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Indigenising Private Law: Lessons from Samoa

(Fa'amatuainu 2023)

Fa'amatuainu, B. (2023) Indigenising Private Law: Lessons from Samoa. *Journal of Commonwealth Law* 4, 101-126.

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ABSTRACT. Legally pluralistic societies such as Samoa face a challenge: the legacy of colonialism, including in law-school curricula. In 2019, the National University of Samoa delivered its first Customary Adjudication programme with core topics including Legal Professional Ethics and Customary Law—a programme that I helped design and deliver. However, for the time being, indigenous law remains virtually non-existent in law-school curricula. This paper critically reviews the existing framework for the teaching of private law in Samoa and discuss how law schools could incorporate indigenous private law to a greater degree. It explores approaches adopted in the Pacific to review and reform local private law, while not pedagogical in nature, it carries potential for informing the integration of indigenous materials into the design and delivery of private-law papers. Accordingly, this paper represents a concrete contribution to the ongoing process of decolonisation in the Pacific region.

KEYWORDS: Indigenous cultural competency, private law, legal education, Samoa, fa'asamoa, teu le vā.

I. INTRODUCTION

Commitments to indigenise legal education are not new.[1] However, it is vital that the process of indigenising (or 'customising' or 'localising') private-law courses be framed correctly, with 'Indigenous Cultural Competency' ('ICC'),[2] and guided by pedagogical principles specific to indigenous communities.[3] Otherwise, there *will* be no indigenising of private-law courses.

Against the background of a growing body of literature, the emergence of separate, stand-alone indigenous (private-)law courses in law schools validates (indigenous) legal orders which were historically conceptualised (in particular as customary law) through black-letter common law.[4] According

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[1] See Kerry Sloan, "A Global Survey of Indigenous Legal Education and Research" (Accessing Justice and Reconciliation Project 28 July 2013) 3 <https://indigenousbar.ca/indigenouslaw/wp-content/uploads/2012/12/kls_world_indigenous_legal_education_complete.pdf> accessed 28 October 2021.

[2] See Section 0.

[3] Marcelle Burns, Anita Lee Hong, and Asmi Wood, "Indigenous Cultural Competency for Legal Academics Program: Final Report" (Australia, Department of Education and Training 2019). <https://www.google.com/search?q=Indigenous+Cultural+Competency+for+Legal+Academics+Program%3A+Final+Report&oq=Indigenous+Cultural+Competency+for+Legal+Academics+Program%3A+Final+Report&aqs=chrome.0.69i59.541j0j7&sourceid=chrome&ie=UTF-8> accessed 28 October 2021.

[1] Ibid. Jacinta Ruru et al, "Inspiring National Indigenous Legal Education for Aotearoa New Zealand's Bachelor of Laws Degree: Phase One" (Michael & Suzanne Borrin Foundation 2020) <https://www.borrinfoundation.nz/wp-

to the 'Global Survey on Indigenous Legal Education and Research', about 50 universities offer indigenous-law courses.[5] The survey did not claim to be exhaustive,[6] and it did not include NUS and AUT, both of which do offer indigenous-law courses. Of the universities surveyed, only one—the University of South Africa (UNISA)—offers a separate, stand-alone 'Indigenous Private Law' course.[7]

In this article, I draw upon my experience in teaching law in Samoa to demonstrate how we may indigenise private- law courses. This background led to my design and delivery of the very first "Indigenous Private Law" course offering in Aotearoa at AUT School of Law. Indigenous legal orders face many challenges, and these manifest themselves in the lecture theatre for lecturers of (indigenous) law, who must choose their pedagogical approaches carefully. These challenges arise in Samoa, where indigenous legal orders exist alongside the common law. To indigenise law-school curricula in such jurisdictions as far as possible, lecturers must take account of certain core principles specific to these legal orders.

II. CHALLENGES

In the post-colonial world, there is some recognition of indigenous law (as customary law) and (at times) of religious

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content/uploads/2020/08/Inspiring-National-Indigenous-Legal-Education-Phase-1-Report.pdf> accessed 28 October 2021; Ben Saul, "Indigenous Issues in the Teaching of International Law" (Sydney Law School Research Paper No. 09/108 October 2009) (*SSRN*) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1485210> accessed 28 October 2021.

5 Sloan (n 1).

6 Ibid.

7 Ibid.

law within a private law context. It is evidenced states across Africa and the Asia-Pacific region where different legal systems co-exist alongside a dominant legal system. However, (and largely as a result of the Eurocentricism prevailing in countries including Samoa and Aotearoa (New Zealand),[8] there are many issues facing so-called 'legally pluralistic', 'multijural' and 'legally dualistic' societies sharing a common legacy of colonialism, although the consequences of this enduring colonialism may be attenuated by private international law.

Legal Pluralism, Multijuralism, and Legal Dualism

Legal pluralism captures the idea of a legal system that comprises non-state legal orders and that positions informal cultural and religious systems as 'subservient to the state system'.[9] Historically, legal pluralism has coincided with colonialism—with the process (in sovereign states) of indigenous systems being rendered 'inferior' to or subjugated by those of the colonising states.[10]

The inclusion of indigenous law within colonial law may be described as a form of multijuralism, as well as of legal pluralism.[11] The terms 'multijuralism' and 'legal pluralism' are not interchangeable—whichever is appropriate in a given case will be dependent on the local realities and the historical context of the relevant indigenous systems.[12]

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[8] Teleiai Lalotoa Mulitalo Ropinisone Silipa Seumanutafa, *Law Reform in Plural Societies* (Springer 2018) 23.

