognition. Or we might say (3) that the rule of change is the rule of recognition, or part of it.

I expand on each of Waldron's possibilities above in light of Samoa's legal system. For possibility (1), at the constitutional level, Hart remarked that in matters of constitutional constraints, the courts "are part of the rule conferring authority" to legislate and as such,⁸⁸ the courts use "such a rule" that specifies procedures and protocols to follow for enacting,⁸⁹ amending and repealing law. This means that in constitutional matters and constraints on law-making in Samoa, Hart views the courts as applying the rule of change as the principal criterion to determine whether norms are legally valid or not, rather than the rule of recognition. Hart also implies that, in some contexts, the courts use the rule of recognition for the same purpose, which is an aspect Hart uses to highlight the certainty and uncertainty regarding the application of the rule of recognition.⁹⁰ Plainly there will be a very close connection between the rules of change and the rules of recognition.

For possibility (2), Hart points out that the rule of change is separate from the rule of recognition and the rule of recognition is identifiable because it:⁹¹

... will necessarily incorporate a reference to legislation as an identifying feature of the rules, though it need not refer to all the details of procedure involved in legislation. Usually, some official certificate or official copy will, under the rules of recognition, be taken as a sufficient proof of due enactment.

According to Hart, reference to enactment is one role for the rule of recognition, whether in simple or more complex societies, at which point, the rule of change is no longer mentioned.⁹² This suggests that Hart straddled with the significance of both rules. In parts, Hart positioned the rule of change as performing the bulk of the foundational work in the legal system, as in empowering Parliament to make,

⁸⁷ Waldron, above n 86, at 340.

⁸⁸ Hart, above n 1, at 69 and 70.

⁸⁹ At 69.

⁹⁰ At 96, 247 and 251–252.

⁹¹ At 247 and 251–252.

⁹² At 101.

amend and repeal laws, while in other parts, the rule of recognition merely served a secondary validating role.

For possibility (3), in light of the discussion above for possibility (2), it becomes clear that Hart considers the two rules as separate and distinct from each other. In the first instance, the rule of change provided the criteria of validity until Hart reframed the rule of recognition, in which the criterion of validity is embedded, thus making it more fundamental to the rule of change in that regard. It is unclear whether Hart's rule of recognition performs the same function as the rule of change or whether it fulfils anything for which the rule of change has not fulfilled. What is clear is that, out of the two, the rule of change is better placed to perform on its own without the need for the rule of recognition.

VI. Rules of Change in Samoa

A. Customary Level

In the *fa'asamoa* system, the village *fono* has long held the power to create or amend rules based on the community's evolving needs.⁹³ This adaptability is a core feature, allowing *fa'asamoa* to respond to social, economic and political changes. The village *fono* enforces rules that reflect communal values which can be adjusted as circumstances require, such as shifting family dynamics, land use or resource management.

This flexibility ensures *fa'asamoa* remains relevant, even in the face of challenges like globalisation and economic development. One significant example of this adaptability is how *fa'asamoa* has responded to global economic pressures.⁹⁴ Thus, rule of change in Samoa's state legal system is land reform aimed at promoting economic development.⁹⁵ Recent legislation has streamlined land registration for commercial purposes to attract foreign investment. However, these reforms have raised concerns among customary landowners, who fear the erosion of traditional land rights and the potential commodification of communal land.⁹⁶ It was argued that the registration of adjudicated customary land under the Land Titles Registration Act 2008 and the effects of the Taking of Land Act 1964 may violate the

⁹³ Iati, above n 13.

⁹⁴ Meleisea and Schoeffel, above n 4.

⁹⁵ Ruiping Ye "Torrens and Customary Land Tenure: A Case Study of the Land Titles Registration Act 2008 of Samoa" (2009) 40 VUWLR 827.

⁹⁶ Ye, above n 95, which highlights issues of the Torrens system in Samoa and analysis of the customary land governance and conflict between the interpretation of Samoan customs and usage in the Constitution, Alienation of Customary Land Act 1965 and the Land and Titles Act 1981.

