Notice of the Final Oral Examination
for the Degree of Doctor of Philosophy

of

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“Challenging the Binary of Custom and Law: A consideration of legal change in the Kingdom of Tonga”

Faculty of Law

Monday, May 15th, 2017
1:00 p.m.
David Turpin Building
Room A144

Supervisory Committee:
Dr. Valerie Napoleon, Faculty of Law, University of Victoria (Supervisor)
Dr. Heidi Kiiwetinepinesiik Stark, Department of Political Science, UVic (Co-Supervisor)
Prof. Rebecca Johnson, Faculty of Law, UVic (Member)

External Examiner:
Dr. Sally Engle Merry, Department of Anthropology, New York University

Chair of Oral Examination:
Dr. Catherine Harding, Department of Art History and Visual Studies, UVic

Dr. David Capson, Dean, Faculty of Graduate Studies
Abstract

The starting point for a consideration of law in former colonies is often a law/custom binary whereby law is the formal legal system imposed during the colonial occupation and retained at independence, and custom the local law disrupted by colonialism. In most South Pacific small island countries, this dichotomy of law and custom has been formalized by the protection of custom by constitutional or statutory provisions. The protection of custom was carried out as a celebration of local culture at Independence, but the effect has been to stymie the development of local custom and to reinforce custom’s post-colonial subsidiary position relative to the formalized legal system.

The Kingdom of Tonga avoided the indirect rule of late colonialism and as a result Tonga’s legal system was never dichotomized into law and custom. There was no constitutional protection of custom because custom was never characterized as something other than law. Although it is undeniable that the direction of the development of law in Tonga was impacted by the presence of the Imperial project in the region, the legal change that occurred was led by Tongans. The starting point for legal change in Tonga was, and continues to be Tongan legal traditions even though local custom has not been formally protected.

This project considers the two human concepts of apology and the protection of reputation. In Tonga’s hierarchical society both concepts already represented important legal traditions when the formal British-style legal system was adopted. However, these legal traditions were not relegated to something ‘other’ than law. The former continued as an informal legal tradition that addressed legal harms not recognized by adopted legal traditions, while the latter was incorporated into the adopted formal legal system with provisions that continued to reflect the distinctive Tongan society.

Both legal traditions have faced challenges recently. Apology was no longer recognized as an efficacious remedy for women in the case of domestic abuse. The protection of the inviolable reputations of the monarch and nobility was limited by the exercise of the constitutional right of the freedom of the press. In both cases Tongans chose to exercise adopted constitutional rights in order to limit what was perceived to be an abuse of the exercise of power in the hierarchical society. Because local legal traditions had not been preserved as something apart from Tongan law, this development did not signal the end of Tongan legal traditions. Rather, it demonstrated the continuing development of Tongan law.