[9] Ruru (n 3) 37.

[10] Sandra L Bunn-Livingstone, *Juricultural Pluralism vis-à-vis Treaty Law* (Nijhoff 2002) 48.

[11] John Borrows, 'Creating an Indigenous Legal Community' (2005) 50 McGill LJ 153, 160.

[12] Ruru (n 3).

> In some countries, such as Kiribati and Tuvalu, there are even private international law rules which resolve conflicts between competing customary laws and which may lead to the application of custom or common law as modified to do justice in the case. Interestingly, that may thus result not in a choice between two possible law systems, but instead in the judicial creation of a third, hybrid law applicable in the particular case.[13]

Legal dualism—commonly referred to as 'bijuralism' in Canada—encompasses the idea of the legal co-existence of two legal systems/order within a dominant legal system/order.[14] In Canada (for example), the civil law operates in co-existence with the common law. The common law applies exclusively throughout the country except in the province of Quebec.

Unfair treatment and racial discrimination were often strong indicators of former colonies with post-colonial European influence.[15] Pieterse explains:

> Legal dualism and the application of customary law [as operating in South Africa] to confine black people to a precarious legal position. This would be the case where legal dualism specifically subjects black people to oppressive treatment, or where customary law is applied in a case where the protection awarded by that system and the remedies

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[13] Saul (n 3) 4.

[14] C Lloyd Brown-John and Howard Pawley, "When Legal Systems Meet: Bijuralism in the Canadian Federal System" (Institut de Ciències Polítiques i Socials 2004) 3. See also Marie-Claude Gaudreault, "Canadian Legislative Bijuralism: An Expression of Legal Duality" (2006) 32 Commw L Bull 205, 205.

[15] Marius Pieterse, "It's a Black Thing: Upholding Culture and Customary Law in a Society Founded on Non-Racialism" (2001) 17 SAJHR 364, 380.

> available thereunder are inferior to the protection awarded by and remedies available under common law.[16]

However, occasionally, legal dualism may manifest into inverted relationships between the dominant (colonial) and the subordinate (indigenous) legal orders. For example, in some Pacific states 'customary law is to prevail over common law and equity', [except] if it is inconsistent with the constitution or with legislation'.[17]

Private International Law

At the same time, legal dualism may produce surprising results when it intersects with private international law.

Similar to problems associated with legal transplants (alluded to later), private international law faces the difficulty of transposing key legal concepts into indigenous customary law. As evident in different areas of private law practice (such as tort, contract, property law), it further reinforces the lack of recognition of private law concepts adopted in customary or indigenous contexts where similar or equivalent concepts are virtually non-existent. Moreover, the public/private law distinction in an indigenous customary law context is deemed as quite controversial and often blurred .[18] Saul argues that 'the ongoing insistence on the preservation of the distinction [between public and private law] ensures that the recognition

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[16] Ibid 364, 380.

[17] Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law* (4th edn, Intersentia 2017), 58, citing Laws of Kiribati Act 1989, ss 5(2) and 6(3)(b), and Laws of Tuvalu Act 1987, ss 5(2) and 6(3)(b).

[18] Jennifer Corrin, "'A Disfunctional Spouse': The Relevance of the Public or Private Dichotomy for Indigenous Customary Laws in Solomon Islands and Vanuatu" (2015) 21 Comp LJ Pacific 69, 72.

of indigenous customary law through private international law principles is only possible in "private" law'. [19]

Building on Pieterse's analysis, another challenge is in essentialising and homogenising the indigenous lived experience.[20] By exclusively defining the indigenous experience as communal or collective, effectively diminishes individual self-determining and self-autonomous interests; in doing so, overemphasis on collective claims overrides and is detrimental to individual claims.[21] Indigenous customary laws existing in Samoa apply customary penalties to misconduct, in line with these more traditional holistic systems.[22] These penalties are more appropriate to the community than they are to 'outsider' petitioners having made individual claims, not following the traditional system or way of life of the community.[23]

III. PEDAGOGICAL APPROACHES

There are many possible approaches to teaching indigenous private law (and law generally). In this article, I discuss only three, as framed within an ICC context. Each approach may be adopted either in isolation or alongside one or both of the others. Each favours diversity. One of the approaches, namely ICC itself, is not specific to the teaching of law, whereas the two others, transsystemic and 'law reform', are 'legalistic' by design.

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19 Saul (n 3).

20 Ibid. See also Pieterse (n 15).

21 Ibid.

22 Corrin (n 18) bur69, 72.

23 Ibid.

ICC Approaches

As Burns, Lee Hong, and Wood note, '[i]ndigenous teaching and learning projects have generated a significant discourse on ICC which highlights the complexities involved in programs to develop intercultural awareness and skills to work with Indigenous peoples'[24] The following pedagogical principles are recommended to integrate ICC approaches in legal education:[25]

- critical self-reflection upon one's own culture and profession, including how culture influences identity and worldview;
- challenging assumptions, stereotypes and awareness of unconscious bias;
- privileging Indigenous knowledges and voices;
- local-place-based community engagement;
- two-ways learning approaches;
- use of Indigenous narratives to privilege Indigenousknowledges and expertise.

