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'Sua le Lea - toto le Ata'

THE LAND AND TITLES COURT OF SAMOA

1903 - 2008

'Continuity amid Change'

FANAAFIAIONO - LE TAGALOA

“Le Lea a Lagi – Le Lea feai”

Cover Design by: *Leota Fitimaula Donna Leaniva Galumaninoa*

The *Ava (Lea)* ceremony of today is the only remnant of a form of pre-Christian Samoan worship observed by the *matai*. “*Sua le Lea - toto le Ata*” speaks of continuity amid change. Such continuity is expressed in the fact that although *matai* titleholders may change, the *matai* titles will continue. As long as there are *matai*, - the *elele* and *fanua* (lands belonging to the titles), the *Faamatai*, and Samoa, will remain.

‘Sua le Lea – toto le Ata’

**THE LAND AND TITLES COURT OF SAMOA
1903 – 2008**

‘Continuity amid Change’

FANAAFI AIONO – LE TAGALOA

A thesis submitted for the degree of Doctor of Philosophy
in Law at the University of Otago, Dunedin, New Zealand.

August 2009

“Le sua Lea, lea le Atua... Ia apelepelea pea Samoa, e Lau Afio.”

'Sua le Lea – toto le Ata'
THE LAND AND TITLES COURT OF SAMOA
1903-2008

*'Continuity amid Change'*¹

ABSTRACT

This thesis is a study of the Land and Titles Court of Samoa from its inception to the present day. It has exclusive jurisdiction over Samoan customary land and *matai* title matters. The Land and Titles Court began as a Commission in 1903 and survived three different administrations – German, New Zealand and Independent Samoan. Despite significant political changes, the Court has retained its general aim and objective of resolving disputes concerning Samoan customary lands and *matai* titles (names). It is now enshrined in the *Constitution of the Independent State of Samoa 1960 (Samoa)* which provides for the continuation of the Court. Its exclusive jurisdiction over customary lands and *matai* title matters is now governed by the *Land and Titles Act 1981 (Samoa)*.

The Court is a cross-cultural legal institution bridging the European and Samoan cultures and the colonial and post-colonial eras. The Court exhibits many of the features of a European court, but applies the 'customs and laws of Samoa' and operates in the Samoan language. It exists as a specialised enclave within the wider Samoan legal system, which is based largely on European law. Despite its colonial origins and significant political changes that occurred during the twentieth century, the Court has retained its original purpose. However, its composition and processes have changed over the years from being almost exclusively European to being predominantly Samoan. The Court is now of crucial importance to Samoan life and has a central role in protecting Samoan custom and resolving disputes in accordance with customary law.

¹ The *Ava (Lea)* ceremony of today is the only remnant of a form of pre-Christian Samoan worship observed by the *matai*. "*Sua le Lea - toto le Ata*" speaks of continuity amid change. Such continuity is expressed in the fact that although *matai* titleholders may change, the *matai* titles will continue. As long as there are *matai*, - the *eleele* and *fanua* (lands belonging to the titles), the *Faamatai*, and Samoa, will remain.

What this study has found is that the life and workings of the Court over the past century can be captured in the overarching theme of ‘continuity amid change’ which is expressed in the push and pull between the pressures of colonisation, decolonisation and commercialisation of land. These themes structure this general study’s consideration of various aspects of the Court: its history, its practice and procedures, its decision making processes, its relations with other Samoan courts, the social, political and legislative context within which it has developed and currently operates, the problems it faces or areas of possible improvement and, finally, its future. One of the main issues the Court faces today is its continual existence and relevance in a modern, commercialised world. The pressure to commercialise land will change the role of the Court. The question is whether the change that the Court will have to undergo to ensure its survival will undermine or strengthen its role as guardian of Samoan lore, customs and tradition.

I decided to study the Land and Titles Court as a means of preserving and reviving the *Faamatai* and Samoan custom. I also wanted to capitalise on the deference that academia is paid in order to raise the awareness of Samoan philosophy, tradition and custom. My hope is to present an alternative paradigm, not merely tabulating inflections, but a fulcrum by which influence, understanding and empathy would be brought to bear on the ‘Samoan-ness’ of our lifestyle, which may also be the axis of a sensitive melding of the indigenous and the foreign. This has also been an opportunity to describe and record the Court in all its glory, and failings, from the perspective of a Samoan who is familiar with the language, the society, and the culture upon which the foreign structure of the Court was imposed. The hope is that this exploration of the Court by a Samoan may find a *turangawaewae* in international scholarship.

The Court is an example of survival through adaptation. The survival of the Court, a colonial creation has, ironically, become a parallel story to that of the survival of Samoan custom. As the Court’s existence is a remnant of colonisation, one would expect it to be the bane of custom, and all things Samoan. As history would have it, the Court has in fact become a bastion of Samoan custom, especially concerning customary land and *matai* titles, which are at the heart of what it is to be Samoan. Whatever the original, colonial, founders of the Court had in mind when they

established this institution, it has, I believe, become a last hope for the future of Samoan custom in a rapidly modernising and highly commercialised world.

ACKNOWLEDGEMENTS

*"I have seen the difficulties of life – seen that anything good must grow to maturity, must temper, and perfect itself, and must undergo trial after trial."*²

Although the path I have taken has been strewn with many difficulties, I have made it thus far, only because I did not journey alone.

To my parents, Hon. Le Tagaloa Dr. Pitapola and Professor Aiono Dr. Fanaafi, thank you for instilling in me the value of education and the power of thought and word to render positive change; for teaching me to challenge and to question. Thank you for showing me a love for Samoa and concern for her future; for exemplifying integrity, *tautua* and courage.

Thank you to my siblings, Taelefusi Mr. Semisi, Satualafaalagilagi Dr. Leinani Salamasina Galumaninoa, Leota Fitimaula Donna Leaniva Galumaninoa for your prayers, friendship, and constant support. I would also like to acknowledge and thank the rest of my family for their love, support and prayers, Dr. Eva-Marie Beckmann-Aiono, Tuloa Aniseko, Noah Tavita, Ariel Fanaafi Aimiti, Leah Birgit Fanaafi, Pitapola 'Sunshine' Matua o Faiva Mai'ai Liron, Fanaafi-Salamasina Alaine'fu Agaitafili Taupaopao Umumata Marina-Yehuddit.

I am very grateful to my supervisors, Professor John Dawson and Professor Nicola Peart for their patience, guidance, advice and for the long hours of revising countless drafts.

I also wish to express my gratitude to Dr. Robert Hinds, Dr. George Burrill, Dr. Graeme Fogelberg (Former Vice Chancellor, University of Otago), Professor Mark Henaghan (Dean of the Faculty of Law, University of Otago), Professor Alistair Fox (Former Pro-Vice Chancellor, Humanities Division, University of Otago), Professor Majella Franzmann (Pro-Vice Chancellor, Humanities Division, University of Otago), Associate Professor Judy Bennett (Associate Dean Graduate Studies), Dr. Nigel

² Wang Meng, Former Minister of Culture for the Peoples Republic of China, *What am I searching for?* (January 1980).

Jamieson, Professor Rex Tauati Ahdar, Dr. Kim Maiai, Tofilau Nina Kirifi-Alai (Manager of the Pacific Islands Centre, University of Otago), Vaaiga Autagavaia, Anita Latai, Dr. Faafetai and Angelo Ventura, Christine and Kelby Smith-Han, Rosa and Miles Pask, Gretchen Robertson and John Hollows, Marie-Louise Nielsen, Matt Hall and the staff of the University of Otago Law Library for their support and assistance during the course of my studies.

Malo le tapuai! Faafetai le tapuai!

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CHAPTER ONE – INTRODUCTION

CONTINUITY AMID CHANGE

This thesis is a general study of the Land and Titles Court of Samoa (“the Court”): its origins, current practice and processes, and likely future. It uses the Court as a lens through which to consider the extent to which colonisation, decolonisation and commercialisation have affected Samoa’s indigenous systems of land tenure and *matai* titles. The Court is responsible for resolving disputes concerning customary land tenure and *matai* titles. As 80% of Samoa’s land is in customary tenure and ownership of this land is rested in *matai* titles, the Court plays a vital role within the Samoan legal system.

The Court is a cross-cultural legal institution. It bridges the European and Samoan cultures and the colonial and post-colonial eras. It was created in 1903 under the German administration; it continued under the British and New Zealand administrations; and it still exists, under new legislation, in Independent Samoa. The Court exhibits many features of a European court but applies the land tenure 'customs and laws of Samoa' and operates in the Samoan language. A Samoan Supreme Court decision in 1995 declared that:

*Western Samoa has two systems of law working side by side. On the one hand we have statute law, English common law and equity; on the other, custom and usage and the principles of customary law which govern the holding of matai titles and customary land. Each legal system has its own court: the former the Supreme Court and Magistrates Court, the latter the Land and Titles Court.*¹

This thesis is a study of the Land and Titles Court in general, and of its role as a dispute resolution mechanism, in particular. Certain themes will be emphasised that link the past, present and future of the Court, or indicate tensions concerning its work, or point to possible changes that may occur in its functioning. Some of these changes may be inevitable, some may be required to resolve particular conflicts or tensions, and some may represent a deliberate choice on the part of Samoans to compromise. The main themes addressed are those of colonisation and decolonisation, the commercialisation of land, and the continuity of the Court amid change.

¹ *Alaelua V.S. Vaai v The Land and Titles Court* [1980-1993] WSLR 519; S. Vaai, *Faamatai and the Rule of Law* (National University of Samoa, Apia, 1999) 176. The Magistrates Court is now known as the District Court and Western Samoa is simply Samoa.

A variety of sources and data collection methods have been used in this study of the Court. Both primary and secondary sources have been relied upon: legislation, judgments of the Court, government reports, newspaper articles, personal interviews, plus theses and secondary material concerning the Court, Samoan customs, land laws and history. The hope is that this thesis will advance understanding of a very significant aspect of Samoa's legal history and judicial system that has often been overlooked.

RESEARCH QUESTION

The principal question that this thesis seeks to answer is: *to what extent have the colonisation and decolonisation of Samoa, and the commercialisation of its lands, affected the Samoan customary system of land tenure and matai titles?* The Court's history, practice and future are studied in light of this overarching question. Subsidiary questions are considered in each chapter. The answers provided to these questions illustrate the thesis' overarching theme of continuity amid change.

Chapter Two begins the task by setting the context and outlining the indigenous Samoan or *Faamatai* principles concerning customary land, *matai* titles, and dispute resolution or decision-making. The question being asked is what was in place before colonisation.

This is followed by a trek through the statutory history of the Court, tracing the evolution of its legal underpinnings, in Chapters Three and Four. It was through this legislation that foreign ideas of land tenure and alternative forms of dispute resolution were introduced into Samoa. The legislation, over the years, has changed the dispute resolution process concerning customary land and *matai* titles. These chapters therefore provide a description of the effect of colonisation on the customary systems.

Subsequent chapters analyse various aspects of the Court. They are preceded by a review of the literature and an outline of the methodology in Chapter Five.

Chapter Six deals with the Court's current procedures in some detail, and considers the extent to which colonisation has changed indigenous processes, or, alternatively, whether indigenous processes have been allowed to prevail, or have re-surfaced. Chapter Seven deals with the question of how the Court and its specialist jurisdiction, as established by the *Constitution*, fit in with the guarantees of fundamental rights and fair process in the

Constitution. This is considered by examining whether judicial review is available in the general courts of decisions of the Land and Titles Court that are alleged to have breached fundamental rights enshrined in the *Constitution*. This question must be considered in light of the purported bar on judicial review of the Court's decisions that is set out in the *Land and Titles Act 1981 (Samoa)*, the Court's governing legislation. Chapter Seven therefore illustrates the current relationship between the Court and the general courts in the Samoan legal structure.

In Chapter Eight, a range of the Court's decisions from 1903 to 2008 is considered. This gives a flavour of the kinds of customs that the Court deals with. In particular, it considers the customary practice of banishment, to show how the Samoan courts have responded to apparent conflicts between a customary practice like banishment, and a fundamental right, in this case, to freedom of movement that is also entrenched in the *Constitution*.

Finally, in Chapter Nine, attention turns to the future of the Court in the light of contemporary pressures to increase commercial use of land. Although the *Constitutional* bar on the alienation of customary land remains in place, there are a variety of ways in which customary land tenure may be affected and eroded by pressures for greater commercialisation of land. These pressures may be resisted by Samoans who may oppose significant erosion of their indigenous customs and practices, but it seems likely that the Court will continue to play a vital role in mediating the tension between such commercial pressures and customary principles concerning customary land and *matai* titles, as an aspect of its dispute resolution function.

Considering this material as a whole will show the significant value of the Court and how it has become part of the indigenous structure concerning customary land and *matai* titles, despite the fact that it is a foreign construct that has changed little in some aspects over the past century, amid much political and social change.

BACKGROUND: Samoa

Samoa is the native name of the group of volcanic islands in Central Polynesia which a Frenchman, Admiral Antoine de Bougainville, called the Navigators Islands. The Samoan archipelago consists of fifteen islands. Nine of these now make up the Independent State of Samoa and the other six are an American Territory. The Samoan archipelago lies in the

Central Pacific Ocean 2,896 kilometres (1,600 miles)² north east of Auckland.³ The name 'Samoa' refers to the geographical location of the group of islands: *Sa* meaning sacred, and *moa* meaning centre. Samoans would not be the first to claim to be the centre of 'their world'. However, there could be some truth in the Samoans' claim. For if you stand in Samoa (the 'Sacred Centre'), then Tokelau (which means 'North') lies to the North, and Tonga (which means 'South') lies to the South.

An Expedition in 1722 under a Dutch explorer, Roggeveen, is said to have brought the first Europeans to notice the Islands. Bougainville (1768) and La Perouse (1787) followed. Little was known of the Island group until 1830 when missionaries of the London Missionary society landed at *Sapapaalii*, *Savaii*. Subsequently Christianity was accepted in Samoa. This is one of the most significant contacts Samoa has had with European ways. There would be many more.

Unlike other colonies where a single power beat the rest in a race to expand their territories in the South Pacific, Samoa was colonised simultaneously by three Western Powers. In the mid 1800s, *Apia*, the current capital of Samoa, was an 'international zone' occupied by consuls, land agencies, and other business enterprises from Germany, Great Britain and the United States of America, all simultaneously trading in Samoan land and other goods and settling on Samoan soil. By 1889 Samoa was under the tripartite supervision of Germany, Britain and America. The '*Berlin Act*' 1889, a treaty of sorts among the 'Big Three', contained some of the legal mechanics of their tripartite supervision of Samoa.⁴ This included the setting up of the 1889 Land Commission, the Court's forerunner, which was to investigate foreign interests in Samoan land.⁵ On 1 March 1900 Germany declared Samoa a German protectorate. With the outbreak of World War I in 1914 Military Government was established in Samoa under the control of the British forces. On 1 May 1920 Samoa was declared a mandate of the League of Nations with the New Zealand Government as the Mandatory. At the end of World

² R.P. Gilson, *Samoa 1830-1900 – the Politics of a Multicultural Community*, (Oxford University Press, Melbourne, 1970), 1.

³ Appendix A: Map of Samoa.

⁴ *Berlin Act 1889 - Final Act of the Berlin Conference on Samoan Affairs*, 14 June 1889, "The Samoa Times" Office 1889, (Alexander Turnbull Library, Wellington, New Zealand), Articles III (Establishment of the Supreme Court of Justice for Samoa), IV (Titles to land in Samoa, limit on alienation, investigation of foreign claims to Samoan land).

⁵ '*Berlin Act*', Article IV, sections 2-12.

War II Samoa was made a Trust Territory under the United Nations Charter with the Government of New Zealand again as the Administering Authority.

There were two Constitutional Conventions, one in 1954 and another in 1960. It was at the end of the second Constitutional Convention, on the 28 October 1960, the people of Samoa, adopted, enacted and gave to themselves their *Constitution*. The *Constitution* came into force on 1 January 1962. This was when the Trustee Agreement with the United Nations was terminated, the New Zealand flag was lowered, and Samoa became independent. Samoa is a parliamentary democracy with its attendant legal system.

Samoa is generally a homogeneous society with a single language and culture, from *Manua*, the easternmost island of the archipelago, to *Savaii* in the west. The customary principles concerning the tenure of land and *matai* titles are also generally the same across the Samoan group. The basic understanding is that customary land is owned by the relevant *matai* title (name) to which an individual with Samoan blood is a *suli* (heir). The *Constitution of the Independent State of Samoa 1960 (Samoa)*, (“the *Constitution*”) prohibits the alienation of customary land, which makes up 80% of Samoa’s land area, and it establishes the Land and Titles Court.

BACKGROUND: Land and Titles Court

The Land and Titles Court began as a Land Commission in 1903 and survived three different administrations – German, New Zealand and Independent Samoan. It has also maintained its general aim and objective of resolving disputes regarding customary lands and *matai* titles.⁶ The 1960 *Constitution* provided for the continuation of the Land and Titles Court. Its jurisdiction over customary lands and titles cases is now described in detail in the *Land and Titles Act 1981 (Samoa)*. The Constitution and legislation have established a dual court system: the general courts that deal with civil and criminal matters, and a special court that deals solely with customary lands and titles and applies customary law in its deliberations and decisions.⁷

⁶ See Chapter Four for specific consideration of the legislation (German, New Zealand and Samoan) that provided for the jurisdiction of the Commission/Court.

⁷ *Constitution of the Independent State of Samoa*, Articles 72, 73 and 103; Vaai, *Faamatai and the Rule of Law*, i.

The *Constitution* contains specific provisions that protect Samoan custom(s) and usage(s) concerning customary lands and titles. These provisions reflect the importance of customary lands and titles in the Samoan culture and of the *Faamatai* - the ideal social organisation of the Samoan people. The *Constitution* therefore, although foreign in form, protects the specific environment of Samoa's indigenous practices and norms.

CONTEXT: Themes

In the course of this thesis certain themes are explored. These may be described as: colonisation and decolonisation, and the commercialisation of land, in the context of the Samoan customary land tenure system. These themes are not unique to Samoa or the Land and Titles Court. In fact they are frequently evident wherever the foreign and the indigenous, or the new and the old, have met or collided.⁸ Such themes could even be called universal as there seems to have been, and continues to be, an impetus to colonise, decolonise or commercialise virtually any aspect of any society. However, the impact of these themes will differ from country to country. This study considers them within the Samoan context, in relation to the customary tenure of land and *matai* titles. The life of the Court is used as a measure of the extent of colonisation, decolonisation and commercialisation that have occurred in Samoan land law. What this thesis will show is that the interplay between the opposing trends of colonisation and decolonisation has generated a compromise or hybrid body. This is the position the Court now occupies and needs to occupy to guarantee its survival. It may be described as one in which an acceptable and necessary balance is established between colonial and decolonised legal forms.

Faamatai Land Tenure

According to the *Faamatai* and Samoan (customary) land tenure principles, land is owned by the relevant *matai* title (name) to which a Samoan is a *suli* (heir).⁹ This was the premise upon which all matters concerning land use, access and succession were decided. Land was not individually¹⁰ owned nor was it commercialised. 'Individual ownership' here refers to private ownership of an estate in fee, which is part of the English common law doctrine of estate and tenure. Under the *Faamatai*, land pertained to *matai* titles (names), and was administered by

⁸ S. Banner, *Possessing the Pacific: Land, Settlers, and Indigenous Peoples from Australia to Alaska*, (Harvard University Press, Cambridge, 2007), 1; R. Boast, *Buying the Land, Selling the Land: Governments and Maori Land in the North Island 1865 – 1921*, (Victoria University Press, Wellington, 2008), 44-47.

⁹ See Chapter Eight for the discussion of decisions of the Land and Titles Court concerning the *pule* (authority or 'ownership') over/of land being in particular *matai* titles.

¹⁰ *Ibid.*

the person holding the relevant *matai* title from time to time.¹¹ That title had *pule* (authority) over the land, and ownership of land, in the Samoan customary sense, lies where *pule* resides. The *Faamatai* also provided avenues for dispute resolution. A dispute was usually dealt with within the *aiga* (family) unless it affected another *aiga* which could require the matter to be considered at the *nuu* level (that is, by a collective of *matai* in a specific geographical location). Within the Samoan social order there are keepers of *aiga* knowledge. Such knowledge includes genealogies (which would trace lineage to *matai* titles) and details of land that the relevant *matai* titles own (their names, location, boundaries and current users). This is the *Faamatai*'s system of record keeping. These 'records' were oral, committed to memory, and communicated verbally from one generation to the next.

COLONISATION: Transfer of Colonial Law

The first theme, colonisation, is the focus of the early chapters where the effect of German, British and New Zealand colonisation on customary land tenure is examined.

Although colonisation brought a new faith, and different languages and cultures, this thesis focuses on the new legal system introduced or imposed on the colonised. Law served the 'civilising mission' of colonialism, to transform the societies of the Third World into a Western form, especially in the hands of the British throughout the nineteenth and early twentieth centuries.¹² For this reason, considering the legal system of a colony before and after colonisation should indicate the part law played in the Westernisation/colonisation of an indigenous society.¹³ Often, the introduction of Western law was used, particularly by the British and Americans, to justify and legitimise conquest and control. Colonisers often saw law as the 'gift' they gave the colonised.¹⁴ Traditional British policy, whenever English law was introduced into a colony, was to recognise customary (indigenous) law that was well established and not contrary or repugnant to (English/Christian/Western) notions of morality and justice.¹⁵ As one historian says of Samoa, "In those areas of politics and administration that did not impinge directly upon Samoan custom, the new government (German) built, in

¹¹ AUSAID, *Making Land Work*, June 2008, Vol. 2, Chapter 10, 213 refers to land as being 'attached' to the *matai* title.

¹² S. E. Merry, "Law and Colonialism", (1991) 25 *Law and Society Review* 890, 894.

¹³ *Ibid.*, 890.

¹⁴ *Ibid.*

¹⁵ T. O. Elias, *British Colonial Law*, (Stevens, London, 1962), 101, 102.

the main, upon the existing foundations.”¹⁶ Although the German Administration of Samoa did not formally legislate a repugnancy clause like those used by the Americans and British in their colonies, Samoa’s first German Governor, Dr. Wilhelm Solf, was known to have voiced his belief that Samoan customs that were thought to be contrary to basic (Western) standards of morality and justice would not be tolerated, acknowledged or kept.¹⁷ According to Davidson, Solf “intended to recognise Samoan institutions and traditional attitudes only because he saw that to do so was temporarily unavoidable. His long-term objective was that of breaking them down.”¹⁸

In Samoa, the usual German practice of militarising colonies and governing with the “mailed fist” did not occur.¹⁹ Instead, according to P.J. Hempenstall, Solf was “accorded a free hand to determine ‘the most judicious method of solving the issue of native administration’”.²⁰ Governor Solf apparently did not see the Samoans as “a commodity to be exploited for the sake of colonial profits”.²¹ He was instead “ready to treat the Samoans on their own terms, even if this sympathy was based on the customary Eurocentric condescension of his age”.²² The inference that can be drawn is that Solf’s personal sense of morality and justice, whatever that was, had a great effect on the overall transfer of Western/German law into Samoa, especially in relation to the customs the Court would apply in land and *matai* title disputes.

Regardless of variation in the colonial experience, and differences between colonisers, it can still be safely said that, wherever the colonial enterprise went, the laws of the coloniser were imposed on the colonised. However, the effect, extent and form of the transfer of law(s), and the consequent transformation of the colonised society, were highly diverse. Outcomes were influenced by geography, the era of colonisation, the purposes of colonisation, and the history and the culture of the colonised as well as the coloniser.²³ Two possible permutations of colonisation with regard to the transfer of Western/colonial law are: the total annihilation of

¹⁶ J. W. Davidson, *Samoa mo Samoa: The emergence of the Independent State of Western Samoa*, (Oxford University Press, Melbourne, 1967), 77.

¹⁷ M. Meleisea, *Change and Adaptations in Modern Samoa*, Christchurch, N.Z., 1992, 30.

¹⁸ Davidson, *Samoa mo Samoa*, 78-79.

¹⁹ P.J. Hempenstall, “Native Resistance and German Control Policy in the Pacific: the case of Samoa and Ponape”, in J.A. Moses & P.M. Kennedy, eds., *Germany in the Pacific and Far East 1870-1914*, University of Queensland Press, Queensland, 1977, 214.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Merry, 894, 895.

the traditional/indigenous legal system and its replacement with the colonial, although this rarely occurred;²⁴ and the establishment of a dual system where the colonial legal system operates alongside the indigenous to varying degrees.²⁵

A dual system of this kind can take various forms. For example, the coexistence of the colonial and the indigenous may mean that both colonial and indigenous law are recognised, but with the continuation of indigenous law limited by a repugnancy clause, or something similar, imposed by the coloniser to prevent application of possibly undesirable aspects of the indigenous system, as, for example, in much of Africa. These clauses appealed to Western notions of justice, fairness and morality.²⁶ Another variation on this is where there is a separate law for the colonisers and for the colonised, again, as in Africa.²⁷

Where two systems operate alongside each other, it is common to have separate court structures for each, at least at the lower level.²⁸ This would result in a dual system where one court structure is set up to deal with colonial legal matters and a different court is established to deal with indigenous issues, in which case the indigenous dispute resolution mechanism that was formerly used is replaced by a colonial court structure. The decision-makers in both sets of courts are usually colonists, but often there is some room for the natives to be decision-makers in the courts that deal with indigenous matters.

Colonisation in the Samoan context

In Samoa, the transfer of Western law upon colonisation took the following form. A centralised legal system was established which contrasted with the decentralised operation of the *Faamatai* in individual *nuu*. But this was still a dual system wherein the colonial and the *Faamatai* operated alongside each other. Customary/indigenous/*Faamatai* law was recognised in so far as it related to land tenure and *matai* title matters, through a specialist court that was centrally established.²⁹ There was no formal repugnancy clause in these arrangements but customs were vetted based on their morality and justice from a Western

²⁴ L. Gandhi, *Postcolonial Theory: A Critical Introduction*, Allen Unwin, St. Leonards, 1998, 124.

²⁵ *Making Land Work*, Vol.2, Chapter 10, 216-217 is a brief account of the dual court system in Samoa which provides an illustration of the colonisation through the transfer of colonial law. At page 202, there is a summary of the mixture of laws Samoa was left with post colonially or at Independence in 1962.

²⁶ Merry, 897.

²⁷ Merry, 890, 897.

²⁸ Merry 897.

²⁹ *Constitution*, Articles 100 and 103.

perspective by judges of the Court, who were initially non-Samoans.³⁰ Limited recognition of indigenous law by the colonial authority is therefore seen in the establishment of the Land and Titles Commission/Court as a dispute resolution mechanism that applied custom in matters regarding customary land and *matai* titles.

This specialist court was colonial in form and procedure, and its decision-makers were colonial, but it considered customary matters and was to apply customary rules in its decision-making and one of these rules was that customary land could not be sold or fully alienated from the customary group. Dealing with land in this separate and ‘special’ way was unusual for the colonial enterprise, because often law was used as a way “to extract land from pre-colonial users” and to facilitate its commodification.³¹ Yet, in Samoa’s case, a special enclave was being carved out wherein customary principles concerning land and *matai* titles would continue to be applied, at least to the extent that could be accommodated within a colonial dispute-resolution framework, and customary land did not become a market commodity.

Colonisation of the Samoan system of Land Tenure

Some of the basic features of a system of land tenure are: substantive land law rules, a mechanism for dispute resolution, and a record keeping system. The coloniser and the colonised would each have their own system of land tenure which contained these basic features in some form. This was true of Samoa and her colonisers, Germany and New Zealand. In relation to Samoan (customary) land tenure, colonisation involved the imposition of some of the coloniser’s legal rules, forms and institutions upon the colonised³² society. Many of the rules, classifications and institutions that form the centralised system concerning land tenure, set up by the Germans, and continued by the New Zealanders, find their origin in the ‘*Berlin Act*’ 1889, and were first introduced to Samoa through the work of the 1889 Land Commission, established under that ‘Act’.³³

The colonisation of the Samoan system of land tenure by the Germans led to the establishment of the Land and Titles Commission (“the Commission”) in 1903. After World

³⁰ See Chapter Four for a discussion of the 1950s legislative amendment that saw the appointment of the first Samoan judges for the Land and Titles Court. Prior to that, judges were either German or New Zealanders.

³¹ *Ibid.*, 891.

³² Vaai, *Faamatai and the Rule of Law*, 28.

³³ ‘*Berlin Act*’ 1889, Article IV. See Chapter Three for further consideration of the 1889 Land Commission.

War I, New Zealand continued the German Commission as the Land and Titles Court. The Commission was established through a German Ordinance³⁴ and the Court was continued through an Act of the New Zealand Parliament.³⁵ In this way legislation changed some of the Samoan (customary) processes concerning land tenure. In particular, the colonisers' legislation gave the Commission/Court the role of deciding disputes concerning land tenure. By creating an alternative mechanism, the role of the *Faamatai* was reduced.

The colonisers introduced their own classification of land. There was native land on which a bar on future alienations had been placed under the '*Berlin Act*'; there were town lots which were in the *Apia* municipal area (the international zone), that could be sold or leased which could have been land belonging to a central authority such as the Crown, the Kaiser or the United States Government, but that fact is not clear; and there were the lands where an alien's claim had been validated which were capable of individual ownership and could have located within or beyond the municipal area.³⁶ Under the *Faamatai* land did not belong to a centralised Government or authority nor could it be owned by private individuals. It can be said, therefore, that the classification of land as 'customary' (native) was due to colonisation, because previously all land in Samoa was customary and no such classification existed.

As well as reclassifying land in Samoa in this manner, the colonisers introduced their system of record keeping, in the form of a central Land Register. There foreign interests in land were recorded. As with the establishment of the Commission/Court, legislation set out how and when the registration of land would occur. Under both the German and New Zealand administrations, legislation required alien land interests to be registered whereas the registration of 'customary' or 'native' land was piecemeal and relied on the Commission/Court's transmission of decisions concerning customary/native land to the central Land Registry. To aid the registration of land, it was surveyed, another practice that did not exist in the Samoan system of land tenure. The survey and registration of land was introduced into Samoa with the 1889 Land Commission set up under the '*Berlin Act*'.³⁷

³⁴ *Verordnung des Gouverneurs betreffend die Ernennung einer Land und Titel Kommission 1903* – 'Land and Titles Commission Ordinance 1903'.

³⁵ *Samoa Constitution Order 1920 (NZ)*; *Samoa Native Land and Titles Commission Order 1920 (NZ)*.

³⁶ '*Berlin Act*' 1889, Article IV refers to native lands, town lots that could be leased or sold, agricultural lands, and alien claims to titles to land. See Chapter Three for further consideration of the 1889 Land Commission and the relevant provisions of the '*Berlin Act*'.

³⁷ '*Berlin Act*' 1889, Article IV, Sections 6, 7.

These procedural changes made by the colonisers were significant. Customary land tenure was incorporated into a traditionally Western structure, conforming to Western models of legal regulation and dispute resolution. However, by establishing a specialist court to deal with disputes and questions concerning customary land and *matai* titles, and empowering that Court to apply customary law, customary tenure retained a significant role within the legal system of Samoa. The adverse effects of colonisation on customary law were thereby lessened. The classification of certain land as 'customary', and the bar on the sale of this land (which made up 80% of Samoa's land area),³⁸ in German and New Zealand colonial legislation, shows that the Samoan land tenure system was only colonised to a limited extent. This is further evidenced by colonial legislation defining customary land and *matai* titles as land or titles held according to Samoan custom and usage, with no further attempt made to define such customs or usages in the legislation. So, although the Court was a colonial institution, the substantive land law rules it has applied in its dispute resolution have been those of the colonised Samoans. The fact there were Samoan Commissioners in the German Commission and Samoan Judges and Assessors in the New Zealand Court could also be seen as evidence that the colonisation of land tenure in Samoa was incomplete. For, because the coloniser had decided to retain some of the ways of the colonised, they needed to employ some of the colonised people to advise and inform the Court and liaise with the natives on 'customary' matters. Furthermore, the need to use the Samoan language when the Court began, and the later continuation of Samoan as the language of the Court, further assisted the retention of custom despite the imposition of a foreign structure. Samoan rules and forms concerning the tenure of land and *matai* titles therefore continued to a significant extent, although the body administering them was a colonial creation.