Constitution as the Torrens system is incompatible with customary land. One of the recommendations to preserve the *fa'asamoa* was to exclude customary land from the Torrens system's indefeasibility of title.⁹⁷

Nonetheless, the VFA 1990 formalised the village *fono's* authority to regulate local customs and impose penalties for breaches.⁹⁸ It granted legal recognition to the village *fono's* power to create, amend and repeal customary rules, ensuring the flexibility of *fa'asamoa* within Samoa's legal system which integrates customary law into the formal framework.

B. State Level

In Samoa, the rule of change at the state level is reflected in the Constitution, which grants Parliament the authority to create, amend, and repeal laws.⁹⁹ The legislative process follows representative democracy, where elected officials make decisions on behalf of the people.¹⁰⁰ This process is formal, requiring established procedures for introducing, debating and passing laws.

Unlike the flexible adaptation seen in *fa'asamoa*, changes in the state legal system follow a more rigid and structured process. State law requires formal debate, consultation, and legislative approval before new laws can be enacted or amended, which can create tensions when state laws impact customary practices.¹⁰¹ For example, state laws affecting land use, such as those related to land registration or property development, may conflict with the interests of customary landowners.¹⁰² In such cases, state law may be perceived as undermining the authority of the village *fono* and the principles of *fa'asamoa*. These tensions illustrate the broader challenges faced by legally pluralistic societies, where different legal systems must coexist and adapt.

Another contentious area is in the example of a statute of wills and how to determine a valid will from an invalid will according to the rules of recognition. Here, the statute of wills could also constitute a rule of change in that it sets out the legal procedures and requirements that must be satisfied to give effect to a valid change. In Samoa's legal system, the court determines whether to grant probate or letters of administration for the executors named in the will to be formally

97 Ye, above n 95.

98 Ye, above n 95.

99 Samoan Constitution.

100 Graham Maddox "Representative Government" in Tony Blackshield, Michael Coper and George Williams (eds) *The Oxford Companion to the High Court of Australia, Melbourne* (Oxford University Press, Oxford, 2002) 33 as cited in Allan Beever *Forgotten Justice: The Forms of Justice in the History of Legal and Political Theory* (Oxford University Press, Oxford, 2013) 293.

101 Land, above n 7; and Meleisea and Schoeffel, above n 4.

102 Land, above n 7; and Meleisea and Schoeffel, above n 4.

recognised as administrators of the will.¹⁰³ Once the court confirms all is in order, the administrators of the will carry out administration, which may include property bequeathed, devised or disposed of by will.¹⁰⁴

The interaction between state law and customary law in Samoa's legal system demonstrates the complexities of managing legal change in a pluralistic society. While the state legal system provides a formal mechanism for introducing new laws and amending existing ones, the *fa'asamoa* system relies on more informal, consensus-based processes for changing customary rules. This bijural system of legal change reflects the broader challenges of legal pluralism, where different legal systems must adapt to one another while preserving their unique values and traditions.

According to Samoa's Constitution, the extent to which the status of customs and customary rules against which individual rights may be refined and assessed is problematic. The local reality is that each of the 330 villages in Samoa have their own set of customary rules which is fraught with complex challenges: (1) it makes it difficult to reach consensus on a uniform, specific and identifiable list of customary rules; and (2) this makes it more problematic from which to assess, determine and base a set of individual rights in a customary context.¹⁰⁵ This is quite a separate matter, but it affirms the position of the 2010 Commission of Inquiry into freedom of religion in Samoa in relation to the inadequacies in legislation to resolve irreconcilable differences in society:¹⁰⁶

Firstly, the central factor in the whole debate is essentially the matter of ideas and their spread among human minds. This is something that cannot be dealt with by legislation unless it becomes possible to stop people thinking by passing laws or changing constitutions.

The development of a "practical jurisprudence" is possible in Samoa, in light of modernisation and urbanisation.¹⁰⁷ Certainly, the flexible nature of Samoa customs makes it more resilient and accommodating of change which is complementary to the social rules and lifestyle in Samoan villages.¹⁰⁸ In principle, Samoa was not bound by a rigid set of customs. Customs were woven into the living fabric of the

¹⁰³ Administration Act, s 5 (Samoa 1975).