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[24] Burns et al (n 3). See also Thalia Anthony and Melanie Schwartz, "Invoking Cultural Awareness through Teaching Indigenous Issues in Criminal Law and Procedure" (2013) 23 Legal Educ Rev 31; Nicole Graham, "Indigenous Property Matters in Real Property Courses at Australian Universities" (2009) 19 Legal Educ Rev 289; Thalia Anthony, "Embedding Specific Graduate Attributes: Cultural Awareness and Indigenous Perspectives" in Sally Kift et al (eds), *Excellence and Innovation in Legal Education* (LexisNexis 2011) 137–169; Heron Loban, "Embedding Indigenous Perspectives in Business Law" (2011) 5 e-J Bus Ed & Scholarship of Teaching 11.

[25] Burns et al (n 3).

These principles were adopted in the Indigenous Cultural Competency for Legal Academic Professionals (ICCLAP) project[26] which involved a few law schools in Australia which focussed on strengthening ICC capacity and understanding in both law staff and Learners.[27]

In legal practice, litigants tend to be individuals with wealth or large corporations and companies.[28] The stories of indigenous people and people representing less privileged backgrounds rarely feature in law-school curricula.[29] Such practices on the part of law schools only affirm the importance of certain pedagogical principles to ICC in legal academia.[30] Hood's proposal for a redesign of the LLB curricula in Aotearoa (New Zealand) favours the ICC approach.[31] Hood argues that learners would engage in 'courses where trial transcripts are

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[26] Ibid.

[27] Ibid.

[28] Owen Bowcott, "Top Judge Says Justice System Is Now Unaffordable to Most" *The Guardian* (London, 14 January 2016).

[29] Anna Hood, "Considering the Future of Legal Education in New Zealand Reflections on the Article 'Employer Perceptions of the Work Readiness of New Zealand Law Graduates: What More Can Law Schools Do?'" (2018) 28 NZULR 85, 99.

[30] Janet Mooney, Lynette Riley, and Deirdre Howard-Wagner, "Indigenous Online Cultural Teaching and Sharing: Kinship Project: Final Report" (Australian Government, Office for Learning and Teaching 2017) 18 <https://ltr.edu.au/resources/ID11-1940_Mooney_Report_2017.pdf> accessed 28 October 2021. See also Burns et al (n 3); Cobie Rudd, Moira Sim, Colleen Hayward, and Toni Wainet, "Creating Cultural Empathy and Challenging Attitudes through Indigenous Narratives, Final Report" (Australia, Office for Learning & Teaching 2013) <https://healthinfonet.ecu.edu.au/healthinfonet/getContent.php?linkid=462743&title=Creating+cultural+empathy+and+challenging+attitudes+through+Indigenous+narratives%3A+final+report+2013>.

[31] Hood (n 29) 85, 98.

examined, decisions from lower courts considered and interviews and writings from those who have been through the legal system are discussed'.[32] Such teaching materials would comprise of interview scripts with Self-Represented Litigants (SRLs) and so forth. It further aligns with the ICC approach where other critical theories outside the traditional scope of legal education such as intersectionality, indigenous customary law[33] which will then cause learners to undergo critical self-reflection of their own culture.[34]

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[32] Ibid 85, 99.

[33] Gerald F Hess, "Heads and Hearts: The Teaching and Learning Environment in Law School" (2002) 52 J Legal Ed 75, 78–79. See also Susan B Apel, "Principle 1: Good Practice Encourages Student-Faculty Contact" (1999) 49 J Legal Ed 371, 373–375; Diane Kraal, "Legal Teaching Methods to Diverse Student Cohorts: A Comparison between the United Kingdom, the United States, Australia and New Zealand" (2017) 47 Cambridge J Ed 389; Lynne Taylor, Ursula Cheer, Neil Boister, Elizabeth Toomey, Sascha Mueller, and Debra Wilson, "Improving the Effectiveness of Large Class Teaching in Law Degrees" (2013) 2013 NZ L Rev 101; Lynne Taylor, Ursula Cheer, Natalie Baird, Erik Brogt, John Caldwell, and Valerie Sotardi, "The Making of Lawyers: Expectations and Experiences of Fifth Year New Zealand Law Students and Recent New Zealand Law Graduates" (Ako Aotearoa 2018) <https://ako.ac.nz/assets/Knowledge-centre/RHPF-s1607-Developing-a-law-student-profile/RESEARCH-REPORT-The-Making-of-Lawyers-Expectations-and-Experiences-of-Fifth-Year-New-Zealand-Law-Students.pdf> 20 accessed 28 October 2021; Katherine Wimpenny and Maggi Savin-Baden, "Exploring and Implementing Participatory Action Synthesis" (2012) 18 Qualitative Inquiry 689; Nick Zepke and Linda Leach, "Improving Student Engagement: Ten Proposals for Action" (2010) 11 Active Learning in Higher Ed 170.