The specific purposes the colonisers had in mind when they recognised custom as a source of law are difficult to pinpoint, especially if one is to assume that the aim of colonisation is the acquisition of land, and that land held according to custom would be a hindrance to the easy acquisition of such land. Why, therefore, did the German colonisers limit this aspect of the colonisation of Samoa to 20% of the land? Why did they allow for the continuation of the customary norms in relation to the rest of the land? It is possible that the Germans only

³⁸ 'Berlin Act' 1889, Article IV, Section 1, prohibited future alienations of native land. As a result of the 1889 Land Commission's investigations, 80% of Samoa's land area was returned to customary owners and resumed its Status as 'customary' land; C.G. Powles, *The Status of Customary Law in Western Samoa*, Master of Laws, Victoria University of Wellington, October 1973, 1. See Chapter Three for further discussion of the Land Commission and its work.

needed 20% of the land either because their commercial interests were better met in other German colonies; or because Samoans supplied what the Germans needed without transfer of land ownership; or perhaps Samoa was only needed as a naval base or port requiring access, ownership and control of only part of the land. It is also possible that the Germans did not intend to settle Samoa in large numbers, meaning 20% of the land would be sufficient for business purposes and for the offices of the German Administration. The amount of customary land would possibly have been reduced if the Germans had won the Great War.

The reason for colonising only 20% of Samoa's land, according to John A. Moses, was not solely economic. Moses states that archival records show that German "policy makers were guided by more than purely economic aims" in the case of Samoa. They had "determined that Samoa was to be administered primarily for the Samoans, not the planters and traders".³⁹ The debate about bringing in Chinese coolies to work the German plantations in Samoa shows that German policy concerning the government of Samoa took racial and possibly cultural or customary factors into consideration. Although bringing in Chinese labourers was an economic matter, Governor Solf's concern was for the cultural impact that an influx of Chinese would have on Samoa and the Samoan population. This concern resulted in a limitation on the numbers of coolies that were brought into Samoa, a decision that would have detrimentally impacted the traders and planters economically, but probably ensured the racial homogeneity of Samoa, that we see today.

Colonisation of the Maori system of Land Tenure

These considerations become more pertinent when considering British colonisation of Maori customary land tenure in New Zealand. The situation in New Zealand may usefully be compared with Samoa. They are both Pacific nations populated by Polynesians who were colonised by the British in the nineteenth century, and both subsequently shared a New Zealand administration after World War I. In both cases a specialist court was established to adjudicate issues concerning customary land - in the New Zealand case, the Maori Land Court.

The establishment and history of the Native/Maori Land Court of New Zealand is therefore an analogous example of the colonisation of an indigenous system of land tenure and the

³⁹ J.A. Moses, "The Coolie Labour Question and German Colonial Policy in Samoa, 1900-1914", in J.A. Moses and P. M. Kennedy, eds., *Germany in the Pacific & Far East 1870-1914*, University of Queensland Press, Queensland, 1977, 234.

adoption of a foreign dispute resolution mechanism.⁴⁰ However, unlike the Samoan situation, the colonisation of the Maori system of land tenure was practically complete.⁴¹ Only about 5% of New Zealand land remains in Maori ownership and virtually none in customary land tenure. Through the Native/Maori Land Court the customary norms concerning land tenure among the indigenous groupings who held collective or communal titles to land were virtually abolished. These collective titles were individualised to facilitate the sale and commercialisation of the land, and a market for land was created.⁴² This view of land as a commodity was the antithesis of Maori custom and a deliberate feature of the imposition of the coloniser's system of land tenure. In the Maori context, the purposes of the coloniser were very clear: the acquisition of land. Compared with Samoa the colonists set out to acquire most if not all of New Zealand land. Furthermore, in regard to land that remained in Maori control, and subject to the jurisdiction of the Maori Land Court, there is little evidence of a desire to maintain Maori customary land tenure principles.⁴³ A statutory system of 'Maori land law' was instead imposed, removing the land from customary tenure.⁴⁴ This new statutory regime contained numerous rules, such as limitations on the number of persons who could be the co-owners of land, which was directly contrary to Maori customary norms.⁴⁵ There was no equivalent attempt to displace the customary norms concerning land tenure in relation to the great majority of land in Samoa.

Difference in the Colonial Experience

Banner offers one theory that attempts to explain the difference in the degree of colonisation experienced by land tenure systems of different indigenous peoples. He argues that it depends on three factors: "the presence of agriculture before contact, the degree of indigenous political organisation, and the relative speed of white settlement and the establishment of imperial control".⁴⁶ In addition, local contingencies may be very significant, including the role of individual colonial administrators.⁴⁷ In Samoa's case, agriculture was well-established

⁴⁰ B.D. Gilling, "Engine of Destruction? An Introduction to the History of the Maori Land Court", (1994) 24 *VUWLR*, 115; D.V. Williams, *Te Kooti Tango Whenua: the Native Land Court 1864-1909*, (Huia Publishers, Wellington, 1999), 47.

⁴¹ Boast, 48.

⁴² Banner, 97-98.

⁴³ Banner, 112.

⁴⁴ Banner, 84, 97, 98.

⁴⁵ Banner, 84-86.

⁴⁶ *Ibid.*, 318.

⁴⁷ *Ibid.*, 319.

before contact.⁴⁸ Furthermore, the *Faamatai* as a system of political and social organisation was very strong, although decentralised.⁴⁹ Settlers from Germany, the United States of America and Britain then arrived simultaneously in Samoa. As a result, each settler group probably had to temper their land policies to ensure the natives' support for their group. Events in Samoa may also have been influenced by the personal leadership styles of German Administrators.⁵⁰ Some combination of these factors could also help explain why the colonisation of the Samoan customary land tenure system was only partial.

In contrast, the colonisation of the Maori land tenure system was much more systematic and complete. As a consequence, many Maori today have a highly critical view of the colonisation process.⁵¹ When the colonial enterprise was at its peak, many colonists thought the best approach was to try and raise the colonised race to the coloniser's standards, and to assimilate the natives to their models.⁵² That was very much the British policy. A former New Zealand Native Minister, C W Richmond, verbalised this belief when he said that the colonisers "must first civilise the Natives if they wished to extend colonisation in this colony".⁵³ Such beliefs, although probably genuinely held at the time,⁵⁴ are today seen by some as evidence of the deliberate and systematic destruction of indigenous custom and the demoralisation of the indigenes through colonisation.⁵⁵ The reaction of the descendants of the colonists and the aggrieved natives has in turn seen a resurgence of indigenous forms. This reassertion of indigenous forms,⁵⁶ or indigenisation, can be viewed as one form of decolonisation.

DECOLONISATION: Indigenisation and Hybridisation of the Court

The second theme of this thesis is decolonisation. It should be noted that a line, demarcating the end of colonisation and the beginning of decolonisation or post-colonialism, cannot be easily drawn. Examples of decolonisation can be found in periods before and after

⁴⁸ C. Wilkes, *Narrative of the United States' Exploring Expedition during the Years: 1838-1842*, (McMillan, Auckland), 104; Gilson, 6, 11.

⁴⁹ Gilson, 6, 8-9.

⁵⁰ See Chapter Three for further information on the influence of local German Administrators such as the first Imperial German Governor for Samoa.

⁵¹ M Jackson, "Justice and political power: reasserting Maori legal processes", in Kayleen M. Hazelhurst (ed.), *Legal Pluralism and the Colonial Legacy*, (Avebury, Vermont, 1995), 249; Banner, 104.

⁵² Gilling, 123.

⁵³ Ibid., 122, 125; Banner, 86-87, 93.

⁵⁴ Banner, 96.

⁵⁵ Jackson, 250; Vaai, *Faamatai and the Rule of Law*, 9.

⁵⁶ Jackson, 244.

independence, even though independence is often associated with the end of colonisation. Examples of indigenisation and hybridisation can be found in Chapter Four, which deals with the Court's legislative history, Chapter Six which deals with the Court's practice and processes, and also Chapter Eight which considers a selection of cases the Court has considered and decided by applying certain customs.

If colonisation in the Samoan land law context involved the imposition of some colonial legal rules, forms and institutions, in the case of the Land and Titles Commission/Court, then the decolonisation process should arguably involve its abolition. In effect, the extent of decolonisation required would depend on the degree of colonisation that had gone before. As noted earlier, however, the colonisation of Samoan land tenure principles was only partial. By establishing a specialist Court, staffed mainly by Samoans, and by empowering it to apply Samoan custom, much of the indigenous land tenure system was retained. Therefore the degree of decolonisation required in the Samoan context would be less, compared to other places where colonisation was practically complete.

Decolonisation, like colonisation, can occur in a variety of forms and at various speeds. For example, if we take independence as a chronological marker for the end of colonisation,⁵⁷ a number of avenues are available to a colony for its decolonisation. For example, theoretically, a colony could decide to do away fully with anything and everything colonial and revert comprehensively to indigenous legal processes. In this way it would be choosing to re-assert the fundamentals or the essence of the customary system.⁵⁸ The question that would then arise is whether a colonised system can revert to a pre-colonial state of affairs; practically speaking, would there be anyone who recalled precisely the pre-colonial system or, would it be possible to find untainted, 'pure' customary law to return to.⁵⁹ Furthermore, 'untainted' customary law might not be suit the post-colonial society.

A contrasting approach to an attempted return to the essence of pre-colonial law and legal processes is hybridisation or adaptation.⁶⁰ By hybridisation, I mean the modification of the

⁵⁷ See L. Gandhi, 3, 17-18 for discussion of colonisation not ending with the end of colonial occupation and the discussion of the 'colonial aftermath'.

⁵⁸ L. Gandhi, viii.

⁵⁹ Merry, 900.

⁶⁰ L. Gandhi, viii, 129 – 130. The 'hybrid' in postcolonial theory refers to a new entity that develops post-colonially, in a state of 'in-between-ness'. It is neither colonial nor indigenous, but surfaces in the context of anti-colonial politics. I am not using the 'hybrid' in this postcolonial sense.

colonial by acknowledging and applying indigenous/customary law or norms to a greater degree while continuing to operate within aspects of the colonial structure. This form of hybridisation occurred in the Samoan context, particularly through a process of indigenisation seen in the workings of the Court⁶¹ and in a limited way in the general courts.⁶² Examples of this are greater acknowledgment of custom as a source of law in the *Constitution of Independent Samoa*,⁶³ acknowledgment of custom in the Preamble to the *Constitution*, reference to customary apology (*ifoga*) in sentencing, and of course the entrenchment in the *Constitution* of the role of the Court.⁶⁴

Many of the examples of decolonisation that occurred in the Court began on the eve of independence, possibly because independence was in sight. This meant that when independence was finally formally attained in 1962, one could say that nothing much changed with the Court's processes and structures. Perhaps the major change that independence brought about was the formalising of the continuation of the Court in Independent Samoa's *Constitution* of 1960. In the *Constitution*, the structure of the Land and Titles Commission/Court, as it was under German and New Zealand rule, was retained. The Court however, continued to operate under the legislation created by the New Zealand colonial power for a further 18 years, until the Samoan Parliament passed its own legislation for the Court in 1981. Even then, the provisions of the 1981 Act closely resembled those of the prior New Zealand and German legislation. In the *Constitution*, the colonial classification of land as freehold, public (Crown) or customary was continued, and the prohibition on the sale of customary land was entrenched. The requirement for the registration of freehold and public land, and the piecemeal registration of customary land, was retained in Independent Samoan legislation. The *Constitution* specified that Samoan custom and usage were to be applied in the determinations of the Court. The definition of customary land and titles, as those held according to Samoan custom and usage, was also retained in Samoan legislation. In other words, the laws of Independent Samoa did not substantially change the colonial land tenure regime. This suggests that a form of decolonisation that would involve the abolition of imposed legal rules, forms and institutions, did not occur in Samoa. But does this mean that Samoa has not been decolonised at all? Not necessarily, especially if a different definition of decolonisation is considered. Arguably, decolonisation in the Samoan context took a different

⁶¹ See Chapter Six.

⁶² See Chapter Eight.

⁶³ *Constitution of the Independent State of Samoa 1960 (Samoa)*, Article 111.

⁶⁴ *Ibid.*, Article 103.

turn. It involved the voluntary (as opposed to 'imposed') continuation of some colonial legal rules, forms and institutions by the 'decolonised' indigenes. The previously imposed rules and forms, however, were arguably continued for the indigenes' own purposes, rather than those of the coloniser. This less extreme and incremental or gradual form of decolonisation was perhaps an appropriate response to the limited degree of colonisation that had occurred.

To a large extent decolonisation in the Samoan context is seen, therefore, not in changes to the legislation governing the Court, but in certain examples of indigenisation, or the greater recognition of indigenous forms, within the continuing colonial structure of the Court. For example, the colonial Bench and staff were gradually replaced by Samoans. Today the Bench and staff of the Court are all Samoan, as are the Assessors, and one of the necessary qualifications of a Judge or an Assessor is to be the holder of a *matai* title. Therefore, although the Court has provided an alternative dispute resolution mechanism to that performed by the *matai* (titleholders) under the *Faamatai*, the resolution of disputes is still carried out by *matai* who are Judges and Assessors of the Court. The Samoan language is also used in the proceedings of the Court. Further evidence of decolonisation is seen in the fact that certain customary practices and norms surrounding dispute resolution, such as *seumalo* and *tapuaiga*,⁶⁵ are being observed informally, alongside the European legal procedures that came with the structure of the Court. Decolonisation in the Samoan context therefore includes the grafting of customary practices on to colonial dispute resolution systems.

Indigenisation was recently enhanced by the appointment of a separate President for the Land and Titles Court. Previously, the Chief Justice of the general courts was also the President of the Land and Titles Court. Now these roles have been separated. This recognises the need to separate the Court that deals with customary matters from the 'mainstream' courts. It allows and possibly encourages further indigenisation (decolonisation) to occur in the Land and Titles Court.

Like colonisation, decolonisation in the Samoan context has therefore been partial. It has mainly been expressed through the indigenisation of imposed colonial procedures and institutions. Such indigenisation or grafting is an illustration of the adaptability of a culture

⁶⁵ See Chapter Six for discussion of these practices.

and custom, in this case the Samoan culture and its customs concerning land tenure and *matai* titles.⁶⁶ The result of this adaptation is a form of hybridisation that at once displays elements of colonial and indigenous legal forms: that is, the current Land and Titles Court. It is possible that, in the future, the Court could be indigenised even further.

FUTURE: Pressure for greater commercialisation of Samoan land

The third theme of this thesis, regarding the commercialisation of land, also bears on the future of the Court. This theme is addressed predominantly in Chapter Nine. There are significant pressures on Samoa at this time to reduce its dependence on foreign aid, by increasing the commercial use of its land. As much of the land is subject to customary tenure, and cannot be sold, the pressure to commercialise this land may lead to modifications of these rules, such as expanding leasing opportunities of customary land. These changes are likely to affect the powers and processes of the Court. Commercialisation in the Samoan context would mean the inclusion of customary land within the market in land. Some commercialisation of customary land occurred under the German and New Zealand administrations, as some former customary land had had its status changed to freehold or Crown land, and could then be sold, but this only constituted 20% of the land. The market in land that remained in customary tenure was then, as now, limited to the leasing of land for a limited period, not its sale. This partial commercialisation can again be contrasted with the systems that were put in place, which facilitated much greater commercialisation of land, in the Maori context in New Zealand. The Native/Maori Land Court was set up precisely to facilitate the commercialisation, via sale, of Maori land.⁶⁷ However, in the Samoan context, the sale on the open market of land that remained customary was prohibited under colonial legislation, and, most importantly, this rule was entrenched in Independent Samoa's *Constitution*.

Today, the pressure to commercialise customary land comes from the desire for greater wealth and development, both of which rely on land, 80% of which is currently beyond the reach of the market. This desire is not new. In the nineteenth century, in places such as New Zealand and Hawaii, indigenous land tenure systems were destroyed and replaced with

⁶⁶ A. F. Le Tagaloa, "Change is a Fleetfooted Steed", in *O Motugaafa*, (Le Lamepa Press, Apia, 1996), 31-32; E. Stokes, *The Individualisation of Maori Interests in Land*, Te Matahauariki Institute Monograph Series, (University of Waikato, Hamilton, 2002), 187, 190.

⁶⁷ Banner, 85, 97-98, 103; Williams, 51-53, 56, 63-64.; Boast, 47-48.

colonial systems in the name of economic progress.⁶⁸ A recent and significant change that could facilitate the commercialisation of customary land in Samoa is the introduction of the Torrens system of land registration. This change, its impact on customary land tenure, and its constitutionality, will be considered in Chapter Nine. If customary land is further commercialised, through changes to the law on leasing or compulsory acquisition, or by the consequences of the registration of customary land under the Torrens system, this will in turn put further pressure on the Court to change or adapt its role. It may be given, and probably should be given, new roles and functions to alleviate the pressures of commercialisation, or to supervise the process.⁶⁹

If the pressure to commercialise leads only to an increase in the leasing of customary land but to lifting of the prohibition on the sale of customary land, then this might have an even greater impact on the indigenous system of land tenure and *matai* titles than colonisation.⁷⁰ If this were to happen, Samoans could not blame the colonisers for the decimation of Samoan forms, rules and institutions concerning the tenure of customary lands and *matai* titles. They could only blame themselves. Furthermore, if the result of commercialisation was the creation of a market in customary land, then the need for the Court might eventually cease, if all land eventually passed out of customary tenure. This would be an interesting outcome, especially considering the colonial origins of the Court. It would show that the continuation of a colonial institution (the Court) was heavily reliant on the continued existence of the customary structures of land tenure upon which it was superimposed.

‘ORDER OF FARE’

Chapters Two, Three and Four set the scene for this study by considering the historical and legislative origins of the Court. Chapter Two attempts to describe the indigenous system of land tenure and Chapter Three looks at the introduction of a colonial land law system and discusses the Land Commission that was formed to look into the sale of customary land in Samoa in the late 1800s. Chapter Four then considers the Court’s legislative base. It looks at the original German legislation whereby the Commission (the predecessor of the Court) was established, New Zealand legislation for Samoa, and legislation passed by Independent

⁶⁸ Boast, 42, 44-48.

⁶⁹ These possible changes will be touched upon in Chapter Nine.

⁷⁰ An example of the surge in interest in customary land is in the tourism industry. Samoa is increasingly becoming an attractive tourist destination, and as most of the prime locations for resorts and hotels are on or adjacent to customary land the issue of the prohibition on the alienation of customary land and the limited leasing that is permissible has come to the fore.

Samoa's Parliament concerning the Court. It considers the Court's establishment, its constitution, jurisdiction, and powers, from 1903 to 2008.

Chapter Five describes in detail the methods and sources used in this thesis and reviews the literature on the Court. The literature review is located here rather than earlier because it is best understood against the background provided in the earlier chapters. A number of earlier chapters are required to set in context the rather slim literature on the Court: that is, Chapter Two dealing with the indigenous framework concerning Samoan land and *matai* titles, Chapter Three dealing with the initial colonial experiments in land tenure issues under the tripartite supervision of Samoa, and Chapter Four which maps the legislative journey of the Court. Having established the legal framework surrounding the Court, the focus of those few authors who have previously considered the Court's functions can be more readily understood.

Chapter Six uses the *Land and Titles Act 1981 (Samoa)*, the Court's current governing legislation, as a skeleton for the discussion of its current practice and procedure. In addition, a case study is used to illustrate the practice and procedure of the Court. There is discussion of the doctrine of precedent and the principle of *res judicata* and whether this applies to the Court. Because the *Land and Titles Act* is an enactment of the independent Samoan Parliament that continues provisions from colonial legislation, it serves as an example of the voluntary adoption of colonial forms by a once colonised society.

Chapter Seven addresses judicial review of Land and Titles Court decisions. This allows for consideration of the Court's governing legislation within the context of the greater legislative framework of Samoa, especially the *Constitution*. This chapter also provides an opportunity to discuss the interplay, differences and possible conflicts between constitutional rights and customary norms.

Chapter Eight assesses the substance of the customary law recognised by the Court. The question asked is: what is the 'customary law' that the Court applies when it decides disputes concerning lands and titles? It draws on 460 decisions of the Court and considers general principles of Samoan customary law concerning land and *matai* titles that can be extracted from them.

The final chapters consider the future of the Court. Chapter Nine looks at the pressure for change that the Court is under because of the need to find ways to increase the economic use of customary land. It highlights the tension between indigenous interests and potential commercialisation with the proposed introduction of the 'Torrens System' of land registration. This tension arguably results in the need for compromise. Chapter Nine therefore considers a legal arrangement whereby some economic development, that is not contrary to custom or the constitutional prohibition on the alienation of customary land, could lawfully occur. This would mean that both continuity and change could be achieved.

Chapter Ten reviews the history of the Court under the cross-cutting pressures of colonisation, decolonisation, and commercialisation, and makes some recommendations for the improvement, survival and relevance of the Court in Samoa.

TERMINOLOGY

The fact that the name of the Land and Titles Court has changed over the years presents a dilemma, in some contexts, concerning the proper terminology to employ. What name should one use to discuss the functions of this body in general when it has had several different names in the last one hundred years?

In this area, the following decisions have been taken. The tri-partite land commission that was established in the late 1800s will be referred to in this thesis as the '1889 Commission'. The predecessor to the Court that was then established as a commission in 1903, under the German colonial Administration, will be referred to as the 'German Commission'. Its full title was the 'Land and Titles Commission'. Regarding the body that operated under the New Zealand Administration from 1914 until 1933, the term to be used is the 'New Zealand Commission'. Its full title was initially the 'Native Land and Titles Commission' but that terminology was changed to that of the Land and Titles Court from 1937 onwards. That name was maintained after Independence in 1962. For clarification, the terms 'New Zealand Court' or 'Samoa Court' will be used when necessary to differentiate between these two Courts that operated before and after Independence occurred. At many points in this thesis, however, when the operation of this body is being discussed in general terms, the simple phrase 'the Court' will be employed.

THE FUTURE OF THIS STUDY

This thesis exemplifies the current attitude of Samoans towards the Land and Titles Court and shows how topical land issues are in modern Samoa. It seems Samoans are no longer accepting the level of information they previously had on the workings of the Court. The Samoan public wants to know in detail how their land and *matai* titles are dealt with by the Court. They want a clear legal analysis of what is to become of their lands and *matai* titles. They want to know, understand and exercise their rights within the processes of the Court. This demand for deeper knowledge, and this move to seek greater involvement in issues concerning customary land and *matai* titles, could give the Court a new lease on life and greater relevance in changing times. The surge of interest in the Court, and in customary land and *matai* titles, is probably because of the belief that greater wealth and development, and full transition to a monetary economy, require greater commercialisation of land, 80% of which is customary and therefore under the jurisdiction of the Land and Titles Court.

The aim of this thesis is therefore to provide a better understanding of the Court and customary land or *matai* title issues. At the moment there is no case digest or classification of its decisions. This research could be a stepping-stone towards providing such a resource that would benefit the whole community who access the Court. The Court is staffed by an array of people with wide-ranging backgrounds. Material from this study can be used to create courses that will enhance their qualifications or perhaps even create a qualification necessary for those who aspire to work in this field. Such a course will not only aid those who do not have a foreign education but will enable those who have not yet encountered the Samoan land tenure system to ease into this field and be confident in the handling of cases in this most vital legal institution.

This research will also be a good base for further legal texts as few have been written on this area of Samoan Law. It may enable translation of indigenous legal terms that will aid in the education of all those involved or who come in contact with the Court. Such resources will not only aid Samoans in Samoa but Samoans in every country, wherever they may reside, including New Zealand and the United States of America. The preservation, conservation and rejuvenation of our ways, and of our language that is so intrinsically linked to our way of life, are the goals that encapsulate the core desire of this work.

CONCLUSIONS PREFIGURED

The overarching theme for this study is that of continuity amid change. This theme responds to the question of: *to what extent have colonisation, decolonisation, and the pressure for the commercialisation of land affected the Samoan customary system concerning land tenure and matai titles?* The response is that these pressures have, collectively, produced a need for compromise that has produced the hybridisation evident in the Court today. This hybrid position, it will be suggested, is vital to the future of the Land and Titles Court. It is a melding of the indigenous and the colonial or the modern, which reflects the partial nature of the colonisation Samoa experienced and the particular form of decolonisation that has occurred, decolonisation in this case taking place through a process of indigenisation that began on the eve of Independence and continues today.

CHAPTER TWO

FAAMATAI

MATAI TITLE SUCCESSION AND CUSTOMARY LAND TENURE

INTRODUCTION

This chapter attempts to summarise the customary principles of the *Faamatai* concerning *matai* title succession, land tenure, and the resolution of disputes about lands and titles. The aim is to describe the system in place in Samoa before colonisation and therefore to highlight the impact of colonisation and the examples of decolonisation that follow. The indigenous principles concerning title succession, land tenure, and dispute resolution reflected the core values of the *Faamatai*, which was the foundation of Samoan society. This chapter therefore begins with a brief description of the *Faamatai*. The arrival of foreigners and their ways altered and influenced the customary processes of the Samoans concerning title succession, land tenure, and dispute resolution. The most obvious change came in the form of the Land and Titles Commission/Court as a dispute resolution mechanism, which reduced the role of the *Faamatai*. However, to assess this change, one must first consider what originally existed, and how this subsequently changed. Some of these changes are touched upon in this chapter although the major changes will be discussed in later chapters.

FAAMATAI

The *Faamatai* or the *Matai* system, which is, philosophically speaking, the ideal social organisation of Samoa, arranges the socio-economic and political groups within the *Nuu*⁷¹ (the basic unit of authority in Samoan society). The *Faamatai* arrays Samoans upon a three-fold base, of the *Faasinomaga*, or 'points of reference pertaining to identity'. The first base of the *Faasinomaga* of the Samoan is the *matai* title to which he/she is heir. Every Samoan is heir to a *matai* title, regardless of residence or place of birth. As long as the parents are, or one of the parents is, Samoan, the issue is automatically heir to the *matai* title of his/her *Faasinomaga*. A Samoan can be heir to more than one *matai* title. The second base of the *Faasinomaga* is the land held by the *matai* title. The *Faamatai* provides that the *matai* title holds the land, while the titleholder is the administrator and protector of the *aigapotopoto* or *aiga* (extended family) land, and also protector and keeper of the oral tradition or lore

⁷¹ The *Nuu* is a social – political – geographical unit. It is also used to refer to the group of *matai* in the social structure. The word 'village' has been used to translate *Nuu*, however to use 'village' is to limit the meaning of *Nuu* to a geographical location alone.

pertaining to the *matai* title and the *aiga*. The third base of the *Faasinomaga* is the *Gagana* or Samoan language. There is only one language from Manua to Savaii. The use of this language for social communication, for worship, in the deliberation of the *Fono* (Council), and in the everyday life of the *aiga* has never been disrupted, interrupted or had to be relearned.⁷²

These are the basic tenets of the *Faamatai* pertaining to land and titles. There are two further customary principles that need to be understood before one can appreciate how the *Faamatai* would apply or deal with these tenets in the making of decisions and the resolution of disputes. These are *Va* and *soalaupule*.

Va is first of all the relationship between the Creator and the created. Between Creator and created and between all of creation is the *Va*. The *Va* pervades Samoan life and living even today among all Samoans in Samoa or residing elsewhere. *Va* is relationship, connection, affiliation, boundaries, difference, separation, distance, responsibility, obligation, state of being, position, standing, and so much more.⁷³ The *Va* defines and dictates the relationship between the different groups within the *Faamatai*. It governs how they operate within the individual groups and also in relation to other groups in the *Faamatai*. The *Va* determines the relationship among the heirs of *matai* titles. It also determines the relationship between the titleholder and the other *suli* who are not titleholders. The *Va* governs the relationship among title holders within an *aiga* and the titleholders of the *Nuu* who form the *Fono a Matai* (Council of *matai*).⁷⁴

It is when there has been a breach or non-recognition of the *Va* that disputes arise. For example, disputes where the eligibility of *suli* will be questioned, in which case genealogies will become pivotal in the resolution of the dispute and assessing the various claims made. The *Va* between all those concerned in a dispute or disagreement will automatically come

⁷² Le Tagaloa, *O Motugaafa*, 31.

⁷³ F. Aiono- Le Tagaloa, *TAPUAI - Samoan Worship*, (Malua Printing Press, Apia, 2003), 7-8.

⁷⁴ An expression of the *Va* is in the importance given to the *suli* or the heir. The *suli* can be called the gateway to *matai* titles and land(s). For, all the individual has to do is show a genealogical connection to a *matai* title to establish eligibility to hold that title and to access land(s) pertaining to that title even if they are not the titleholder. The acknowledgment of the *Va* is also seen in the fact that the *Faamatai* does not practise primogeniture. Your eligibility is determined by your relationship by blood to the *matai* title; a relationship which is not ranked according to whether you were born first or last. The *Va* can also be seen as the 'unseen' lines of division that demarcate the boundaries between different relationships; setting in place requirements for mutual respect and deference.

into question. Even while going through the processes of dispute resolution within the *Faamatai* close attention will be given, however, to acting and deciding in ways that will not breach, but will strengthen, the various *Va*. That is why the decision-making according to the *Faamatai* is by the process of *soalaupule*.

The principle of *soalaupule* is closely related to and arises out of the *Va*. In acknowledgement of the *Va* which exists between all Samoans, the *Faamatai*'s decisions are made through *soalaupule*. *Soa* means two or a pair; *lau* means to recite or declare; *pule* to distribute or portion out, conveying authority. The given meanings of the three words in *soalaupule* should make it easy to understand the inclusive and consultative decision-making of the *Faamatai*. *Soalaupule* decision-making recognises the fact that all *suli* (heirs) are of equal standing. The equal standing of *suli* is another expression of the *Va*. At least two people are involved in the making of a decision, but the ideal is to include and involve all the relevant people. The goal of *soalaupule* is consensus or unanimity. *Soalaupule* is observed within *aiga* and also at the *Nuu* level.⁷⁵

FAAMATAI AND MATAI TITLES

*"... the chiefs are Samoa, and have power, as leaders or tools; the dynamic in its changing social life ..."*⁷⁶

The *Faamatai* is a social structure based on *matai* titles and heirs (*suli*) to *matai* titles, both male and female. Every Samoan is a member of the *aigapotopoto* or *aiga* (extended family) of one or more *matai* title. This membership is possible because every Samoan is a *suli* (heir) of one/other *matai* title, whether child, youth or adult.⁷⁷ The basic unit of *Faamatai* society is the *suli* (heir) who make up the *aigapotopoto* or *aiga* (extended family), each of which, and often each branch of which, is headed by a *matai* (chief) holding the appropriate *matai* title (name).⁷⁸ *Aiga* is the largest kin grouping present in the *Faamatai*. Such kin groupings are based on non-unilineal principles of descent. This enables an individual to

⁷⁵ Appendix C: In a recent decision of the Court – LC 853 P1-P39 – 18 June 2008, concerning title succession, the Court set out in its decision at pages 9 and 13 that unanimity is a custom that is to be observed when a successor to a title is to be determined. At page 14, the Court refers to the need to acknowledge the voice of each *suli* in deliberations concerning title succession.

⁷⁶ Powles, *The Status of Customary Law in Western Samoa*, 5.

⁷⁷ A. F. Le Tagaloa, "The Samoan Culture and Government" in Ron Crocombe, V. Asesela Ravuvu, Werner Vom Busch (eds.), *Culture and Democracy in the South Pacific*, (Institute of Pacific Studies, University of the South Pacific (USP), Suva, Fiji, 1992) 117 – 118.

⁷⁸ Powles, *The Status of Customary Law in Western Samoa*, 5.

cite both male and female links to establish eligibility as a *suli* of a *matai* title and subsequent inclusion in an *aiga* descent group.⁷⁹ Each *aigapotopoto* reflects the ideal social organisation of the *Faamatai*, which is the *Nuu* (local community) or the *Atunuu* (whole country) in microcosm.