¹⁰⁴ Wills Act, s 3 (Samoa 1975).

¹⁰⁵ Mulitalo, above n 25.

¹⁰⁶ Commission of Inquiry, above n 16; and Davidson, above n 16.

¹⁰⁷ *In re the Constitution, Pita v Attorney-General*, above n 4.

¹⁰⁸ Mulitalo, above n 25.

fa'asamoa. Like customs, rules were also subject to change, conditional upon the maintenance of the *fa'asamoa*.

I argue that the village *fono* is the mechanism, collectively recognised in *fa'asamoa* customary practice, to incorporate and introduce change to *aiga, nu'u* and the general community. In a broader sense, Samoa is a legally pluralistic society, therefore, the state system co-exists alongside the customary system. This means that at state level, the rule of change empowers Parliament and the courts to legislate and make laws, respectively.

Consensus decision-making is a common feature across indigenous societies of the Pacific.¹⁰⁹ In the *fa'asamoa* customary context, the village *fono* make decisions and such decisions may be framed as law or customary law. If we regard this customary practice as a *fa'asamoa* rule of change, this elevates the status of the village *fono* as a critical institution, where collective decision-making on customary and legal matters, such as in land ownership, may determine what rules are made, amended and removed, as a way to resolve customary matters in the community according to *fa'asamoa*. Moreover, if legislation forms a corpus of laws, thus, legislation is enacted, amended or repealed, as necessary, in the meetings (*fono*), provided such legislation or laws are validated according to *fa'asamoa* custom.

Bearing all this in mind, let us return to Hart. If Hart's proposition is that, specifically, uncertainty, stasis and inefficiency are the defects to the pre-legal primitive system, the earlier points just made may cast further doubt that it is the rule of recognition that lies at the heart of Samoa's legal system, rather than the rule of change. In Hart-ish jurisprudence, in the first instance, it is claimed that the rule of change provides the criteria of legal validity and how to exercise a power – law-making, for example – thus, judges must apply all norms to satisfy legal tests according to the rule of change. Certainly, Samoa had customary processes in place to resolve matters before these were formalised into Samoa's legal system, and these customary processes were flexible and adapted to *fa'asamoa*, accordingly. Such customary processes were not rigid. They were quite the opposite. The inconsistency is that Hart did not envision a pre-legal primitive system outside of that characterised.

109 Tamasailau Suaalii-Sauni and others *In Search of Fragrance, Tui Atua Tupua Tamasese Ta'isi and the Samoan Indigenous Reference* (Centre for Samoan Studies, National University of Samoa, Apia, 2009) as cited in Mulitalo, above n 25, at 42; and Meleisea, above n 4.

VII. Hart's Rule of Adjudication

Hart's rule of adjudication refers to the procedures by which breaches of legal rules are identified and disputes are resolved. In modern legal systems, this function is typically conducted by a judiciary, which has the authority to interpret laws, resolve disputes and issue judgments. Courts provide formal mechanisms for resolving disputes, ensuring that laws are applied consistently and fairly. In contrast, Hart argued that primitive legal systems lack formal adjudicative mechanisms, leaving disputes to be resolved informally through social customs or community pressure.

A. Critique

To resolve breaches in rules, and the resulting inefficiency due to the lack of processes to remedy breaches in Hart's primitive law, these could only be rectified by the rules of adjudication.¹¹⁰ The rules of adjudication empower officials to determine the nature of the breaches and the procedure to remedy such breaches. The onus is on the individual or group to pursue resolution for any breaches of the rules.¹¹¹ The rules of adjudication also set out the procedure for which breaches are: (1) identified; and (2) remedied.¹¹²