[34] Ken Nobin, Jack Frawley, Trina Jackson, Sue McGinty, Felecia Watkin-Lui, and Nereda White, "Relationships Are Key: Building Intercultural Capabilities for Indigenous Postgraduate Coursework Students and Their Teachers" (Australia, Office for Learning and Teaching 2013) 56.

The ICC model of legal education lends much needed support to law school curricula with a deficit in indigenous legal knowledge, academic staff and learners. It carries the potential, if integrated into legal education, to: (1) Enhance existing teaching pedagogies in law whilst enriching the learner's experience; and (2) Contribute to building more innovative, inclusive and diverse models of cross-cultural teaching pedagogies in law.[35]

The Transsystemic Approach

The so-called transsystemic approach is one that was developed by McGill University in Montreal, Québec, largely to address some fundamental limitations in 'localised' delivery of legal education.[36] More specifically, teaching jurisdiction-specific and in this case, it was focussed on where the law school was located. As a model of legal education, the transsystemic approach is premised on the recognition of a bilingual, dialogic, and integrated learning in a bijural or multijural context.[37] For instance, lecturers (and researchers) using the approach describe it as also having an "interdisciplinary dimension".[38]

The transsystemic approach is now officially adopted in numerous law schools in Canada, notably the University of

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[35] G.S. Bajpai and Neha Kapoor, "Innovative Teaching Pedagogies in Law: A Critical Analysis of Methods and Tools" (2018) 2 Contemp L Rev 91-110.

[36] McGill University, Paul-André Crépeau Centre for Private and Comparative Law, "Transsystemic Legal Education" <https://www.mcgill.ca/centre-crepeau/projects/transsystemic> accessed 28 October 2021.

[37] Ibid.

[38] Yaëll Emerich, *Conceptualising Property Law: Integrating Common Law and Civil Law Traditions* (Elgar 2019) 5.

Victoria.[39] It involves education outside the classroom, where Learners work alongside local indigenous communities, as well as indigenous academics and indigenous experts outside academia. This feature was integrated into Samoa's legal education (as will be discussed later). Learners critically analyse historical narratives common across multiple jurisdictions beyond the scope of a single jurisdictions[40] such as through the use of case methods.

Law-Reform Approaches

The legacy of colonisation in the Asia-Pacific region[41] is evident in variants of the common law adopted by countries with British influences.[42] This influence would come to result in the operation (locally) of imperial statutes and the common law, adopted in line with the "birth right theory".[43] The forms of bijuralism and multijuralism recognised by the local authorities influenced which legal systems (such as the common law, Romano-Germanic civil law, and indigenous law) became national legal systems, where the national legal systems stood in relation to one another, and how the national legal systems

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[39] University of Victoria, Faculty of Law, "Joint Degree Program in Canadian Common Law and Indigenous Legal Orders (JD/JID)" <https://www.uvic.ca/law/about/indigenous/jid/index.php> accessed 16 February 2021. See also Ruru et al (n 3).

[40] McGill University (n 37).

[41] See Jerry Dupont, *The Common Law Abroad: Constitutional and Legal Legacy of the British Empire* (Rothman 2001) 312–470.

[42] Gordon Walker and Alma Pekmezovic, "Legal Transplanting: International Financial Institutions and Secured Transactions Law Reform in South Pacific Island Nations" (2013) 25 NZULR 560, 566–567; Dupont (n 41) 457, 461,463.

[43] BH McPherson *The Reception of English Law Abroad* (Supreme Court of Queensland Library 2007) ch 9.

interacted with one another.[44] However, the 'two-dimensional classification' (corresponding to the distinction between the common law and the civil law) obscured the variety of legal systems existing within countries that featured less homogeneity.[45] For example, Indonesia is founded upon *many* different legal systems, including—but *far* from not limited to—(Roman-Dutch) civil law and sharia law.[46]

Approaches to law reform adopted across the Pacific may inform and highlight common problems associated with indigenising 'Private Law' courses.[47] Geller defines legal transplants in the context of law reform as 'any legal notion or rule which, after being developed in a source body of law, is then introduced into another, host body of law'.[48] Carothers provides guidance as to the three types of law reform approaches involved in legal transplants:[49] *Type one* looks at the reform, review and amendment of draconian provisions of

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[44] MB Hooker, *Legal Pluralism: An Introduction to Colonial and Neo- colonial Laws* (OUP 1975) 1–5; Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, Georgia 1993) 95.

[45] Walker and Pekmezovic (n 42) 560, 563.

[46] Tim Lindsey (ed), *Indonesia: Law and Society* (2nd edn, Federation 2008) 2.

[47] Walker and Pekmezovic (n 42) 560, 562.

[48] Edward Geller, "Policy Consideration: Legal Transplants in International Copyright: Some Problems of Method" (1994) 13 UCLA Pac Basin LJ 199, 199.