The *matai* title can have the rank of paramount chief, chief, or orator. The differentiation between the ranks was determined long ago when the *matai* titles first came into being and when the delineation of power within the *Faamatai* was established. These delineations are encapsulated in the honourifics or *faalupega* of different *Nuu* (geographical location), *itumalo* (districts) and the *atunuu* (nation) as a whole.⁸⁰ All the sons, daughters or descendants of a *matai* title are heirs who have equal opportunity and proximity to the title, or to becoming the bearer of the *matai* title, because primogeniture does not apply in the *Faamatai* culture of Samoa.⁸¹ There are two broad classifications of titles – *alii* (chief) and *tulafale* (orator). In their own families, *matai* have the same responsibilities whether *alii* or *tulafale*, but in the *Nuu* and public affairs the functions are more demarcated; they neither overlap nor conflict but are complementary. Different titles will have a pre-determined and meticulously defined rank or hierarchy. The titles may refer to a *Nuu* or *itumalo* (district), but a *matai* will always know precisely where in the order of seniority his/her title lies.⁸²

Matai titles are generally the names of those who were the first holders of the names. Therefore, in *matai* titles themselves, there is sexual differentiation concerning the original titleholder. Men may therefore hold *matai* titles where the original holder was a female. For example, there are modern *matai* titles that were originally the names of females, such as Sooaemalelagi, Salamasina, Le Valasi, Leilua, Nafanua, and Taufagalupe (to name a few), but these titles are now held by men. This phenomenon is related to the concept of *feagaiga*⁸³ (covenant). There are many *matai* titles that are *feagaiga* even though the

⁷⁹ S. W. Tiffany, "The Land and Titles Court and the Regulation of Customary Title Successions and Removals in Western Samoa", (1974) 85, *Journal of Polynesian Society*, 35-36.

⁸⁰ *Making Land Work*, Vol.2, Chapter 10, 202, sets out the number of districts and *Nuu* (geographical location) which are referred to as 'villages', there are in Samoa.

⁸¹ Le Tagaloa, *Culture and Democracy in the South Pacific*, 117-118.

⁸² Powles, *The Status of Customary Law in Western Samoa*, 6-7; L. Holmes, "Samoan Village", in George and Louise Spindler (eds.), *Case Studies in Anthropology* (Stanford University, Holt, Rinehart and Winston Inc., San Francisco, 1974), 18; J. W. Ellison, "Opening and Penetration of Foreign Influence in Samoa to 1880, *Studies in History*, (Oregon State College, Oregon, March 1938) 16.

⁸³ Le Tagaloa, *Culture and Democracy in the South Pacific*, 122,134; The *Feagaiga* term includes the entire responsibilities enumerated (healer, teacher, priestess, maker of wealth and currency and the peacemaker) as well as the embodiment of the tacit agreement between the male and female heirs of the *matai* title. The male

holders happen to be male. This expresses the ability of the *Faamatai* to be inclusive, to view things in their wholeness, their entirety as well as their unity.

***Faamatai* Social Organisation represented as a ‘Socio-metric Wheel’**

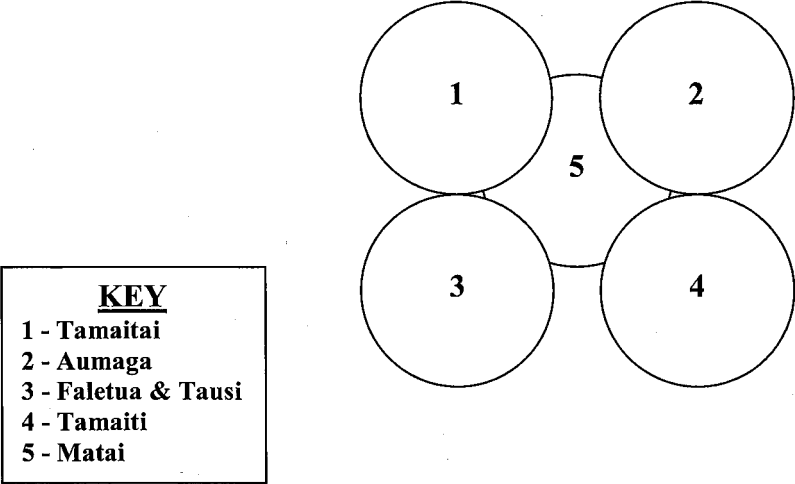


Figure 1: Representation of the *Faamatai* Social Organisation

At the heart of the *Faamatai* is a complex system of relationships or *Va*. The structure of every *Nuu* is represented by a ‘socio-metric wheel’ on which Samoan society turns; the hub is the group of *matai*. The five groups in the socio-metric wheel are: the *tamaitai* (daughters of the *matai*), the *aumaga* (untitled sons of the *matai*), the *faletua ma taus* (wives of *matai*), the *tamaiti* (young children of *matai*), and the *matai*. These elements exist side by side and relate through concentric connections of blood ties and marital reciprocity. In effect, this is the microcosm of the *aiga*, writ large in the *Nuu* and repeated through the different levels of society.⁸⁴

line shall be eligible to hold *matai* titles while the female line shall be eligible to be the *feagaiga* and may be chosen as the *saotamaitai* and *augafaapae* of the *matai* title. This agreement has been abused by some *matai* titles, hence the insistence of the female heirs to become titleholders (*matai*). This holds especially if they have not been able to join the clergy or the *faafeagaiga*, which is the modern equivalent of the traditional *tamaitai* group.

⁸⁴ Le Tagaloa, *O Motugaafa*, 33. Figure 1 is also taken from this reference. When a person is not a *matai* they are referred to as a *taulealea*. Therefore the *aumaga* group is often also referred to as *taulealea* (plural of *taulealea*). Husbands of female *matai* do not sit in the group of *faletua ma taus* (wives of the *matai*). If they are untitled, which is rare, they would probably participate in the *aumaga*, the group of the untitled sons of the *matai*.

***Matai* group – the hub of the *Faamatai* ‘Socio-metric wheel’**

The core of the *Faamatai* is the *matai* or the title-holder. The *matai* is an heir who has been elected by all the heirs of the *matai* title to be the holder of the *matai* title of the *aiga*, regardless of age or sex. The *matai* is: the head of the *aiga*; the administrator and protector of *aiga* heritage and land; the *aiga*’s representative and elector on the council (*Fono*); and priest, the *atua o lalo nei*. Each extended family has its main *matai* title, or *Sao*, and also lesser *matai* titles that serve the main *matai* title and *Nuu* or district (*itumalo*).⁸⁵ It does not matter how many lesser *matai* titles a family has, the main *matai* title is the head of the *aiga* and upon his/her head falls the burden of responsibilities, as well as the privileges of the rank of the main *matai*. Responsibilities of the *Sao* include allocating lands, supervising the collection of contributions for redistributing, and maintaining peace. Many of these duties of the *Sao* may then be delegated to lesser *matai* within the *aiga*. In fact, many affairs of an *aigapotopoto* may be administered along internal subdivisions or *faletama*. *Faletama* descendants trace non-unilineal descent from either a sibling or child of the original *matai*. Each *faletama* may be identified by having a lesser *matai* attached to it, although such *matai* remain subordinate in rank to the *Sao*.⁸⁶

Membership in an *aiga* is optional and not all potential *aiga* memberships are activated and maintained. The choice of which *aiga* to associate with is sometimes determined by where the *suli* (heir) resides and sometimes by which *aiga* they have a close affinity with. Often many different *aiga* connections are acknowledged but in varying degrees. For example, one may live with one’s maternal grandfather’s *aiga* but still make contributions for occasions that occur in one’s maternal grandmother’s *aiga*. Often the proximity (generation-wise or in association) in a relationship with those involved in a situation (funeral, wedding) determines the acknowledgement of the *aiga* connection. Again, the *Va* plays a role, in that by choosing to acknowledge various *Va* or not, one determines one’s involvement. The particular manifestation of the *Va* that comes into play when determining which *aiga* membership to activate or acknowledge is found in genealogical relationships or *Va*, as *suli* (heirs).

⁸⁵ Appendix C: The differentiation between the main *matai* or *Sao* and less *matai* or *matai tautua* is set out in the Court’s recent decision – LC 853 P1-P39 – 18 June 2008, at page 9 of 16.

⁸⁶ Tiffany (1974), 36 – 37; Holmes, 22.

Often *aiga* memberships that are actually maintained will be far fewer than potential memberships. *Suli* (heirs) are geographically dispersed. Some will choose to reside on *aiga* land and will constitute the localised core of *aiga* membership while others will reside on land pertaining to different *matai* title(s) of which they are a *suli* and in which they participate as part of that *aiga*. The residential core of an *aiga* is composed of consanguineal members as well as non-members who associate themselves with that *aiga*. The residential core of an *aiga* continues to exercise their membership options with other *aiga* on whose land they do not reside by contributing goods and services when important events take place, such as deaths, marriages, title bestowals, and house dedications.⁸⁷

***Matai* title succession**

When a title becomes vacant it may sometimes be a relatively simple matter for the *aigapotopoto* to select a successor. More often there are a number of contenders. The choice may involve the adjustment of great potential conflicts and if the family cannot agree the title may remain vacant for some time. The higher the title the more intense is the power struggle. The most important single quality required in a candidate is loyalty to the interests of the *aiga*. It is summed up in the word *tautua* (service) which every untitled person is expected to render to his *matai*, *aiga* and *Nuu*.⁸⁸ *Tautua* is not only expected, it is considered the 'right' and 'privilege' of an heir or *suli* to render.⁸⁹ The conferring of a title is not recognised unless the ceremony appropriate to that title has taken place. The ceremony is often the *saofai* (title bestowal ceremony), which is attended by the *Nuu* and *aiga* and is marked by the *ava* ceremony. The *ava* ceremony is the public form of worship observed by the *matai* group, who are the representatives of all the *aiga* of the *Nuu*. The *matai* group or *Saofaiga a matai* is that which the new *matai* will enter and take his/her place. The *ava* ceremony is followed by the exchange of fine mats acknowledging the various *Va*. The bestowal ceremony is always accompanied by feasting and more recently the making of monetary gifts.

The following is my mother's account of the deliberations surrounding the bestowal of her family's *Sao* title when it became vacant, on the death of the previous holder. It provides an

⁸⁷ Tiffany, 36; Holmes, 19; Davidson, 15; Meleisea, 13.

⁸⁸ Powles, *The Status of Customary Law in Western Samoa*, 5-6.

⁸⁹ See Chapter Eight for consideration and application of *tautua* by the Court in its decisions.

illustration of how, on one occasion, one of the many families of Samoa made the decision as to who would hold the *matai* title of their *aiga*.

“According to the *Faalupega* (honourifics) of Fasitoota, the title *Aiono* is the *Aliitai* and is the first to be named or proclaimed in all the affairs of the *Nuu* of Fasitoota.

Once upon a time, the *Falefitu* or ‘the collective orator *matai*’ of Fasitoota, claimed the first *Aiono*, or *Aiono Levave* as their *Aliitai*, and created a mutual covenant or *Feagiga* which states that the *Falefitu* will defer to the *Aiono* and will serve and protect him in every way. The words of the *Feagiga* spell out the relationship as the ‘*ulugasega e feiai*’ or *matai* who are equal in status although differing in responsibility. There was one *Aiono Levave* and seven *Falefitu*, in the beginning.

Then *Aiono Levave* had three sons: *Tuaifaiva*, *Suamataia* and *Finai*, who, because all were bestowed with the title *Aiono*, formed the *Taofia a le Aiono Levave* the ‘Threesome of the original *Aiono*’. The three sons and descendants form the three branches of the *matai* title - *Aiono*.

The *Aiono* title that I hold belongs to the *Suamataia* branch of the residence of *Pouniu*, or sub-branch of the *Aiono Suamataia*. A branch is an *Itupaepae* while a sub-branch is a *Fuaifale*.

The delineation of branches and sub-branches seems very clear when stated like this, but it is not so. After the terrible ‘influenza epidemic’ of 1918 that wiped out twenty percent of the population in a matter of days, it was recorded that most of the dead were adults; were *matai*. An ancestor, *Aiono Suamataia Tavita*, who was the *Aliimatua* (the longest serving *Aiono*) of the *Taofia*, died in the *Faamai*, which is still the way the Samoans refer to it, as if there is/was only one ‘epidemic’. The Residence of *Pouniu* was therefore vacant for many years until my father and his uncle were bestowed with the *Aiono Suamataia* of *Pouniu* in 1950. The *Aiono* of *Pouniu* was vacant again in the seventies, when my father died. His uncle who was bestowed the title in 1950, passed away before him. A general meeting to consult and decide

on who shall be the next *Aiono Suamataia* of *Pouniu* was called over the Radio 2AP, summoning all heirs of the title to come to the familial residence, at the beginning of the year 1972.

I counted about thirteen ‘spokesmen’ at the consultation and I assumed that that is the number of *Faletama* or *Ituaiga* of descendants of *Aiono Suamataia* of *Pouniu*. But there may have been others who, for their own reasons, decided not to heed the summons. In the radio message, it was mentioned why the heirs were called and that if they did not come, then they forfeited their right to be part of the makers of whatever decision that the consultation would unanimously agree upon.

Our ‘spokesman’ was my father’s sister. She was the only surviving sibling of my father’s *faletama*. She was a widow who had returned to her own *Aiga* and took up her responsibilities as the *Tamaitai* (*Feagaiga*). I observed that two of the other ‘spokesmen’ were also *Tamaitai*, living in their ‘children’s family’, or the *Aiga* of their spouses. I also observed that the ‘spokesmen’ were of the ‘older generation’ and my generation among the heirs became the ‘listening participants’. This impressed me. ‘Seniority’ was the order of the day among the heirs.

Earlier in the day, when the *ava* and the meal took place we all sat together. It was a full house. But after the meal, one of the older members of the *Aiga*, an Elder Church minister questioned the presence of four men who had been in the house, during the *ava* (*usu a le Falefitu*) and the meal. When the *Falefitu* left after the *ava* to *tapuai* our consultation, these four men didn’t leave, so I assumed that they were members of our *Aiga*.

However, when the elder politely asked them the reason why they were still in the house, I realised that they were not heirs of the *Aiono Suamataia* of *Pouniu*. One of the four replied that they were there according to some ‘traditional’ right. Again, the elder told them politely, but firmly, ‘to leave, because we will not proceed with our consultation’, if they remained in the house. Finally, they left and the consultation began. We stayed where we sat

during the meal, but the talking was now done by the older members of the *Aiga* according to the seniority of the heir from which the *faletama* descended. I learned then that our *faletama* is 'number three' in the order of speakers.

The proceedings were very orderly. The first speaker went straight to the point. He said that "this time, the title should be theirs, it's their turn". The second speaker said the same. The third, my father's sister, said "I know that we had the title, until the last *Aiono* died, but, I still feel that it should remain in our *faletama*; that we should have another turn." Obviously, this was the first round, indicating, "intentions" for every 'spokesman' said that 'it was their turn'.

In the second round, the intention was accompanied by the name of the candidate. When the third spokesman gave her candidate's name, I was shocked, for I had no idea, that she would name me. She did not ask me. I have an older brother. I personally did not want to be a *matai*. But as heirs, this is the time to defer to the older heirs. In any case, the consultation is in process, and it could be any heir of the *Aiga* who will be chosen "unanimously". So I listened closely, to the fourth spokesman. The fourth spokesman said that although he had stated at the start, that it was their turn to hold the *Aiono*, now that the previous speaker has named Fanaafi, he and the heirs of his *faletama*, wholeheartedly support Fanaafi for the title *Aiono* of the *Aiga* at *Pouniu*. That started an amazing turn in the proceedings, for every spokesman after him supported Fanaafi.

I listened with a sinking heart; I did not want the responsibility. The late *Aiono*, my father, was very close to me, and had talked about the many court cases that he went through in order to re-establish the *pule* (authority) of the *Aiono Suamataia* of *Pouniu* among the branches and sub-branches of the title. I knew that his death interrupted the court cases at the Lands and Titles Court; there were at least two 'in the pipeline' as it were. The Court awaited the appointment of another *Aiono Suamataia* of *Pouniu*; I waited for the views of the first two spokesmen, hoping that they would stay with their first

statements, thus eliminating the required 'unanimity'. But, they too, supported Fanaafi! In less than half an hour, the *Aiga* at *Pouniu* made a unanimous decision: I was to take over the leadership of the *Aiga*.

Someone was sent to fetch the orators, the *Falefitu*, for the *Aiga* at *Pouniu* had reached a decision, and the new *Aiono* were to take the cup of *ava*. The seating within the house changed; the two heirs chosen by all the heirs were given the seats of honour, while the house was cleared for the ceremony of 'pouring' the *ava*.

I was so impressed with the procedure, the process of *soalaupule*, of consultation, that I just sat and admired this aspect of the *Faamatai*. To *fale*, to get the views and the agreement of everyone within the house, takes a long time and many words, normally. But thanks be for the *tapuaiga* and the wish to have peace within and with the *Nuu* of Fasitoouta, that *afaetasi* was achieved readily.

I left Samoa for a conference in Honolulu shortly after that consultation, and although the bestowal of title was set for the following year, the fact that I had drunk the 'cup' *Matamata i muliulu*, gave me pride to be named *Aiono*. I felt that it was an honour thrust on me unlike any thing that I worked for in academia- by the sweat of the brow. So when I was asked for my name at the conference, and how to write it for the labels, I heard myself, say: "*Aiono* Dr. Fanaafi" - Never mind my fears of the enormous responsibility and the walking on the razor's edge or eggs (without cutting one's feet or scrambling the eggs) which I know is the heavy lot of a *matai*, an heir chosen to lead the heirs of an *Aiga*, and the *Nuu*."⁹⁰

⁹⁰ Personal Interview with Aiono Dr. Fanaafi, who is the current holder of the Aiono Suamataia title of Pouniu, Fasitoouta, at Alafua, Samoa - 30 July 2006. Fasitoouta is on the north coast of the island of Upolu and is about a fifteen minute drive from the International Airport at Faleolo, and forty minutes from the capital of Apia. This account shows that the practice of *soalaupule* and the primary importance of being a *suli* or heir of a *matai* title is still observed in reference to title succession in 'modern' Samoa. It is also evidence of the continual strength and maintenance of the *Faamatai*.

***Papa, Ao, Tama a Aiga* - Paramount title succession**

There are other *matai* titles that are not family titles but are called paramount titles. These are known as the *papa*, the *ao*, and the comparatively recent creation of *tama a aiga*. These terms refer to the role and place of such titles as ‘head’ over groups of *matai* as opposed to heirs (*suli*) of an extended family (*aigapotopoto*). There is a slight variation in the selection and in those who would qualify to receive these titles. One qualification that makes the election of the holder of paramount titles similar to the selection of the holder of *aigapotopoto* titles is that the holder still has to be an heir (*suli*). The *papa* paramount titles – Le Tagaloa, Tonumaipea, Lilomaiava, Malietoa, Tu-i-Atua, Tu-i-Aana, Vaetamasoalii, Gatoaitete – belong to particular groups of *matai*: chiefly *matai* who are referred to collectively as *gafa* or *aiga*; or orator groups who are known collectively as *nofo a tula*, or specifically by their orator group name, for example *Faleagafua*, *Alataua*, *Leulumoea*, *Lufilufi*, *Tuisamau*. The paramount titles on the island of Upolu were originally *ao* of the *nofo a tula* or orator groups; they are similar to the concept of more recent times – the *tama a aiga* (Tupua, Tuimalealiifano, Mataafa, et al) or literally the son of the chiefs. The oldest paramount title of *papa* or *ao* is ‘Le Tagaloa’, so written to differentiate it from ‘Tagaloa’ that are *aigapotopoto matai* titles. The Le Tagaloa is the *papa* or *ao* of the *Gafa* and *Safune ma Taulauniu*.⁹¹ Here my father tells of the bestowal of the *Le Tagaloa* title on him. It is an example of how one paramount title was, on one occasion, bestowed.

It was early on a Friday morning in August 1974. I remember it clearly because the night before, Afioga Tuiaana Tuimalealiifano Suatipatipa Sualauvi II, Samoa’s first Member of the Council of Deputies passed away. The *Nuu* of Sili, Gautavai and Vaiala – consisting of the collective chiefs – *Aiga ma le Gafa* and the collective orators – *Safune ma Taulauniu* came from Savaii to where I was living in Vaimoso on Upolu. At that time I already held the titles *Leota Tama* of Gautavai and *Sauafatu* of Salani, the first being a chiefly title and the second an orator title. I was thirty seven and living on *aiga* land of the *Leapai* title of Vaimoso to which I am connected through my father.

⁹¹ A. F. Le Tagaloa, “Western Samoa – The Sacred Covenant” in *Land Rights of Pacific Women* (University of the South Pacific (USP), Suva, Fiji, 1986), 120.

Aiga, le Gafa, Safune ma Taulauniu came to carry out the first part of the bestowal of their paramount title, *Le Tagaloa*. This part is to "*Alaga Papa*". It is like a proclamation of/on whom they have decided would hold the title. It was like nothing I had ever experienced or seen before. Our house was surrounded by *aumaga*, they encircled it row upon row and were also joined by other *matai*. While they stood, they muttered prayers asking that *Le Tagaloa* would have long life and that they may serve *Le Tagaloa* faithfully. The throng outside was separate from the elder *matai* who had come into the house to make the proclamation. There were about eight of them, each holding the end of a coconut frond; they came in right to where I was sleeping, I quickly got up and found a chair nearby to sit in while they continued their proclamation, speaking words in which they gave me, bestowed upon me the *Le Tagaloa* title along with its various honourifics, its position and place in the *Nuu* of Sili, Gautavai and Vaiala.

After this we went down to the ground floor of the house, where there was a little more room and there, the *ava*, specific to the *Alagaga o Papa* was prepared by the *aumaga*.

The authority of the *Le Tagaloa* title is sustained by the *Fale Fagafua*, which means the four groupings or 'houses' of Chiefs and orators of the *Le Tagaloa* title. Each of the groupings is known as *Fale Safune*. One such *Fale Safune*, located at Sili proclaimed the *Le Tagaloa* on me. Proclaiming *Le Tagaloa* by any one of the *Fale Safune* can be a Herculean task because of the protocol that requires unanimity. An example is the *Le Tagaloa* of Sili, where there was approximately forty years between the last holder and myself. It was impossible to reach unanimity when the decision required the agreement of the entire *Fale Fagafua*. In 1922, the question of succession for the *Le Tagaloa* title came before the Lands and Titles Court. The Court's decision was a 'compromise'. It empowered each *Fale Safune* to select and appoint their own *Le Tagaloa*. Unanimity of each *Fale Safune* was, however, still required; no casting of votes or balloting.... There is a difference in the selection/appointment of a paramount title from an *aiga* titular head (*Sao*). With the *Le Tagaloa*, each *Fale Safune* has to agree

unanimously to bestow the title on a candidate who descends from a particular line; whereas the *aiga* title is bestowed, on the agreement of all the true heirs of the *aiga* title, on a single heir, who will hold the title of the *aiga*.⁹²

Other Groups of the *Faamatai* 'Socio-metric wheel'

The hub of the socio-metric wheel, as stated earlier, is the *matai* group. The first spoke of the wheel represents the *tamaitai*, the daughters of the *matai*.⁹³ They are the most privileged group within the extended family and within the *Nuu*, and are known as the *feagaiga*. The second spoke, the *aumaga*, are the untitled sons of the *matai* group. They are the tillers and planters in Samoan society and their wives usually assist them in the weeding, harvesting, and other duties involving the preparation, cooking and serving of food especially on formal occasions.⁹⁴ As soon as the young boys and girls stop going to school, they automatically become *tamaitai* and *aumaga*.⁹⁵

The third spoke, the *faletua* and *tausi*, are the wives of the *matai*. Their status depends on the status of their husbands. Since, traditionally, marriage within a *Nuu* was discouraged, the *faletua* and *tausi* are "aliens". They are *tamaitai* of other *Nuu* and *aiga* who function as "in-laws", spouses of the chiefs and orators in the *aiga* into which they are married. They have no formal land rights in their husband's village other than the right to use land for the duration of the marriage. Any influence they might bring to bear in the matter of land is only through personal pressure they might put on their husbands, the *matai*.⁹⁶ Being the wives of the *matai*, they represent the 'foreign' element in the social organization of the *Nuu* and *aiga*. They are advisors in their capacity as spouse and mother but as 'in-laws' do not have the authority of the *tamaitai*. Once she returns to her own *aiga* and *Nuu*, a *faletua* or *tausi* automatically assumes her status and authority as *tamaitai*. The fourth spoke are the young children of the *matai* not yet part of the *tamaitai* or *aumaga* groups.

⁹² Personal Interview with Le Tagaloa Dr. Pitapola current holder of the paramount title *Le Tagaloa* at Alafua, Apia, Samoa, 14 August 2006.

⁹³ Le Tagaloa, *O Motugaafa*, 32.

⁹⁴ Le Tagaloa, *Land Rights of Pacific Women*, 105.

⁹⁵ Le Tagaloa, *O Motugaafa*, 33 – 34.

⁹⁶ Le Tagaloa, *Land Rights of Pacific Women*, 104 – 105.

Within all groups of the *Faamatai*, there is no age differentiation, only status qualification. For example, when a young boy is initiated into manhood, he becomes a *taulealea* (untitled) and joins the *aumaga* group. He will remain a *taulealea* all his life, if he is not given entry into the *matai* group. The same applies to a *tamaitai* where, if she gets married, she loses her right to participate in the *tamaitai* group, but if her marriage does not work out or she is widowed, she automatically resumes her status as *tamaitai* on returning to her own *aiga*. The ranking within Groups one, two, three and five reflects the rank of the *matai* title. If the *matai* title is chiefly or oratorical, the functions and positions of the *tamaitai* or *taulealea*, *faletua* or *tausi* and *matai* would and should reflect that ranking differentiation. No such ranking is observed among the *tamaiti* (children) in Group four.⁹⁷

FAAMATAI AND LAND MATTERS

The *Faamatai* provides for customary land tenure as it does for *matai* title succession.⁹⁸ As stated earlier, every Samoan is heir to one or more *matai* titles. And every heir (*suli*) has the right of access to, or use of, land belonging to the title(s) of which he/she is an heir. That is why before this chapter considered land matters under the *Faamatai*, it discussed *matai* titles and their centrality to the *Faamatai*. The fact that *matai* titles are at the centre of the *Faamatai* should suggest why the ownership of customary land is vested in *matai* titles. Ownership here means that the land(s) pertain to a *matai* title. Authority (*pule*) over the land is exercised by the holder of the title at any given time. As every heir of the *matai* title is eligible to hold the *matai* title that 'owns' the land it could be said that every heir (*suli*) exercises/holds part of the *pule* over the *matai* title and the land(s) pertaining to it; to that extent, and only to that extent, each *suli* could be said to 'own' the land(s).

Since a Samoan is connected as an heir to more than one *matai* title, he/she has access to more than one land/property. Female (*suli*) heirs have rights equal to male heirs concerning access to and use of *aiga* or customary lands.⁹⁹ As outlined above, the *matai* titleholder is a *suli* whom the other *suli* of the *matai* title have unanimously chosen to hold the *matai* title of the *aiga* (family). This means that any *suli* is eligible to hold the *matai* title of their family as long as all the heirs of the title unanimously decide to bestow it on them.

⁹⁷ Le Tagaloa, *O Motugaafa*, 33 – 34.

⁹⁸ Ibid., 31-32.

⁹⁹ Le Tagaloa, *Land Rights of Pacific Women*, 104 – 105.

Each *matai* possesses and exercises *pule* (authority) over the members of the *aiga* and regulates their activities. *Aiga* resources are similarly distributed under the *matai*'s direction, as is the use or allocation of land to *suli* (heirs). All customary land comes under the *pule* (authority) of a *matai*, therefore every *matai* of the *Nuu* has some degree of *pule* in respect of land. Just as the *matai* title has an existence in itself, independent of the personality of the holder for the time being, so the title comes to be associated permanently with the land over which it has *pule*. The untitled person is excluded from *pule* – a concept basic to custom. Because of the permanence in the relationship of title to land, it seems that when conquest ceased to be a mode of acquisition, it followed that no permanent alienation of land would be permitted. This is consistent with the responsibility which the *matai* has towards his *aiga*. In short, the *matai* holding land under *pule* does so in a capacity similar to that of a 'trustee' for the family. The *matai* has almost unlimited powers of administration but they must exercise the powers for the benefit of the *aiga*. Exercise of power by the *matai* in such a way acknowledges the *Va* between the titleholder and the other *suli* who could have been chosen to be the *matai* of the *aiga*.

Because of the link between *matai* titles and land, it would be possible to ascertain who has the rights to any customary land in Samoa by finding out which title 'owns' the land, and then determining who the *suli* of that title are.¹⁰⁰ The largest jurisdiction regarding land is that of the *Nuu*. The *Nuu* is composed of *matai* titleholders of individual *aiga*. If an area that is unused and not associated with a *matai* title is cleared for cultivation or designated for such purpose, the *Fono* (Council of *Matai*) of the *Nuu* will allocate it to a *matai* or retain it as *Nuu* land. Often the land goes to a *matai* and the *Fono* retains only a supervisory jurisdiction of last resort: *pule faamalumalu*.¹⁰¹

As land is connected to *matai* titles, and as every *suli* in succeeding generations has the right of access and use of *matai* title land(s), absolute alienation was highly unlikely under the *Faamatai*.¹⁰² However, there is evidence in the Samoan language of arrangements similar to

¹⁰⁰ Chapter Nine considers the *Matai* Register and how this could be used as the basis for a separate Register for Customary Land in Samoa.

¹⁰¹ Powles, *The Status of Customary Law in Western Samoa*, 9 – 10; Meleisea 17; F. M. Keesing, *Modern Samoa – Its Government and Changing Life*, (George Allen and Unwin Limited, London, 1934), 270.

¹⁰² The non-alienation of land is a customary practice that is observed by the indigenous Maori of New Zealand and some African societies, and possibly also by other Polynesian societies: E.T. Durie, "Will the Settlers Settle? Cultural Conciliation and Law", (1996) Vol 8, *Otago Law Review*, 454; T. Olawale Elias, *The Nature of African Customary Law*, (Manchester, Manchester University Press, 1956), 162.

‘leasing’, and there is also evidence of “gifts” of land, though these gifts were not intended to be permanent alienations.¹⁰³

DISPUTE RESOLUTION: *Faamatai* in action – *Fono a Matai (Nuu)*

The form and practice of the *Faamatai* varies slightly from *Nuu* to *Nuu*. However, the entire Samoan Archipelago from Manua in the East, to Savaii in the West is homogeneous in the basics of the *Faamatai* pertaining to customary land tenure and title succession. The *Faamatai* also provides for the necessary decision making and dispute resolution processes.

The functions of the individual *matai* and of the *Nuu* were not performed, if tradition was observed, by simple dictation, but after consultation or *soalaupule*, a practice that was highly developed in Samoan society at every level. Through such processes the *Faamatai* provided for and maintained law and order. The *Faamatai* is a sophisticated system. It provided “...channels for the attainment of personal satisfaction by the participants as well as the procedures for the maintenance of social and political stability. Structural rigidity and operational flexibility were effectively combined...”.¹⁰⁴ In 1837, Rev. Thomas Heath, a missionary to Samoa with the London Missionary Society, who was based on Manono, one of the smaller islands of the group, described the *Faamatai* in action, in its *Fono*, as having “...something of the character of Parliament, but exercises the legislative, judicial and executive functions...”.¹⁰⁵ The *tulafono*, or law and constitution of the *Fono* (Council of *matai*), has been established for every *Fono*, of every *Nuu*. The *tulafono* legislates the position of each *matai* title within the *Nuu* and district and allocates executive and judicial functions to the *Fono* as a collective, and also to its individual members. The threefold function of the *Fono-a-Matai* is repeated in the *fono* of the other groups within the ideal social organisation of the *Faamatai*, except of course Group Four – the children of the *matai*.¹⁰⁶

Decision making in general, and dispute resolution in particular, was and still is mainly carried out in *fono* (meeting/consultation) either of the heirs of an *aiga* or of the collective

¹⁰³ Chapter Eight refers to customary gifts of land and *matai* titles. Land was usually returned to the *aiga* that gifted the land upon the death of the recipient of the gift.