B. Rules of Adjudication in Samoa

In Samoa, the rule of adjudication operates within both the customary and state legal systems. The village *fono*, which serves as the primary governing body in rural areas, is responsible for adjudicating disputes in accordance with customary law. The *matai*, as leaders within their families and villages, have the authority to resolve conflicts and impose sanctions. Decisions made by the village *fono* are respected as legally binding within the community, and the focus of adjudication in *fa'asamoa* is often on restoring relationships rather than punishing wrongdoers.¹¹³

1. Customary level

Adjudication in *fa'asamoa* is deeply connected to Samoan cultural values, prioritising harmony and collective interests over individual rights. This reflects Samoan society, pre-contact, as the role of the *matai* in the village *fono* was similar to the role of judges in court, Members of Parliament or councillors in municipal

¹¹⁰ Hart, above n 1, at 93.

¹¹¹ Hart, above n 1, at 93.

¹¹² Hart, above n 1, at 96–97.

¹¹³ Fa'amatuainu, above n 56.

authorities.¹¹⁴ Unlike Western legal systems, which focus on determining guilt or liability, the village *fono* aims to resolve disputes through reconciliation and maintaining the community's social fabric.¹¹⁵ Thus, the *matai* of the village *fono* were empowered to make official decisions to determine breaches of customary rules and the resolution of such breaches.¹¹⁶

A key area where this is evident is in land disputes. Customary land in Samoa is governed by *fa'asamoa*, and disputes over land use or ownership are typically handled by the village *fono*.¹¹⁷ *Matai*, as land custodians, have the authority to decide who can use or occupy specific parcels. These decisions are made collectively by the village *fono* to ensure that land remains within the family and benefits the entire community.¹¹⁸

2. State level

In addition to the customary system, Samoa has a formal legal system based on British common law. The state judiciary, which includes the District Court, the Supreme Court and the Court of Appeal, is responsible for interpreting and applying state law. These courts provide a formal mechanism for adjudicating disputes, ensuring that laws are applied consistently and in accordance with the principles set out in the Constitution. The bifurcation of the court system empowers the new LTC courts to hold exclusive jurisdiction over disputes related to customary land and *matai* titles.¹¹⁹

One of the key challenges in the adjudication process is the interaction between the customary and state legal systems. While the LTC applies customary law, it does so within the formal structure of the state judiciary.¹²⁰ This can create tensions when the outcomes of court decisions conflict with the expectations of the village *fono*. These tensions illustrate the broader challenges of managing legal pluralism, where different legal systems must coexist and sometimes come into conflict.¹²¹

The interaction between the LTC and the village *fono* highlights the complexities of managing legal pluralism in Samoa. While the village *fono* operates according to the principles of *fa'asamoa*, the LTC applies a more formal, adversarial approach to

114 Meleisea, above n 4; James W Davidson *Samoa mo Samoa: the Emergence of the Independent State of Western Samoa* (Oxford University Press, Melbourne, 1967) 391.

115 Bridget Fa'amatuainu "Self-represented litigation and meaningful access to justice in Aotearoa and Samoa" (2023) 19(1) *AlterNative: An International Journal of Indigenous Peoples ("Fa'amatuainu 3")* 13–22.

116 Fa'amatuainu 3, above n 115.

117 Tamasailau and others, above n 109 as cited in Mulitalo, above n 25, at 42; and Meleisea, above n 4.

118 Meleisea, above n 4.

119 Land, above n 7.

120 Land, above n 7.

121 Land, above n 7; Mulitalo, above n 25; Meleisea and Schoeffel, above n 4.

dispute resolution. This difference in approach can lead to tensions between the two systems, particularly when the *fono* and the court reach different conclusions about the same dispute. In some cases, the village *fono* may refuse to recognise the authority of the court, leading to a breakdown in the adjudication process.¹²²

One example of this tension is seen in cases involving fundamental human rights.

¹²³ If a party to the dispute is dissatisfied with the decision of the village *fono*, they may appeal to the new Land and Titles Court of Appeal and Review,¹²⁴ thus reflecting the tensions faced by legally pluralistic societies in managing the interaction between different legal systems. Balancing these two systems is a complex task, and the interaction between the LTC and the village *fono* highlights the difficulties of managing legal pluralism in Samoa.