[49] Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Carnegie Endowment for International Peace 2006) 7–8. See also Jonathan M Miller, "A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process" (2003) 51 Am J Comp L 839; Tim Lindsey (ed), *Law Reform in Developing and Transitional States* (NewRoutledge 2006).

laws[50] and as such, it is often considered to carry minimal risk[51] with less controversy as amending outdated laws often marks progressive realisation; *Type two* explores ways to improve institutions and agency's responsible for law-making and law-enforcement. This is usually accompanied by high risk as reflected in the political system of the incumbent government, coupled with the impact on its legislative and regulatory framework[52]; and lastly, *Type three* aims to foster government compliance with its own laws. [53] Of the three types of law reforms, *type three* is considered to have the greatest political impact (and carry an acceptable level of political risk), given the degree of accountability and transparency required in ensuring that the government complies with state laws.[54]

It is important to identify such barriers that may arise in the complex process of customising legal transplants—in the process of passing from the origin/source body of law or jurisdiction (i.e., intricately tied to the cultural, economic or political system) to the host/recipient body of law or jurisdiction.[55] Studies have found that similar barriers arise in the process of indigenising teaching material.[56] As Walker and Pekmezovic note:

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[50] Carothers (n 49) 7.

[51] Walker and Pekmezovic (n 42) 560, 563.

[52] Ibid 560, 563.

[53] Carothers (n 49) 7.

[54] Ibid 7.

[55] Louis F Del Duca and Alain A Levasseur, "Impact of Legal Culture and Legal Transplant on the Evolution of the US Legal System" (2010) 58 Am J Comp L Supp 1, 1–2.

[56] Thalia and Schwartz (n 24) 31; Thalia (n 24) 137-139; Loban (n 24) 11; Graham (n 24) 289.

> A recurring theme in the literature is that legal transplants are ineffective in new settings because they are inadequately adapted to local circumstances.[57] However, it is also their view that if no customisation of laws occurs, it may simply be because the "local populations … were never the [laws'] intended users".[58]

Of course, law-reform approaches are in one sense just that: *law-reform* approaches, not *pedagogical* approaches as such. However, law-reform approaches can inform pedagogy, by serving as the theoretical framework for *any* course in law. At the same time, they are particularly suited to serving as the theoretical framework for courses designed to indigenise the private law, if nothing else because they are approaches that South Pacific jurisdictions—governed as they were, pre-colonially, by indigenous legal orders and only by indigenous legal orders—have tended to use historically.

IV. INDIGENOUS LAW AND INSTRUCTION OF LAW IN SAMOA

Historically, law served as a tool of colonisation, often politically disenfranchising indigenous communities whilst denying them self-determining rights to culture, land and political autonomy. This is evidenced in international literature that captures the systemic and institutional biases prevalent in law-school curricula compounded by the barriers facing indigenous Learners entering law school.[59] I contend that

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[57] Walker and Pekmezovic (n 42) 560, 569.

[58] Ibid 560, 567.

[59] Saul (n 3); Burns et al (n 3); Michael Coyle *"Indigenous Legal Orders in Canada—A Literature Review"* (2017) Western Law Publications 92 <http://ir.lib.uwo.ca/lawpub/92> accessed 28 October 2021; Ruru et al (n 3).

Samoa should develop law curricula addressing the need for systemic and institutional change.[60]

Samoa

Samoa is a bijural state, where both the common law and indigenous customary law apply. Section 111 of the Constitution of the Independent State of Samoa provides that the '"law" … in force in Samoa':

> includes this Constitution, any Act of Parliament and any proclamation, regulation, order, bylaw or other act of authority made thereunder, the English common law and equity for the time being in so far as they are not excluded by any other law in force in Samoa, and 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.

Samoa is also a bijural state where law and custom usage are well respected alongside the value of education However, Teleiai notes that Samoa is relatively lacking in formal education about local laws.[61] As Teleai asserts, it has been a challenge for Samoa 'to develop a population educated in both the customary and the state systems. Formal education is required to further understand the state system, and embrace modern technology, economies and thinking that facilitate the inclusion of customary principles into formal laws'.[62]

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60 Ibid.

61 Seumanutafa (n 8) 53.

62 Ibid 57.

V. INDIGENOUS LAW IN ACADEMIC PRACTICE IN SAMOA

When Learners do look beyond colonial legal systems, their colonial legal tools take them only so far. The indigenous legal systems of the Asia-Pacific region are based on principles different from those underlying colonial legal systems. There are of course principles specific to *fa'asamoa* (the Samoan way, or Samoa's indigenous legal system[63]), which may operate under the *teu le vā* model.

Samoa: Fa'asamoa and Teu le vā

The essence of fa'asamoa is underpinned by core values which guide social action: *usitai* (obedience), *faaaloalo* (respect), *alofa* (love), and *tautua* (service).[64] When framed within an ICC paradigm, *teu le vā* is a Samoan Pacific-specific holistic model[65] supported by an indigenous reference point. The recognition of the fa'asamoa is vital to legal education in Samoa, as any

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[63] Tamasailau Suaalii-Sauni T, "Legal Pluralism and Politics in Samoa: The Faamatai, Monotaga and the Samoa Electoral Act 1963" in Petra Butler & Caroline Morris (eds), *Small States in a Legal World. The World of Small States* (Springer 2017), 165-187.

[64] See Melani Anae, Eve Coxon, Diane Mara, Tanya Wendt-Samu, and Christine Finau, *Pasifika Education Research Guidelines: Final Report* (New Zealand, Ministry of Education 2001) <https://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/pasifika_education_guidelines.pdf > accessed 28 October 2021; RP Gilson, *Samoa 1830-1900: The Politics of a Multi-Cultural Community* (OUP 1970); Pio Mailo, *Palefuiono* (Tofa 1992); M Meleisea, *Lagaga: A Short History of Samoa* (Institute of Pacific Studies and the Western Samoa Extension Centre of the University of the South Pacific 1987); Bradd Shore, *Sala'ilua: A Samoan Mystery* (Columbia 1982).