¹⁰⁴ Davidson, 17, 20.

¹⁰⁵ Le Tagaloa, *Culture and Democracy*, 117.

¹⁰⁶ Le Tagaloa, *O Motugaafa*, 33 – 34; Footnote 90 – Aiono Dr. Fanaafi’s interview outlines a *fono* of the heirs of a *matai* or the *aigapotopoto*.

of *matai* of a *Nuu* (*Fono a Matai*). This means that the ‘aggrieved’ and the ‘aggressor’ as well as those who have no part in the grievance would all participate in the consideration of the matter and the resolution or decision that is reached. There are however, occasions where the decision rests with the *matai*. In that case the only option an unhappy *suli* may have is to approach the *matai* one on one, and attempt to reason with him or her. However, in most cases the decisions or resolution of disputes is made in a *fono*. All the decisions of the *Fono a Matai* (Council of *Matai*) and all *fono* of the *Faamatai* must be unanimous; they must be reached by consensus. There are no ballots, secret or otherwise, no majorities and minorities. All must agree before a decision is carried out, or a course of action followed. It is this approach to decision making and dispute resolution that shows the importance of the *Va*. The observance of the *Va* is pivotal to the resolution of disputes or questions concerning land and *matai* titles.

If a question arises concerning title succession, access to or allocation and use of land, or even the clarification or setting of boundaries, that results in a disagreement or a difference of opinion, the customary process of *soalaupule* is employed until a unanimous decision is reached. One of the most common occasions where *soalaupule* is exercised is in the *fono* of the heirs of a *matai* title (whether it be for an extended family title or a paramount title, whether it be for a chiefly title or an orator title) to select the heir upon whom the title will be bestowed. *Soalaupule* loosely translated is to seek out each person’s position on an issue that is to be decided. The *Faamatai* firmly believes in the efficiency of *soalaupule* in making long-term decisions, because it is a process that makes the appropriately involved individual feel important by being consulted. It is an excellent way of identifying those who are responsible for executing and supervising the implementation of the decision within the community. Everyone agreed; therefore, everyone will see to it that the decision is carried out successfully.¹⁰⁷ *Soalaupule* does take longer than taking a ballot but is observed because *soalaupule* is the way by which the equal footing of *suli* established by the *Va* can be honoured. If a certain matter is taking a little longer than expected to reach a resolution the *Faamatai* observes another practice: *moe le toa* whereby the matter is adjourned. This customary practice and others were confirmed in a recent decision of the Court concerning the *Malietao* title which was held most recently by Samoa’s late Head of

¹⁰⁷ Le Tagaloa, *Culture and Democracy*, 122 – 123.

State, who passed away in May 2007.¹⁰⁸ The adjournment acknowledges the value of ‘sleeping on it’, letting the matter rest, allowing those involved to think the issues over. It is the belief of the *Faamatai* that the next day, when all are refreshed and have had time to turn the issues over in their minds, a way forward may be clearer and a decision that all agree to is more likely to be made.

CONCLUSION

Before colonisation, *matai* title succession and land tenure in Samoa was determined by the *Faamatai*. Decision-making and dispute resolution concerning *matai* titles and customary land were made pursuant to *Faamatai* processes. It was on these processes that a foreign structure, the Court, was imposed, through colonisation, to deal with customary land and *matai* title disputes. Through the Court, a non-customary mechanism, modeled on the European judicial process for the resolution of disputes, was introduced. How this imposed institution affected the customary processes of the *Faamatai*, outlined in this chapter, will be considered in Chapter Three. Surprisingly, the effect of the Court’s imposition on Samoan customary processes may not have been as great as one would expect, considering its colonial origins. This would support the conclusion that only partial colonisation of the *Faamatai* occurred.

¹⁰⁸ Appendix C: In this recent decision on title succession – LC 853 P1-P39, 18 June 2008, the Court dealt with a petition concerning a successor to the *Malietao* title, which was last held by the late Head of State of Samoa. In a number of places in its decision the Court refers to the need for all *suli* to consult, deliberate and reach an unanimous decision as to a successor to this title and any other *matai* title. The need to observe the practice of *moe le toa* is specifically mentioned at page 9 of the decision.

CHAPTER THREE

THE EARLY COLONIAL LEGAL ORDER

INTRODUCTION

This chapter provides an overview of colonial Samoa's changing land tenure system. It describes the central legal changes that occurred in relation to land in Samoa between the mid 19th century and 1903. It records the early manifestations of colonisation through the transfer of Western law into Samoa via colonisation.

Samoa first found its place on European maps in the eighteenth century when explorers, whalers and traders 'happened' upon the islands. In the early nineteenth century, the missionaries came and were the first European 'overstayers' in the Samoan Archipelago. Not far behind them were their political colonising counterparts: the Germans, British and Americans. The arrival of foreigners, or non-Samoans, led to the introduction of radically different ideas concerning land tenure and permissible dealings in land, and to the alienation of Samoan land to foreign interests.

Under the *Faamatai*, each *matai* title had its own lands to which every *suli* (heir) had access if they so desired. Boundaries of lands within the *Nuu* were settled, as were the boundaries between one *Nuu* and the next, and between one *itumalo* (district) and the other. Now, with the arrival of the *papalagi* (white people), suddenly the system was in upheaval. Old boundary lines were shifted and land started to disappear into the hands of *papalagi*, who were settling the land and using it in non-traditional ways. A new religious faith, new goods, new developments, new trades, and new buildings were emerging throughout the islands. The colonial enterprise was in full swing. By the late nineteenth century, missionaries, land agencies and speculators, and the ordinary settler, were a typical feature of Samoan life. In this milieu, the introduction of aspects of the colonists' legal system, in parallel, and with its influences on, the *Faamatai*, was perhaps inevitable, especially as this was a time when the British saw law as personal, to be carried with the British citizen wherever they went, rather than something territorial, or a thing to be determined by the existing customary rules of the country to which they had emigrated.¹⁰⁹

¹⁰⁹ This understanding or belief can be likened to the way the orthodox Jews of today view Hebraic Law or some Roman Catholics view the canons of the Roman Catholic Church.

When the first missionaries arrived in Savaii, in 1830, Samoa's population was an estimated 47,000. They found a "small-scale, homogeneous society based on subsistence agriculture" where social, economic and political structures were based on the pivotal relationship between the *matai* titles and land control. The control of resources was connected to status, or rank, which was in turn linked to responsibility for its administration and redistribution, and maintained through the expectation and practice of reciprocity.¹¹⁰

In the beginning it was only the missions that acquired property for church purposes, with a few traders and officials securing holdings in or near Apia. Then, from 1864, the 'land grabbing' began. It concerned lands within easy access of the port in Upolu, but also land in more remote areas and other islands. The bulk was 'grabbed' by the Hamburg firm of "Godeffroy und Sohn", which later became the "DH and PG", while other companies and individuals "also took the opportunity to speculate in Samoan land".¹¹¹ Generally, as was typical of frontier 'land grabbing', large holdings were acquired for relatively valueless and temporary goods that appealed to the Samoans. Inevitably, misunderstandings arose: Samoans 'sold' land that was not theirs to sell, or sold the same lot several times, and some 'grabbers' altered surveys and boundaries, or obtained 'signatures' on documents without explaining their content to land owners. The result was confusion and ill-feeling among Samoans and between them and foreign speculators. This led to disputes among speculators, resulting in each group of nationals seeking help from their consuls and warships to enforce their "rights".¹¹²

Each group of nationals sought assistance pursuant to the treaties their respective nations had signed with the 'Samoan Government'. This government was the result of the various attempts by Germany, Great Britain and the United States of America to create a central, identifiable body they could relate to as representative of a 'collective Samoa'. As Samoa was a 'nation' of *matai*, each having their respective rank and spheres of influence, this was a difficult objective to attain. So each major power chose a chief to champion in the struggle to create a 'Samoan Government'. What ensued has been referred to as 'civil unrest' amongst the natives. Colonisation introduced the idea of singling out one person as paramount leader, an alien notion to the *Faamatai*.

¹¹⁰ P. Thomas, "Society and Law: Land Policy in Western Samoa", (July 1985) 12 *Melanesian Law Journal* 130.

¹¹¹ Keesing, 257.

¹¹² Ibid.

Despite this tumultuous period, each of the 'Big Three' secured treaties with those who appeared to represent the 'Samoan Government' at the time: the United States of America on 17 January 1877; Germany on 24 January 1879; and Great Britain on 28 August 1879. The competition between the 'Big Three' was brought to a head by a famous maritime disaster. On the 16 March 1889, six warships, three German and three American, were wrecked on the reef at Apia, victims of a great hurricane which swept down suddenly, taking the lives of a hundred and forty six sailors.

In response to what was believed to be 'providential punishment', the 'Big Three' sent representatives to a meeting in Berlin on 29 April 1889.¹¹³ There, the '*Berlin Act*'¹¹⁴ was negotiated. This 'Act' was not the product of any Parliamentary or legislative process, much less one that had any clear constitutional authority to legislate for Samoa. It was simply an international agreement between three colonising powers. Nevertheless, its implementation would in fact have important implications for the future of land tenure in Samoa.

The '*Berlin Act*' purported to acknowledge the 'independence' of Samoa and declared it a neutral territory in which the subjects of the 'Big Three' had equal rights of residence, trade and personal protection. It was also agreed that no Power would exercise any separate control over the islands or its Government. In effect, the '*Berlin Act*' formalised the tri-partite rule of Samoa and restricted Western control to the town of Apia.

ARTICLE IV AND 1889 LAND COMMISSION

Article IV of the '*Berlin Act*' nevertheless imposed a land solution, albeit from a tri-partite, *papalagi* perspective. Article IV was a:

*Declaration respecting Titles to Land in Samoa, and restraining the disposition thereof by natives; and providing for the investigation of Claims thereto and for the registration of valid titles.*¹¹⁵

¹¹³ Holmes, 14.

¹¹⁴ The *Final Act of the Berlin Conference on Samoan Affairs* which is often referred to in short as the '*Berlin Act*' 1889. It was signed on 14 June 1889, in Berlin, by the representatives of the 'Big Three' who planned (under Article II) to obtain the Assent of the 'Samoan Government' for the 'Act', presumably at a later date.

¹¹⁵ '*Berlin Act*' 1889, Article IV.

Article IV set out three pivotal points concerning land law in the new colonial order: the prohibition of the sale of customary land; the investigation and validation of foreigners' titles, and the establishment of a dispute resolution process.

Prohibition of sale of customary land

Section 1 of Article IV declared that "all future alienation of lands in the islands of Samoa to the citizens or subjects of any foreign country whether by sale, mortgage or otherwise shall be prohibited whether by sale, mortgage or otherwise" so that Samoans might "keep their lands for cultivation by themselves and by their children after them".

The prohibition seems generous at first sight, on the part of the colonising powers, especially if one believes one of the most important goals of colonisation is the acquisition of land. However, the prohibition had two equally generous exceptions. First, native lots and lands within the Municipality of Apia could be bought or leased with the approval of the Chief Justice; and second, agricultural lands elsewhere could be leased for a term not exceeding forty years.¹¹⁶ Thus a prime location was excluded from the prohibition because land within the 'Municipal District of Apia'¹¹⁷ could still be sold to a foreigner.¹¹⁸ This was not surprising because the 'Municipal District' was where the main harbour was, a lifeline in nineteenth century trade and commerce. Moreover, if more land was needed, it could be leased, regardless of its location. Thus two new forms of dealing in land were authorised: sales, within a limited area, and leasing for a limited term.

Despite these exceptions, it is still highly significant that there was a powerful prohibition on the sale of land outside Apia. This prohibition was continued by subsequent colonial administrations and was later entrenched in Independent Samoa's *Constitution*. Why this general prohibition was included in Article IV of the *Berlin Act* is not entirely clear. The matter is not addressed in standard histories of the period.¹¹⁹ A possible explanation may lie in mutual suspicion between the three super powers who 'supervised' Samoa at the time.

¹¹⁶ Ibid., Article IV, s.1; Article III, sections 1 and 2 of the *Berlin Act* provided for the establishment of the Supreme Court of Samoa. The Supreme Court consisted of one judge, styled as a Chief Justice, named by the 'Big Three'. Under Article III, sections 3, 6, 7 and 9, the Chief Justice's powers ranged from considering civil suits between natives and foreigners or amongst foreigners, to deciding claims regarding the leadership of Samoa, so as to avoid any outbreaks of war.

¹¹⁷ Under Article V of the *Berlin Act* the Municipal District of Apia was administered by a Municipal Council, headed by a President. The President was also named by the 'Big Three'.

¹¹⁸ *Berlin Act*, Article IV, s.1.

¹¹⁹ Keesing; Davidson; Gilson; Meleisea.

Perhaps each wished to prevent the others' nationals purchasing land, or perhaps it would prevent the Powers having to adjudicate further disputes arising from competing foreign interests in native land. Another reason might have been that the colonial powers' primary interest was in Apia, as a naval base, which was exempt from the prohibition. Outside Apia, the lease exception still provided flexibility. Overall, the effect of this general prohibition on the sale of customary land was to bring land in Samoa firmly under the colonial administration's control, bringing some order to the chaos of the mid 19th century, by validating some of the foreigners' claims, while ensuring other dealings in land had to occur within the parameters set by the new colonial legal order in Article IV.

Land Commission

The Land Commission established pursuant to Article IV of the *'Berlin Act'* was the first formal judicial body set up to consider land claims of any kind in Samoa.¹²⁰ This Commission was the forerunner to other land commissions and would eventually be transformed into the Land and Titles Court. But it did not directly adjudicate Samoans' interests in land. The 1889 Commission was established to investigate, and possibly validate, the existing foreign purchases that had already been made.

The Commission was responsible for adjusting and settling all claims by aliens to interests in land in Samoa, whether those interests were acquired from natives or aliens.¹²¹ It reported to the Supreme Court in relation to each case on the following matters: the character and description of the land claim, the consideration paid, the kind of title alleged to be conveyed, and all circumstances affecting its validity. It was to report whether an apparent sale or disposition had been made by the rightful owner, or by the native entitled to make it, whether it was for sufficient consideration, and to identify the property concerned.¹²²

The Commission consisted of "three competent and impartial persons", one named by each of the 'Big-Three'. They were assisted by a "Natives Advocate".¹²³ The Commission had two years¹²⁴ to investigate and report to the Supreme Court.

¹²⁰ Keesing at 258 writes about the setting up of the 1889 Land Commission.

¹²¹ *'Berlin Act'*, Article IV, ss.2, 4.

¹²² *Ibid.*, s.4.

¹²³ *Ibid.*, s.2.

¹²⁴ *Ibid.*, s.3.

Native Participation in the Commission

Native participation in the Commission was limited to assistance by a “Natives’ Advocate”. However, the *‘Berlin Act’* did not require that person to be a native. It is unclear whether a native ever held the office. So, while native opinion was apparently provided for, native participation was not a necessary part of the process.¹²⁵ Section 12 of Article IV provided, however, that the Commission could, at its discretion, through the Local Government of a District in which disputed land was situated, appoint a Native Commission to determine the native grantor’s right of ownership and sale. The results of this Native Commission’s investigation would then be laid before the general Land Commission which would report these results to the Supreme Court.¹²⁶ How the Native Commission was meant to operate, or the principles it was to apply in its deliberations, was not indicated.

Mechanism for validation of land claims

The Supreme Court could recognise or reject the Commission’s findings and, where claims were disputed, adjudicate between the parties concerned.¹²⁷ Article IV provided that those foreigners who acquired land before 28 August 1879 held it validly “if purchased from Samoans in good faith, for valuable consideration, in a regular and customary manner”.¹²⁸ It also provided that “undisputed possession and cultivation of land for ten years” gave valid title;¹²⁹ and payment could make good a claim over land that was acquired and cultivated in good faith.¹³⁰

Generally, the Commission was instructed to effect a just and equitable compromise between the litigants. If the description of land was unsatisfactory, however, or if there had been only a promise to sell, or compensation was inadequate, or payment was in liquor or firearms, the claim should be ruled invalid.¹³¹

The Commission also reported to the Supreme Court whether the alleged title should be recognised and registered, or rejected in whole or part, as the case required.¹³² All disputed

¹²⁵ Ibid., s.2.

¹²⁶ Ibid., s.4.

¹²⁷ Ibid., s.5.

¹²⁸ Ibid., s.8; 28 August 1879 is the date of the Anglo-Samoan Treaty – the last of the treaties between the ‘Big Three’ and the ‘Samoan Government’.

¹²⁹ Ibid., s.9.

¹³⁰ Ibid., s.10.

¹³¹ Ibid., s.11.

¹³² Ibid., s.5.

claims to land in Samoa were reported, together with evidence affecting their validity. The Court then made the final decision. In addition, undisputed claims and those validated unanimously by the Commission still required confirmation by the Supreme Court in proper form.¹³³

Registration of valid titles

The Supreme Court was also to operate a registry of all valid titles to land owned by foreigners.¹³⁴ Whether this would be a 'Deeds System' or otherwise was not specified, but such a system was established, as in Britain at the time, and remained in place until June 2008.¹³⁵

IMMEDIATE CONSEQUENCES OF THE LAND COMMISSION'S WORK

Unregulated 'land grabbing' ended after 1889, due to the prohibition on alienation. The commissioners were appointed and, in 1893, the Land Commission started work. The total land area claimed by foreigners' appearing before the Commission was 1,691,893 acres, more than twice the entire area of Samoa. One claim in Savaii was larger than the island itself. Extraordinarily, each case was dealt with individually within two years. The effect of the Commission's work was to change the status of lands that were the subject of successful claims, from native to European or private title. But only eight percent of the claims were accepted as valid, with their titles officially registered as "Court Grants" in the Registry of the Supreme Court.¹³⁶

This Register recorded only foreign interests in Samoan lands, showing that the provisions of Article IV were not aimed directly at the protection or confirmation of Samoan interests in land. But such a Register was required for the successful introduction of a European system of land tenure. It allowed for a new – individually owned classification of land. Previously all the land had been held in native or customary tenure.¹³⁷ Now there was private title, and some form of 'state' title, in addition to the traditional Samoan concept of customary land, in

¹³³ Ibid., s.6.

¹³⁴ Ibid., s.7.

¹³⁵ Chapter Nine considers the *Land Titles Registration Act 2008 (Samoa)* that has changed the system for the registration of land in Samoa from a 'Deeds System' to the 'Torrens System'.

¹³⁶ 'Berlin Act', Article IV, s.7; Keesing, 258.

¹³⁷ The term 'native' in legislation, was replaced with the term 'customary' and 'Samoa' closer to Independence in 1962.

relation to which leasehold interests could be created. A system for recording land titles had been established, and a mechanism for the adjudication of land disputes had been developed.

Some issues remained, regarding boundaries and surveys, but order had been established out of the chaos of the 'land grabbing' era.¹³⁸ The rudiments of a centralised system of land tenure had been instituted that suited European plans and purposes, and stabilised the unsettled period of the previous twenty years.¹³⁹

EFFECT OF THE COLONIAL LAW ORDER ON THE *FAAMATAI*

The land tenure system introduced by the '*Berlin Act*' did not eliminate the Samoan system of customary tenure. At first glance, it seemed to acknowledge it. However, the new colonial system of land tenure also permitted limited sales and the leasing of customary land. New forms of land tenure, alien to the *Faamatai*, were introduced. Furthermore, instead of each *matai* and the relevant *suli* groups determining disputes concerning their land, within their *aiga* or *Nuu*, the colonial land tenure system brought land issues under a central system of administration which kept official, written records of interests in land. In addition, some of these interests could now be individualised, and no longer attached to a *matai* title as had previously been required under the *Faamatai*.

With regard to the impact on customary tenure, perhaps the major change the colonial powers introduced was the establishment of the Land Commission itself. Although established to deal with the land claims of foreign nationals, it marked the beginning of an introduced and foreign system of dispute resolution for land matters, quite different to that provided by the *Faamatai*. Under the *Faamatai*, matters or disputes concerning land were dealt with by the *matai* and *suli* (heirs) within the individual *aiga*, by the *Fono a Matai* (or Council of *matai*) if the matter concerned the wider *Nuu*, or by the *Fono a le Itumalo* (Council of *matai* of a district) if the matter had impact at that level. Processes of consultation, such as *soalaupule*, would have been observed, and *afaetasi* (unanimity or consensus) required before a decision could be made or implemented. The decision would then carry the full backing and authority of the *matai* and the *aiga*, or of the *Fono a Matai* of a *Nuu*, or the *Fono a Matai* of an *Itumalo* (district), as the case may be.

¹³⁸ Keesing, 258 – 259.

¹³⁹ Ibid., 277; Meleisea, 9.

With the Land Commission, on the other hand, a non-customary mechanism for resolving land disputes was introduced. Even though this mechanism initially applied only to foreign claims to native land, it would later be used to determine disputes about customary land and *matai* titles, through the work of its successor, the Land and Titles Commission or Court. The differences between this introduced dispute resolution mechanism and those of the *Faamatai* include: the centralised nature of the mechanism; its severance from the customary decision-making process, resulting in the disempowerment of customary decision-makers; the fact that *soalaupule* (consensus decision-making) was not employed; the adoption of formal court procedures reflecting the principles of European law; and a centralised, written recording system concerning some titles to land.

Treaty of Berlin 1899

The '*Berlin Act*' maintained a shaky peace¹⁴⁰ until December 1899, when the 'Big Three' signed a further convention, the *Treaty of Berlin 1899*, in which it was agreed that control of Samoa would be divided between Germany and the United States. The tri-partite supervision of Samoa, formalised by the '*Berlin Act*', formally came to an end, with partitioning of the Samoan Archipelago between these two Powers. The East (Tutuila, Aunuu, and the Manua Group) went to America, while the West (Savaii, Upolu, Apolima and Manono) became 'German Samoa'. Britain withdrew all claims to Samoa but gained political rights in other islands in the South Pacific.¹⁴¹ The rest of this thesis is concerned only with Western Samoa.

CONCLUSION

Before colonisation, the Samoan land tenure system was governed by the principles and processes of the *Faamatai*. Disagreements concerning the boundaries or use of land, or *matai* title succession, or any other matter concerning customary lands or titles, were resolved under the dispute resolution processes of the *Faamatai*. Colonisation and the 'land grabbing' of the colonists in the mid 19th century led to the introduction of concepts such as 'buying' and 'selling' and individual ownership of land, including private title, and other forms of land tenure that were alien to Samoan customary norms and the *Faamatai*. The 1889 *Berlin Act* provided the necessary mechanism to investigate and validate some foreign land claims in Samoa. In doing so, it introduced Western land tenure and registration systems, and formal

¹⁴⁰ *Western Samoa Mail (WSM)* Vol. III No. 17 Saturday 30 April 1938, 3 – quotes an editorial comment from "The New Zealand Herald" of 5 March 1888, (Hocken Library, Dunedin, New Zealand).

¹⁴¹ Holmes, 14 – 15; Keesing, 257.

judicial structures, to adjudicate land matters. These new systems served the purposes of centralised government, which was also a markedly different system of administration from the prior, decentralised governmental structures based on the local region or *Nuu*, where governance was conducted through the holders of various *matai* titles, and their respective *suli* (heirs), under the *Faamatai*. This introduced structure of government and land administration, although not initially applicable to native affairs or native interests in lands, was the foundation upon which the German Administration would build its own Land and Titles Commission of 1903.

On the eve of the twentieth century, a parallel system of land tenure, based on principles inconsistent with those of the *Faamatai*, had been introduced, displacing to some extent, the system of customary tenure. However, significant confrontation between the new system and the *Faamatai* had largely been avoided as the 'Berlin Act' prohibited future 'sales' of land by natives to foreigners, validation of existing private titles was largely limited to the area around Apia, and the Land Commission's jurisdiction had not extended to controversies within *aiga* and *Nuu*. Those cases, and the great majority of land within Samoa, were still under the jurisdiction of the *Faamatai*.¹⁴² Nevertheless, at the turn of the century, the colonial administration of a single European power had superseded the tri-partite supervision of Samoa in the West of the island group, and had created a centralised administration to rule this region in place of the 'Big Three'. The future of this region's land tenure systems now lay in German hands.

¹⁴² *Making Land Work*, Vol.2, Chapter 10, 209 refers to situations today where dispute resolution still occurs within the *aiga* as opposed to the Land and Titles Court whose forerunner was the 1889 Commission.

CHAPTER FOUR

THE EVOLVING LEGAL STRUCTURE OF THE LAND AND TITLES COURT

INTRODUCTION

Article IV of the tri-partite '*Berlin Act*' did not provide a process for dealing with customary land or *matai* titles. That remained within the jurisdiction of the *Faamatai*. However, in 1903, after Germany gained sole control of Samoa, the German Administration passed an Ordinance establishing a Commission to adjudicate on matters that had previously been left to the customary processes of the *Faamatai*. The 1903 Commission therefore marks the German addition to the introduced system of land tenure begun by the 'Big Three'. Instead of a commission to adjudicate claims by foreigners to lands in Samoa, the German Commission adjudicated native disputes over native lands and titles.¹⁴³ The German Commission would greatly impact on the *Faamatai*'s role in the resolution of customary land and *matai* title matters.

This chapter describes the general legal framework for the Land and Titles Court from its establishment in 1903 to the present day. Over this time, the role of the Court as a formal dispute resolution mechanism imposed by the colonising power to resolve disputes concerning customary land and *matai* titles has remained remarkably constant. Its jurisdiction remains today largely as it was in 1903, and the substantive rules of law that it applies are still the uncoded 'customary law' of Samoans concerning land and titles. The fact that the 'customary law' applied by the Court has never been codified is further evidence of the limited degree of colonisation experienced by Samoa, in its land tenure in particular.

The Court was established by the German Administration in 1903 as a commission. When Germany lost World War I it lost all its colonies, including Samoa. The German Commission was continued by the New Zealand Administration. Pursuant to a League of Nations mandate,¹⁴⁴ the New Zealand Parliament as well as the New Zealand Administration in

¹⁴³ Appendix B: *Verordnung des Gouverneurs betreffend die Ernennung einer Land und Titel Kommission 1903* (Land and Titles Commission Ordinance 1903), Clause 1.

¹⁴⁴ With the *Treaty of Versailles 1919*, Germany was penalised and the League of Nations was established in the hope of averting any future World Wars. Samoa was one of the colonies Germany lost at the end of World War I pursuant to Article 119 of the *Treaty of Versailles*. On 17 December 1920, a mandate was made in Geneva by the League of Nations for German Samoa. The mandate was conferred on the King of Great Britain and would be exercised on his behalf by the Government of the Dominion of New Zealand. Article 2 of the mandate gave "full power of administration and legislation over" Samoa to the Mandatory "as an integral portion of the

Samoa legislated for Samoa, which included legislation concerning the work and life of the New Zealand Land and Titles Commission. It was under the New Zealand Administration that the Commission was changed to a Court in 1937.¹⁴⁵ Legislation enacted while Samoa was administered by New Zealand continued to govern the Court even after Samoa gained independence in 1962.

Independent Samoa's 1960 *Constitution* provided for the Land and Titles Court and established the newly independent nation's approach to the Court which Samoa had inherited from her former colonial masters. Subsequently, in 1981, Samoa's Parliament enacted its own legislation to govern the Court, replacing colonial legislation that had been used for over a decade after independence.¹⁴⁶ Since 1981, other legislation touching on customary land, and therefore *matai* titles, has come before the Samoan Parliament and the effect of its enactment has thrown some doubt on the future of the Court. Such legislation has at times called for a review of the Court's functions and a reassessment of its current place in the Samoan legal framework as well as Samoan society.¹⁴⁷

Nonetheless, legislation concerning the Court has changed very little, but the lack of formal change does not mean the Court has not undergone change in fact. Such change, although not seen in the letter of the law, is due to the changing contexts within which the formal statutes are applied and the Court operates. These contexts, it is proposed, are determined by the push and pull between colonisation, decolonisation and the pressure for the commercialisation of land which this thesis suggests captures the life, workings and history of the Court in a nutshell.

Dominion of New Zealand, and may apply laws of the Dominion of New Zealand to the Territory subject to local modifications as circumstances may require" (*League of Nations Mandate for German Samoa 1920*, Preamble, in *Samoa Act 1921 (N.Z.)*, Schedule 1.)

¹⁴⁵ This was implemented through an amendment of the *Samoan Land and Titles Protection Ordinance 1934 (NZ-Samoa)*.

¹⁴⁶ *Land and Titles Act 1981 (Samoa)*.

¹⁴⁷ Doubts concerning the future of the Court and the impact of land related legislation that is being proposed and enacted are considered in more depth in Chapter Nine.

THE LAND AND TITLES COMMISSION 1903

Dr. Wilhelm Solf and the German Land and Titles Commission

After the raising of the German flag on 1 March 1900, Dr. Wilhelm Solf became the first Imperial Governor of German Samoa.¹⁴⁸ The establishment of the Commission¹⁴⁹ was possibly Solf's most significant initiative and greatest contribution, evidenced by the place of the Court today and the role it plays in the Samoan legal framework and society. Whether Solf intended such an outcome is hard to say. Solf's initiatives and policies regarding customary lands and titles were not "grounded in any prior German legislation, rather his own reading of Samoan political and cultural structure".¹⁵⁰ He also made sure that he had a "strong even a deciding voice in the traditional processes involved in title conferring and land transfer".¹⁵¹

The German Commission, comprising an Imperial district judge (as chair) and two assessors, appointed by the Imperial Governor,¹⁵² became the first foreign institution to 'legalise' *Faamatai* processes concerning *matai* titles and customary land. Although some Samoans did not want their disputes to be decided by the Commission, others saw it as official recognition of the *Faamatai*.¹⁵³

The 1903 *Ordinance* does not state the rules of law to be applied by the Commission. However, it seems that Samoan custom was generally applied. This is evidenced by a provision in the *Ordinance* allowing the Commission to obtain the advice of a Native Commission, presumably on questions of custom.¹⁵⁴ This provision should be read in light of prevailing colonial opinion concerning native custom¹⁵⁵ reflected in Solf's following statement:

"The customs, usages and legal institutions of the Samoans will have to be further studied in more detail. Whatever is good, will be retained and gradually transferred

¹⁴⁸ He was appointed by the Kaiser acting on a recommendation from the Director of the Colonial Department of the Foreign Office in 1899. (*Personal Correspondence* with Professor Peter Hempenstall (University of Canterbury, Christchurch, New Zealand, 22 November 2006)).

¹⁴⁹ Appendix B: *Ordinance 1903 (Germany)*.

¹⁵⁰ Meleisea, 35 – 36; *Personal Correspondence* - Hempenstall 22 November 2006.

¹⁵¹ Meleisea, 36.

¹⁵² Appendix B, *Ordinance 1903 (Germany)*, Clauses 1, 2.

¹⁵³ Meleisea 35 – 36; Hon. B.C. Spring (Former Chief Justice of Samoa), (1979) 5 (2) *The Samoan Pacific Law Journal* 43.

¹⁵⁴ Appendix B: *Instruction fuer das Verfahren der Land und Titel Kommission* ("Instructions" for the Proceedings of the Land and Titles Commission 1903), Clause 9.

¹⁵⁵ Refer to discussion of this in Chapter One.

*and amalgamated into our forms and concepts. Whatever is bad, barbaric and stupid will be stamped out...the natives are ignorant, they have to be instructed; they are lazy and have to learn to work; they are dirty and have to be washed; they are sick with all manner of disease, they must be healed; the natives are savage, cruel and superstitious, they must be soothed and illuminated: they are all big children in need of education and loving guidance".*¹⁵⁶

This type of statement seems to suggest that custom and tradition would be limited to what was thought to be acceptable. If it was acceptable, it would be permitted to continue. The question then arises as to whose standard of 'acceptability' would be used. Solf's statement reflects a view that was also widely held by British colonial powers about the acceptability of native custom and the extent to which it should be recognised. British colonial laws commonly empowered the courts to recognise indigenous customary law subject to a 'repugnancy' proviso that involved general principles thought to underpin the law of any nation. The judgment was made by Western judges who appealed to their own ideas of acceptable legal rules. 'Repugnancy' provisions were also commonly found in legislation for many African nations.¹⁵⁷ Samoa's colonial powers by contrast, never introduced a formal repugnancy proviso into the legislation concerning the Court over the past century.