In practice, the legal reality is that only *matai* in the village *fono* may actively contribute to decision-making processes and procedures in the village. According to Samoa's 2020 Second Voluntary National Review on the Implementation of the Sustainable Development Goals, only 22 per cent of women are registered *matai*,¹²⁵ and 21 *nu'u* continue to prohibit women *matai*.¹²⁶ Thus, the combined impact of colonisation and Christianity meant that women in Samoa were subjected to maternal/domestic roles in the private domain, further removing women from active participation in decision-making in the public domain.¹²⁷ This observation means that in *fa'asamoa* customary practice, predominantly men hold rank according to Samoan hierarchy and dominate input at the village *fono* in relation to what constitutes the rule of adjudication. No doubt, their influence is extrapolated into other areas, including *aiga* and community. What this points to is the complexity in Samoa customary processes, undermining Hart's categorisation of "primitive".

¹²² Before the 2020 constitutional reforms, these two leading customary cases highlighted the tension between customary law and state law in Samoa: In *Alaelua v Land and Titles Court* (1992) 3 WSLR 507 (SC Apia), the Supreme Court refused to review LTC decisions, applying s 71 ("ouster clause") of the former Land and Titles Act 1981 which barred judicial review of LTC decisions by other courts, establishing six principles that reinforced LTC's unique and equal status with the Supreme Court in specific respects; and *Ullise Aloimaina v Land and Titles Court* WSSC 4 November 1998 overruled *Alaelua's* reasoning and determined that the LTC was an inferior court subject to judicial review by the Supreme Court, especially on fundamental rights grounds and reinforced the supremacy of the Constitution (Samoan Constitution, art 2) over LTC decisions.

¹²³ Land, above n 7.

¹²⁴ Samoan Constitution, art 104C; and Land, above n 7.

¹²⁵ Government of Samoa *Samoa's Second Voluntary National Review on the Implementation of the Sustainable Development Goals* (Apia, 2020) <<https://samoa.un.org>>.

¹²⁶ National University of Samoa *Political Representation and Women's Empowerment in Samoa Volume 1: Findings and Recommendations* (Centre for Samoan Studies, National University of Samoa, 2015).

¹²⁷ Bronwen Douglas "Provocative Readings in Intransigent Archives: Finding Aneityumese women" (1999) 70(2) *Oceania* 111; and Anna-Karina Hermkens "Mary, Motherhood and Nation: Religion and Gender Ideology in Bougainville's Secessionist Warfare" (2011) 25 *Intersections: Gender and Sexuality in Asia and the Pacific*.

VIII. Critical Gaps to Address

Hart's theory of legal positivism, while influential in Western thought, shows limitations in legally pluralistic societies like Samoa. A key flaw is the assumption that primitive legal systems lack secondary rules. However, Samoa's *fa'asamoa* system includes all three of Hart's secondary rules – recognition, change and adjudication – proving it is far more complex than Hart's depiction of primitive systems.

It could be argued further that a Samoan rule of recognition remains uncertain due to the fluid nature of the *fa'asamoa*. These *fa'asamoa* values, while common across the different *aiga* and *nu'u*, may also vary in interpretation and practice according to the different *aiga*, *nu'u* or community contexts.¹²⁸ For example, neighbouring *nu'u* may adopt different customs to resolve *aiga* disputes and other *aiga* may exercise customary practices for *suli* (heir by blood connection), depending on the role of the *suli* in their *aiga*. It could be inferred here that *fa'asamoa* result from a set of core values, while at the same time, *fa'asamoa* may also stem from the result of such values as well as the values in and of themselves. This points to flaws of uncertainty present in Samoan law which invalidates *fa'asamoa* in a Hartian sense, as a rule of recognition. But even Hart points to the "beliefs" of officials, constrained by the rule of recognition. It does not, however, invalidate that certain provisions of Samoa's Constitution may contain the rule of recognition, which sets out the principal criteria for legal validity.

