

Pacific Perspectives: Fa'afafine and Fakaleiti in Samoa and Tonga: People Between Worlds

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Abstract The law is full of labels which serve to define the concept, person or principle under consideration. These labels have their uses but can also create straight-jackets when applied in different social and cultural environments. This paper considers some of the challenges posed by groups of people in the Pacific countries of Samoa and Tonga. A variety of labels may be used to describe such people: transgender; gender-liminal; transvestite; gay, but none fully encompass what it is to be *fa'afafine* or *fakaleiti*. These individuals are both integrated and marginalised in their island countries and among the Polynesian Diaspora. They have a place in customary society, but are also influenced by the more global contemporary picture. They are therefore part of tradition but also symbols of change. The legal environment in which they lived is shaped by colonialism but there are also neo-colonial forces at work which threaten and shape their identity. In many respects therefore, they find themselves between two worlds: gender enlightened and gender repressed.

Keywords South Pacific · Tonga · Samoa · Culture · Custom · Gender

Introduction

The island countries of the Pacific region are countries which are undergoing rapid change driven by internal and external forces. As relatively young countries, they

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are newcomers to the international stage¹; they are small²; underdeveloped³; and underrepresented in world politics. They are at the same time, countries which are proud of their traditions, culture and languages, and of forms of social organisation which remain crucial to the survival of individuals and families in states where public welfare provision is at best embryonic, where government is often uncertain, and where economies are shaky.

The focus of this paper is on two Pacific island countries: the Republic of Samoa and the Kingdom of Tonga. More specifically this paper is about two groups of people who share many characteristics but have different names: the *fa'afafine* of Samoa and the *fakaleiti* of Tonga.⁴ It is my proposition that these groups fall between two worlds in a number of ways. On the one hand their dilemmas represent the dilemmas facing their own societies, in particular their situation may be illustrative of the tension between tradition and change; former colonialism and neo-colonialism; identity and globalisation. On the other hand, consideration of these Polynesian people challenge the labels, boxes and stereotypes that can all too easily be assumed when considering broader and not specifically Pacific identities.

Who are Fa'afafine and Fakaleiti?

Fa'afafine and *fakaleiti* are men who are not just cross-dressers but often males who have been reared as females—either by choice or under family encouragement. Biologically they are men—but psychologically and behaviourally they may be women, perceiving themselves as women and carrying out women's work in the home or the community⁵; or they may be neither men nor women; or alternatively the one or the other. One definition applied to *fa'afafine* but equally true of *fakaleiti* is that they are 'a heterogeneous group of androphilic males, some of whom are unremarkably masculine, but most of whom behave in a feminine manner in adulthood'.⁶ Besnier suggests that these labels 'can function as nouns to refer to a person, as verbs to refer to demeanour or action and often as adverbs to specify the manner in which an action is being performed'.⁷

¹ Samoa, formerly Western Samoa, was the first Pacific island country to gain independence in 1962. Palau was not independent until 1994, and countries such as Tokelau, New Caledonia, Pitcairn Islands and Norfolk islands remain dependent territories. Tonga was never a colony, although it was a British protectorate from 1900 to 1970.

² Some Pacific island countries such as Tokelau, Nauru, Tuvalu and Pitcairn are under 40 sq kms in land size. The two countries to be considered here are larger: Samoa has 2,935 sq kms of land while Tonga has 650 sq kms of land.

³ PICS (Pacific Island States) are listed by the United Nations as not only SIDS (small island developing states) but also as LDSs (least developed states).

⁴ Similar groups are found elsewhere in the region, for example, *Mahu Wahine* (Hawaii), *Mahu Wahine* or *Rae Rae* (Tahiti), *Whakawahine* (Maori, New Zealand), *Akava'ine* (Cook Islands), *Vaka sa lewa lewa* (Fiji), *pinapinaaine* of Tuvalu and Kiribati (sometimes spelt *binabinaaine*) and *Fafafine* (Niue).

⁵ See Miles (2003).

⁶ Bartlett and Vasey (2006).

⁷ Besnier (1994a, b).

Gender or Sexuality?

Whether *fa'afafine* and *fakaleiti* are distinguishable by sex or gender is controversial. The terms: *fa'afafine* or *fakaleiti* are used to refer to people who may be sexually categorised as male,⁸ but in terms of gender orientation are 'lady-like' or behave 'in the fashion of a woman.' However, the question of the sexuality of *fa'afafine* and *fakaleiti* is complex and cannot be generalised. Traditional or conservative *fa'afafine* and *fakaleiti* may perceive themselves and be perceived by others as different from their urban or more modern counterparts who may be more outrageous in dress and mannerisms and more explicitly sexual.