Yet, there is evidence that the first Chairman of the German Commission, on occasions, decided as he thought appropriate and, in doing so, altered Samoan custom. The rulings of German Samoa's first Chief Justice, and Chairman of the Commission, Dr. Schultz, reflected Solf's desire to bypass the decentralised political and social structures of the *Faamatai* such as the *Nuu*, favouring a centralised mechanism such as the Commission in matters concerning lands and titles. For example, one of the most influential of Schultz's rulings concerned the method by which a *matai* was to be legally recognised by the German Administration. He decided that the validity of a bestowal would be confirmed if the decision to bestow was that of the *aigapotopoto* (extended family) alone and if the *aiga* recognised the existence of land

¹⁵⁶ Meleisea, 11.

¹⁵⁷ "In Botswana for instance, customary law was applicable except in so far as it was 'contrary to morality, humanity or natural justice'. The Sierra Leone Local Courts Act provided that customary law might be applied as long as it 'conform[ed] with natural justice and equity', and, in Zimbabwe, customary law was applicable unless repugnant to 'natural justice and morality'" (N. Peart, 'Section 11(1) of the Black Administration Act No 38 of 1927: The Application of the Repugnancy Clause', (1992), *Acta Juridica* 99.) One example of a 'repugnancy clause' (although never invoked), concerning New Zealand, stated that aboriginal customs of the Maori would be maintained as long as they were not repugnant to the general principles of humanity, *New Zealand Constitution Act 1852 (U.K.)*, ss. 70 and 71.

over which the title bestowed had authority. He did not acknowledge the role of the *Nuu* in the bestowal and confirmation of bestowals of *matai* titles.¹⁵⁸ This is an example of custom as applied by the Commission that differed from the situation in the *Nuu* and under the *Faamatai*. Schultz also ruled that if parties to a dispute failed to agree upon a successor to a title then they should *felafoai* – take turns. This meant that the party which was not awarded a title, following a dispute over its succession, should have the right to claim it next. This undermined the importance of recognition from the *Nuu*, and the necessity of *tautua* (service). A branch of a family could now sit and wait, and then claim, based on rights created by the Commission, without having rendered *tautua*. This would appear to have been the beginning of the trend (that occasionally recurs) of claiming titles on the justification that it is ‘fair’¹⁵⁹ for every branch to have a turn, eliminating the need for and recognition of *soalaupule* and customary decision-making processes. This changed the basis of *matai* title succession under the *Faamatai*.

Case Study - 1903 Commission in action

The earliest decision of the Commission found in the Records of the current Court was made in 1903.¹⁶⁰ Numbered LK 14, it is used here as an example of the Commission’s process which began with a referral from the Imperial Governor.¹⁶¹ The entire process was recorded in forms to be filled. It is not clear whether there were any other forms apart from those found in the Record for LK 14.

- The first form in the Record for LK 14 is “Form 2”. It records the name of the claimant and sets out a handwritten letter in Samoan to the Imperial Governor (Solf) asking for the matter to be referred to the Land and Titles Commission for examination/consideration and a final decision. The form outlines in brief the nature of the complaint. The ‘claim’ was made on the 5 June 1903. The claimant alleged that the respondent had interfered with the use of his land and had challenged his *pule* (authority) over the land. The claimant added that he had undisturbed use of the land for a long time and that this was the first time anyone had interfered in this way.
- On the 17 June 1903, using “Form 3”, the Imperial Governor wrote to two named Clerks of the Commission, both Samoans. In the letter the Imperial Governor asked

¹⁵⁸ Meleisea, 40.

¹⁵⁹ Ibid., 41.

¹⁶⁰ These records are kept in the Office of the current Land and Titles Court of Samoa, at Mulinu, Apia, Samoa.

¹⁶¹ Appendix B: *Ordinance 1903 (Germany)*, Clause 4.

that the two Clerks look into the matter and provide a summary or a report on the matter for his consideration.

- On the 19 June 1903, using “Form 4”, the Clerks of the Commission responded to the Imperial Governor’s request attaching the requested information. The details recorded concerning the matter, on the back of “Form 4” are: the name of the claimant and the district in which the claimant resides, whether it is a title or land that is in dispute, and the actual native title or name of the land concerned, plus the respondent’s details and the district they reside in.
- On the 23 June 1903, using “Form 6a”, the Imperial Governor wrote to the claimant. He stated that he had read his letter of request for the Commission’s assistance and that his case would be referred to the Commission for a final decision subject to his payment of fifty German marks to the Treasurer of the Imperial Courts. If the claimant failed to pay the fifty marks within three months from the date of the letter, then the Commission would not consider his case. Below the Governor’s signature is another section headed “Decree”. The record provides an English translation of the decree which was originally in German. The translation does not seem very accurate especially where it states the office Dr. Schultz held. Schultz was, as mentioned in the previous chapter, the Chief Justice and the Chairman of the Commission. Nevertheless the translation of the ‘Decree’ that was provided is as follows:

“Original with all proceedings to the Chairman of the Land and Titles Commission, Sir District Judge Dr. Schultz for kind further proceeding.”

- Below the decree is a note of the Proceedings signed by Dr. Schultz. It is very short and seems to be dated 26 June 1903. It simply says to inform Mr. Peters, whom I presume was one of the Commissioners.
- The claimant paid the required fifty marks.
- The identifiable “Forms” end with “Form 6a” but there was considerable correspondence and a hearing after a number of adjournments. The matter was settled on 19 February 1904. The two parties had reached an agreement: *pule* (authority) over the land would not be considered or decided, the land would be used together by both parties. Dr. Schultz recorded the settlement.

- On 18 May 1904 the claimant wrote seeking a refund of the fifty marks as the matter was settled amicably.
- Dr. Schultz replied on the 21 May 1904 that a refund could be made if the claimant confirmed that the case had indeed been settled.
- On 13 June 1904 both parties wrote to Schultz to confirm the matter had been settled and that they had actually divided the land between them.
- On 9 July 1904 the two parties appeared before Schultz to confirm that the matter was settled and to inform the Commission that the responding party wanted to give his half of the land to some of his relatives.
- On 26 July 1904 the refund was made to the claimant.
- An instruction to 'file away' the matter was entered in the file on 23 August 1904, more than a year after the initial claim was brought.

The Record of LK 14 shows how central the Governor's role was in the workings of the 1903 Commission. The process began with a written request to the Imperial Governor who referred the matter for investigation to the two (2) Native Clerks of the Commission. The Native Clerks reported back to the Imperial Governor who decided whether to refer the matter to the Chairman of the Commission, which he did in this case. The Commission then heard the matter. It seems that once the Imperial Governor had referred the matter to the Commission, it made all the subsequent decisions concerning the case in a manner similar to a judicial process. However, access to this process was under firm political control.

The fact LK 14 considers *pule* (authority) over customary land suggests that custom was at least considered and possibly applied by the Commission in this case. Something of interest, that the record of LK 14 does not touch upon, is the fact that representation of parties by solicitors was not permitted, although the Commission could grant counsel to one or both parties in a matter.¹⁶² The fact that parties cannot be represented by solicitors is still one defining feature of the Court today which also indicates that the transfer of a fully Western judicial model did not occur when the Commission was originally established. It could be said that, by not permitting solicitors to appear before the Commission, the transfer left out a central aspect of the Western judicial model. LK 14 also does not show that, under the 1903

¹⁶² Appendix B: *Instructions*, Clause 2.

Ordinance, the decisions of the Commission were final,¹⁶³ or could not be appealed. The finality of the decisions of the Commission/Court is another common thread that runs through most of a century's legislation regulating the Commission/Court.

Neither the Record for LK 14 nor the 1903 *Ordinance* and *Instructions* mention the German Administration's stance on the prohibition on alienation of customary land, under Article IV of the *Berlin Act*. The rule prohibiting alienation of land outside Apia was instead provided for in the *Constitution Order 1900 (Germany)*.¹⁶⁴ The fact that a separate commission was established to deal with native lands and *matai* titles suggests that the German Administration intended to keep native and private lands separate, and one aspect of this was that the former could not be alienated while the latter could.

In summary, the 1903 *Ordinance* introduced a dispute mechanism for land and *matai* titles that was different to the customary processes already in place under the *Faamatai*. This dispute resolution mechanism applied to customary land and *matai* titles in a way the *Berlin Act* did not. The 1903 *Ordinance* was a further step in the imposition of a foreign system on Samoa's customary land tenure. However, the 1903 *Ordinance* did allow for the consideration of Samoan law, customs and conventions in the deliberations of the Commission. The Imperial Governor could appoint a separate commission of Samoans who could be heard by the Commission, if it deemed it necessary to obtain their advice.¹⁶⁵ In this way, native participation in the 1903 Commission was very similar to that in the 1889 Commission, in that there was no native representation, only the possibility of an advisory role. The possible consideration of Samoan law, customs and conventions in the 1903 Commission has bearing on the question of whether custom remained intact when Samoa was colonised. In any case, the fact that Solf's Commission was established to determine customary matters using a foreign structure and process, and foreign decision makers, while maintaining some suggestion of the application or consideration of Samoan customs and usages, is initial evidence of an emerging hybrid process which is the Court of today.

The impact of the establishment of the 1903 Commission was probably clearer when more Samoans brought their customary disputes for its determination, in the lead up to the Great

¹⁶³ Appendix B: *Ordinance*, Clause 5.

¹⁶⁴ L. Holmes, "Samoa: Custom versus Productivity", in R. Crocombe (ed.), *Land Tenure in the Pacific*, (Wellington, Oxford University Press, 1971), 98.

¹⁶⁵ Appendix B: *Ordinance 1903 (Germany)*, Clause 6, *Instructions 1903 (Germany)*, Clause 9.

War.¹⁶⁶ This trend suggests that either the German Administration was getting stronger or the Samoans were seeing the need or value of a foreign, dispute resolution mechanism that was an alternative to that offered under the *Faamatai*.

LAND AND TITLES COURT- NEW ZEALAND AND SAMOA 1914 - 2008

In the German Commission of 1903 lay the embryonic beginnings of the Land and Titles Court of today. How the Court would have looked if Germany had won World War I is something that will never be known. However, the fact that the Commission was retained and converted into a Court does show that the New Zealand Administration and Independent Samoa saw something of value in this institution that was worth keeping. Aside from the Commission becoming a Court in 1934, although it was not referred to as such until 1937, there have been remarkably few substantive changes to the jurisdiction and powers of the Court.

Jurisdiction and Powers

The jurisdiction of the Court today is not very different from what it was under colonial rule. The first New Zealand legislation to deal with the Commission/Court was made in 1920.¹⁶⁷ It stated that its jurisdiction was to hear and determine by way of civil proceedings all disputes and claims between Samoans relating to native land, Samoan names or titles, and succession to any property or rights in accordance with Samoan custom.¹⁶⁸ The 1934 Ordinance converted the Commission into a court of record,¹⁶⁹ and confirmed its exclusive jurisdiction over the following matters:

- (a) *In all matters relating to Samoan names and titles:*
- (b) *To make orders and declarations in respect of Samoan names and titles that were necessary to preserve or define them or the rights or obligations attached to them in accordance with the customs of the Samoan race and all relevant laws in force in Samoa:*
- (c) *In all claims and disputes between Samoans relating to 'customary land' and the right of succession to property held in accordance with usages and customs of the Samoan race:*

¹⁶⁶ Chapter Eight considers a number of judgments of the Commission in this period concerning lands, and titles from a number of different *nuu* in Upolu and Savaii, suggesting that Samoans were increasingly utilising the Commission as a dispute resolution mechanism.

¹⁶⁷ *Samoa Native Land and Titles Commission Order 1920 (N.Z.)*.

¹⁶⁸ *Ibid.*, Clause 20.

¹⁶⁹ Although the 1934 Ordinance converted the Commission into a court it was still called the 'Native Land and Titles Commission'. Its change in name only occurred in 1937. The reason for the delay in name change is unclear.

(d) *In matters specified in this Ordinance or in any Act, regulation or other Ordinance.*¹⁷⁰

When Samoa became independent in 1962, Article 103 of the *Constitution of the Independent State of Samoa 1960 (Samoa)* ensured the continuation of the Court:

There shall be a Land and Titles Court with such composition and with such jurisdiction in relation to matai titles and customary land as may be provided by Act.

New Zealand legislation continued to govern the work of the Court until the Samoan Parliament passed its own legislation in 1981. Section 34 of the *Land and Titles Act 1981 (Samoa)* provides that the Court shall continue to have the jurisdiction it previously exercised. The 1981 Act still governs the work of the Court today.

Rules of Law to be Applied

German legislation concerning the Commission did not expressly state whether Samoan custom and usage would be applied or recognised in its decision-making and deliberations. The Record for LK 14, as shown above, indicates that some consideration was given to Samoan custom and usage. New Zealand legislation, on the other hand, formally provided for certain Samoan customs and usages concerning *matai* title succession and customary land tenure to be applied by the Commission/Court.

New Zealand policy concerning the Commission was influenced by the procedures and policies of the German Administration, especially the approach of Schultz,¹⁷¹ but New Zealand legislation enacted in 1921,¹⁷² 1928¹⁷³ and 1934¹⁷⁴ was more explicit than the German 1903 *Ordinance and Instructions* in its reference to customs and its application in the Commission/Court. For example, there is the reference in the *Samoa Act 1921 (N.Z.)* to 'native land' as that which is held under the 'customs and usages of the Samoan race'.¹⁷⁵ The same formulation is used in the statutory definition of the 'rightful holder'¹⁷⁶ of a *matai* title,

¹⁷⁰ *Samoa Land and Titles Protection Ordinance 1934 (N.Z.-Samoa)*, s. 37.

¹⁷¹ Meleisea, 40, 41.

¹⁷² *Samoa Act 1921 (N.Z.)*.

¹⁷³ *Samoa Native Titles Protection Order 1928 (N.Z.)*.

¹⁷⁴ *Samoa Land and Titles Protection Ordinance 1934 (N.Z. – Samoa)*.

¹⁷⁵ *Samoa Act 1921 (N.Z.)*, s. 278.

¹⁷⁶ *Samoa Native Titles Protection Order 1928 (N.Z.)*, Clauses 2, 3, 4 and 5; *Samoa Land and Titles Protection Ordinance 1934 (N.Z. – Samoa)*, ss. 27, 28. [The term 'rightful holder' was introduced in the 1928 Order and

and in the statutory regulation of the process for title succession,¹⁷⁷ following much the same approach as Shultz had through his decisions. Therefore, although there was no clear rule that custom was to be applied, these references implied that custom would be applied. The definition of the 'rightful holder' in particular, shows how the Commission effectively took control of some aspects of native affairs that would have been governed by custom and tradition, such as the appointment of the holders of *matai* titles. The words, 'in accordance to customs and usages' of the Samoans only appear as part of the definition of a 'rightful holder' in the 1934 *Ordinance* and this is the most explicit reference to the application of custom in the Court that can be found in pre-Independence legislation.¹⁷⁸ However, what exactly was meant by 'customs and usages' was not stated. This meant that the Commission had a large say in determining what Samoan customs and usages were, as had Solf and Shultz. Therefore, although a customary practice of *matai* title bestowal/succession was still acknowledged, its definition and legitimacy now relied upon an imposed colonial structure and its attendant rules and laws. The validity of titles held according to Samoan custom and usage depended on a 'stamp' from a centralised colonial institution.

Article 111 of the *Constitution* 1960 defines the 'law of Samoa' in the following way:

111. Interpretation

...

"Law" means any law for the time being in force in Samoa; and includes this Constitution, and Act of Parliament and any proclamation, regulation, order, by-law 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" (emphasis added).

Custom or usage that may be recognised in the courts is therefore explicitly included in the authoritative definition of Samoan law.¹⁷⁹ As before, the 1960 *Constitution* does not provide

continued in the 1934 Ordinance. The 1934 Ordinance was amended in 1935, 1937, 1950, 1951, 1952, 1954, 1955, 1957, 1960, 1961, 1964, 1965, 1966, 1967, 1968, 1969, 1972, 1975, 1977 and 1978.]

¹⁷⁷ *Vacant Titles Ordinance* 1921 (N.Z. - Samoa), Clauses 2, 3, and 4.

¹⁷⁸ *Samoan Land and Titles Protection Ordinance* 1934 (N.Z.-Samoa), Clause 27.

¹⁷⁹ J. Corrin and D. Paterson, *Introduction to South Pacific Law*, (2nd Edition, Routledge-Cavendish, Wellington, 2007,) 48, 50.

a precise definition of Samoan “customs and usages” or “customs of the Samoan race,” as when these terms were used in the 1934 Ordinance in relation to *matai* titles and customary land. The lack of a precise definition of customs and usages makes the definitions of *matai* titles and customary land in the following Articles of the *Constitution* very open-ended:

100. Matai Titles - A Matai title shall be held in accordance with Samoan custom and usage and with the law relating to Samoan custom and usage (emphasis added).

101. Land in Samoa - (1) All land in Samoa is customary land, freehold or public land.

(2) Customary land means land held from Samoa in accordance with Samoan custom and usage and with the law relating to Samoan custom and usage (emphasis added).

(3) Freehold land means land held from Samoa for an estate in fee simple.

(4) Public land means land vested in Samoa being land that is free from customary title and from any estate in fee simple.

Section 37 of the *Land and Titles Act 1981 (Samoa)* then provided that:

(1) In all matters before it the Court shall apply:

(a) Custom and usage;

(b) The law relating to custom and usage;

(c) This Act and any other enactment that expressly applies to the Court.

(2) Subject to subsection (1), the Court shall decide all matters in accordance with what it considers to be fair and just between the parties.

Section 2 of the 1981 Act attempts a definition of Samoan custom and usage not found in any previous legislation, including the 1960 *Constitution*’s definition of the ‘Laws of Samoa’ in Article 111.

2. Interpretation

...

"Custom and usage" or "Samoan custom and usage" means the customs and usages of Western Samoa accepted as being in force at the relevant time and includes:

- (a) *The principles of custom usage accepted by the people of Western Samoa in general; and*
- (b) *The customs and usages accepted as being in force in respect of a particular place or matter.*

But even this definition is vague and imprecise. It provides no direction on how the Court is to recognise, define or apply ‘custom’ in matters that come before it, and raises a question as to how the Court manages to make consistent decisions. It seems that exactly what constitutes Samoan custom and usage concerning *matai* titles and customary land has been left to judicial interpretation. This gives weight to the suggestion Vaai makes that Samoan custom might be given greater weighting in relation to Western law by a process of judicial intervention or interpretation in favour of custom.¹⁸⁰

Prohibition on alienation

The prohibition on the alienation of customary land (with a few exceptions that existed under the *Berlin Act*) was continued under the New Zealand Administration. As was the case with German legislation, the prohibition is not found in legislation governing the Commission/Court.¹⁸¹ The *Berlin Act* allowed for the alienation of customary land in the Apia area but restricted alienation elsewhere to leases.¹⁸² The *Samoa Act 1921 (NZ)* permitted another form of alienation. It provided for the taking of land in Samoa (whether European or Native) by the Crown for public purposes.¹⁸³ The *Samoa Act* also declared the foreshore and

¹⁸⁰ See discussion in Chapter Five.

¹⁸¹ Prohibition on the alienation of customary land is found in Article IV, ‘*Berlin Act*’ 1889 (Germany, Britain USA), the *Constitution Order 1900 (Germany)*, and then s. 280 (1), (5) *Samoa Act 1921 (NZ)*. Section 268(1) classified all land in Samoa as Crown land, or European land, or Native land. The Registration only of foreign interests in Samoan land begun by the 1889 Land Commission was continued.

¹⁸² Under section 280(4) of the *Samoa Act 1921 (N.Z.)* native land could be leased. The registration of such interests in Customary land as well as that of Freehold and Crown land were recorded in a central land register. (*Samoa Act 1921(N.Z.)* ss. 269, 280; *Native Land and Titles Protection Ordinance 1934 (N.Z-Samoa)* s.91; *WSM* (Vol. II, No.39 – Saturday 2 October 1937) 3).

¹⁸³ *Samoa Act 1921 (N.Z.)* s. 271(1), “Any European or Native land in Samoa may, by Ordinance, be taken for any public purpose specified in the Ordinance, and it shall thereupon become absolutely vested in His Majesty”. Section 271(2) and (3) provided for compensation for the taking of land, which was to be assessed by the High Court. Section 271(4) made it clear that leases and other limited rights, titles, or interests in European or Native land could also be taken by Ordinance, for public purposes and such takings would also be compensated. The *Taking of Land Act 1964 (Samoa)* continues the function of and replaces sections 270, and 273 *Samoa Act 1921 (N.Z.)*. It provides for the taking of land for public purposes and for the payment of compensation. Customary land can be taken under this Act pursuant to the proviso to Article 102 of the *Constitution 1960 (Samoa)*, an exception to the prohibition on the alienation of customary land. Where customary land is taken, compensation is paid to the holder of the *matai* title that owns or has the authority or *pule* over the land (*Constitution 1960* Art. 102; Vaai, 157 – 158, 154). Takings of customary land for public purposes is discussed more fully in Chapter Nine.

tidal lands and waters to be vested in the Crown.¹⁸⁴ Beyond these limited exceptions, the prohibition on the alienation of customary land was retained.

One of the resolutions adopted by the Constitutional Convention 1960¹⁸⁵ which led to the *Constitution* 1960 concerned the non-alienation of customary land. The resolution was that particular attention should be paid to customary land and that its protection should be “more rigid”. The resolution referred to the state of affairs under the 1934 Ordinance which allowed for the alienation of customary land.¹⁸⁶ It then proposed adoption of what would become Article 102 of the *Constitution* which would prohibit the alienation of all customary land. For this reason, the qualified prohibition on the alienation of customary land under the 1934 New Zealand legislation became invalid on Independence Day.

Article 102 of the *Constitution* provides:

102. No alienation of customary land - It shall not be lawful or competent for any person to make any alienation or disposition of customary land or of any interest in customary land, whether by way of sale, mortgage or otherwise howsoever, nor shall customary land or any interest therein be capable of being taken in execution or be assets for the payment of the debts of any person on his decease or insolvency:

Provided that an Act of Parliament may authorise -

- (a) the granting of a lease or licence of any customary land or of any interest therein;*
- (b) the taking of any customary land or interest therein for public purposes.*

This prohibition on the alienation of customary land under the *Constitution*, which is the supreme law of Samoa, reflects the place of custom in the legal foundation of Samoa. Instead of providing for the prohibition in ordinary legislation, its importance is confirmed by its

¹⁸⁴ *Samoa Act 1921 (N.Z.)*, s. 276.

¹⁸⁵ *Resolutions Adopted by the Constitutional Convention of Western Samoa 1960* (Apia, Government of Western Samoa, 1960) 11.

¹⁸⁶ *The Native Land and Titles Protection Ordinance 1934 (New Zealand)*, section 9: “Any Samoan claiming to be beneficial owner of native land situate whether in town area of Apia or elsewhere desiring to make alienation thereof to another Samoan may apply in writing to the Secretary of Native Affairs for the authority of the Administrator to make the proposed alienation”; section 11: “Any land alienated under the provisions of this part of this Ordinance shall remain native land.”

place in the *Constitution*. Although the taking and leasing¹⁸⁷ of customary land is still possible under the *Constitution*, express prohibition of its alienation is the clearest expression of an intention to protect it.

Articles 100, 101(2), 102, 103 and 111 of the *Constitution* and the *Land and Titles Act 1981(Samoa)* together represent the legislature's position on the rules of law to be applied in the Land and Titles Court of today. How the Court attempts to comply with the obligations imposed by the provisions is another matter.

Structure and Composition of the Court

Although the New Zealand Administration continued the German system of dealing with native matters separately from non-native matters, it did make a few changes. The New Zealand Commission was initially a reconstituted form of the High Court of Samoa. In its legislation, it made provision for the appointment of Samoan Commissioners.¹⁸⁸ Samoan Commissioners had merely advisory roles much like in the German Commission.¹⁸⁹ The Land and Titles Commission was still a colonial machine. Although it was expected to apply Samoan custom, the European Assessors were not bound to seek, let alone follow, the advice of the Samoan Commissioners.

The *Samoan (Native)*¹⁹⁰ *Land and Titles Protection Ordinance 1934 (N.Z. – Samoa)* introduced a significant change. The Commission was no longer the Samoan High Court reconstituted. It became a separate court of record consisting of a President, who was the

¹⁸⁷ The *Alienation of Customary Land Act 1965 (Samoa)* replaces section 280(4) *Samoa Act 1921(N.Z.)* and section 12 *Samoa Land and Titles Protection Ordinance 1934 (N.Z.-Samoa)*. This legislation extends the limits on alienation of customary (Native) land under the 'Berlin Act' 1889. Under the 'Berlin Act' alienation by way of sale was possible with the Chief Justice's approval. The 1921 New Zealand legislation also provided for limited alienation of customary land. It allowed leases by approval of the Administrator and sale but only to the Crown. This new 1965 Act fulfils the stipulations of Article 102 of the *Constitution* prohibiting the alienation of customary land or interests in it except where Parliament authorises the grant of a lease or licence. Customary land can not be sold, mortgaged or taken to recover debt. It can be alienated only by way of lease or licence for which purpose this Act establishes a regime.

¹⁸⁸ The New Zealand Commission was made up of the Chief Judge of the High Court of Samoa, not less than two nor more than four European Assessors and no fewer than ten nor more than thirty Samoan Commissioners (*Samoa Native Land and Titles Commission Order 1920 (N.Z.)* Clause 4). The composition was changed slightly in 1924 to not more than three European assessors (one of whom was the Secretary for Native Affairs), and no fewer than eight and no more than fourteen Samoan Commissioners whose function was only advisory and consultative (*Samoa Native Land and Titles Commission Order 1924 (N.Z.)*, Clause 7).

¹⁸⁹ Keesing, 277.

¹⁹⁰ Legislative Amendment in 1951 altered the term 'native' to 'Samoan' in all New Zealand legislation. (*Samoa Amendment Act 1951 (N.Z.)*, s.2).

Chief Justice of the Supreme Court of Samoa,¹⁹¹ plus European Assessors and Samoan Commissioners. The creation of a separate court of record can be seen as the elevation of the importance and relevance of the institution and possibly even of the customary matters it deals with: lands and titles. In 1937, this separate court of record became known as the 'Native Land and Titles Court' instead of the 'Native Land and Titles Commission' and the term 'Samoan Commissioner' was changed to 'Native Judge'. Native Judges had to be Samoan *matai*.¹⁹² It is not clear why the change in name was only implemented three years after it was provided for in legislation. The change in name did not come with a change in role. Native Judges still played only an advisory role in the Court.¹⁹³ It was only in 1950 that 'Native Judges' were given decision making powers and were renamed Samoan Judge.¹⁹⁴ The 'Samoan Judge', unlike its predecessors the 'Samoan Commissioner' and the 'Native Judge', could participate in the making of decisions. The 'Samoan Judge' did not merely play an advisory role.¹⁹⁵ As before, the 'Samoan Judge' had to be a Samoan *matai*, and that is still a requirement today, but did not have to be legally qualified.¹⁹⁶ This change in the role of the 'Samoan Judge' was probably because Independence was on the horizon.¹⁹⁷ It could also have been indicative of a trend towards indigenisation as part of the decolonisation that came with Independence but began well before it.

In the Court today there is also the office of Assessor with the same qualifications as a Samoan Judge pursuant to section 28 of the *Land and Titles Act 1981 (Samoa)*. As outlined above, there were European Assessors and Samoan Commissioners previously and the Samoan Commissioners eventually became Samoan Judges while the European Assessors were phased out. It is therefore not quite clear which office the current Assessors might now reflect. As they too need to be *matai*, it can be presumed they are not meant to be a continuation of the office of European Assessor. Perhaps this is a reason why the 1975

¹⁹¹ *Land and Titles Protection Amendment Ordinance 1958 (N.Z.-Samoa)*, Clause 2 allowed a Judge of the High Court of Samoa to preside over sittings of the Samoan Land and Titles Court and exercise other functions of the President with the Chief Judge's authorisation.

¹⁹² *Samoan Land and Titles Protection Amendment Ordinance 1937 (N.Z.-Samoa)*, Clause 5(iii).

¹⁹³ *Samoan Land and Titles Protection Ordinance 1934 (N.Z.-Samoa)*, s. 38; *Native Land and Titles Protection Amendment Ordinance 1937 (N.Z.-Samoa)*, ss. 2 and 3(1).

¹⁹⁴ *Samoan Judges Ordinance 1950 (N.Z. - Samoa)*.

¹⁹⁵ *Ibid.*, Clause 4 (1); Samoan Judges and Assessors are continued in the *Land and Titles Act 1981 (Samoa)*, ss.29, 31.

¹⁹⁶ *Land and Titles Act 1981 (Samoa)*, s.28(a). Samoan Judges, however, do not need to be legally qualified. Up until 2004 only the President of the Court had to be legally trained. Following an amendment to the qualifications of the President of the Court in 2004, a non-legally qualified person can now become President. For example, it is now legally possible for a Samoan Judge, who is not legally qualified, to become President of the Court.

¹⁹⁷ Tiffany (1974), 38.

Committee on the Court, customary land and *matai* titles recommended in its Report that the office of Assessor be changed to that of Temporary Judge.¹⁹⁸

The separation of the Land and Titles Court from the general courts was further strengthened by the appointment of a separate registrar for the Court, a post that was previously occupied by the Registrar of the Supreme Court.¹⁹⁹ The separation of customary matters from the general or non-customary matters is another thread that has run through legislation concerning the Court. This separation acknowledges the need for separate legal structures to deal with customary and non-customary matters, and it has allowed the Court to evolve, adapt and change within its specialist jurisdiction, leading to a melding and grafting of the foreign and the indigenous in its process, revealing the hybridisation that is one of its defining characteristics.²⁰⁰ In this manner, the Court moved from being a structure wherein native involvement was limited to the provision of advice to operating with a predominantly native Bench with full decision making powers.²⁰¹

Under section 27 of the *Land and Titles Act 1981 (Samoa)*, Samoan Judges may be appointed Deputy Presidents from time to time, subject to the direction of the President. A Deputy President may preside over sittings of the Court and exercise other functions of the President. The trend towards the indigenisation of the Court is further evidenced by the most significant amendment made to the 1981 Act. This amendment, enacted in 2004, altered the qualifications required for the President of the Court. This person no longer needs to be the Chief Justice of the Supreme Court – a requirement which had previously provided a formal link between the two judicial structures. After 2004, any person qualified to be a Supreme Court Judge (in terms of Article 65 of the *Constitution*) can be appointed President of the

¹⁹⁸ See discussion on this in Chapter Five.

¹⁹⁹ *Samoa Land and Titles Protection Ordinance 1934 (N.Z.-Samoa)*, s.44.

²⁰⁰ An additional Court, to be known as “Additional Land and Titles Court”, could be set up in case of an increase in “volume of business”. An additional Court would have the same status, powers and jurisdiction as the Land and Titles Court. The order was signed for an additional court in Tuasivi, Savaii on 4 April 1967, and its work commenced in 1970. The 1966 amendment also allowed Samoan Judges to be appointed as Deputy Presidents to preside over sittings of the Court in the President’s absence. (Vaai, 162.) The *Land and Titles Act 1981 (Samoa)*, s.35 sets out the composition of the Court as: the President/Deputy President, at least 2 Samoan Judges and at least 1 Assessor (S. Farran and D. Paterson, *Property Law in the South Pacific*, (Cavendish Publishing Ltd., London, 2004), 246).