[65] Melani Anae, "Research for Better Pacific Schooling in New Zealand: Teu Le Va—A Samoan Perspective" (2010) 1 MAI Review 1.

dismissal of it is essentially a rejection of the indigenous Pacific context.[66]

Anae's *teu le vā* paradigm governs the expression of fa'asamoa values and beliefs in practice and 'in any context, [whereby] respectful and polite communication is adhered to by all'.[67] *Teu le vā* is based on three concepts which govern how relational connections to the *vā* (relationship) are defined and expressed. First, there is *vā fealoa'i*, defined as 'spaces between relational arrangements',[68] which are both 'physical and metaphysical'.[69] Secondly, there is *vā tapuia*, defined as the 'relationship of respect',[70] or 'sacred spaces of relationship arrangements'[71] The onus is on the *teu le vā* practitioner (or facilitator adopting *teu le vā*, traditionally in focus groups, *fono* [meetings], or interviews, within a Samoan context), to understand and to be aware of such relational connections, which are inextricably tied to how they behave or approach

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[66] Tupua Tamasese Ta'isi Efi Tui Atua, "Bioethics and the Samoan Indigenous Reference" 60 Int'l Soc Sci J 115–124.

[67] Vaoiva Ponton, "Utilizing Pacific Methodologies as Inclusive Practice" (2018) SAGE Open 1, 3.

[68] Melani Anae and Karlo Mila-Schaaf, *Teu Le Va—Relationships Across Research and Policy in Pasifika Education: A Collective Approach to Knowledge Generation & Policy Development For Action towards Pasifika Education Success* (New Zealand, Ministry of Education 2010) <https://www.educationcounts.govt.nz/__data/assets/pdf_file/0009/75897/944_TeuLeVa-30062010.pdf> 12 accessed 28 October 2021.

[69] Melani Anae, 'Teu Le Va: "'New' Directions in Thinking about Doing Pacific Health Research in New Zealand" (University of Auckland Pacific Scholars Postgraduate Seminar Series, Paper presented at the Centre for Pacific Studies, Auckland, July 2005).

[70] Malama Meleisea et al, *Samoa's Journey 1962-2012: Aspects of History* (Victoria University 2012) 39.

[71] Anae and Mila-Schaaf (n 68).

others.[72] The *teu le vā* practitioner's gender, status, or relationship to others is vital to strengthening a relationship with *tapu* dimensions, which helps to enrich the *vā tapuia* between brothers and sisters, mothers and fathers and so forth. Thirdly, there is *teu le vā* itself, defined as 'to value, nurture, look after, if necessary to tidy up the *vā* (the relationship)'.[73] It acknowledges the special connections and principles required to maintain authentic and respectful methods of communication within and outside the Samoan community. Therefore, the *teu le vā* paradigm is holistic and adopts a pan-Pacific, cross-cultural, cross-disciplinary approach, whilst governing familial ('brother and sister') and non-familial contexts ('male and female').[74]

At the risk of oversimplifying, to use the *teu le vā* paradigm in the lecture theatre is to make the class less of 'lecture' and more of a 'tutorial' or 'workshop'. It is to help the Learners learn by them interacting with the lecturer much more than is traditional in the typical Western law school.

Anae further asserts that:[75]

> [I]t has been assumed that to *Teu le vā* in *palagi* [(European)] spaces occurs by a process of osmosis. Unfortunately this has not happened. The result is that there is a sense that any Pacific researcher who is culturally competent in his or her own culture can 'do' research because they can *Teu le vā* within their own communities …

This 'either/or' positioning is not good enough for high quality research outputs that our research institutions and Pacific communities require and deserve. What we need are

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72 Ponton (n 67) 1, 3.

73 Anae (n 69); Anae and Mila-Schaaf (n 68).

74 Ponton (n 67) 1, 3.

75 Anae (n 69) 1, 14.

balanced Pacific researchers who are skilled and experienced, and who can *Teu le vā* in *palagi* spaces, their own Pacific spaces, Māori spaces and others.

Therefore, it is instructive that in its design, construction, and delivery, legal education in Samoa should not only complement the principles of *teu le vā* but also be applied by experienced practitioners capable of working in cross-cultural and inter-disciplinary contexts.

VI. New Frameworks for Indigenising Legal Education in Samoa

I have used the above pedagogical approaches and principles of indigenous law to indigenise their own common-law private law courses, deconstructing the prevailing systemic and institutional inequalities and the effects of a shared legacy of colonialism. The relevant courses include courses taught by myself, Fa'amatuainu, in the past in Samoa.

Business-Minor Private-Law Courses

Between 2017 and 2019, Fa'amatuainu coordinated the development and teaching of a range of private-law courses (HCL152 Introduction to Commercial Law, HCL252 Contract Law, HCL253 Company Law and Partnerships, and HCL351 Employment Law) at the Faculty of Business and Entrepreneurship (FOBE), National University of Samoa (NUS). The courses were taught within the Bachelor of Commerce (BCom) programme, which offers Commercial Law as a Business Minor specialisation. There is no law school as such at NUS.