Nevertheless it can be argued that despite these variations, as a group *fa'afafine* and *fakaleiti* do not neatly fit into western categories of male, female, heterosexual, homosexual, bisexual or transsexual,⁹ but are unique to the Pacific region.¹⁰ For example one Samoan *fa'afafine* has said 'defining Fa'afafine in Western terms is difficult, but in the Samoan language literally means "in the manner of a woman"... Maybe from a Western eye you will look at it as a cross dresser or transvestite but in Samoa it's more than that. It's also a member of the Samoan community.'¹¹ This suggests that to define *fa'afafine* and *fakaleiti* in terms of 'otherness' may also be unhelpful because of the importance of integration (oneness) within their families and the wider community. It is also not clear whether *fa'afafine* or *fakaleiti* would define themselves in terms of sexual orientation or gender orientation. This is for a number of reasons.

Firstly, it would appear that sexuality has not traditionally been a key aspect of *fa'afafine* or *fakaleiti* definition—either self-definition or that of others. The distinguishing characteristics of *fa'afafine* or *fakaleiti* appear, at least until recently, to have been directed at gender rather than sex, at roles rather than sexual identity or orientation. While sexual exploitation seems to have occurred, sexual preferences—as opposed to romantic preferences—seem to have been largely unexplored, perhaps because there has been no choice or perhaps because of the wider taboos regarding sexual discussion and expression.

Secondly, the difficulty for *fa'afafine* or *fakaleiti* is that if they wish to have sexual encounters with men rather than with women this may be seen as homosexuality. While they themselves may see sexual encounters with women as being same-sex relationships or lesbianism. This is particularly a dilemma if *fa'afafine* or *fakaleiti* see themselves as women. For example, one of the informants interviewed by Schmidt states: 'I was born like this. Right from when I was young, I was like this. When I grow up, I just ... my brain, I think my brain works as a woman's brain, you know, not a man's'.¹² Similarly one of Poasa's informants defined *fa'afafine* as '(a) person that

⁸ For example, under the criteria established in the English case of *Corbett v Corbett* [1970] 2 WLR 1306.

⁹ Schmidt (2001).

¹⁰ Kalteborne explores the culturally specific definition of gender—Kalteborne (2003).

¹¹ Su'a (2008).

¹² Schmidt (2001).

is biologically a male but mentally a female. They want to live their whole life and everything as a woman. They socialize with girls and are sexually attracted to (straight) males'.¹³ While Besnier has written '(N)either complete men nor full women, *fa'afafine* waver back and forth between male privilege and the covert authority of women, between status degradation and social visibility'.¹⁴

Thirdly, while it is possible that *fa'afafine* and *fakaleiti* might be classified as transsexual it is not clear if *fa'afafine* or *fakaleiti* suffer from gender dysphoria.¹⁵ Although silence on this matter may be due to the previous lack of any practical possibility of aligning their biological sex with their 'brain' sex, it should be remembered that in the case law of common law countries such as the United Kingdom, Australia and New Zealand, 'gender dysphoria' has been seen as an illness or medical condition which is deserving of sympathy, recognition and in many countries now, state-funded treatment.¹⁶ It is by no means clear whether *fa'afafine* or *fakaliet* are uncomfortable with their bodies or traumatised by the disparity between their sex and their gender. Surgical treatment is a phenomenon of modern science and although expensive may now be available to those seeking to align their physical bodies with their gender identity either in New Zealand or elsewhere outside the region. Possibly some *fa'afafine* or *fakaliet* are taking this path. Many however, may not see this as necessary as long as their identity is gender/role based rather than sex based.

It may also be the case that the sexual orientation of *fa'afafine* and *fakaliet* should be distinguished from whatever sexual activities they may or may not participate in. Maintaining this distinction however, may be made more difficult by reference to developments outside the region in that much of the case law regarding gender has focussed on aspects of relationships which remain sensitive subjects in Tongan and Samoan society. For example, cases considering the rights of transsexuals have focussed on the sexual functioning of post-operative transsexuals and the procreative function of marriage; the debate regarding gay marriage has been side-tracked by concerns about consummation; while arguments advocating the non-differentiation between gender groups, such as transsexuals; inter-sex groups; homosexuals and bisexuals, may deter even the most liberal Polynesian from considering where *fa'afafine* and *fakaleiti* fit in. Similarly the growing tendency for western media to depict *fa'afafine* and *fakaliet* either as deviant—usually as homosexuals or transvestites or both,¹⁷ or mythically erotic/exotic, or to engage in speculative voyeurism on their sexuality will detract from the multi faceted dimensions of Polynesian trans-gender groups.¹⁸

¹³ Poasa (1992).