²⁰¹ The trend began with the 1934 Ordinance. The ‘new’ Court constituted thereafter was very different in constitution to the Native Land and Titles Commission under the 1924 Order. The main difference is seen in the appointment of Samoan Judges to the Court and the removal of positions that were previously held by Europeans only, such as the office of ‘European’ Assessor in sections 40 and 43. *Samoa Land and Titles Protection Ordinance 1934 (N.Z.-Samoa)*, Clause 56 was amended in 1950 to include ‘Samoan Judges’ in the decision-making of the Court.

Court.²⁰² Furthermore, a Samoan Judge can be President provided that certain requirements are met, such as having five years of relevant work experience and other qualifications, to be determined by the Judicial Services Commission. These amendments therefore enlarged the pool of people eligible to be President of the Court. Following these changes the first President of the Court, who was not also the Chief Justice of the Supreme Court, was appointed in 2005.

The severance of the formal link between the two judicial systems, and the earlier changes giving Samoan Judges decision-making authority, were major changes in the structure of the Court. This is evidence of the progressive indigenisation of the Court that began in the colonial period then accelerated after Independence, especially within the last decade or so. A necessary corollary of this indigenisation process has been greater severance of the Land and Titles Court from the general courts where general law, rather than customary land and titles law, is applied.

Process and Procedure

The process for initiating a matter in the Court today is much the same as it was under the New Zealand Administration,²⁰³ but markedly different from the German Commission. Access to the Commission under the German Administration was under the control of the Imperial Governor. He determined whether an application could be heard by the Commission. The New Zealand Administration opened access by allowing applicants to petition the Commission directly. That is also the case today. The process begins by filing a petition with the Court.

Another major development is that today the hearings are conducted wholly in the Samoan language. This reflects the fact that the Court is now staffed entirely by Samoans who are Samoan speakers. Previously, German and English were the languages of the Court, with provision for Samoan translators. Indigenisation is further supported by the Court's informal acknowledgement of certain Samoan practices concerning dispute resolution such as *seumalo*, alongside the formal process prescribed by legislation.²⁰⁴ The process of the Court

²⁰² *Land and Titles Act 1981 (Samoa)*, s.26(a) was amended.

²⁰³ Chapter Six discusses the *Land and Titles Act 1981 (Samoa)* in detail and provides a case study on the process of the Court of today under the 1981 Act.

²⁰⁴ Chapter Six discusses *seumalo* and other customary practices that are being informally observed alongside the statutory processes of the Land and Titles Court today.

of today is still inquisitorial, however, and solicitors have no standing to appear.²⁰⁵ This is how it was under both the German²⁰⁶ and New Zealand Administrations.²⁰⁷

Prior to 1950 the decisions of the Court were issued under the Seal of the Court, and under the hand of the President and the concurring European members of the Bench.²⁰⁸ The 'Samoan Commissioners' and later the 'Native Judges' did not sign the judgments, reflecting their advisory role. That changed in 1950 when 'Samoan Judges' acquired full decision-making powers.²⁰⁹ As with the 1920 and 1924 Orders, it seems the decisions were made by majority vote, but the judgment did not disclose who were the concurring and dissenting judges. That is still the position today. Dissenting judges are not identified in the Court's judgments.

A further change was also made to the form of the Court's decisions in 1981 when the requirement was introduced that written reasons be given.²¹⁰ Every decision has since provided the reasons of the Court (or the majority of its members), in writing. No reasons have to be given for dissent. Obviously, this has dramatically increased the length of decisions. It is then the Registrar's duty to publish the particulars of every final decision in the *Savali* (Government Gazette) and publication deems the decision complete.²¹¹ When the new legislation required publication of the majority's reasons for its decisions, this effectively made it easier to challenge the Court's decisions, which probably explains the expansion in judicial review proceedings in the mid 1980s. But the absence of reasons from dissenting judges prevents applicants from having access to an informed and reasoned counterargument.

²⁰⁵ *Land and Titles Act 1981 (Samoa)*, s.92.

²⁰⁶ *Land and Titles Commission Instructions 1903 (Germany)*, Clause 2.

²⁰⁷ *Samoan Land and Titles Protection Ordinance 1934 (N.Z. - Samoa)*, s.76.

²⁰⁸ *Samoan Land and Titles Protection Ordinance 1934 (N.Z. - Samoa)*, s.56. This section of the 1934 Ordinance provided that only the President and the (European) Assessors made the decisions. Samoan Commissioners, later known as 'Native Judges', did not participate in the decision making. It was only when 'Samoan Judges' were appointed and replaced 'Native Judges' in 1950 that they were included in the decision-making and therefore formed part of the Bench: *Land and Titles Act 1981 (Samoa)*, s. 67. Samoan Judges had decision-making powers from the start in the 1981 Act.

²⁰⁹ Amendment of s. 56 of the *Samoan Land and Titles Protection Ordinance 1934 (N.Z.-Samoa)*; *Land and Titles Act 1981 (Samoa)*, s. 63.

²¹⁰ *Land and Titles Act 1981 (Samoa)*, s.66.

²¹¹ *Ibid.*, s. 69.

Decisions of the New Zealand Court and the Court today are considered to be judgments *in rem*.²¹² This means that they bind not only the parties to the particular case, but also any other person affected by the decision. It is, in effect, a judgment about the land or title in question, not just a judgment about the interests of parties to the case. This effect of *in rem* judgments was recently confirmed by the Court in a case involving *matai* title succession, where the Court held:²¹³

Section 70 of the 1981 Act uses two very small words – in rem which mean, a decision has been reached and stands or remains (forever) and that the decision reached binds all who may be affected by it, whether they were parties to the proceedings or not (emphasis added).

Unlike in the German era, re-hearings were possible in the New Zealand Court.²¹⁴ However, in neither case were appeals allowed. Appeals were first allowed by the 1981 Act.²¹⁵ Now any party to any proceeding may appeal against any final decision or order of the Court.²¹⁶ An appeal is heard by the Appellate Division of the Court, and is by way of re-hearing.²¹⁷ However, appeals can not be lodged without the leave of the President. An application for leave to appeal is heard by the President sitting alone. If leave is granted, the Court sits with three judges who were not involved in the case at first instance. The Appellate Division may then dismiss or uphold the appeal, and set aside or vary the decision, and make such order as to costs as it thinks fit. This was also the case with re-hearings in the New Zealand Court. A decision of the Court on an appeal is deemed to be final, as were decisions of the New Zealand Court on a re-hearing, and those of the German Commission at first instance.²¹⁸ Under the New Zealand Administration the Court reconstituted as an appellate Court could

²¹² *Samoa Native Land and Titles Commission Order 1920 (N.Z.)*, Clause 8, 9, 14; *Samoa Native Land and Titles Commission Order 1924 (N.Z.)*, Clause 13; *Samoa Land and Titles Protection Ordinance 1934 (N.Z. - Samoa)*.

²¹³ Appendix C: LC 853 P1-P39, 18 June 2008, at page 12 of 16.

²¹⁴ *Samoa Native Land and Titles Commission Order 1920 (N.Z.)*, Clause 13; *Samoa Native Land and Titles Commission Amendment Order 1920*, Clause 3; *Samoa Native Land and Titles Commission Order 1924 (N.Z.)*, Clause 12; *Samoa Land and Titles Protection Ordinance 1934 (N.Z.-Samoa)*, ss. 59, 60.

²¹⁵ *Land and Titles Act 1981 (Samoa)*, Part IX.

²¹⁶ *Land and Titles Act 1981 (Samoa)*, s.76.

²¹⁷ *Land and Titles Act 1981 (Samoa)*, s.77. Appeals are heard by the President and two Samoan Judges appointed by the President. The Chief Justice or a Judge of the Supreme Court can stand in for the President of the Appellate Division. A Deputy President of the Land and Titles Court can not preside as President of the Appellate Division. Before 2004, this meant that a non-legally qualified could not be President of the Appellate Division. Since 2004 and the amendment to the qualifications of the President, it is possible that a non-legally trained person could be President of the Appellate Division of the Court. S. Farran and D. Paterson, in *South Pacific Property Law*, at 247 comment generally on the advantages and disadvantages of specialist courts with appellate divisions in the resolution of property claims. *Land and Titles Act 1981 (Samoa)*, s.88 states that every appeal shall be by way of rehearing.

²¹⁸ *Land and Titles Court Act 1981 (Samoa)* s.70.

rehear a matter and vary or set aside its original decision in much the same way as the Appellate Division of today's Court. Decisions of the New Zealand Court could not, however, be appealed to the High Court of New Zealand or to the Supreme Court of Samoa.

Whether or not appeals are permitted by the statute governing the Court, the additional possibility remains that decisions of the Court might be subject to the alternative process of judicial review in the general courts, especially if the Court exceeds its jurisdiction or makes some other error of law. Ouster or privative clauses have been included in the legislation governing the Court at various times in an attempt to block the operation of this alternative process. Section 61 of the 1934 Ordinance declared that the Supreme Court of New Zealand (and from 1962 the Supreme Court of Samoa) could not exercise control over the Land and Titles Court (whether in respect of want of jurisdiction or otherwise) by way of appeal, *certiorari*, *mandamus*, prohibition or otherwise – a classical privative clause designed to oust the possibility of judicial review.

The 1981 Act takes a similar approach. In section 71, the decisions of the Land and Titles Court are deemed to be 'final' and it is declared that no decision or order of the Court shall be reviewed or questioned by any other Court by way or appeal, prerogative writ or otherwise howsoever. This section also purports to bar judicial review of the Court's decisions in the Supreme Court of Samoa.²¹⁹ Yet, as will be explained in Chapter Seven, the effectiveness of these ouster clauses must be doubted.

Nothing would seem to permit the Court to act in a manner that infringes the Samoan *Constitution*, as this is the 'supreme law' of Samoa and binding at all times on the Court. These matters are taken up in more detail in Chapter Seven.

Register of *Matai*

A provision enacted in 1957 provided for a 'Register of *Matai*' to be kept in the Court by the Registrar.²²⁰ Impending Independence was the spur to this development because Independent Samoa, prior to 1991, practised '*Matai* Suffrage', where only the holder of a *matai* title could

²¹⁹ In the late 1980s this ouster clause was challenged in a case that was brought on constitutional grounds before the Supreme Court of Samoa. That decision, along with others, will be discussed in relation to section 71 in Chapter Seven.

²²⁰ *Samoan Land and Titles Protection Ordinance 1934 (N.Z. – Samoa)*, s.30. The amendment of s. 30 to set up a '*Matai* Register' was made in 1957.

vote.²²¹ A 'Register of *Matai*' was therefore necessary and crucial to post Independence elections. A new *matai* appointment was not valid unless the provisions regarding the rightful holder were met and the title was duly registered in the 'Register of *Matai*'. This requirement was later continued in the *Land and Titles Act 1981 (Samoa)*.²²²

The need for a *Matai* Register to facilitate voting in elections suggests that perhaps the hybridisation evident in the Court was not limited to it, and could even be considered the hallmark of the entire governmental framework of Samoa. Here, for instance, the concept of an election was imported but the qualifications for voting were on customary lines.

CONCLUSION

This examination of the legal structure of the Court (its jurisdiction, structure and process) has involved a review of a hundred or more years of legislation. This has brought to light a number of continuities in the legal structure of the Court despite dramatic changes in Samoa's social, cultural and political environment over the years. Changes were made to the name of the Court, and many changes were made in form, but few changes occurred in the Court's basic functions. The original tri-partite intent of 1889, to centrally control, via a judicial institution, matters concerning the natives, their land and customs, was fostered by the German Administration from 1903, nurtured by the New Zealand Administration from 1914, and continued by Independent Samoa after 1962.

The German Commission operated alongside the general courts that were also established to deal with non-native matters. This created a 'dual system' of civil dispute resolution, one largely for native matters and the other largely for the affairs of foreigners or colonials. This 'dual system' was continued by the New Zealand Administration that succeeded the Germans after World War I. New Zealand backing for the Court cemented its exclusive jurisdiction over native lands and titles and ensured all matters of custom pertaining to land and titles were dealt with by this central body. This 'dual system' is the manifestation of a transfer of Western law that Samoa experienced and shows the extent of colonisation Samoan land tenure underwent.

²²¹ *Proposals for Constitutional Development*, (Apia, Government of Western Samoa, January 1956), 11; *Report by the New Zealand Government to the General Assembly of the United Nations on the Administration of Western Samoa for the calendar year 1957* (Wellington, Department of Island Territories, 1958) 31.

²²² *Land and Titles Act 1981 (Samoa)*, ss. 20(c), 22, and 23.

A new dispute resolution process was therefore imposed by the colonising powers, replacing part of the role previously performed at the *aiga* or *nuu* level by *matai*. This mechanism has nevertheless become an integral part of the Samoan legal order. It has been entrenched in the *Constitution*. It operates with Samoans' consent today, possibly because the judges of the Court are *matai*, hearings are conducted in Samoan, and elements of Samoan custom and protocol are followed. What started as a colonial institution that was alien to the indigenous population and its customs has become a heavily indigenised hybrid body. Furthermore, the colonising powers did not expressly abrogate the substantive customary rules relating to land and titles. On the contrary, they empowered the court to enforce them, albeit through a non-customary process. Some customary rules were codified, even into the Samoan *Constitution*, and have become cemented within the legal order of Samoa: for example, the prohibition on the sale of customary land and associated limits on the permissible length of a lease. Other substantive land law rules have been enacted that have no customary counter-part, to meet the needs of the modern state, or of centralised government, such as the Register of private and Government land and the takings legislation. Other substantive rules reflect the partial colonisation and commercialisation of Samoan lands: for example, the recognition and registration of private land titles.

Overall this legislative overview shows, firstly, that the colonisation of the land tenure system of Samoa was of a limited kind, and, secondly, that many of the colonial developments were subsequently continued within the legal system of Independent Samoa, including the continued operation of the Land and Titles Court, the prohibition on the sale of customary land, alongside allowance for limited commercialisation through leasing or compulsory acquisition, in a manner that ensured the continued vitality of the *Faamatai*.

Yet, in spite of the indigenous orientation of the Court, both in its current process and in the law it applies, it cannot be denied that the Court has to a great extent replaced the indigenous *Faamatai*'s role in adjudicating disputes concerning customary land and *matai* titles. It cannot be over-emphasised, however, that because the *Constitution* of Samoa acknowledges custom as an official source of law for the nation, it immediately elevates the role of the Court that is granted exclusive jurisdiction to determine matters concerning customary land and titles. In this way, the Court has been superimposed on to the *Faamatai* social organisation which is still largely intact. The Court nevertheless, now operates, in a different constitutional environment than obtained during the colonial era. It has a special duty to

define and apply Samoan custom and usage concerning customary land and titles. It is how the Court carries out this role or bears this burden that is the subject of the Chapter Six.

CHAPTER FIVE

LITERATURE REVIEW AND METHODS

The preceding chapters of this thesis have set the indigenous context for the entry of the colonial enterprise into Samoa. The limited colonisation of the *Faamatai* system of land tenure is seen in the establishment of the Commission/Court to replace only the *Faamatai* dispute resolution processes relating to customary land and *matai* titles, even if these are at the core of Samoan life and society.

Chapter Three examined the Court's forerunner, the 1889 Land Commission that investigated alien claims to Samoan land. It was through provision for the 1889 Commission in the '*Berlin Act*' 1889 that Western concepts concerning land, such as its classification, registration, individualisation, sale and lease, were formally introduced to Samoa. In this way the *Berlin Act* and the 1889 Land Commission mark the point of entry for these Western, non-indigenous legal concepts. They illustrate a particular aspect of the colonisation: the introduction of foreign or colonial laws.

Chapter Four continued this account of the transfer of colonial law to Samoa by tracing the evolution of legislation enacted specifically for the Land and Titles Commission/Court and related legal measures. The aim of these preceding chapters has been to establish a clear framework for considering the functions of the Commission/Court.

Before we consider the Court closely, however, this chapter will review the existing literature concerning the Court and provide a detailed description of the methods and sources used in this thesis. It should be stated at the outset that the literature on the Court is scant. Very little has been written about the Court itself and general works on Samoa's history, politics, culture, and land law provide only a limited insight into the Court.

For such an important institution, this is surprising. There are standard legal works on South Pacific law,²²³ that note the Court's existence, and briefly state its jurisdiction,²²⁴ but remarkably little sustained writing on its procedures, or the content of the customary norms it applies, or its relations with the general courts, which are considered in Chapters Six, Seven

²²³S. Farran & D. Paterson, *South Pacific Property Law*, Cavendish Publishing, London, 2004; J. Corrin & D. Paterson, *Introduction to South Pacific Law*, Second Edition, Routledge Cavendish, London, 2007.

²²⁴J. Corrin & D. Paterson (2007), 364; AUSAID, *Making Land Work*, June 2008, Vol.2, Chapter 10, 207.

and Eight of this thesis. In fact, one of the few writings specifically on the Court is a brief memorandum written in 1958²²⁵ by former Chief Justice Marsack, President of the Court. Some general historical, political and legal works on Samoa²²⁶ and the South Pacific²²⁷ include brief material on the Court, but there remains a gaping hole in the legal literature which this thesis aims to fill.

THE EARLY YEARS OF THE COURT

Keesing,²²⁸ Gilson,²²⁹ Marsack,²³⁰ and Tiffany²³¹ touch upon the early years of the Court's existence, when it was an international commission dealing with land sales in Samoa in the late 1800s and when it was a German Commission in the early 1900s engaged in resolving disputes concerning customary land and *matai* titles. Gilson, in his work on Samoa between 1830 and 1900, referred to the international commission established by the Berlin Act 1889. He said, regarding the Commission, that "the one durable monument of the Berlin Act [was] the settlement of foreign land claims, complemented by the establishment of a land titles registry."²³² Gilson did not consider the German Commission because the period he covered

²²⁵ C. C. Marsack, *Notes on the practice of the Court and the proceedings and principles adopted in the hearing of cases affecting 1. Samoan matai titles 2. Land held according to customs and usages of Western Samoa*, Land and Titles Court (Justice Department), Apia, July 1958.

²²⁶ F. M. Keesing, *'Modern Samoa' - Its Government and Changing Life*, George Allen and Unwin Limited, London, 1934; R. Gilson, *Samoa 1830-1900 - The Politics of a Multi-Cultural Community*, Oxford University Press, Melbourne, 1970; C. G. Powles, *The Status of Customary Law in Western Samoa*, Submitted for the Degree of Master of Laws at the Victoria University of Wellington, October 1973; S. W. Tiffany, 'The Land and Titles Court and the Regulation of Customary Title Successions and Removals in Western Samoa', *Journal of Polynesian Society* (1974) 85, University of Wisconsin, Whitewater, pp. 35-57; Hon. B.C. Spring, 'The Land and Titles Court of Western Samoa', *The Samoan Pacific Law Journal* Vol. 5(2) 1979, pp 41-58; S. W. Tiffany, 'Politics of Land Disputes in Western Samoa', *Oceania* (1980) 50, Department of Anthropology, University of Wisconsin, Whitewater, pp 176-208; M. Meleisea, *Change and Adaptations in Western Samoa*, Christchurch, New Zealand 1992; S. Vaai, *Samoa Faamatai and the Rule of Law*, National University of Samoa, Apia, 1999.

²²⁷ T. Anesi, 'The land and chiefly titles court of Western Samoa', *Pacific Courts and Justice*, Suva, Fiji, University of the South Pacific, 1977, pp 68-69; L. Holmes, 'Samoa: Custom versus productivity', *Land Tenure in the Pacific*, (ed. R.G. Crocombe), University of the South Pacific, Suva, 1971, pp. 91-105; T. O'Meara, 'Samoa: Customary Individualism', *Land Tenure in the Pacific*, 1987, USP, Suva, pp.74-113; T. Anesi, A. F. Enari, 'The Land and Chiefly Titles Court of Western Samoa', in *Pacific Courts and Legal Systems*, G. Powles and M. Pulea, (eds.), University of the South Pacific in Association with Faculty of Law, Monash University, Suva, Fiji, 1988, pp 107-111; A. S. Epati, 'Lawyers and the Customary Law Court', in *Pacific Courts and Legal Systems*, G. Powles and M. Pulea, (eds.), University of the South Pacific in Association with Faculty of Law, Monash University, 1988, Suva, Fiji, pp. 167-171; C. G. Powles, 'Western Samoa', in *South Pacific Islands Legal Systems*, M. A. Ntuny (General Editor), University of Hawaii Press, Honolulu, 1993, pp 395-432; S. Farran and D. Paterson, *South Pacific Property Law*, Cavendish Publishing, London, 2004; J. Corrin, *Introduction to South Pacific Law*, Second Edition, Routledge Cavendish, London, 2007; *Making Land Work*, Vol.1, Chapter 8, 62-63, Vol.2 Chapter 10, 210-212.

²²⁸ Keesing, 257-259.

²²⁹ Gilson, 404-409;

²³⁰ Marsack, 4.

²³¹ Tiffany (1974), 37.

²³² *Ibid.*, 404.

ended in 1900.

There was no writing on the Court between 1900 and 1958, when Marsack published his memorandum. There was a further gap until 1975 when a Committee on customary land, *matai* titles and the Land and Titles Court²³³ produced a Report which provided valuable insight into the official review of the Court's role, its procedures and practice, plus the need for possible reform. In 1977 and 1988, brief accounts were given by two former officials of the Court, Taulapapa Anesi and Auelua Enari, and by a former Samoan legal practitioner, and current New Zealand District Court Judge, Aeau Semi Epati, in general works on Pacific courts and justice.²³⁴ These works cited or referred to the 1975 Committee Report. Though brief, these accounts show how the Court had been accepted in Independent Samoa. All of these works refer to the value of the Land and Titles Court to Samoa. Anesi and Enari highlight it in their writings.²³⁵ Former Prime Minister Tupua Tamasese Lealofi IV in his speech at the opening of the additional Land and Titles Court in Savaii, in 1970, explained the distinct roles and functions of the Supreme Court and the Land and Titles Court:

*The respective roles and functions of the two courts are different. One is for the maintenance of law and order, the other is for the protection of rights to customary lands and titles – the two basic fundamental things which form the very core of our Samoan society. The decision of the Criminal Courts will affect only those accused, whereas the decisions of the Land and Titles Court have far reaching effect for they are binding even on unborn generations.*²³⁶

Epati cited Prime Minister Tupua Tamasese Lealofi's speech and added that the Court is "a most important, perhaps the most important, court of the Independent State of Western Samoa."²³⁷ These commentators seem to place value on the Court because it deals with customary matters and applies Samoan custom. The Court therefore acknowledges what is at the heart of being Samoan, and of the *Faamatai*: land and *matai* titles. Their opinions and that of Prime Minister Tupua Tamasese Lealofi IV, evident in his speech, show that the Court was

²³³ Committee on Matai Titles, Customary Land and the Land and Titles Court, *Report on Matai titles, customary land and the Land and Titles Court*, 1975, Western Samoa,

²³⁴ T. Anesi, 'The land and chiefly titles court of Western Samoa', *Pacific Courts and Justice*, Suva, Fiji, University of the South Pacific, 1977; T. Anesi, A. F. Enari, 'The Land and Chiefly Titles Court of Western Samoa', in *Pacific Courts and Legal Systems*, G. Powles and M. Pulea, (eds.), University of the South Pacific in Association with Faculty of Law, Monash University, Suva, Fiji, 1988; A. S. Epati, 'Lawyers and the Customary Law Court', in *Pacific Courts and Legal Systems*, G. Powles and M. Pulea, (eds.), University of the South Pacific in Association with Faculty of Law, Monash University, Suva, Fiji, 1988.

²³⁵ Anesi, 69; Anesi and Enari, 110.

²³⁶ Epati, 167.

²³⁷ Ibid.

probably valued because it could be a medium for the acknowledgement and maybe even the preservation of custom.

IDENTIFYING CUSTOM

Powles' 1973 thesis on *The Status of Customary Law in Western Samoa*²³⁸ was not focused primarily on the Court itself. Although he considers the constitution²³⁹ of the Court and its jurisdiction²⁴⁰ pursuant to the *Land Titles Protection Ordinance 1934 (New Zealand - Samoa)*, his primary focus is on custom generally as a source of law in Samoa. Nevertheless, he identifies the Court as a forum where custom is discovered and applied, and writes:

*The Court interprets its jurisdiction widely, as "protector of custom" and, in relation to land and titles, "it is regarded as the supreme authority on the subject." However, the Court's role is primarily conciliatory and it does not pronounce upon custom unless parties require a matter to be heard and determined which involves a dispute over the relevant customary principle.*²⁴¹

Powles concludes that "it would be more correct to say that the Land and Titles Court and the parties before it will assume that the basic customary principles apply unless a party is able to show a local variant of custom in his case – when his allegation will be subjected to the closest scrutiny by Members of the Court."²⁴² He then states that "the main principles of Samoan customs are of general application to *matai* titles and authority and to customary land throughout society," and they "are unwritten but they have now for seventy years been applied by a court established for the purpose."²⁴³ Powles' points seem to be that Samoan customs and principles concerning customary land and *matai* titles are sufficiently general to apply nationally, and that the fact they are not written does not make them any less applicable or legitimate as 'customary law'. Nevertheless, he suggests they should at least be recorded in a suitable form, without freezing their content or preventing their modification as required. In his view, it is the durability of a custom that should determine its life expectancy.²⁴⁴

²³⁸ C.G. Powles, *The Status of Customary Law in Western Samoa*, Master of Laws thesis, Victoria University of Wellington, October 1973.

²³⁹ Ibid., 47.

²⁴⁰ Ibid., 48.

²⁴¹ Ibid., 49.

²⁴² Ibid., 58, 59.

²⁴³ Ibid., 74.

²⁴⁴ Ibid., 84.

Such an approach to the determination of customary 'law' merges the indigenous and the Western. The convenience or efficiency that comes from being able to identify custom clearly, as either generally applicable or a local variation, through recording, can be seen as a Western contribution. On the other hand, leaving open the life expectancy of a custom, while retaining its flexibility, and its capacity for modification, acknowledge the dynamic nature of custom and the need for it to adapt to social changes within the indigenous society. This balancing act is one the Court constantly has to perform because it is both required to act judicially and is constantly immersed in custom.

With regard to the content of Samoan 'customs and usages', a number of writers agree, firstly, that custom has never been statutorily defined. Secondly, custom is part of the 'laws of Samoa' under the 1960 *Constitution*.²⁴⁵ Thirdly, customs concerning customary land and *matai* titles can generally be determined for the whole of Samoa, although there may be some local variations.²⁴⁶ And, finally, custom is unwritten and there is no systematic recording of the customs applied by the Court. Some Samoan customs which are often applied include: *pule* (over lands and titles),²⁴⁷ consent and involvement of *aiga* (extended family) and the *fono a le nuu* (council of *matai*) in title succession and land allocation decisions,²⁴⁸ and the requirement of *tautua* (or service) and blood relationship, in relation to title succession and land use or allocation.²⁴⁹

THE COURT'S PROCEDURE

Apart from observations on custom and its content, the secondary writing also looks at the Court's procedures, using the Court's current governing legislation, the *Land and Titles Act 1981 (Samoa)*, as a framework. Consideration of the Court's procedures focuses on its exclusive jurisdiction in matters concerning customary land and *matai* titles and its composition, the fact its decisions have not been subject to review, the problems it has enforcing its decisions, and the lack of standing within it for the legal profession.²⁵⁰ But this material is limited to a few pages and is mainly descriptive in its treatment of these matters

²⁴⁵ Article 111; Powles, *The Status of Customary Law in Western Samoa*, 23.

²⁴⁶ Marsack, 28; Powles, *The Status of Customary Law in Western Samoa*, 58-59, 73-74; Meleisea, 61.

²⁴⁷ Marsack, 6-9, 14, 20, 25;

²⁴⁸ Tiffany (1974), 35-36; Meleisea, 13,17-18; Powles (1993), 419.

²⁴⁹ Marsack, 11, 14-15, 18, 23, 26-27; Holmes, 91,93; Powles, *The Status of Customary Law in Western Samoa*, 49-50, 52, 60, 62, 84; O'Meara, 75-78, 80-81, 83, 91.

²⁵⁰ Marsack, 6; Powles, *The Status of Customary Law in Western Samoa*, 47-49, 53, 56-57; Spring, 47,49; Enari and Anesi, 110-111; Epati, 170-171; Powles (1993), 405; Vaai, 260; Farran and Paterson, 246; Corrin, 364; Meleisea, 51,54, 61.

by recording observations of how the Court functions.

PROPOSALS FOR REFORM

In 1975, a little over a decade after independence, the Committee on *matai* titles, customary land and the Land and Titles Court was established to consider reform to the Court. Samoa was by then rapidly developing its own identity and values.²⁵¹

The 1975 Report described the Court as the key to maintaining a balance between the retention of traditional processes and having a realistic appreciation of changing times.²⁵² The Committee's Report and recommendations covered customary land, *matai* titles and the Court itself. With regard to the Court, its first recommendation was that "the legislation and practice of the Court needed a complete overhaul involving considerable expansion to meet rapidly growing needs of Samoa".²⁵³ The Committee had noted in its Report that in the fifteen years since independence the Court's work had grown by "more than four times and people are looking to the Court, more than ever before, to resolve disputes and problems in their daily lives."²⁵⁴ Related to this was the recommendation that Court procedures should be readily available to the public and the public should be able to understand them.²⁵⁵ Some new procedures recommended included those that would encourage: settlement wherever possible, adequate preparation for every hearing, full examination of the facts of every case, time for careful deliberation by the Court, effective enforcement of decisions, and adequate review of Court decisions.²⁵⁶

Secondly, the Committee believed that "the customary legal system should be retained, not for its own sake but as an instrument for preservation of peace and harmonious relationships in society. A strong Court is needed to help custom carry out its task in modern society."²⁵⁷ The Committee then went on to outline the basic requirements for an effective Court which included: impartial and capable judges, qualified registrars and staff, and new Court houses,

²⁵¹ There is brief consideration of recommendations for reform in Anesi and Epati's accounts on the Court, where they refer to the 1975 Report.

²⁵² Committee on Matai Titles, Customary Land and the Land and Titles Court, *Report on Matai titles, customary land and the Land and Titles Court*, 1975, Western Samoa, 2,3,4.

²⁵³ *Report on Matai titles, Customary Land and the Land and Titles Court* 1975, 4.

²⁵⁴ *Ibid.*, 95.

²⁵⁵ *Ibid.*, 5.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*, 4.

capable of dealing with the increase in workload.²⁵⁸

The Committee found that “the President of Land and Titles Court should be equal in some respects to the Chief Justice of the Supreme Court. A President for the Court should be appointed as soon as an experienced person becomes available.”²⁵⁹ This was only implemented in 2004.²⁶⁰

The Committee believed that the dignity of the Court required every member of the Court to have the status of judge. It suggested that the office of Assessor be replaced by that of Temporary Judge and that Judges and Temporary judges should all undergo a period of training and supervision.²⁶¹ The Committee believed that the change in title would reflect the actual role performed by the Assessors.²⁶² There was perhaps also the thought that a change in title would be followed by a necessary change in salary which was being recommended for the Judges.²⁶³

The final recommendation of the Committee concerned the state of the records of the Court. Steps should be taken to protect them as they were dangerously exposed to fire and theft. In addition, new procedures should be laid down to encourage a secure and efficient record system.²⁶⁴

When Anesi’s account of the Court was updated in 1988, the 1975 Committee’s recommendations still had not been implemented. By 1988, the Court’s current governing legislation, the *Land and Titles Act 1981 (Samoa)*, had been passed and a quick glance at that legislation shows that it did not implement any of the recommendations. Nevertheless, the legislation reflects the Committee’s overall opinion that the Court is a valued institution and should be continued.

It was almost another decade until further research on the Court was carried out, notably by Vaai.

²⁵⁸ Ibid., 5, 104.

²⁵⁹ Ibid., 4, 105.

²⁶⁰ Chapter Six discusses the appointment of the Land and Titles Court’s inaugural President.

²⁶¹ *Report on Matai titles, Customary Land and the Land and Titles court 1975*, 5.

²⁶² Ibid., 111.

²⁶³ Ibid., 106.

²⁶⁴ Ibid.