Hart stated that the Constitutional system "of course contains an ultimate rule of recognition and, in the clauses of its constitution, a supreme criterion of validity".¹²⁹ Hart uses the United States Constitution as an example of the validating role played by the rule of recognition:¹³⁰

In some systems of law, as in the United States, the ultimate criteria of legal validity might explicitly incorporate besides pedigree, principles of justice or substantive moral values, and these may form the content of legal constitutional restraints.

What is questionable is Hart's assignment of the rule of recognition to play the validating role which underpins these social practices, although the practice of law

128 Samoa Law Reform Commission, above n 38.

129 Hart, above n 1, at 106.

130 At 247.

making and law reform are vital to any legal system, according to provisions in the Constitution, a Bill of Rights or similar constitutional arrangements.¹³¹

Hart's neglect of customary law in such societies is another major shortcoming. In Samoa, customary law is central to governance and deeply rooted in the social fabric, shaping relationships and decision-making processes. Hart's focus on formal legal structures overlooks the flexible and culturally grounded nature of systems like *fa'asamoa*.

To the extent that social practices form the foundation of a legal system is not questionable. "The foundation of each institution is not the rule in question but the social acceptance of that rule."¹³² I agree that the rule of recognition is the formalisation of a collectively recognised social practice recognising certain rules and not others as legal rules.¹³³ Importantly, it determines the status of a rule having the status of a rule of recognition because it is accepted by people who have status by virtue of the rule having such status.¹³⁴ This line of reasoning is consistent with the view that the foundation of law is a social practice and not a rule which is particularly applicable to the customary context of Samoa.

A further gap in Hart's theory is the failure to address legal pluralism. Samoa's legal system integrates both state and customary law, which interact and adapt to social, economic and political shifts. Hart's distinction between primitive and modern legal systems does not account for the fluidity in pluralistic societies like Samoa, where multiple legal frameworks coexist and influence each other. The coexistence of state and customary law in Samoa emphasises the need for a flexible system that accommodates both. For instance, in land disputes the village *fono* may apply customary law, while the state judiciary uses formal principles, requiring an integrated approach.

On the whole, this points to questioning what is exactly under investigation: Hart's theory which underpins the nature of acceptance, when determined by social

131 See Matthew D Adler and Michael C Dorf "Constitutional Existence Conditions and Judicial Review" 89 (2003) Va L Rev 1105: Adler and Dorf present some mixed claims about the role of the rule of recognition. They argue that positivists are likely to challenge Hart's idea that the Constitution provides the rule of recognition while also being open to the idea that the Constitution may incorporate the ultimate criteria for legal validity of legislation with an emphasis on the content of the legislation.

132 Beever, above n 42, at 159.

133 Beever, above n 42; see Luka Burazin "Legal Systems as Abstract Institutional Artifacts" in Luka Burazin, Kenneth E Himma and Corrado Rovorsi (eds) *Law as an Artifact* (Oxford University Press, Oxford, 2018) 114 as cited in Beever, above n 42, at 168; see Scott J Shapiro *Legality* (Harvard University Press, Cambridge, 2011) 103 as cited in Beever, above n 42, at 168.

134 Beever, above n 42, at 167; see Brian Leiter "Legal Positivism about the Artifact Law: A Retrospective Assessment" in Luka Burazin, Kenneth E Himma and Corrado Rovorsi (eds) *Law as an Artifact* (Oxford University Press, Oxford, 2018) 6 as cited in Beever, above n 100, at 68.

practices; or, how Hart's theory establishes the standard for determining the basis for whether a rule is recognised as legally valid or not. As Beaver states:¹³⁵

I have provided an answer as to how to distinguish between law and non-law. That answer is collective recognition. In short, law is what is collectively recognised as law and non-law is what is collectively recognised as non-law.