¹⁴ Besnier (1997).

¹⁵ For further discussion on transsexuality and marriage see Farran (2004).

¹⁶ It may be similarly unhelpful to describe *fa'afafine* as suffering from 'gender disorder'. See for example, Bartlett and Vasey (2006).

¹⁷ Schmidt (2001).

¹⁸ See Matzner (2001) and Schmidt (2001). See also Croall and Elder (1999) in Schmidt (2003).

Tradition and Change

It is unclear whether and to what extent *fa'afafine* and *fakaleiti* were part of pre-contact society. Alex Su'a, organiser of the 2008 Teuila Festival in Samoa, has suggested that 'It has been a long history I should say—immemorial time ... They were looked (on) as high profile members of society until Christianity came in ... that really changed the perception of Samoa towards (their own) ... people themselves who are Fa'afafine.'¹⁹ Certainly there is some evidence to suggest that during the earliest contacts with the islands Europeans encountered girls who turned out to be boys.²⁰ Whether this was a ploy used to safeguard young virginal girls from rapacious mariners, or a way of mocking the incomers; or evidence of a long-standing cultural practice is unclear. Others however, suggest that in Samoa *fa'afafine* are a recent, post-contact phenomena.²¹ In Tonga, Besnier indicates that early European travellers noted the absence of transvestism—compared to Tahiti, so that its antiquity may be in doubt.²² Divergences of opinion may depend on how *fa'afafine* and *fakaleiti* are perceived: as an integral aspect of Samoan or Tongan society, or as sexual deviants of recent origin.

Nevertheless there is some evidence that traditionally *fa'afafine* and *fakaleiti* were able to step outside the constraints and taboos that determined the roles of men and women and were not only able to carry out tasks of both genders but to go between the gender groups. For example in Samoa prior to the arrival of missionaries and the reforming influence of Christianity, the *poula* or 'joking night' was a feature of village entertainment and performed for important occasions.²³ These started with decorum, with a dance by the nominated village virgin and gradually deteriorated into ribald and suggestive dancing as first, the less revered girls joined in, then *fa'afafine* and then men 'pantomiming' as women.²⁴

In Tonga *fakaleiti* did not sleep in the segregated boys' houses nor were they kept as apart from the girls as other boys were.²⁵ Unlike girls, however, they had freedom of movement and could act as useful 'go betweens' not only because of their freedom of movement but because they could speak out in a way which would not be appropriate for Tongan women. There is also some evidence to suggest that traditional forms of homosexuality were viewed somewhat differently from western 'modern' constructions of homosexuality,²⁶ and that in some cases *fa'afafine* or

¹⁹ Interview with Haxton (2008). Although earlier research by Su'a indicated that the view of many informants was that in Samoa *fa'afafine* were not part of the pre-contact *fa'asamoa*. See Farran and Su'a (2005).

²⁰ See for example, the writings of Mortimer, G 'Observations and Remarks Made During a Voyage' (1791), London, referred to with other early references by Besnier in Herdt (1994a, b); and James (1994).

²¹ Mead (1968) for example, makes virtually no reference to *fa'afafine*.

²² Besnier (2004a, b).

²³ A missionary, John Williams (1830–1832) describes these. See Mageo (1992).

²⁴ See Mageo (1969). The author has witnessed a modern and more amateur version of the *poula* performed by Samoan students, including most of the University rugby team.

²⁵ James (1994).

²⁶ McIntosh (1999).

fakaleiti were equated with barren women.²⁷ Also, in the highly stratified Polynesian societies found in Tonga and Samoa, while some women, notably sisters and virgins, were placed on pedestals, generally women were regarded as considerably inferior to men—and in some cases still are—so that in Tonga for example, *fakaleiti*, like other women, were subject to various forms of abuse or disrespect, particularly if they were not of noble birth.

