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Nearly 40 years ago, in the time of Sir Tom Davis' Prime Ministership, I was commissioned by the then Solicitor-General, our friend and colleague Mike Mitchell, to compile an index to the Laws of the Cook Islands as a necessary step towards the production of a comprehensive printing of the laws of the Cook Islands. The project was funded by UNDP - the United Nations Development Programme. The result appears in Volume I of the green books titled *Laws of the Cook Islands*, finally published in 1994, when our late friend and colleague John McFadzien was Solicitor-General. Careful and regular updating of finding lists has been carried out from time to time by my friend and former colleague Professor Tony Angelo of Victoria University in Wellington. The first task of the original project had of course been the identification of the sources of modern Cook Islands law, which were tabulated as follows to which are here added some updating in bold square brackets:

a) The *Cook Islands Constitution* as contained in the *Cook Islands Constitution Act* 1964 of the New Zealand Parliament and as amended sixteen times **[now twenty eight times]** by Act of the Cook Islands Parliament under the special procedure contained in Article 41. The Constitution is the 'supreme law' of the Cook Islands and provides unlimited and exclusive legislative powers to the Cook Islands Parliament subject to the *Constitution*.

b) Acts of the Cook Islands Parliament made after 4 August 1965, and Statutory Regulations, Rules, and Orders in Council made under them.

c) The *Cook Islands Act* 1915 (NZ) and all amendments, whether of New Zealand or Cook Islands origin, and Statutory Regulations, Rules and Orders in Council made under the 1915 Act before 4 August 1965.

d) Ordinances made before 4 August 1965 by the Cook Islands Legislative Assembly, or its predecessor, the Cook Islands Legislative Council, so far as unaffected by subsequent repeals or modifications.

e) New Zealand Acts declared to be in force in the Cook Islands before 4 August 1965, whether by the *Cook Islands Act* 1915 or by other New Zealand enactments. Amendments to such Acts, Acts passed 'in substitution' for them, and Regulations made under them form part of Cook Islands law if made before 4 August 1965.

f) New Zealand Acts and Regulations since 4 August 1965 which have been specifically 'adopted' by 'New Zealand Laws Acts' of the Cook Islands Parliament from time to time.

g) New Zealand Acts and Regulations between 4 August 1965 and 5 June 1981 the passing or promulgation of which were 'requested and consented to' by the Government of the Cook Islands and which expressly so declare. That method of extending New Zealand legislation was abolished in 1981.

h) Imperial Acts and other English laws existing on 14 January 1840 where applicable to Cook Islands circumstances and in force in New Zealand on 1 April 1916. Subsequent Imperial Acts may apply by express declaration or necessary implication. **[See Volume I, *Laws of the Cook Islands 1994*, p.106-109, for some significant Imperial Acts considered applicable with brief descriptions of their effect; see also the *Admiralty Act* 2004 (Cook Islands) section 12 of which brought the operation of the *Colonial Court of Admiralty Act* 1890 (UK) to an end as Cook Islands law]**

i) Cook Islands custom in relation to customary land, titles, and succession, in accordance with sections 422, 426, and 446 of the *Cook Islands Act* 1915, **[and, generally, in accordance with Article 66A of the *Constitution* as inserted in 1995 - see further discussion below]**.

j) The common law in accordance with section 615 of the *Cook Islands Act* 1915, and as it is declared from time to time by the Courts.

k) Ordinances and By-laws of Island Councils made under authority of section 70 of the *Cook Islands Act* 1915 and its successor provisions.

You will see also in Volume I of the 'Green Volumes' a few pages (28-34) of 'Explanatory Notes' covering some points which were found interesting or problematical in compilation of the Index in the early 1980s, such as the circumstances under which an Act could be considered to be 'in substitution' for an earlier Act, the position of subsequent Acts 'deemed' to be part of earlier Acts, and the position of Ordinances and By-laws of the Island Councils. Without burdening this presentation with repetition of those technical discussions, it may

be worth noting two concepts and mechanisms involved in deciding whether a law is or is not part of the modern law of the Cook Islands.

First, the transitional bridge between Cook Islands law before and after 1965 is Article 77 of the *Constitution* providing that:

> **Existing law to continue** - Subject to the provisions of this Constitution...the existing law shall, until repealed, and subject to any amendment thereof, continue in force on and after Constitution Day.