Also, Fa'amatuainu herself completed an NUS course, CAT101 Teaching and Learning 1, in the Certificate IV in Adult Teaching (accredited by the Samoa Qualifications Authority in

2015) through the Oloamanu Centre for Professional Development and Continuing Education. Completing this course was a professional-development requirement for all academic staff.

Generally, the private-law courses were not indigenised, even though the common-law/customary-law distinction is upheld by the Constitution of Samoa and village governance structures.[76] The content of the private-law courses was adapted to the context: the overriding bijural system in Samoa,[77] which operates alongside village councils, which are governed either under separate legal orders or in conflict with (or in complement to) the overriding bijural system.[78] The legacy of colonialism here is largely indicative of a Eurocentric Western system of common law, shared by countries with a similar post-colonial history.[79] The system encompasses the pedagogical approach to private-law teaching in Samoa, preserving the public-/private-law distinction and maintaining the separation between the common law and indigenous customary law.

Nevertheless, Fa'amatuainu was able to indigenise the private-law courses to some extent, guided by multiple pedagogical approaches, including the *teu le vā* model of engagement; the Samoan principles of *usitai*, *faaaloalo*, *alofa*, and

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[76] Constitution of the Independent State of Samoa 1962 (as amended), s 111(1) *sub verbo* 'Law'.

[77] See Sally Engle Merry, "Legal Pluralism" (1988) 22 Law & Soc'y Rev 869; Brian Z Tamanaha, "A Proposal for the Development of a System of Indigenous Jurisprudence in the Federated States of Micronesia" (1989) 13 Hastings Int'l & Comp L Rev 71; Lynne D Wardle, "Same-Sex Marriage and the Limits of Legal Pluralism" in John Eekelaar and Thandabantu Nhlapo (eds), *The Changing Family*

International Perspectives on the Family and Family Law (Bloomsbury 1998) 381.

[78] Seumanutafa (n 8) 5.

[79] Ibid 2.

tautua;[80]and approaches drawn from CAT101 Teaching and Learning 1.[81] Fa'amatuainu constructed the private-law courses using an interdisciplinary approach and maintained an effective facilitation role as Lecturer.[82] Assessments provided opportunities to discuss global and local topics (climate change and gender equity), apply critical schools of thought (intersectionality and feminism), and engage in critical self-reflection. Case reviews enabled Learners to empathise and develop narrative imagination skills.

Also, the courses did feature *some* customary law. Each did so in the first, introductory lecture, in order to explain the sources of law in Samoa. Otherwise, the content was weighted toward common-law black-letter law.

Furthermore, marking the constitutional separation between the common law and customary law, the Centre for Samoan Studies (CSS), NUS, coordinated (and coordinates) the law course HCA354 Samoan Custom and the Law. The CSS is a research centre separate from the FOBE focussing primarily on Samoa-studies subjects (such as archaeology and cultural heritage; Samoan language and culture; and development studies). These are outside of the scope of courses delivered by the FOBE.

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[80] Anae (n 69); Gilson (n 64); Shore (n 64); Meleisea (n 64), (n70).

[81] https://nus.edu.ws/courses_trashed/courses-2/nus01/cat101-teaching-and-learning-1/

[82] See Angele Attard, , Emma Di Iorio, Koen Geven, and Robert Santa, *Student-Centred Learning—Toolkit for Students, Staff and Higher Education Institutions* (October 2010) (European Students Union) <https://www.esu-online.org/wp-content/uploads/2017/10/SCL_toolkit_ESU_EI.compressed.pdf>; David Kember and Lyn Gow, "Orientations to Teaching and their Effect on the Quality of Student Learning" (1994) 65 J Higher Ed 58; Malcolm Knowles, *The Adult Learner: A Neglected Species* (Gulf Publishing 1973).

In 2019, Fa'amatuainu took the lead in developing three courses for the Certificate in Customary Adjudication (CCA) programme. They were TCA104 Customary Law, TCA103 Legal Professional Ethics, and TCA105 Legal Practices and Adjudication. Fa'amatuainu taught TCA103 Legal Professional Ethics, a course that obviously straddles the public-/private-law divide.

Samoa's Ministry of Justice and Courts Administration's had sought direct assistance from the NUS FOBE to develop the CCA, initially to train and equip Judges of the Lands and Titles Court of Samoa. Accordingly, the original content was weighted more toward the examination of common-law case law and theories of legal ethics (including Immanuel Kant's categorial imperative and John Stuart Mill's theory of utilitarianism, as applied to legal and judicial practice).