In societies which remain strongly patriarchal, where male machoism is ingrained, and where respect and status within families and established hierarchies is integral to the social structure; *fa'afafine* and *fakaleiti* can move between two worlds. For example, in Tonga *fakaleiti* can cross the divide between men and women by making fun of male and female stereotypes. They are able to behave far more outrageously than women because they are not women, and are less inhibited than many rather serious, formal, Tongan males. They are able to be effeminate because they are not expected to be macho. In Samoa *fa'afafine* may enjoy more freedom in their social lives and although they will still be expected to conform to the *fa'asamoa*—the culture and traditions of Samoa, which is central to the organization of social and political life, they may act as brokers between tradition and change.²⁸

Today *fa'afafine* and *fakaleiti* may hold traditionally male jobs, or be found in those more usually associated with traditional female roles such as care in the community, hospitals and other organisations such as youth and church groups,²⁹ or be associated with hairdressing or the fashion and textile sector,³⁰ and they are in demand as employees in the tourism and hospitality industry. In their own island countries and in New Zealand, they have developed their own niche in the modern entertainment industry in the form of drag shows, fashion parades and cabarets, which are put onto entertain foreign tourists and local audiences.³¹ In part this reflects a continuation of the traditional role of trans-gender 'actors', and the use of parody and burlesque to diffuse sexual tensions in sexually segregated societies. In part it may be a way of controlling and compartmentalizing *fa'afafine* and *fakaleiti* through the medium of spectacle, which is safe because it is bizarre, unusual, occasional and entertainment—which respectable people may watch but do not participate in (even if they are themselves *fa'afafine* or *fakaleiti*).³² Such events receive sponsorship from respectable commercial firms and the patronage of persons of status, for example members of the royal family in Tonga and the Prime Minister in Samoa.

²⁷ Schmidt (2001).

²⁸ An example is in fashion, where *fa'afafine* may lead the way in wearing new styles long before respectable girls are wearing them.

²⁹ Besnier (1994a, b).

³⁰ Competitors in various 'beauty' or talent contests are often sponsored by their employer, giving some indication of the employment background of contestants.

³¹ Pierce (2003). The best known of these are the Teuila Festival in Samoa, the Miss Galaxy Pageant in Tonga and the Pasifika Festival in Auckland, New Zealand.

³² See the analysis by Besnier (2002) and Besnier (2004a, b).

Contact with other cultures by Polynesians living or working outside their Pacific island states and through the global media create challenges to traditional values and social organisation. Legal changes taking place in the nearby jurisdictions of Australia and New Zealand as well as in the United Kingdom—which continues to be a jurisprudential influence, present new possibilities for gender-liminal groups. Nevertheless there are questions to be asked. In particular whether the conceptual framework for bringing such groups or individuals within the legal framework are appropriate for Pacific island societies or whether the application of legal principles developed elsewhere may be inappropriate on cultural and contextual grounds? Indeed it might be asked whether modern law reform especially of less-developed countries under the influence of more developed and certainly more influential countries is not simply a form of neo-colonialism?

Colonialism and Neo-Colonialism

Missionaries

In many countries of the region contact with missionaries was amongst the earliest contact with non-indigenous people. In Tonga the first missionaries arrived in 1822, in Samoa this was 1830, from which time Pacific islanders converted to Christianity. The constitutions of both Tonga and Samoa refer to God and to Christian principles.³³ Today it is almost impossible to separate tradition, culture and custom from the influence of religious teaching and practices and in countries such as Tonga and Samoa, the religious observation, the physical presence of churches and the role and status of clergy is integral to the organisation of societies in which ninety per cent of the population are churchgoers.³⁴

In the context of family law and sexual mores, missionary influence and the role of the church did two things. It reinforced the ecclesiastical background which had moulded much of the introduced common law in relation to family matters; and, it strengthened certain cultural taboos relating, for example, to adultery and sex before marriage. Introduced religion did not always however, uphold cultural practices—polygamy, public ceremonies witnessing a bride's virginity, arranged marriages of young people, institutionalised homosexuality in men's houses and initiation rituals, and the marriage of close relatives were all frowned upon and gradually eradicated under the influence of the church. Other practices appear to have been tolerated or at least, in some societies, not eradicated, including the recognition of *fa'afafine* and *fakaleiti*. Indeed in Samoa, there is some suggestion that the church may have had a positive influence on the development of the role of *fa'afafine*. Mageo, writing about

³³ Indeed the Reverend Shirley Baker was a formative influence in the drafting of the Tongan Constitution.