That is the mechanism by which the common law, and some important Acts of the English Parliament, such as *Magna Carta* of 1297, and the *Bill of Rights* of 1688 have remained part of the law of the Cook Islands after Constitution Day in 1965.

Secondly, the concept that New Zealand statutes applicable to the Cook Islands are 'frozen', for Cook Islands purposes, in their 1965 state by the operation of Article 46 of the *Constitution* providing that:

> No Act...of the Parliament of New Zealand passed on or after Constitution Day shall extend or be deemed to extend to the Cook Islands as part of the law of the Cook Islands...

We must accordingly always be careful to inquire whether a New Zealand statute having effect as part of Cook Islands law may have a significantly different content from that which may appear in the New Zealand statute book. Indeed, some are surprised to learn that if the New Zealand Parliament were to repeal or amend the *Cook Islands Constitution Act* 1964 tomorrow, it would continue to be the law of the Cook Islands in its present form notwithstanding that it had ceased to be the law of New Zealand in that form.

Custom as a Source of Cook Islands law

The place of customary law in the Cook Islands legal system perhaps deserves a more extended discussion, especially in the light of the 1995 insertion in the *Constitution* of Article 66A providing that:

> 66A. **Custom** - (1) In addition to its powers to make laws pursuant to Article 39, Parliament may make laws recognising or giving effect to custom and usage.
> (2) In exercising its powers pursuant to this Article, Parliament shall have particular regard to the customs, traditions, usages, and values of the indigenous people of the Cook Islands.

> (3) Until such time as an Act otherwise provides, custom and usage shall have effect as part of the law of the Cook Islands, provided that this subclause shall not apply in respect of any custom, tradition, usage or value that is, and to the extent that it is, inconsistent with a provision of this Constitution or of any other enactment.
> (4) For the purposes of this Constitution, the opinion of the Aronga Mana of the island or vaka to which a custom, tradition or value relates, as to matters relating to and concerning custom, tradition, usage or the existence, extent or application of custom, shall be final and conclusive and shall not be questioned in any court of law.

The growing consciousness that *ma'ohi*, or polynesian, customary law has a legitimate and important place in Pacific legal systems is emphasised by recent observations of the Court of Appeal of Samoa (Baragwanath, Slicer, and Fisher JJ.) in *Sia'aga v. OF Nelson Properties Ltd* that:

> It is now recognised that what was in the past sometimes called the 'custom' of indigenous people in contradistinction to law is to be recognised as true law…[1]

It is easy to forget that the common law is customary law. There are only two kinds of law known to legal systems described as 'common law systems'. We may rely on Sir John Salmond, as it happens the draftsman of the *Cook Islands Act* 1915, for a clear statement of the position:

> It was long the received theory of English law that whatever was not the product of legislation had its source in custom. Law was either the written statute law, or the unwritten, common, or customary law. … *Lex et consuetudo Angliae* was the familiar title of our legal system. The common law and the common custom of the realm were synonymous expressions.[2]

Sir John Salmond also identifies and discusses the four tests which must be satisfied for custom to operate as a source of law for our courts.

(1) '[A] custom must be reasonable';

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[1] *Sia'aga v. OF Nelson Properties Ltd* [2009] 3 LRC 344. For a discussion of the nature and status of customary law, see the introduction to *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Maori Customary Law,* compiled, introduced, and edited by Richard Benton, Alex Frame, and Paul Meredith, Victoria University Press, Wellington, 2013.
[2] Sir John Salmond, *Jurisprudence* (7th ed, Sweet and Maxwell, London, 1924) at p.208. Although the work was first published in 1902, the 7th edition was the last published under Salmond's personal control before his death in the same year, and is for that reason perhaps the best expression of that author's mature and considered thought.