THE VIEWS OF VAAI²⁶⁵

In the late 1990s, a major work was finally published that considers the Court's role, even if that was not the work's primary focus. Saleimoa Vaai's thesis on the *Faamatai and the Rule of Law*, published in 1999, looks at the Court briefly, and in a less positive light than previous commentators. He acknowledges that the Court has had some success "in defusing tensions and effecting settlements and changes to Samoan customs and traditions" and that its "investigatory procedures without the formality of court procedures and the involvement of legal practitioners have wide support in the community."²⁶⁶ He concludes, however, that:

*the Court is ...an institution with anachronistic colonial methods that are hostile to the Constitution and furthermore open to administrative and bureaucratic abuse... in need of fundamental review. The maintenance of such a separate court system furthermore sanctions 'legal apartheid' and 'second class justice.' ... In the adopting of a constitutional system in which custom and customary law is made subservient to a foreign structure, a regime was entrenched in which Western influence would be more likely to dominate changes that would inevitably come and traditional values, practices and traditions would consequently erode at a rapid rate.*²⁶⁷

Vaai's negative view of the Court seems to be based on the fact that he sees the Court as one of many examples of the marginalisation of custom during colonisation which continued even after independence and found its way into the post-colonial constitution.²⁶⁸ Vaai challenges the claims to autochthony of many post-colonial Constitutions such as Samoa's and does not see the continuation of the Court as an acknowledgment of custom but as cementing the subservience of custom to Western legal forms. So, although the Samoan Constitution acknowledges custom as a source of law, continues the Court, acknowledges custom in the preamble, and acknowledges the existence of customary land and *matai* titles, this is seen as lip service, because the basic constitutional framework within which it operates has not changed with independence. He therefore views custom and the indigenous, within these arrangements, as subservient

²⁶⁵ Asiata Dr. Saleimoa Vaai is a leading Samoan legal practitioner. He is currently a Member of Parliament and was formerly the Deputy Leader of the Opposition. He also previously headed the Centre for Samoan Studies at the National University of Samoa. He was the first Samoan to gain a PhD in Law and I believe is still the only Samoan who holds that qualification.

²⁶⁶ Vaai, *Faamatai and the Rule of Law*, 263.

²⁶⁷ *Ibid.*, 263-264.

²⁶⁸ *Ibid.*, 244, 263, 264, 265.

to Western law.²⁶⁹

After independence, on Vaai's view, this imbalance was entrenched in the Supreme Law of the nation which was supposedly given by the indigenes to themselves. To return balance and stability to this situation, Vaai suggests that a certain approach to judicial interpretation is required.²⁷⁰ That is, the judiciary should interpret the Supreme Law (the Constitution) in a way that corrects the imbalanced view of custom vis-à-vis Western law. Then the colonial basis of Samoan law, and of Samoa's *Constitution*, will be truly redressed in favour of Samoans.

Vaai appears to be arguing for a different form of decolonisation in Samoa. Progressive indigenisation of the Court is not necessarily inconsistent with this objective, however: that is, with the judiciary giving more weight and consideration to custom in the procedures followed in the Land and Titles Court, as well as strongly emphasising custom in the general courts of Samoa. However, Vaai's research was undertaken in the 1990s. It is possible that he might take a different position if his observations of the Court had been made more recently.

In this thesis, I argue that the *Faamatai* experienced only a partial form of colonisation with the establishment of the Court, because the Court only took over the dispute resolution mechanism of the *Faamatai* whilst still acknowledging and applying the substantive customs as to land and titles. This meant a lesser degree of decolonisation was required when independence occurred, and this decolonisation, it is argued, occurred through a process of indigenisation of the Court, leading its dispute resolution mechanism to more closely resemble that of the *Faamatai* before its usurpation by the Court. This partial colonisation of the *Faamatai* is seen in this thesis as an example of hybridisation. The structure of the Court may be foreign or colonial in origin but the system of land tenure it deals with, and the substantive law it applies, are customary or indigenous.

In contrast, Vaai views the co-existence of a foreign structure and customary law more as an example of a double-standard: of the application of different legal rules and different judicial

²⁶⁹ Ibid., 265, 268.

²⁷⁰ Ibid., 265.

processes to the coloniser and the colonised.²⁷¹ In this observation, I believe Vaai is referring to the possibility that the law of the coloniser - Western law - is seen as legitimate and superior, and is viewed as the preferred source of law in the general courts, where relations between Samoans and others are adjudicated (especially commercial relations), whereas the customs of Samoans (even if mentioned expressly as a source of law in the *Constitution*) are considered inferior, and are rarely applied in the general courts in preference to Western law.²⁷² The application of custom is relegated in practice to the Land and Titles Court, which has a limited jurisdiction, dealing almost exclusively with relations between Samoans. In the general courts, on the other hand, the application of custom, in preference to Western law, is very much dependent on judicial discretion and interpretation.

Vaai's concerns therefore focus primarily on Samoa's constitutional arrangements and judicial choices concerning sources of law. He uses the Land and Titles Court to illustrate how the imbalanced and non-autochthonous character of the Samoan *Constitution* is perpetuated by maintaining a separate Court in which custom is applied and contained. It is as if custom is only good enough for this separate institution and is not on equal footing with Western law, which is illustrated by its not being given an equal hearing in the general courts. This position, Vaai suggests, is due to the Samoan constitutional arrangements.

There are certainly valid reasons for taking this position but perhaps it places insufficient weight on the fact that the *Constitution* is supreme law, that it continued the Land and Titles Court, that it cites custom as a source of law in Samoa, that it provides for customary land and *matai* titles to be held according to Samoan custom and usage, and that it prohibits the sale of customary land. It is true that these provisions do not make the entire *Constitution* autochthonous or indigenous and certainly much depends on how the general courts prioritise the various sources of law in practice, but the value of the acknowledgments of Samoan custom in Samoa's supreme law should not be overlooked. Instead, it may be more productive to emphasise the customary elements in the *Constitution* and to build creatively on these foundations.

Vaai's views also depart from those expressed in this thesis when he argues that the Court

²⁷¹ Ibid., 244.

²⁷² Ibid., 263, 264.

remains colonial in form and continues to hold the Samoan people in colonial shackles.²⁷³ Furthermore, Vaai seems to say that Samoans have embraced and continued this colonial institution because they have internalised the colonial perception to such a great degree that they no longer feel it is foreign but has become the norm.²⁷⁴ He refers to the notion of an *introppressor*,²⁷⁵ wherein the oppressor has been internalised by the oppressed.²⁷⁶ In contrast to this observation, I am proposing that the Court, although colonial in origin and structure, has been progressively indigenised, especially in the years preceding independence, and again more recently, so that it is questionable whether it should now be viewed as a colonial institution at all.

DISCUSSION

In summary, much of the literature on the Court to date deals relatively briefly with its history, its processes and procedures, and the custom and usages it is meant to apply in its decision-making. In most of the literature, the Court is described as a product of colonisation that has supplanted customary processes and still exhibits its colonial roots. It is nevertheless considered an important institution because it determines disputes concerning customary lands and *matai* titles, which are at the core of Samoan society and life, but its processes are considered in need of overhaul, mainly with regard to matters of efficiency and staff training.

This thesis seeks to expand greatly on that secondary material in a number of areas. Chapter Two considered the customary principles of the *Faamatai* concerning customary land tenure, *matai* title succession and customary decision-making. Chapter Three considered the international commission, the precursor to the German Land and Titles Commission, the forerunner of the Court of today. Chapter Four considered the statutory history or evolution of the Court from when it was established as a Commission by German Ordinance in 1903 until 2005. Chapter Six considers in detail the processes and procedures of the Court, official and otherwise.

In Chapter Seven the position maintained in much of the secondary material, that the decisions of the Court are not subject to review in the general courts, is addressed and questioned. Chapter Eight offers a taste of the range of matters that come before the Court,

²⁷³ Ibid., 264.

²⁷⁴ Ibid., 260.

²⁷⁵ Ibid., 265.

²⁷⁶ Ibid., 267, 268.

analysing a number of its decisions from 1903-2008, and the 'customs and usages' it has applied. This will enable us to assess the claim that customs concerning customary land and *matai* titles can, in general, be determined for the whole nation, with a few exceptions due to local variations. The decisions considered become much more informative after 1981, following introduction of the legislative requirement that reasons for decisions must be provided, not just orders of the Court. This permits clearer inferences to be drawn as to the content of the customs the Court applies.

Chapter Nine looks at possible threats to the Court and custom, while Chapter Ten considers the future, much like the 1975 Committee's Report, with the hope that some of the conclusions reached in this study will bring about needed change.

What follows is a detailed record of the various sources this thesis drew upon, how these sources were accessed, and their validity.

METHODS AND SOURCES

This is a multi-method study in which a variety of sources and approaches to data collection have been employed. The aim has been to view the work of the Land and Titles Court from several different angles, both historical and contemporary, in order to obtain a composite picture of its functions as a whole. Primary legal material has been studied such as legislation, decisions of the Court of Appeal and Supreme Court of Samoa, and decisions of the Land and Titles Court of Samoa plus a variety of secondary writing on the Court.

Furthermore, I have relied in part on my own observations and experience of the Court in the course of my employment there, and I have interviewed judges and politicians, concerning its work.

Finally, contemporary government documents and policy papers in the public domain have been scrutinised concerning likely future trends in the life of the Court.

Further detail on these sources and data collection methods, and on approaches taken to locate material that was difficult to obtain, and on issues of consent and confidentiality, is provided below.

FIELD WORK IN SAMOA

Much of the research for this thesis was conducted in Samoa, and in the Samoan language, during the years 2004-2006, while I was employed in the Appeals section of the administration of the Land and Titles Court. My employers were aware that I was engaged in a dual capacity, as researcher and employee, and, with the permission of the Court, I was able to obtain access to some of the Court's decisions to study their content. I was also able to observe the Court's proceedings in action, interact with its judges and administrative staff, and participate in policy debates concerning the legislation relating to its work. I have drawn on all this material in writing this thesis. I did not canvas the opinions of the general public or ordinary litigants in my fieldwork because that would be another entire research project in itself.

LEGISLATION

With the exception of the early German ordinances concerning the Court, all the legislation relied upon was officially published in the usual way, so is readily available in the public domain. One very important piece of legislation was difficult to locate as none of the secondary sources consulted revealed its existence or location. This was the original Imperial German Ordinance, made by German Samoa's first Imperial Governor, Dr. Wilhelm Solf, in 1903, to establish the Land and Titles Commission, the predecessor of the current Court. When I happened upon a reference to this Ordinance in 2007, I had spent a little over a year trying to identify the original legal basis for the establishment of the German Commission in 1903. I then discovered the existence of this Ordinance from a reference to it in the *Samoa Land and Titles Repeal and Savings Order 1935 (N.Z.)*. Via this 1935 Order, certain instruments which originated under the 1903 Ordinance and were still in force when the *Samoa Native Land and Titles Commission Order 1920 (N.Z.)* was enacted, were deemed to have originated under the 1920 New Zealand legislation.²⁷⁷ The source or location of this German Ordinance noted in the 1935 Order was the 'Samoanisches Gouvernements Blatt', a German - Samoa Government Gazette. Through further research and assistance from Dr. Dirk Spenneman copies of this publication were found in the University of New South Wales Library, Australia. I inter-loaned the relevant issue of the 'Samoanisches Gouvernements Blatt' and received a piece of microfiche. The Ordinance was in German and the fiche was not clear enough to allow a legible copy to be scanned and printed, so I copied the document

²⁷⁷ *Samoa Land and Titles Repeal and Savings Order 1935 (N.Z.)*, Clause 5(2).

by hand. I gave copies of it to three German speakers to check for inaccuracies in my copying. It was then translated into English by Emeritus Professor August Obermayer at the University of Otago. A blurry copy of the microfiche received is provided in the Appendix as proof of its existence.²⁷⁸

There is another piece of German legislation that is important in establishing the origins of the law concerning customary land in Samoa. That is the *Constitution Order 1900 (Germany)* which provided for the non-alienation of customary land.²⁷⁹ I have not located a copy of this legislation, which would be in the German language, but have found references to it in reliable secondary sources.

DECISIONS: COURT OF APPEAL AND SUPREME COURT OF SAMOA

The decisions of the general courts of Samoa are readily available to the public. Several of these decisions are relied upon in the discussion of the relationship between the Land and Titles Court and other courts in the Samoan legal system. These are all decisions of judicial review proceedings wherein decisions of the Court have been subject to review in the general courts, including subsequent appeals.

DECISIONS: LAND AND TITLES COURT OF SAMOA

The major part of my primary research on these decisions was carried out in Samoa as the Records of the Court are not found elsewhere. Decisions of the Court are neither published nor readily accessible to the public. There is restricted access to them, which is monitored by the Registrar of the Court in Samoa. Permission to obtain access to these decisions was therefore required.

Eventually, with the permission of the Court, I was able to obtain access to, and copy, 480 decisions of the Court from a variety of decades in the Court's life. Although attempts were made to select the decisions on a planned basis, in the end the decisions studied were simply those to which access could properly be obtained. Nevertheless, a large and unprecedented number of decisions has been studied. This material is unique and is not generally available to the public. Its analysis has been of great importance to the chapter on the content of the Samoan customary land laws applied by the Court.

²⁷⁸ Appendix B.

²⁷⁹ See Chapter Four, Footnote 164.

The decisions of the Court are kept in files, which are tracked using a Card Index system. Each *nuu* (geographical location) has one or several index cards depending on the number of matters from that *nuu* that have been the subject of proceedings before the Court. The index cards are filed alphabetically using the name of the *nuu* where the relevant *matai* title originates, or the customary land concerned is situated. There are over three hundred *nuu* in Samoa. Each matter has its own file. Each file may contain a number of different proceedings concerning the same *matai* title or customary land. For example, within a file on the *matai* title 'X' there will be decisions or correspondence from as early as the 1900s to as recently as last year. One decision might deal with the determination of the founding heirs of title 'X' and another could be about objections to bestowal of title 'X' at a later time. Therefore, although the proceedings filed vary in time and subject, because they all relate to title 'X', the records are kept in one file. One file however does not necessarily mean one 'bundle' of documents. Because some *matai* titles and customary land have been greatly litigated, although there is only one file number, that number may refer to a number of 'bundles' of Court records or documents.

The estimated number of files is over fifty thousand with a number of different matters and decisions in each file. The index cards record the names of the petitioner, the respondents, the file number, dates and the matter concerned. These details were also entered in the 'Judgment Book' along with the decision or orders. The matters are not classified or categorised in any way within the individual files. The only search option is through the name of the *nuu* and then the *matai* title or the 'name' of the customary land concerned.

The approach I took to obtaining access to the decisions contained in these files was as follows. In June 2003, on a visit to Samoa, I provided the Chief Executive Officer of the Ministry of Justice and Courts Administration (MJCA) (also the Registrar of the Land and Titles Court) with a copy of the proposed outline for my thesis. I planned to undertake a close reading and analysis of the decisions of the Court from its inception in 1903 to 2002, particularly to assess how the Court determined, defined and applied 'customary law'. For this purpose I needed to obtain copies of decisions of the Court, and as these decisions numbered in the tens of thousands I had to decide on a method of selection. Because I wanted to observe any possible changes over time I chose to take decisions from historically significant years such as: 1903, when the Land Commission began under German Administration; 1914, when World War I broke out and the Military Occupation of Samoa by

British troops began; 1918, when World War I ended; 1920, when the New Zealand Administration of Samoa officially began; 1937, when the Commission became a Court under New Zealand Administration; 1939, when World War Two broke out; 1943-1945, around the end of World War II; 1955, ten years after World War Two; 1960, when the *Constitution* of Independent Samoa was framed and two years before Independence; and 1962, when Samoa became independent. After Independence I chose decisions from every tenth year: 1972, 1982, 1992, and 2002.

At the same meeting with the Registrar in June 2003, I was given permission to view the Court's 'Judgment Book', the central record of matters and their decisions from 1903 up to the mid 1980s. There were a total of ten Volumes of the 'Judgment Book.' The entries in the 'Judgment Book' did not record the names of the judges who sat on the bench for each decision. There were one or two entries for the 1980s that listed the bench, otherwise one had to go through the relevant file to find out who was on the bench and even then it was almost impossible to identify them because of illegible signatures or hand writing. There were years where decisions were noted in the 'Judgment Book'. These were: 1924, 1926, 1927 and 1944. When I enquired into this, the only reason I was given by the Records Section of the Court to explain this omission was that the records or files had perhaps gone missing. This would suggest that the 'Judgment Book' was not kept by the Commission from the beginning but was a central record created retrospectively, although it may have been kept simultaneously at some points. It is not clear when this central record was created.²⁸⁰

I went through all ten Volumes of the 'Judgment Book' and noted down the Reference Numbers for every decision from the selected years. Because the 'Judgment Book' ended in the mid 1980s, there was no central record from 1981 to date. This period included the selected years of 1992 and 2002. The 'Judgment Book' had apparently been discontinued because the decisions had become lengthy. This was due to the fact that the reasons for the decisions had to be set out and formed part of the decisions after 1981. Prior to that time, the decision consisted only of the orders of the Court on a matter, at most ten lines. At the end of

²⁸⁰ More recently (March 2007) a 'Registrar's File' has been created. This is intended to be a collation of copies of all the decisions of the Court from this point onward. In this way it is similar to the 'Judgment Book' but more comprehensive. It will be interesting to observe how this development will unfold.

this process, I identified seven hundred and forty nine decisions that I needed copies of, excluding decisions from 1992 and 2002.

When I returned to Samoa at the end of 2003 to carry out my primary research, I began trying to collect the seven hundred and forty nine decisions I had previously identified. During my primary research in 2004, and later when I was employed with MJCA and the Court in particular, I found it very difficult to obtain copies of these decisions in practice even though I had been given written permission by the Registrar of the Court to access them. Pursuant to section 94(2) *Land and Titles Act 1981 (Samoa)* permission for this could be obtained from either the President or the Registrar.

Eventually, I was able to obtain access to 480 decisions, with the permission of the Registrar. Some of these were from the years selected for study, others were not, but were made available. In the end I have simply studied every decision to which access could be obtained. The outcome is that the sample is partly selected and partly random. The decisions are drawn from many different years, from 1903 to 2008, and cover many different subjects. They may not be fully representative of the Court's decisions as a whole and are not presented as such. Nevertheless, a substantial body of the Court's decisions has been analysed, for the first time, permitting some conclusions to be drawn about the issues addressed and the content of the customary rules applied. More information on these decisions is provided in Chapter Eight.

I would therefore like to acknowledge the assistance of, and record my gratitude to, the Chief Executive Officer of MJCA and the Registrar of the Land and Titles Court, Masinalupe Tusipa Masinalupe, and his staff, for allowing me access to, and copies of, the decisions of the Court that are used in this thesis.

CASE STUDY

In Chapter Six, a case study is used by way of illustration of a particular dispute that came before the Court in 2005-2006. This case study, which will be referred to as 'LC 123', was chosen because I had the opportunity to follow the entire proceedings during my fieldwork at the Court. It is a recent example illustrating the practice and procedure of the Court from the beginning to the end of a matter. Often continuity is lost when the time between the initial hearing and the end of the appeal process is separated by a number of years, which has been the case in the Court on many occasions. In this case, however, the matter proceeded with

some speed, and all stages, from initial filing, through hearing in the lower court, followed by the appeal, were heard in little over a year. Such speed in the handling of matters is not typical.

The subject matter of the case is interesting and increasingly common. The case is not advanced as one that is necessarily representative of the Court's work, as the Court handles many different kinds of disputes, but it furnishes an example of a dispute from start to finish. To preserve the anonymity of the litigants, fictitious names and numbers are used.

OFFICIAL REPORTS

At several points in the thesis, reliance is placed on government reports. Chapter Nine, for example, refers to the Working Group Report for the Economic Use of Customary Land Project. This Report was tabled in Cabinet in 2006 and is readily found on the website for the Asia Development Bank that funded the Project and compilation of the Report.

NEWSPAPERS

In 2003, I examined the collection of Samoan Newspapers in the Hocken Library (Dunedin, New Zealand) and in the Samoa Public Library. As a consequence, there is reference throughout the thesis to issues of the 'Western Samoa Mail' and more recent Samoan Newspapers, such as 'The Samoa Observer'.

PERSONAL INTERVIEWS

I approached nineteen people in Samoa for interview. Some were selected because of their knowledge of Samoan custom, customary land, *matai* title, or legal and policy matters. Others were selected because of their experience with the Court through their positions (past or present). All of them without exception are influential Samoan community, church or political leaders. Fifteen of those approached agreed to be interviewed. As some agreed to a follow up interview, I carried out eighteen interviews in total. The interviews were not intended to be comprehensive or to canvas the full spectrum of opinion on the Court, but to examine an important range of opinion by asking questions of a few key players in Samoan society concerning the Court and its functioning. These interviews offer a 'taste' or 'flavour' of Samoan opinion concerning the Court. This should not be seen as a scientific survey in that such morsels are not categorical, and do not meet a scientific standard of proof. They are not proffered as conclusive.

The shortest interview took about an hour and the longest three hours. The interviewees were all asked questions regarding the history, practice, legislation, strengths, and weaknesses of the Court, customary land and *matai* titles, from their experience or point of view. Further questioning then followed, depending on their particular area of expertise, or the direction they wanted to take the interview. For example, if they were involved more in the practice of the Court, or in the passing of relevant legislation, then discussion concentrated on those points. Follow up interviews were made if the initial interview raised any issue that needed clarification or elaboration.

All of the interviews were transcribed. Where a tape recorder was not used, notes were taken of the interviews. In the case of hand written notes, transcripts were subsequently endorsed by the interviewees. The transcribed interviews were analysed according to the answers provided by the interviewee to the questions that all were asked. Their answers are incorporated into discussion in the chapters at relevant points. Most of the interviews were carried out in the Samoan language with some being in both English and Samoan. The language used depended on the interviewee. All interviews were carried out in Samoa and all interviewees were Samoan. Ethical approval was obtained for these interviews in accordance with the University of Otago Ethics Committee requirements.²⁸¹

The interviewees include:

- One of the Council of Deputies and a former Prime Minister, at the time of the interview, who is now the Head of State – His Highness Tuiatua Tupua Tamasese Efi. His Highness was the Prime Minister when the 1981 Act was passed;²⁸²
- The current Prime Minister of Samoa – Hon. Tuilaepa Lupesoliai Sailele Malielegaoi;²⁸³
- The current Chief Justice and former Attorney General – Patu Tiavaasue Falefatu Maka Sapolu;²⁸⁴
- The first and current President of the Land and Titles Court, former Minister of Natural Resources and Environment (MNRE - includes Lands), and former Secretary of Justice – Hon. Tagaloa Donald Charles Kerslake;²⁸⁵

²⁸¹ www.otago.ac.nz/policies/ethics/UniEthicsCommittee.

²⁸² October 2006, Apia, Samoa.

²⁸³ July 2006, Apia, Samoa.

²⁸⁴ August 2006, Apia, Samoa.

²⁸⁵ August and September 2005, Apia, Samoa.

- The current Minister for MJCA – Hon. Unasa Mesi, whose portfolio includes the Land and Titles Court,²⁸⁶
- The current Minister of Works Transport and Infrastructure (MWTI), and former Minister for MNREM – Hon. Tuisugaletauatele Sofara Aveau. The leasing and compulsory acquisition of customary land is administered by MNREM,²⁸⁷
- Former Minister of Economics and Development for Samoa – Hon. Le Tagaloa Dr. Pita,²⁸⁸
- Professor of Samoan Language, Culture and Philosophy, and former Member of Parliament – Aiono Dr. Fanaafi,²⁸⁹
- Current Member of Parliament, former Minister of Education, and former Leader of the Opposition – Hon. Le Mamea Ropati Mualia,²⁹⁰
- Current Member of Parliament, Barrister and Solicitor, and former Deputy Leader of the Opposition – Asiata Dr. Saleimoa Vaai,²⁹¹
- Former Director of Lands – Faamausili Leinafo Tuimalealiifano,²⁹²
- One of five current Deputy Presidents of the Land and Titles Court, and former Registrar of the Land and Titles Court – Fonoivasa Lolesio Ah Ching,²⁹³
- The current Chief Executive Officer for MJCA, and Registrar of the Land and Titles Court – Masinalupe Tusipa Masinalupe,²⁹⁴
- Roman Catholic Archbishop of Apia, Samoa – His Worship Alapati Mataeliga. The Roman Catholic Church is one of the biggest landowners in Samoa,²⁹⁵ and
- The then Secretary of the Congregational Christian Church of Samoa (CCCS) – Dr. Iutisone Salevao.²⁹⁶

All the interviewees are *matai* except for His Worship the Archbishop and the Secretary of the CCCS. These two men were interviewed particularly because the Roman Catholic Church and the CCCS are major landholders in Samoa. A number of other Samoan leaders of a similar kind were approached for an interview either because of the landholdings they

²⁸⁶ August 2006, Apia, Samoa.

²⁸⁷ February 2006, Apia, Samoa.

²⁸⁸ August 2006, Apia, Samoa.

²⁸⁹ July 2006, Apia, Samoa.

²⁹⁰ August 2006, Apia, Samoa.

²⁹¹ August 2006, Apia, Samoa.

²⁹² August 2006, Apia, Samoa.

²⁹³ August 2005, Apia, Samoa.

²⁹⁴ August and October 2006, Apia, Samoa.

²⁹⁵ August 2006, Apia, Samoa.

²⁹⁶ August 2006, Apia, Samoa.

administered, or because of their role in formulating government policy concerning customary land or in administering projects that will affect customary land, or in drafting legislation that would affect the Court or customary land, but they declined or the interview did not eventuate.

Regarding Hon. Le Tagaloa Dr. Pita and Aiono Dr. Fanaafi, it is not accidental that their names are similar to mine as they are my parents. They were interviewed particularly in connection with the *matai* titles they hold, which I have used as examples of a family title, and a paramount title, in Chapter Two. Additionally, they both have a vast store of knowledge and experience concerning matters of Samoan custom, language, philosophy and the processes of the Court, which was the second reason for selecting them as interview subjects. Perhaps the most important reason for selecting them is due to my respect for and observation of Samoan protocol. According to Samoan custom, it is unseemly and presumptuous for one to *tala gafa* (recount another person's genealogy or land entitlement). I therefore cannot speak with any authority on matters concerning another person. However, I do have the right to speak of the titles that my parents hold and to which I am connected. Even this I have approached with much care, conscious that I may have offended another's sense of protocol.

I wish to express my sincere gratitude to all those who were interviewed. The assistance they have provided is invaluable. Knowledge of Samoan culture and traditions is pivotal to the workings of the Court. Under Samoan custom and tradition, leaders are regarded as keepers of this knowledge, very little of which is in written form. I am therefore humbled by the willingness of these leaders of Samoa to share this knowledge with me and the future generations of Samoa. *Ia alofa le Atua o manu – aua nei tofatumoanaina la outou tofa – ona e mua le vao o le auauna. Ae, ou te palea la outou pule to, Sao!*

PERSONAL CORRESPONDENCE

Chapter Four refers to personal correspondence with Professor Dr. Peter Hempenstall of Canterbury University, Christchurch, New Zealand. This correspondence was necessary when I was trying to find out more information about the beginnings of the Land and Titles Commission under the German Imperial Rule of Samoa and the first Imperial Governor of German Samoa – Dr. Wilhelm Solf. Dr. Hempenstall has researched and written extensively on Dr. Solf and his Administration, and the German presence in Samoa and the South Pacific.

PERSONAL EXPERIENCE

Employment

From 2004 – 2006 I was employed by the Ministry of Justice and Courts Administration (MJCA) in Samoa. The Land and Titles Court of Samoa operates under the wing of the MJCA, and I worked in the Appeals Section of the Court. My work there included: receiving Applications for Leave to Appeal, preparation of Appeal files for the Appellate Division of the Court, preparation of reports for Lower Court hearings, and preparation of reports for the President and the Registrar of the Court concerning the interpretation of legislation, especially regarding practice and procedure. Although I worked in the Appeals Section of the Court, I had the opportunity to represent the Chief Executive Officer and the Ministry on Working Groups and Committees concerning the review of the process of leasing customary land and the *Chattels Transfer Act 1978 (Samoa)* and its proposed replacement. During that time I was also seconded to the Office of the Attorney General for a year. While in the Office of the Attorney General I was a member of the Civil Team. The main reason I was seconded to the Attorney General's Office was to work on the preparation or research for cases where decisions of the Court were the subject of judicial review proceedings. I use observations made from my experience as an employee of the Court and the Office of the Attorney General in this thesis.

Family Matters

The Court is a part of everyday life for Samoans, and is frequently Samoans' first exposure to 'the law'. I am an example of this, having frequently been to the Court for matters concerning the various *matai* titles of which I am a *suli* (heir) and the lands pertaining to these titles. I have used personal observations made during the hearing of these family matters in this thesis.

CHAPTER SIX

THE PRACTICE AND PROCEDURE OF THE COURT

Chapters Two, Three and Four provided an historical overview of land tenure in Samoa and described the establishment of the Court with particular reference to its governing legislation. Chapter Four ended with the adoption or inheritance of the Court by the Independent State of Samoa at the formal end of the colonial enterprise. Two questions might be posed, on the basis of this material, about the continuation of the Court: *why did an independent nation retain this colonial creation; and how would it change or evolve under new, indigenous management?* The main response, as we will see, lay in a process of ‘indigenisation’ or ‘hybridisation’ of the Court, which may be viewed as a form of decolonisation. The hybrid that is the Court today is a reflection of the happy balance of the colonial and the indigenous that the Samoans, through their independent government, have adopted. A colonial structure has been continued within which Samoan custom and usage are applied, observed, or deferred to.

Discussion of the Court’s operation will be structured around the following three headings:

1. Practice and Procedure
2. Record Keeping and Registers
3. Precedent and *res judicata*

The provisions of the *Land and Titles Act* 1981 (‘the Act’) will be considered first. Where relevant, reference will be made to the *Land and Titles Court Bench Book* (‘the Bench Book’) launched at the end of 2003. Problems identified and legislative amendments in the pipeline will be discussed as they arise. Personal interviews, correspondence and the experience gained while working at the Court will be used where necessary or relevant.

The Case Study referred to in Chapter Five will also be used here to illustrate the process of the Court. ‘LC 123’ concerns a petition filed by ‘Lupe X’ to remove ‘Ve’a Y’ from all lands

pertaining to the title 'Lupe' of 'Tiasa' in 'Uso', which is a *pitonuu* of the geographical location (*nuu*) known as 'Mau' on the island of Upolu in Samoa.²⁹⁷

PRACTICE AND PROCEDURE

This section discusses practice and procedure in the Court, and in the Office of the Registrar that receives petitions and queries. As discussed in Chapter Four, the Court has exclusive jurisdiction in all matters relating to customary lands and titles.²⁹⁸

Initiating Proceedings

Proceedings before the Court are commenced by filing a petition.²⁹⁹ Section 42(1) of the 1981 Act sets out the process. It is commenced by an oral or written notice to the Registrar by an interested Samoan. On receipt of such notice the Registrar prepares a petition showing the nature of the particulars of the claim or dispute, the relief sought, the names of the petitioner, the respondent and the *nuu* they come from.³⁰⁰ A petition or other document in connection with any proceeding before the Court may be prepared on behalf of any party by a Solicitor,³⁰¹ although solicitors are not entitled to appear or be heard before the Court.³⁰² Nevertheless, every petition must be signed by the petitioner and sworn before the Registrar.³⁰³ When the petition is filed the Registrar sets it down for hearing at the next available sitting of the Court.³⁰⁴ The current fee for filing a petition is SAT\$40.00.³⁰⁵

²⁹⁷ The case study has been given a fictitious file number in order to protect the identity of the parties and the judges in this case. File Numbers for cases in the Land Titles Court are usually preceded by 'LC' for matters from the island of Upolu and 'ALC' for matters dealt with on the island of Savaii. The Case Study file number will be 'LC 123' as the matter is from a *nuu* (geographical location) in Upolu. The fictitious name which will be used for the *nuu* is 'Mau'. The litigants concerned will be referred to as 'Lupe X' for the Petitioner and 'Ve'a Y' for the Respondent. 'Lupe' and 'Ve'a' are fictitious *matai* titles and 'X' and 'Y' refer to their first names. Every *aiga* (family) has a main *matai* title which is referred to in Chapter Two as the *Sao*. In 'LC 123' the Petitioner is the *Sao* therefore the fictitious *matai* title 'Lupe' is the main *matai* title for this *aiga*. 'Ve'a' is also a *matai* title belonging to this *aiga*, but is not the *Sao*. Every *aiga* also has a house site or residence. 'LC 123' will use 'Tiasa' as the fictitious name for the residence of the 'Lupe' *aiga*. The *nuu* of 'Mau' is divided into four; these divisions are known as *pitonuu* or parts of the *nuu*. The *pitonuu* concerned will be given the fictitious name of 'Uso'. The case considers different lands pertaining to the *matai* title 'Lupe'. These lands will be referred to using numbers 1 -7.