³⁴ In Samoa 99.7% of the population are estimated to be Christian and in Tonga at least 50% of the population are thought to be members of the Church of Jesus Christ of Latter Day Saints (Mormon Church) and the majority of the population are members of one of several Christian denominations present in the country. .

the exchange of puns and witticisms which had sexual overtones and were part of traditional Samoan entertainment, suggests that:

before missionary times, the exchange of *ula* was hosted and sponsored by the village girls as a form of public entertainment for visiting groups. Christianity changed the roles of girls, making this type of behaviour no longer acceptable for them. Because “she” belongs in a category that is neither boy nor girl, *ula* is acceptable behaviour for the male transvestite, or *fa’afafine*.³⁵

The role of the *fa’afafine* was therefore important for maintaining various traditions while upholding Christian principles.

The Common Law and Legal Liminality

It may have been the case that pre-contact customary law accommodated this gender diversity. However, in Samoa and Tonga the place of customary law in the post-contact and post-independence legal system is limited. In Tonga there is no official recognition of customary law, although the customs and traditions of Tongan society are very important, especially the authority and power conferred on high ranking members of society. In Samoa custom is important as a legal source of the law relating to land, titles, the recognition and role of traditional leaders and in mechanisms and forums for dispute settlement especially at local level.³⁶ Custom, whether as law or traditional practice, informs the Samoan way of life—the *fa’aSamoa*. In both countries therefore gender may not be as important as an individual’s place in the social hierarchy. In other words, rights, obligations and duties operated—and may still operate—outside the formal legal framework.

Nevertheless colonialism brought with it a process of legal transplant whereby, either directly or indirectly, foreign law was introduced under the influence of colonial administration or contact with Europeans. In Tonga and Samoa this was English common law—which was also of course introduced into the neighbouring and influential countries of Australia and New Zealand. A feature of this law—although not unique to it, was the fundamental premise that people were either male or female. Under introduced law there was no scope to accommodate people who might be recognised as a distinct gender group by the Polynesian society in which they lived. Consequently, while it may be increasingly difficult to categorise these trans-gender groups and there may be considerable differences between, for example, *fa’afafine* or *fakaleiti* in Samoa or Tonga and those in New Zealand, or between urban and rural *fa’afafine* or *fakaleiti*, or younger and older members of these groups, they all have one thing in common, the law makes no allowances for them. Consequently these ‘gender-liminal’ groups may also be legally liminal,³⁷ because where a person does not readily fit in as male or female, man or woman,

³⁵ Mageo (2000).

³⁶ See Powles (1991).

³⁷ This use of this term is itself subject to debate—see for example, Besnier (2000), but it serves my purpose here.

that person may fall outside the laws and legal institutions for which this distinction is fundamental—for example for determining eligibility to marry;³⁸ capacity to commit certain criminal offences;³⁹ the determination of pension and social security rights, employment benefits and tax liabilities. Moreover, because the common law introduced into the region became ‘frozen in time’ due to the ‘cut-off’ dates for its application—usually at independence if not earlier,⁴⁰ the colonial legacy is one that is not only out of date in its country of origin but also in its country of application.

Neo-Colonialism

Categorisation and Labels

Today, the pervasive influence of Western constructions of sexual identity, gendered behaviour and the increasing break down in clear distinctions between men’s work and women’s work in paid employment means that members of this group may seek a new identity especially in urban areas. This may be among the (largely closeted) gay community or among women, with increasing emphasis on feminisation, for example, in dress, makeup, mannerisms, social and sports activity. At the same time women’s rights movements are gaining ground especially in education and employment, so that the gender gap between modern women and effeminate men is narrowing. Modern women are more likely to ‘speak out’ and may be more sexually active than previously and less modest in their dress, or may themselves go between two worlds: the traditional, familial one of respect, modesty and demure demeanour, and the more liberal, controversial one of university, nightclubs, immodest dress and sexual partners.⁴¹ There is also, more generally, especially in urban areas and among the migrant Polynesian population of New Zealand, a social shift away from community and communal roles towards greater individualism. With increasing focus on individual achievement, wage earning capacity, education and the expression of personal choices and identity, men and

³⁸ See for example *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130 at 133 where it was stated that ‘marriage ... may be defined as “the voluntary union for life of one man and one woman, to the exclusion of all others”’. These common law principles were introduced under colonial influence into the region. See for example, the Marriage Act Cap 50 of Fiji, s 15 which states: ‘Marriage in Fiji shall be the voluntary union of one man to one woman to the exclusion of all others’. Although not all legislation express on the requirement that parties to a marriage are ,respectively male and female, nevertheless, failure to consummate may be a ground for annulling the marriage or a ground for divorce—see e.g. Divorce and Matrimonial Causes Ordinance 1961 Samoa.