(2) '[A] custom must not be contrary to an Act of Parliament';

(3) The custom 'must have been observed as of right. A merely voluntary practice, not conceived as based on any rule of right or obligation, does not amount to a legal custom and has no legal operation';

(4) '[C]ustom, to have the force of law, must be immemorial … custom was immemorial when its origin was so ancient that the beginning of it was beyond human memory…'.[3]

Sir John Salmond is clear that the original meaning of 'time immemorial', for the purpose of establishing custom as law, was that the custom be 'so ancient that the beginning of it was beyond human memory, so that no testimony was available as to a time when it did not exist'.[4] But English law substituted 'legal memory' for this human memory and fixed the year 1189 (the date of accession to the throne of Richard I) as the date at which memory ceased. There is no reason, however, for applying this idiosyncratic rule of thumb to Cook Islands customary law, which must accordingly be considered under the original and more general meaning of immemoriality identified by Sir John Salmond.

The Meaning of Article 66A of the *Cook Islands Constitution*

It cannot be pretended that Article 66A, which appears to have had the original purpose of acknowledging the worth and dignity of traditional Cook Islands custom, is a model of drafting clarity or of conceptual coherence. The first three sub-articles appear to be unnecessary, because they merely re-state the existing constitutional powers of Parliament as expansively declared in Article 39 of the *Constitution*, and the status of custom as common law explained in the preceding paragraphs. The fourth sub-article, which does appear to break new ground, can only be made consistent with the third sub-article by reading into it a distinction between the evidentiary basis for custom on the one hand, and the judicial application of it by the High Court on the other.

It is submitted that although the identification and specification of particular customs has apparently been authoritatively allocated by Article 66A(4) of the *Constitution* to the Aronga Mana, whose opinion is declared conclusive, the question whether such customs are received and judicially applied by the High Court of the Cook Islands remains one for that Court in accordance with the

[3] The above paragraph is a digest of Sir John Salmond's exposition at pages 217-220 of his *Jurisprudence* (7th ed, 1924).
[4] Salmond, above n 1, at 220.

common law tests as restated in Article 66A. The separation of the roles of identification of custom on the one hand, and application of it on the other, appears from Article 66A (3) itself. The Aronga Mana may declare its opinion concerning a custom, but if for example the custom so identified is then found by the High Court to be inconsistent with a fundamental freedom in the *Constitution*, then the High Court would be bound to decline to apply the custom, or to apply it only in a form modified so as to abate the inconsistency. Accordingly, the jurisdiction of the High Court in respect of custom is not 'ousted' by Article 66A, but only modified as to the evidentiary basis on which it is exercised. Both the High Court and the Court of Appeal of the Cook Islands have recently declared that to be the legal position. In a judgment in December 2017, Justice Dame Judith Potter quoted from the Cook Islands Court of Appeal's earlier conclusions in 2016:

> ...the correct interpretation to be given to Article 66A(4) is that espoused by the Crown in its submissions: that Article 66A(4) is to be interpreted in accordance with the distinction between, on the one hand, the binding status of evidence regarding custom given by the Aronga Mana and, on the other, the Court's jurisdiction (as affirmed by Article 66A(3)) to apply that custom in a way that is consistent with the Constitution and other statutory enactments.[5]

The opinion of the Aronga Mana can be no more than that, however authoritative: it is evidence as to the state of custom. The effect of Article 66A(4) is to make that evidence conclusive if expressed, but it remains inescapably under sub-Article (3) for the Court to determine whether the custom so found is 'inconsistent with a provision of this Constitution or of any other enactment'. The judicial function of determining whether the custom identified in an opinion of the Aronga Mana complies with the *Constitution* and other enactments of the Parliament of the Cook Islands, and ought therefore to be judicially applied as law, remains exclusively with the Courts of the Cook Islands.

The interpretation described above is also supported by Article 14 of the *International Covenant on Civil and Political Rights* of 1966, by which the Cook Islands is bound in accordance with the New Zealand ratification on 28 December 1978 which, at that time (though not for treaty action since 1988), engaged the whole 'Realm of New Zealand' including the Cook Islands and Niue. The Cook Islands has independently reported to the United Nations under the Covenant on several occasions. Article 14 of the ICCPR states:

[5] Dame Judith Potter J in *Framhein v. Attorney-General*, judgment of 15 December 2017, para. 63. See also the Court of Appeal's earlier judgments in *Hunt v. de Miguel* CA2/14 of 19 February 2016, and *Browne v. Munokoa* [2017] CKCA 1.