The collective recognition of a socially accepted practice in Samoa holds that *matai* in the village *fono* act as representatives of the village and, thus, represent the views of the village, while *matai* in each *aiga* act as representatives of their *aiga* and represent their views. The problem lies in our understanding about the foundation of law or legal systems and how to determine the status of those who accept and are given status by the rule of recognition. Empirical evidence, as provided in New Zealand and South Africa, are required to resolve how the rule of recognition is adopted as jurisdictions differ in approach. Such understandings should be obtained for guidance on the common pitfalls to avoid in law making, such as detaching social practices from the rule of recognition when it is, in fact, a formalisation of our social practice.¹³⁶ Tamanaha agrees that "customary law, religious law, and international law, among other legal forms, do constitute collectively recognized forms of law with legal deontic powers".¹³⁷ In other words, based on Tamanaha's empirical study, customary law is a collectively recognised social practice that amounts to a rule of recognition. This provides an appealing framework for a Samoa rule of recognition.

As Samoa becomes more involved in the global economy, its legal system must balance modern demands with traditional values. Hart's rigid legal positivism does not adequately address the complexities of legal pluralism in post-colonial societies like Samoa, where law must evolve while preserving tradition.

IX. Conclusion

Hart's theory of legal positivism, while foundational in Western legal thought, presents significant challenges when applied to legally pluralistic societies like Samoa. Hart's distinction between primitive and advanced legal systems, based on the presence or absence of secondary rules, fails to capture the complexity of legal systems that incorporate both customary and state law. As this analysis has

¹³⁵ Beaver, above n 42, at 123.

¹³⁶ Beaver, above n 42, at 169 and 171.

¹³⁷ Brian Tamanaha *A Realistic Theory of Law* (Cambridge University Press, Cambridge, 2017) 53 as cited in Beaver, above n 42, at 126.

demonstrated, Samoa's *fa'asamoa* system includes all three of Hart's secondary rules – recognition, change and adjudication – indicating that it is far more complex than Hart's characterisation of primitive legal systems.

The rule of recognition in Samoa operates at two levels: one for state law, as enshrined in the Constitution; and one for customary law, as governed by *fa'asamoa*. The bijural recognition of state and customary law creates a pluralistic legal system where both systems operate simultaneously, sometimes in harmony and sometimes in conflict. This bijural recognition challenges Hart's assumption that legal systems must be unified and coherent, instead suggesting that legal systems can operate in multiple, overlapping spheres.

The rule of change in Samoa also reflects the adaptability of legally pluralistic systems. In *fa'asamoa*, the village *fono* has the authority to modify customary rules in response to changing social, economic and political conditions. This flexibility allows customary law to evolve over time, ensuring that it remains relevant and responsive to the needs of the community. The formal legal system, based on British common law, also incorporates mechanisms for legal change through legislative processes, creating a dynamic legal framework that can accommodate both state and customary law.

The rule of adjudication in Samoa operates within both the customary and state legal systems. The village *fono* serves as the primary adjudicative body in rural areas, resolving disputes according to customary principles. The state judiciary, including the LTC, provides a formal mechanism for adjudicating disputes, particularly those related to land and *matai* titles. The coexistence of these two systems reflects the broader challenges of managing legal pluralism in Samoa, where different legal traditions must be integrated and balanced.

Comparative analysis with other legally pluralistic societies, such as New Zealand and South Africa, further highlights the limitations of Hart's theory in capturing the complexity of post-colonial legal systems. In these societies, customary law operates alongside state law, creating legal frameworks that are flexible and responsive to the needs of diverse communities. The overlap between the rule of recognition and the rule of change in these systems highlights the adaptability of legal pluralism and challenges Hart's rigid distinction between the two functions.

Ultimately, this critical analysis argues that Hart's theory of legal positivism requires significant adaptation when applied to non-Western contexts. In legally pluralistic societies like Samoa, where customary and state law coexist, a more flexible and culturally sensitive approach is necessary to fully understand the complexities of the legal system. Legal pluralism offers a framework for recognising and integrating multiple legal traditions, ensuring that legal systems can respond

to the diverse needs of their communities. By addressing the critical gaps in Hart's theory, this analysis contributes to a broader understanding of how legal systems function in post-colonial and legally pluralistic customary contexts.