³⁹ See for example, in the UK, *Secretary, Department of Social Security v SRA* (1993) 43 FCR 229 and in Australia, *R v Harris and McGuiness* (1988) 17 NSWLP 158.

⁴⁰ Tonga is an exception in so far as not only was it never a colony but it is the only Pacific island country that retained English law until very recently. Under the Civil Law Act (Cap 25) any English law could be applied in Tonga, including legislation. However, this provision was curtailed by the Civil Law (Amendment) Act 2003, which only leaves recourse to the general principles of common law and equity.

⁴¹ The chameleon talents of students at the University of the South Pacific never failed to amaze the author.

women are redefining themselves within these Pacific countries and within the Polynesian Diaspora.

Universalism

In countries outside the region increasing recognition of same sex relationships and rapid advances in embryology, in vitro fertilisation and a whole gamut of medical and technical developments in the creation of children, together with changes in legal regulations relating to pension entitlements, work benefits, succession to tenancies, property rights and so on, have all served to undermine the notion that certain rights, especially those pertaining to family rights and obligations, only pass to partners of the opposite sex linked by the formality of marriage. At the same time social changes have changed perceptions and expectations of marriage, the definition of the family and what is acceptable as regards sexual behaviour. Increasingly claims to family rights or relationship rights are being recognised regardless of the gender or actual sex of the parties and legal systems around the world are beginning to address the challenges posed by people who do not easily fit into the accepted binary divide in order to achieve equal protection of the law without discrimination.

It might therefore, be argued that in the interests of universal human rights Pacific island countries should bring their laws into line with developed countries and that measures such as transsexual gender recognition, consensual homosexual intercourse, gay marriage or civil partnership and other developments being experienced elsewhere should be on the law reform agenda.

However, in the Pacific region the law, especially private law, is slow to change and where reforms have taken place they have largely been based on models from elsewhere.⁴² It is open to Pacific countries to choose whether to follow modern trends. The reason for this is that at independence most countries of the region inherited a body of law in the form of legislation introduced by the colonial administration. This was either drawn directly from England, New Zealand or Australia or modelled on laws from these jurisdictions. At independence much of this law remained in force together with general principles of common law and equity, until replaced by national legislation or deemed to be incompatible with or abhorrent to local customs and circumstance. This approach to sources of law may well mean that there are gaps in the law or legal provision especially when new circumstances arise. If this is the case then the courts or legislators may look elsewhere, turning for example, to developments in Australia or New Zealand, or indeed other parts of the Commonwealth or common law world, for possible approaches.

There is however, a danger in this. Often, as was the case with the Family Law Act 2003 in Fiji,⁴³ funding, draftsmen and ideas are foreign, predominantly from Australia and New Zealand. It is also the case that many changes regarding gender-liminal groups are taking place in these neighbouring countries in a fairly short

⁴² I do not include here Australia or New Zealand where the situation is very different.

⁴³ For comment see Farran (2009).

period of time. Whether such changes should be introduced into Pacific islands should be a matter for those Pacific islands. This is not only an issue of respect for sovereignty but also respect for difference. Unfortunately the internationalisation of human rights, the imposition of Western values from developed countries and the expectations that less developed and least developed nations will aspire to the same values—including sexual values—may be little more than a form of neo-colonialism.

Identity and Globalisation

There are a number of reasons why the Pacific countries under consideration may resist the liberalizing trends which are taking place elsewhere. Foremost among these are the features which are important to Polynesian societies: religion and conservative Christian moral standards; the assimilation of *fa'afafine* and *fakaleiti* within their own societies and according to the terms of those societies; and the uncertain and possibly negative consequences for *fa'afafine* and *fakaleiti* themselves which might flow from following developments taking place elsewhere.

Family

The extent to which *fa'afafine* and *fakaleiti* are assimilated into their families is ambiguous. The role of the extended family is important in Polynesian societies and each member has a place in it. To neglect or mistreat family members is shameful and a breach of traditional and Christian obligations. It appears therefore that within the family *fa'afafine* or *fakaleiti* are accepted and protected, for example, against predatory men, and kept apart from same-sex adolescent experiences. Away from the family however, adult *fakaleiti* or *fa'afafine*, especially those from poorer or less privileged families, may be used for sexual gratification by men. In Tonga, it has been suggested that the reasons for this seem to be on the one hand, a combination of lack of access to women, social acceptance of male promiscuity, and abhorrence of homosexuality on the part of Tongan men, and on the other hand, the attraction of *fakaleiti* to straight men rather than women for sexual encounters. As these encounters are not necessarily viewed by either side as homosexual they do not offend the deeply embedded repugnance of homosexuality nor do they bear the social opprobrium of going with a (female) prostitute. Consequently sex with a *fa'afafine* or *fakaleiti* may not be seen as morally wrong because 'she' is neither a woman nor a homosexual man.