However, the course went through numerous revisions during the semester to make the approach more transsystemic, incorporating examples of customary-law cases. It is important to note this was prompted at the request of the learners, comprised predominantly of male matai (Samoan chief) highly proficient in lāuga (Sāmoan oratory). Traditionally, teaching pedagogies adopted in the instruction and teaching of law in Samoa focused on black-letter common law. In response, Fa'amatuainu revised the course topic on the applicability of ethical analysis to legal practice, incorporating a greater number of indigenous-customary-law cases, to enhance discussion and engagement with the Learners.[83]

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[83] See *Esekia v Land and Titles Court* [2017] WSSC 145 (Nelson J) [3], [4], [26], [43]; *Sano v Appellate Division of Land and Titles Court* [2018] WSCA 13;

Upon further reflection, Fa'amatuainu would draw similarities from experience as a law reformer and practising lawyer as well as the critical challenges in bijural states which maintain the common-law/indigenous-customary-law or public law/private law distinction. In the process of making the revisions, Fa'amatuainu identified the same barriers to successful legal transplants: common-law concepts lacking indigenous-private-law equivalents.[84] Similarly, this problem resonates with the challenges faced in the ethnographic translation of lāuga metaphors and imageries that lack direct literal English translation. Attempts to translate lāuga often give rise to obscurity, linguistic idiosyncracy sometimes in the fa'asamoa which often denies idiomatic English translation. Tātupu Fa'afetai Matā'afa Tu'i asserts "to an outsider unfamiliar with conventions, it would appear foolish and irrational. Not so, to the local community who, in their salutations, help to venerate and elevate their ancestors together with their deeds and names".[85]

For example, while focused on legal professional ethics in a customary-law context, the course covered topics such as conflicts of interest and bias as understood by the common lawyer. Teaching these topics therefore proved to be challenging. To resolve this issue within a fa'asamoa context,

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Lavea v Kerslake [2015] WSCA 3; *Ponifasio v Samoa Law Society* [2012] WSCA 4; *Penaia II v Land and Titles Court* [2012] WSCA 6.

[84] Saul (n 3); Jennifer Corrin, "Exploring the Deep: Looking for Deep Legal Pluralism in the South Pacific" (2017) 48 Victoria U Wellington L Rev 305, 320–321.

[85] Matā'afa Tu'i, Tātupu Fa'afetai, *Lāuga: Samoan Oratory* (University of the South Pacific and National University of Samoa 1987) 38.

would require a critical examination of the principles of lāuga, described as: [86]

The main tool by which the indigenous social structure is maintained, and the principal organ of social communication, awareness and orientation. Its custodians, the orators, employ a variety of linguistic and cultural tools, incorporating genealogy, mythology and legends. . .to the wise and experienced tulafale (orators of Samoa) knowledge of lāuga is real power which explains their reluctance to give away this knowledge, not only to Sāmoans but also outsider researchers. This bizarre behaviour, misunderstood by many and which largely in the past puzzled outsider researchers, links lāuga with mystical and cynical apprehension.

Further to this, lāuga is "the powerful and sophisticated, the living soul of the Samoan people, epitomising their poetic character through symbol and allusion".[87] In Matā'afa Tu'i's study of Sāmoan lāuga in the early 1980s, he emphasised that:

> in order to understand all the figurative and metaphorical expressions expressed in lāuga (Samoan oratory), one has to 'live lāuga' and learn the Sāmoan culture.[88]

Decades later, Anae asserted, '[f]or some it is a need to unlearn Western philosophies in order to re-learn and embrace one's spirit as a "native". So, presenting both the context of the community as well as one's own positioning (in regard to that context) is extremely important in qualitative work'.[89] The numerous revisions proving necessary in TCA103 Legal Professional Ethics highlighted the considerable influence of

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[86] Ibid. 9, 41.

[87] Ibid 198.

[88] Ibid 38.

[89] Anae (n 69) 1, 4.

colonialism in Samoa, common law legal training prevalent in commonwealth Pacific states and therefore the need to develop indigenous-private-laws courses which adequately capture local realities, critical thought and customs.

VII. CONCLUSION

This paper shows how pedagogical approaches developed in Australia and Canada and law-reform approaches used in the South Pacific could enrich the existing framework for the teaching of private law in Samoa, to guide help guide the indigenisation of private-law papers taught in these two island nation-states. Their research builds on a normative effort to document how indigenous issues may be treated differently, in light of the systemic and institutional racism and biases (in the form, for example, of inadequate ICC) prevailing in universities worldwide.[90] The article has proposed models for strategically decolonising and indigenising legal education (and even the legal profession), as part of the ongoing process of decolonisation in the Pacific nation states such as Samoa.

The recommendations[91] lend much-needed support to the unpacking and deconstruction of legal-education discourse in the Asia-Pacific region. In particular, the ICCLAP recommends that there be ICC training for both staff and Learners 'to improve Indigenous Learner success; Indigenous knowledges and perspectives [be] embedded in all university curriculums; and ICC be included as a graduate attribute'.[92]

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[90] Burns et al (n 3); Coyle (n 63) 92; Ruru et al (n 3); Saul (n 3).

[91] Saul (n 3).

[92] Burns et al (n 3); Bridget Fa'amatuainu, 'Critical reflections on teaching pedagogies adopted in law teaching in Aotearoa: Case for Pacific pedagogies in law teaching' (New Zealand Law Librarians Association (NZLLA) Conference 23rd – 27th August 2021 Waiho i te toipoto, kaua i te toiroa – Stronger together, Paper presented (virtual), August 24, 2021,

Tuesday Day 2, 1:15- 2:15pm); Bridget Fa'amatuainu, "Pasifika decolonial pedagogies in Indigenous Private Law teaching" (forthcoming book chapter in Routledge Legal Pedagogy series (collected edition) provisionally titled: 'Decolonising Legal Pedagogy').