> Art. 14. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…(emphasis added)

The interpretation proposed for Article 66A, which leaves intact the judicial role in the application of custom, whilst deferring to the Aronga Mana's role in identifying the custom to be applied, is consistent with the ICCPR requirement and it is respectfully submitted that the Court has properly preferred that interpretation to one that would oust the jurisdiction of the Courts.

Furthermore, the interpretation adopted is indicated by observations of the Judicial Committee of the Privy Council in *Hinds v. The Queen* [1976] 1 All E R 353, [1977] AC 195. Although that Jamaican case concerned the purported establishment of 'Gun Courts' by ordinary legislation, Lord Diplock referred to the separation of powers implicit in 'Westminster model' constitutions and spoke of a 'well-established…rule of construction' favouring the preservation of the judicial role:

> What, however, is implicit in the very structure of a constitution on the Westminster model is that judicial power, however it be distributed from time to time between different courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the chapter dealing with the judicature, even though this is not expressly stated in the constitution. [6]

As earlier noted, Article 66A was added to the law in 1995 by enactment under the special procedure for amendment of the *Constitution*. It was presented to Parliament by the Prime Minister, the late Sir Geoffrey Henry, on 31 March 1995. The Prime Minister stated:

> This Amendment Mr Speaker, is providing the Members of this House the opportunity to keep our customs alive for the coming generations. This has been in our minds for a very long time… We need to make others understand that our traditional laws are different from the foreign laws that are affecting us… Mr Speaker, we are not only talking about the customs and traditions carried out in the outer islands, but also the customs and traditions within the three districts on Rarotonga. What we are trying to do

[6] Hinds v. The Queen [1976] 1 All E R 353, per Lord Diplock at page 360.

> is conserve the different customs carried out in Puaikura, Te Au o Tonga and also in Takitimu…[7]

Another speaker in the debate, our friend and colleague the Hon. Norman George, had, colourfully and perhaps shrewdly, put his finger on the difficulties concerning the conceptual coherence and clarity of the 1995 amendment:

> So my opinion of explaining this is like putting a decoration on a cake. It is not really part of the main cake, it is just putting those colourful icings on it. When you look at the rest of it, it goes back again to say that these things ought to be taken conclusively and no court can question it. Question what? Overall my opinion of this particular Amendment is, it is only a decoration. It serves no realistic or practical purposes. It does not actually give you definitions, it does not give you a precise area where they will blot the effect of existing laws. It tells you first that our customs and traditions are important. It tells you that, when we pass laws, we must bear in mind that they are important. But when it comes to conflict with the existing laws, the existing laws prevail over those customs...[8]

It is increasingly understood by Courts that the customary law which is embodied in the common law in respect of each common law jurisdiction will vary in accordance with the traditions and values of each society in which it operates.[9] That proposition finds acknowledgment in the statutory basis for the common law as a source of Cook Islands law, being sections 615 and 616 of the *Cook Islands Act* 1915 together with the 'bridge' of Article 77 of the *Constitution*:

> 615. **Law of England as in the year 1840 to be in force in the Cook Islands** - The law of England as existing on the 14th day of January in the year 1840...shall be in force in the Cook Islands, save so far as inconsistent with this Act or inapplicable to the circumstances of those islands...

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[7] *Cook Islands Parliamentary Debates*, 31 March 1995, p.1945, the Hon. Prime Minister, Sir G.A. Henry.

[8] *Cook Islands Parliamentary Debates*, 31 March 1995, p.1948, the Hon. Norman George.

[9] For New Zealand see, for example, the observations of Chief Justice Elias in Josephine Takamore v. Denise Clarke [2013] 2 NZLR 733, paragraph 94 at p. 770:

> Values and cultural precepts important in New Zealand society must be weighed in the common law method used by the Court in exercising its inherent jurisdiction, according to their materiality in the particular case. That accords with the basis on which the common law was introduced into New Zealand only 'so far as applicable to the circumstances of the colony'… Maori custom according to tikanga is therefore part of the values of the New Zealand common law.

616. **Jurisdiction of the High Court** - For the purposes of the last preceding section all rules of common law or equity relating to the jurisdiction of the superior Courts of common law and of equity in England shall be construed as relating to the jurisdiction of the High Court of the Cook Islands.