Christianity

Whatever changes have taken place elsewhere, religion and the role of the church within society remains an important force in much of the Pacific. Religious faith and the principles of Christianity go beyond the private and social life of ordinary citizens; they inform the views of members of parliament who would be involved in

considering any changes to existing legislation.⁴⁴ An example can be found in the stand of established churches against homosexuality and their reaction to various potentially liberalising provisions in the Fijian Family Law Bill.⁴⁵ At the same time however, observation of the obligations and duties owed to the church—including financial support of ministers and church projects—provides an avenue of acceptance and integration for *fa'afafine* and *fakaleiti*, and diverts attention from considerations of their sexuality or gender. There is no perceived inconsistency in berating the sins of sodomy from the pulpit and accepting the financial and other donations of *fa'afafine* or *fakaleiti* at the altar.⁴⁶

Social Assimilation

The extent to which *fa'afafine* and *fakaleiti* are accepted within their own societies it open to debate. Some would argue that they are respected and valued, others that they are marginalised, subject to abuse and victimised.⁴⁷ The law is similarly ambiguous. In both Tonga and Samoa there are criminal law provisions for men who represent themselves as women with the intention of deceiving others.⁴⁸ These provisions fall under related provisions dealing with prostitution and although prosecutions under these sections may be rare, nevertheless they remain on the statute books. Similarly in both countries homosexual acts are criminalised,⁴⁹ and while there are few reported cases this does not mean that prosecutions at a lower level of court, where they are not reported, do not occur.⁵⁰

Mainstreaming Liminality

While there are third sex or gender liminal groups found in various parts of the world, it might be argued that these are each unique to their place of origin. To assimilate them within the gay lobby, or transvestites or transsexuals or any other broadly generic trans-national group is to deny their distinctive identity. This is a very real risk if the specific cultural, historical and social context is ignored or suppressed and the emphasis is solely on sexual orientation or gender manifestation. For example, it has been argued that *fa'afafine* and *fakaleiti* do not fit into western

⁴⁴ Schmidt (2001); Matzner (2001).

⁴⁵ McIntosh (1999). See also George (2008) and Jowitt (2005).

⁴⁶ See for example, comment by a Pentecostal church leader cited by Peteru: '(We) must take a firm stand on this issue (fa'afafine as cross dressers and homosexuals) now or we've got a big problem on our hands' Peteru (1996).

⁴⁷ See for example 'Fa'afafine' a play by Brian Fuata reviewed by Paligaru (2001) and Kightley and Fane's 'A Frigate Bird Sings'.

⁴⁸ See s 58D Crimes Ordinance 1962 Samoa and s 81(5) Criminal Offences Act Cap 18 Tonga, and comment by Farran and Su'a (2005).

⁴⁹ See s 58D Crimes Ordinance 1962 Samoa and ss 136–140 of the Criminal Offences Act Cap 18, in Tonga.

⁵⁰ Compare for example, Fiji where the prosecution of homosexual conduct in the case *Nadan v the State* [2005] FJHC 1 and *McCoskar v the State* [2005] FJFC 500 provoked considerable and controversial commentary.

categories of male, female, heterosexual, homosexual or transsexual,⁵¹ but are unique to the Pacific region.⁵² On the other hand there may be advantages to be gained from assimilation into wider gender-based lobby groups which will be denied to those who wish to preserve a separate and unique Pacific identity in an effort to ward off the negative consequences of Western labels. Resistance to assimilation may result in attempts to re-assert or re-invent the distinct identity of *fa'afafine* or *fakalietii* as part of a national cultural identity and an integral aspect of Tongan or Samoan tradition or way of life. One way of doing this might be to link gender with indigeneity. The drawback of this could be that gender issues are not perceived as being part of contemporary society but of traditional society, as unchanging rather than dynamic, and as accepted rather than challenged. Similarly, relying on protectionism afforded to minorities could result in continued legal and social marginalisation of *fa'afafine* or *fakaleiti* rather than integration.

Addressing Discrimination

Although both countries have non-discrimination provisions in their written constitutions, neither provides against discrimination on the grounds of sexual orientation, and only Samoa provides against discrimination on the grounds of sex—Tonga has no such provision. Whether, and to what extent, *fa'afafine* and *fakaleiti* are actually discriminated against is also difficult to ascertain. For example, in response to a question by a member of parliament who had a *fa'afafine* in the family, the Minister of Police indicated that the police welcomed applications from *fa'afafine*.⁵³ It is also true that *fa'afafine* are found in professional jobs,⁵⁴ senior positions and receive patronage from highly respected members of society. Yet when Samoa was hosting the Pacific games *Fa'afafine* were asked to keep a low profile lest they gave a wrong impression, and damaged the reputation of the country.⁵⁵

The question of constitutional protections, fundamental rights and bills of rights are important because outside the region, especially in Europe, the rights of transsexuals and homosexuals have been raised in the context of challenges to fundamental rights, especially those found in the European Convention of Human Rights 1950—which is the model for many of the Bills of Rights in the Pacific Region—and in legislation directed at preventing discrimination on the grounds of sex or sexual orientation. These developments from elsewhere are significant, because the law of the region is strongly influenced by introduced common law principles and legislation. If the introduced law itself is facing challenges then there is the argument that Pacific regional law may be confronted by the dilemma of which law to follow, the old law—

⁵¹ A point argued by Schmidt (2001).

⁵² See also comment by the 2008 Miss Samoa Fa'afafine, Velda Fidl who said, "Yes we do dress up as women but we're different from people who are impersonating women" ABC Radio Australia, 15 September 2008.

⁵³ Radio New Zealand International 27 June 2007.

⁵⁴ Alex Su'a, for example, who was a law student at the University of the South Pacific when the author worked there, now works in the Attorney General's office in Samoa as a lawyer, and James (1994) suggests that *fakaleiti* are found at all levels of Tongan society.

⁵⁵ Jackson (2007).

of a pre-enlightened age as far as gender-awareness and sexual orientation is concerned—or the more modern trends? It is not bound to do either.

Assimilation or Pacific Identity?

Fa'afafine and *fakaleiti* outside their countries of origin and resident in New Zealand or Australia—but especially the former which has a large Polynesian population, find themselves in a different world where their sexual preferences may be more openly expressed, where they may be freer to cross-dress or to engage in long-term intimate relationships. Consequently, *fa'afafine* or *fakaleiti* may seek to identify with LGTB groups where, as in New Zealand and Australia, these have greater legal recognition. As sexual identity becomes more important to individuals, the sexual limbo that confronts *fa'afafine* and *fakaleiti* may compel some to lose their unique identity and merge with groups which already 'fit' Western constructions of sex and gender, such as transvestites, homosexuals or bi-sexuals. The dilemma they face is whether, by doing so, they continue to be Samoan *fa'afafine* or Tongan *fakaleiti* or are assimilated into something different.

Conclusion

It could be argued that in Samoa and Tonga the extended family, communal life and social organisation offer the *fa'afafine* or *fakaleiti* a much stronger and supportive environment than the more nuclear Western family and individualistic society of developed countries. Provided the individual is not marginalised by the family or victimised by society there may be no need to adopt Western-style advocacy of greater or different rights for *fa'afafine* or *fakaleiti*. If however, there was support for change to address experienced inequalities identified by *fa'afafine* and *fakaleiti* themselves, it would be questionable whether the courts and society could accommodate the type of legal reforms experienced elsewhere—for example as regards homosexuals and transsexuals. While there might be scope within existing legislation for regional courts to interpret the terms 'man/woman' in their contemporary context—including the cultural context of Pacific society so as to encompass *fa'afafine* or *fakaleiti* and thereby get around difficulties raised by the law requiring a person to be one or the other, it is doubtful if the courts in Tonga or Samoa would be prepared to set off on a path that is bound to attract social and moral condemnation, especially from church groups, and it would also be questionable whether judges—any more than legislators, could distance themselves from their own moral and religious beliefs.

It would seem therefore that while the Pacific perspective illustrated by the existence of *fa'afafine* and *fakaleiti* marks the acceptance of the idea that there is a continuum of sexuality, that gender is not fixed and that in some cases it may be inappropriate to say that 'this is a man, and this is a woman', in many respects *fa'afafine* and *fakaleiti* remain between worlds.

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