²⁹⁸ *Land and Titles Act 1981 (Samoa)*, s34; *Land and Titles Court Bench Book ('Bench Book')*, MJCA, 2003, 55.

²⁹⁹ *Land and Titles Act 1981 (Samoa)*, s43.

³⁰⁰ *Ibid.*, s42(2).

³⁰¹ *Ibid.*, s44.

³⁰² *Ibid.*, s92.

³⁰³ *Ibid.*, s42(3).

³⁰⁴ *Ibid.*, s42(5).

³⁰⁵ *Ibid.*, s91; Personal Interview with the Chief Executive Officer (CEO), Ministry of Justice and Courts Administration (MJCA), who is also the Registrar of the Land and Titles Court (LTC), October 2006.

Before 2004, a common and well known practice in the Court was the receipt and acceptance of petitions sent from overseas. All one had to do was to write a letter, which was sent by facsimile, outlining the particular concern. Some have claimed to have been able to make a telephone call from Auckland or Sydney which would materialise into a petition that was heard before the Court. Another practice that was common was the payment of the petition fee in lieu of a petition. This usually happened if time was an issue for the petitioner. For example, if for some reason a petition had to be filed before Monday and it was just before end of the hours of business on a Friday, then the petitioner would pay the fee as if to hold their place and then come in on Monday to 'flesh out' the details. At other times a petition was filed and the fee was paid at a later date. Neither practice was considered or held out as 'official' Court practice. It just happened. No one knew exactly what the point of entry was and how a matter could travel from start to finish.³⁰⁶

In 2004, possibly in response to these uncertainties, the Registrar of the Court made a policy decision. If anyone wished to file a petition they would have to come into the Office of the Registrar. There, the petition would be prepared, signed by the petitioner and sworn before the Registrar (Deputy Registrar) in accordance with s42 (2) and (3) of the Act. If any one who resided overseas wanted to file a petition they would either have to personally travel from abroad or one of their family members who resides in Samoa could file the petition. The fee for the petition would also have to be paid at the filing of the petition, not before or at a later date. The policy change received some criticism at the beginning, especially from Samoans residing abroad who were concerned the new policy would limit their access to the Court. However, as everyone has become accustomed to the change the criticism has died down. It is now easier to locate the starting point at which to begin one's journey to the Land and Titles Court of Samoa.³⁰⁷

Preparing the case – Setting down the hearing

According to the Act, the time and places for sittings of the Court are determined by the Registrar after consulting the President.³⁰⁸ Notice of every sitting of the Court is published in

³⁰⁶ Vaai, *Faamatai and the Rule of Law*, 261-263, considers how the procedures of the Court unwittingly gives too much power to the bureaucracy, which it often does not have the capacity to handle. This may lead to corruption, and misuse of such powers. The security of Court records is something that was raised by the 1975 Report referred to in Chapter Five, and this chapter will also consider record-keeping.

³⁰⁷ I was working in the Land and Titles Court when this policy change was made and witnessed first hand how it was received by the Samoan public.

³⁰⁸ *Land and Titles Act 1981 (Samoa)*, s.39 (1).

the *Savali* (Government Gazette) at least twenty one days before its commencement.³⁰⁹ This notice states the time and place of the sitting and the names of the parties to each petition, application, appeal or other proceedings to be heard at the sitting, and the nature of the relief sought.³¹⁰ A petition which has not been notified in this way can not be heard except by leave of the Court.³¹¹ The filed petition is served by an Officer of the Court on every party to the proceedings.³¹² Attached to every copy of the petition for service is a summons to the respondent requiring them to appear at the hearing of the petition.³¹³ One of the main grounds for seeking an adjournment (which is very often granted) of a hearing before the Court has been non-receipt of summons. The summons was either not served or it was served on the wrong person. In defence of the Court officer who travels around the island serving each summons, the difficulty in locating all those listed in a petition must be kept in mind. This problem highlights a deficiency in the petition that can easily be corrected by obtaining sufficient information concerning the parties' contact details. Most parties will have a 'leader', although a number of individuals may be named. A solution, as suggested by the Registrar of the Court, would then be to clarify the law or practice of the Court so that the leader is the one that will be contacted, and it would then be the leader's responsibility to inform the other members in their party concerning the matter before the Court.³¹⁴

The Bench Book sets out in a flow diagram the process for initiating proceedings before the Court.³¹⁵ It notes that, after the Registrar has published the notice of sitting,³¹⁶ the Registrar then researches all the information on the history of the matter that is the subject of the petition and prepares a report, and collects the relevant Court files and relevant volumes of the *Matai* Register for the Court.³¹⁷ At least three clear days prior to the hearing, a comprehensive and factual report on the background of the case is prepared, including:

- certified true copies of every petition;
- certified true copies of previous related decisions;
- written related agreements;
- notices of publications and maps; and

³⁰⁹ Ibid., s40.

³¹⁰ Ibid., s41.

³¹¹ Ibid., s46.

³¹² Ibid., s45(1).

³¹³ Ibid., s45(2).

³¹⁴ Personal Interview with the CEO of MJCA also Registrar of LTC, October 2006.

³¹⁵ *Bench Book*, 41-42.

³¹⁶ *Land and Titles Act 1981 (Samoa)*, s.41.

³¹⁷ *Bench Book*, 42.

- plans of any surveys or sketch plans made during office inspections where land is the matter in dispute.

A copy of this report is not made available to the parties, only to the Court. The Registrar and his staff also make all related Court files and registers available for perusal and examination by the Court. The Court is to be speedily informed on any development likely to affect the hearing.³¹⁸ The President (or Deputy President) and four (Samoan) Judges, or two (Samoan) Judges and two Assessors, then hear the proceedings.³¹⁹

Commencing proceedings for ‘LC 123’

In the Case Study (‘LC 123’) the proceedings were commenced with the filing of a petition by ‘Lupe X’ on 24 October 2004 stating that:

- (1) The Petitioner is the *Sao* (main matai/head) of the ‘Lupe’ family of ‘Tiasa’, in Uso, Mau.
- (2) The petition is to remove the Respondent (‘Vea Y’) from lands pertaining to the ‘Lupe’ title of Tiasa, in Uso, Mau, within thirty days from the making of such an order by the Court.

A copy of this petition was served on ‘Vea Y’, and on 13 December 2004, ‘Vea Y’ filed a ‘Counter’ petition stating:

- (1) That there is no good, serious or grave reason set out in Lupe X’s petition for seeking to have them removed.
- (2) That this Petitioner is a true heir of the ‘Lupe’ title, and a descendant of a previous holder of the ‘Lupe’ title.
- (3) That right from birth Vea Y and Vea Y’s parents have lived on this land and they still live there. No one before has ever challenged their living on this land.
- (4) That the Court not allow the petition filed by Lupe X and that Vea Y be permitted to continue to live on the land.

³¹⁸ Ibid., 61.

³¹⁹ Ibid., 42, 55; The wording of the *Land and Titles Act 1981*, ss. 26, 28, 29 still use the words ‘Samoan Judges’ although all the judges, except the President, of the Court have been Samoan in the last twenty years, at least.

Nowhere does the Act provide for 'counter' petitions. But it is the practice that, where a petition is filed in response, it follows the same format as the original petition. The Respondent then becomes a Petitioner as well. The addition of the word 'counter' just clarifies the order in which the petitions were received.

After the sittings of the Court were set and the date of hearing determined in our illustrative case, the particulars of both these petitions and the date of the hearing were published in the *Savali*. The Staff of the Office of the Registrar would have also begun preparing their Report and the Files for the Court.

Objections to the composition of the Bench

Another unofficial practice that the Court observes is that seven days before the hearing date any party can object to a member of the Bench who will hear the matter. This time frame allows for the Court to accommodate any objections and make the necessary changes. Some parties take advantage of this practice; others make their objection on the day of the hearing and this is therefore another cause of adjournment. If the objection is made in Court, and not in advance of the hearing, the practice seems to be that the member of the Bench objected to does not automatically have to be excused. The Judge can respond to the objection and continue on the Bench if the objection is considered unfounded.

Such is the informal nature of the practice that there have been cases where cause for objection has existed but has not been voiced, and the member of the Bench has also been aware of the 'conflict' but has not stood down and has remained throughout the case. No official objection against a member of the Bench was made in LC 123 although some murmurings were heard after the hearing concerning a connection between one of the Bench and Ve'a Y.

The Hearing

What remains to be considered is the actual hearing. The Bench Book notes that the actual hearings follow procedures that are a combination of Samoan custom and Court convention. This means that in the first instance Court officials seek to mediate between the parties before a petition is filed. Nevertheless, if a petition is filed parties are required to submit written summaries of their arguments in advance of the hearing. At the actual hearing, parties do not

cross-examine one another and lawyers are not permitted to appear.³²⁰ When adjudicating, the Court applies custom and usage and law relating to the application of custom and usage.³²¹ Where no such custom and usage applies, the Court is authorised to act as it considers fair and just.³²²

The Court does not seem to observe the evidentiary rules one would expect of a Western court structure. Although section 47(1) of the Act states that the rules of the Supreme Court shall determine the practice and procedure of the Court unless inconsistent with or inapplicable to the provisions of the Act, the Bench Book advises that most rules relating to procedure, burden of proof, standard of proof, judges' rules, types of evidence and their admissibility may not be applicable in the Land and Titles Court.³²³ Nevertheless it urges the members of the Court to take into account principles of judicial conduct and ethics evident in the judicial Oath of Office,³²⁴ such as diligence, lawfulness, integrity, equality, judicial independence and impartiality.³²⁵ The Head of State may, by Order, make such rules of the Court as are consistent with the Act for the purpose of regulating the practice and procedure of the Court in all matters within its jurisdiction, and prescribe fees.³²⁶ No such rules have been made since the enactment of the Act in 1981 although changes in fees have been made.

The administrative support provided by the Registrar and Staff for hearings includes the traditional welcoming of parties and the public, swearing of parties, collecting written statements from parties, reading party statements in open Court, taking full notes of the proceedings and interpreting aspects of the proceedings where necessary.³²⁷

All hearings in the Court are formal, whether they involve just a single judge, (where the President or Deputy President will sit alone) or two or more judges where the Court (composed as referred to earlier) will sit. The President or Deputy President presiding has discretion to require additional Judges and Assessors in respect of any hearing, if considered necessary in the interest of justice or the importance of the case requires it.³²⁸

³²⁰ *Land and Titles Act 1981 (Samoa)*, s.92.

³²¹ *Ibid.*, s.37(1) and (2); *Bench Book*, 55.

³²² *Land and Titles Act 1981 (Samoa)*, s.37(2).

³²³ *Bench Book*, 63.

³²⁴ *Land and Titles Act 1981 (Samoa)*, s.31(3).

³²⁵ *Bench Book*, 26-28.

³²⁶ *Land and Titles Act 1981 (Samoa)*, s.48.

³²⁷ *Bench Book*, 62.

³²⁸ *Land and Titles Act 1981 (Samoa)*, s.35(3).

However, once the composition of the Court is set, it cannot be changed until it has given its final decision.³²⁹ Every Judge and Assessor hearing the case has an equal voice in all aspects of the hearing.³³⁰ Hearings are conducted in a Courtroom. However, in proceedings relating to land disputes, part of the hearing will have to be conducted on the land in question where inspection by the Court of that land is necessary.³³¹

Outlining the 'rules' and 'guidelines' concerning a hearing as set out in the Act or the Bench Book neither captures nor conveys the full picture or atmosphere of a Court hearing. This is not a shortcoming in the Act or the Bench Book; it is just one of those things you have to experience 'live'. When I first attended a Land and Titles Court hearing I was still an undergraduate. Prior to that, the only other court experience I had had was sitting in on a Samoan Court of Appeal case. My first Land and Titles Court hearing was like nothing I had seen before. The Courtroom was purpose built for the Court. The Court currently uses three other locations for its hearings as the volume of work requires. These are: the original Parliament Building, which is an open, traditionally-designed structure known as a *fale tele* (traditional meeting house for Samoans) across the road from the main Courtroom; the Human Rights Protection Party (HRPP) hall, five minutes walk down the road; and the Ecumenical Centre hall, only a few minutes walk down the road from the Court.

The Courtroom

The purpose built Courthouse has a very open feel to it. It has very low concrete walls on either side of its length and above the wall are louvres. There is a main entrance door at the south end of the building and when you enter there are three sections of seats which are very similar to church pews. These seats are for the public. At the front of the seating area, directly in front of the middle section of seats, are two 'pews' and a long table to be used by the parties. Further north, in front of the extra pews and table is a smaller table and chair facing the public seating area for the Court Clerk. Beside that table on its left is another table and chair also facing the public seating area used by the stenographer. Behind these two tables and chairs is a slightly raised platform which is the Bench. The Bench is semi-circular in shape and in the centre is a grand and ornate looking seat, which is the President's. Behind the Bench are two doors leading to Judges' Chambers.

³²⁹ Ibid., s.35(4).

³³⁰ Ibid., s.63(2); *Bench Book*, 63,

³³¹ *Bench Book*, 62.

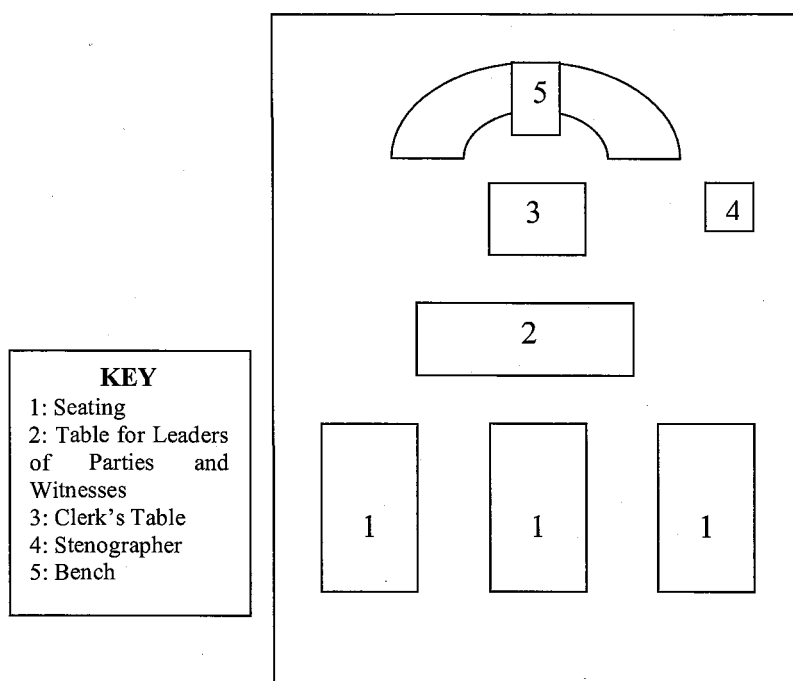


Figure 2: Layout of Main Courthouse

On my first visit to the Court, we had all taken our seats and were busy chatting with relatives that we had not seen in a long time while we eyed up the opposition and the other people that had come to the Court for their own matters. The first thing that struck me was how it was such a mix of people: politicians, business people, doctors, lawyers, the Chief Executive Officers of Government Ministries, farmers, teachers, pastors, students, the young and the old. It was a perfect cross-section of Samoan society. The chatting and reunions ceased with a knock followed by the opening of doors behind the bench and a loud “all rise” from a lone police officer. The President came in through the door directly behind his seat while the other four members of the Bench entered through the other door. Two men stood to the right of the President and the other two on the left. The four bowed to the President, they all bowed in our direction and we all bowed back before taking our seats. The atmosphere was electric. It was as if a mad frenzy or great furore had been suddenly halted in its tracks and was just waiting, poised to resume on cue. The silence was broken by a very strong and forceful voice coming from the small table and chair, immediately in front of the President’s seat. He (who I later ascertained was the Court Clerk) announced that Court was in session and then proceeded to do something I had only heard at gatherings or meetings of *matai*. He greeted the parties to the proceedings and recited the honourifics of our *nuu* and the *matai* title that was in dispute. This is the standard greeting between the *matai* of Samoa. It is our ‘handshake’. What followed was even more astounding for me as everyone in the Courtroom

reciprocated the salutations, reciting the honourifics of the Court and its constituent parts. Straight away I knew that this was a Court with a difference. This Court deals with custom. This Court is Samoan. It was made very clear to me that in this Court it was important for the Bench and the Officers of the Court to be Samoan, to have sufficient knowledge of the Samoan way and especially the Samoan language.

In all hearings, things move swiftly from this point of observance of Samoan custom to observance of Court conventions expected in a Western courtroom, with the reading of the petitions for the specific matter before the Court. I must admit I was very surprised by what I experienced. I had expected Western procedures to match the Western form of the Court and the courtroom. Instead I witnessed a fusion where the overwhelming sense was that the Western form had been indigenised – *Samoanised*.

After each petition is read, the President then calls upon each petitioner for confirmation of each petition, addresses and rules on any preliminary matters a party may raise, such as an amendment to a petition, or a request for an adjournment for various reasons, including those mentioned earlier. He also announces the order in which parties will be called and ascertains from each party the names of their leaders and witnesses. At this point the petitioning parties are identified as are the responding parties. This part of the process sorts through the various petitions and ‘counters’ that may have been filed and arranges them in the order they will be examined. The Court Clerk then administers the Oath of Truth to each party who is represented by their leader and witnesses. The parties are then examined in the order previously set.

It is the Bench who poses the questions. The system is therefore inquisitorial rather than adversarial. It seems that the less senior Judge(s) begins the examination, followed by senior ones, then the Assessors, and the examination is concluded by the President, before moving on to the next party. While the examination is taking place the stenographer, who sits at the other small table to the left of the Court Clerk, busily records the proceedings to be typed out in full later and made available to interested parties, upon written request to the Registrar.³³²

³³² *Land and Titles Act 1981 (Samoa)*, s.94(2).

Language of Hearings

I do not think it would be too bold to say that language is the main medium by which the colonial Land and Titles Court has been indigenised. I would also add that the tracing of the Samoan language's permeation through the practice and procedures of the Court would allow the plotting of the course of this indigenisation. It is language that clothes concepts and ideas. It breathes life into and embodies culture, custom and practice. Nevertheless, there is no clear provision in the Act stating the language of the Court. However, since the appointment of the first Samoan Chief Justice in the 1990s, the entire Bench and Staff of the Court have been Samoan. The petitions are in Samoan, the written statements are in Samoan, the examination of parties is in Samoan and the decisions are in Samoan. Before a Samoan became Chief Justice and therefore President of the Court, all written statements had to be in both Samoan and English. Since 2004,³³³ the requirement of English copies of the written statements in the Lower Court has been relaxed. The Court continues to insist on English copies of Applications for Leave to Appeal and all Appeal documents, because of the rising number of Judicial Review proceedings before the Supreme Court where the Bench is often non-Samoan. This may change with the recent appointment of Vui Clarence Nelson J as a Supreme Court Judge in 2007. He joins Lesa Rapi Vaai J who was made a Supreme Court Judge a few years earlier. There are now two Samoan Supreme Court Judges assisting a Samoan Chief Justice. However, because it is often the case that one or other of the Samoan Supreme Court Judges cannot hear some of the cases because of conflict of interest, an entirely or a partially non-Samoan bench is a strong possibility. As long as this is the case the need to have English copies of Appeal documents will remain.

Recording the Proceedings

At this point I want to make note of a specialised skill that is needed in the Court that has received very little, if any, recognition. All the stenographers at the Court use Samoan Shorthand created or invented by a machinist in the Department of Education in the late 1960s, Saute Sapolu. They acquired this skill from being schooled at one of the Congregational Christian Church of Samoa's schools - Papauta Girls' College. Papauta began as a Girls' School that was established by a German Missionary, Frau Schultze, in the nineteenth century. Her intention was to establish a finishing school akin to those that had become a very important development in German education at the time. The Samoan

³³³ Personal Interview with CEO, MJCA and Registrar of LTC, October 2006.

adaptation of the finishing school idea was that the skills taught would include a strong focus on Samoan culture, arts, crafts, manners and language. In 1969, Saute Sapolu approached the then Director of Education with his invention. Apparently he had approached many institutions but none were willing to teach or use his Samoan Shorthand. Later in 1978, when the former Director of Education for Government Schools became the Director of Education for the Congregational Christian Church, she launched a Diploma Course at Papauta Girls' College with the support of Papauta's Principal, Lady Salamasina. The Director of Education approached Saute Sapolu and he agreed not only to have his Samoan Shorthand taught at Papauta, but to teach it as well. The Papauta Girls' College Diploma Course included subjects such as Typing, Secretarial work, Accounting, Samoan Language and Samoan Shorthand. No other school in Samoa offered or taught Samoan Shorthand. The first Samoan stenographers at the Court were holders of Papauta Girls' College Diplomas. I do not believe Samoan Shorthand is still being taught at Papauta. This means that the five ladies who are the current stenographers for the Court could be the last to have this specialised skill; when they leave, so too will this skill and specialised knowledge that is uniquely Samoan and unique to the Land and Titles Court.³³⁴ Technology provides the 'easy' substitute for this specialist skill. Proceedings in the Criminal and Civil Courts are recorded electronically to be transcribed later, again with the assistance of other technology. It is a logical and perhaps inevitable change. It will be less labour intensive, arguably more efficient and definitely 'modern'. Although unexpected, this foreseeable change identifies another possible variable in the equation, or another point along the spectrum of the Court's journey.

Examination of Parties

The examination of the parties by the Bench provides an excellent example of how most of the usual common law rules relating to procedures, burden of proof, standard of proof, judges' rules, types of evidence and their admissibility may not be applicable in the Land and Titles Court.³³⁵ The evidentiary rules observed in the Court will be discussed further in Chapter Eight. The somewhat relaxed approach concerning standards of proof and evidence is most evident in the examination of parties. It also highlights the importance of the role of the Bench, as parties cannot cross examine each other. It is a perfect example of an inquisitorial system in action and perhaps reflects the Court's German, civil law origins. By

³³⁴ Personal Correspondence from Aiono Dr. Fanaafi, Former Director of Education for Government and Congregational Christian Church, Samoa, 18 April 2007.

³³⁵ See footnote 323.

way of illustration, here are some of the questions that were asked by the Bench in our Case Study 'LC 123' in the Lower Court on 8 April 2005.

Lupe X as the Petitioning Party was examined first. Before the examination began the Deputy President informed the Court that one of the senior Judges who was going to be on the Bench excused himself as he was closely connected to one of the parties. He was therefore replaced by another Judge. After Lupe X's written statement was read out by the Court Clerk and confirmed by Lupe X the examination was begun by one of the Judges.

- What are the names of the lands from which you wish to remove Ve a Y?
- How many lands are you referring to?
- You have named four; is Ve a Y using these four lands?
- No? Which lands exactly are being used by Ve a Y?
- Are these two the ones Ve a Y has fenced?
- Has Ve a Y fenced the whole or only part of these lands?
- What is the size of these lands?
- What is your estimate?
- Can you describe the layout of these lands?
- You say you want Ve a Y removed from all lands pertaining to the Lupe title?
- Isn't it more that you want Ve a Y to be removed from the Lupe family of Mau?
- You are the *Sao*, are you not? Is there any one else holding the *Sao* title of your family with you?
- The relationship between the *Sao* and the family is not an easy one, is it?
- Your petition is very short. You state you are the *Sao* and you wish to have Ve a Y removed.
- You only have written evidence; do you not have any witnesses?
- You say that one of the reasons for your wish to have Ve a Y removed is because Ve a Y has no regard for you and your decisions or requests?
- How exactly has Ve a Y shown this disregard?
- Would you say that when Ve a Y refused to act on your request for the fences Ve a Y had built around the said lands, that was when you decided you wanted to have Ve a Y removed?
- No? Now, do you think it is appropriate for you to write to Ve a Y instead of asking them to come and see you?

- I mean, according to custom, is writing a letter a good way to communicate with members of your family?
- Have you and Veā Y met in person since this situation began?
- So the reason you have not met is because Veā Y does not attend events or functions that concern the family?
- So not only does Veā Y not attend, you have stated in your written statement that Veā Y does not render the *tautua* (service), is that correct?
- Is 'Veā' a *matai* title?
- Did you bestow the 'Veā' title on Y?
- It is only Veā Y that you want removed?
- What I was trying to get at earlier was that Veā Y should have approached you.
- What is your opinion: should the Court come on a site visit to the lands concerned?
- As you will hear when Veā Y's written statement is read out, the reason proposed for the fences was to protect their crops and property, so the reason for the visit would be so that the Court can verify the claim made by Veā Y.
- So, you do not think a site visit is necessary, how about what Veā Y says about protecting their property by fencing in the lands? Are there any crops on the lands?
- Don't you think we should come and see the lands?

The second Judge's examination was much shorter.

- You say that one of the reasons for wanting Veā Y removed is because Veā Y does not render the *tautua*?
- What type of *tautua* should Veā Y render?
- Does Veā Y contribute when your family has events or functions?
- The lands that Veā Y has built iron or metal fences around: does anyone live there?
- When did Y become a *matai*?
- Did you give Veā Y the title?
- Was Veā Y rendering the *tautua* at that time?
- If Veā Y listens to your request and removes the fences, will you let Veā Y remain?
- Where does Veā Y live?
- Is Veā Y residing in Mau?
- Does anyone else of your family work on the said lands?
- Is it only Veā Y who uses the land?

The Judges were followed by the Assessors. The first one asked:

- You say the lands pertaining to the Lupe title are immediately inland from the centre of the *nuu*. Does your *nuu* have an area that is further inland but open to any one in the *nuu* to develop for taro plantations?
- I ask because Ve a Y says that their parents and great grandfather (who was the previous *Sao*) is buried on Land 1 in question. Do you confirm this statement?
- You said that the *Sao* of your family are buried at Tiasa (Residence of the title 'Lupe') and yet here one of the *Sao* is not buried at Tiasa but on Land 1. Why is this?
- So you maintain that Land 1 is part of the lands pertaining to the Lupe title?
- Is Land 1 one of the meeting grounds of your *nuu*?
- Ve a Y claims that Land 1 was personally cleared by their parents and therefore the *Sao* of the family should not interfere as they claim it was woodland before they cleared it. What do you say to this?
- They say it was around 1940 when they cleared Land 1.
- Is Land 1 one of the lands pertaining to the title Lupe?
- Is there a problem in having a fence around the land to protect property? What will you say if the fence is removed and then damage ensues?
- You have said before that Ve a Y has no regard for you, the *Sao* of the family: what exactly do you mean by obstinate?

The second Assessor asked:

- Your petition does not show any reason for Ve a Y to leave the land. Do you understand that the Court will respond only to the main part of the petition? Have you considered that fact?
- You have provided written evidence in support of your petition but although the written evidence is plentiful it is the petition that the Court responds to if it is to make an order to remove Ve a Y from the land, yet there is no such indication in your petition, but we will put that aside.
- You stated that it is your wish that this land should be where the *Sao* of the family are buried. Which land is this?

- It seems like this wish to have the *Sao* buried on this land is not an old practice but one you have come up with recently, isn't it?
- So why are some other *Sao* buried on this land while others are buried at the Residence, especially if this is a practice that has been observed by a Samoan family over time?
- Is Ve'a Y rendering the *tautua* to your family?
- Is Ve'a Y not contributing or rendering the *tautua* for every function or event your family has?
- One thing we *matai* should do is know every part of any land.

The examination of the Lupe X was concluded by the Deputy President.

- Lupe X, your first exhibit is a document where one of the signatures belongs to an elder Minister in your family, what do you make of this agreement?
- You do not accept it because it is handwritten?
- So another reason for your objection is because it was not legally registered or legalised?
- Who is ... (another signatory)?
- Is Ve'a Y's father a *matai* of your family?
- Does Ve'a Y's father's title render *tautua* to the Lupe title?
- What is your opinion on the relationship between a *matai tautua* and the *Sao*?
- What I mean is, in relation to looking after the property, do *matai tautua* have the same rights as the *Sao*?
- I see the name of the elder Minister is written in print.
- So your letter of the 23rd was because of the fence and the gate?
- Then you felt they should leave because they disregarded you?
- Then they responded by letter also?
- If the fence and the gate are removed, will Ve'a Y be able to remain?
- If Ve'a Y is removed can the fence remain?
- Your petition does not mention the removal of the fence and the gate. My question therefore is, if the gate and fence are removed can Ve'a Y then remain?
- So it is Ve'a Y who has to leave even if the fence is not removed?
- Your petition is directed at Ve'a Y alone.
- If the gate is removed can Ve'a Y and immediate family remain on the land?

- The question is because that is what you seem to want even though it is not stated clearly in your petition. The question is if the gate and fence is removed can Ve'a Y then remain?
- If the gate is removed, won't that damage the fence?
- And how then can the fence be protected from people?
- You say the gate is always locked. Is that why the elderly lady of your family could not be buried on the Land 1, because the gate was locked and therefore the land could not be accessed?³³⁶
- If Ve'a Y leaves, will the gate remain locked?
- So you think the lock should also be removed?
- The Responding party's written statements state that when your father was the *Sao* the family was well looked after, but you seem to have forgotten how to show the same love and care, is this true?
- So your father passed away when Ve'a Y was not even a teenager?
- So the lady who was to be buried on Land 1, is she the only person buried on Land 3?
- Is Land 3 another one of the burial grounds for your family?
- Are there any others buried on Land 1?
- According to Samoan custom, if you clear the land yourself does this mean that the land is therefore yours personally: that is, you have the *pule* (authority) over it?
- If not, who then holds the *pule*?
- Have your family's lands been allocated among the *suli* (heirs)?
- You said earlier that if a past *Sao* allocated land to a certain person then later *Sao* (holders of the Lupe title) should not reverse or alter such allocations; is this your honest opinion?
- What *tautua* is Ve'a Y not rendering? Is it failure to contribute, and in what ways?
- Where is Ve'a Y residing?
- The times Ve'a Y gives you some money, isn't that considered *tautua*?

³³⁶ In my understanding, it is vital to the Samoan that they return to their land when they pass away. Just as their *usofanua* (placenta) was planted in their land when they were born, so they return when life ceases. The importance of this is seen in the fact that many Samoans, especially the older generation living abroad, ask to be buried in Samoa when they pass away. This can cause conflicts with first generation immigrants who see the foreign country probably more as home than Samoa. Most understand, however, that the practice and wish to return to Samoa is to do with Samoan custom and the connection to and value of the *fanua* (land). It is also a Samoan belief that unless the deceased's body touches the *fanua* (land) that is theirs, they will not be able to make the journey to *Pulotu*, the after-life/underworld.

- I believe that the Court should consider carefully whether it is best for Ve'a Y to leave or to remain. You as a *matai* should bear the behaviour of Ve'a Y and forgive Ve'a Y not seven times but seventy seven times.

That concluded the examination of the Petitioning party and the Court went on to examine the Responding party in the same way. This shows very clearly the inquisitorial process of the Court.

Attendance of Relatives

The following discussion concerning the customary processes of *tapuaiga* and *seumalo* again illustrates where western legalism and Samoan culture and custom meet in the Court. In this case the indigenisation process has not fully occurred. Instead of a fusion we have two parallel systems operating side by side, separated physically by the walls of the courtroom. It suggests that indigenisation may only proceed so far before it is held at bay by a need to retain a certain degree of Western legalism to maintain the Western structure or form of the Court. It could also suggest that there are parts of Western legalism that cannot be indigenised simply because they are so contrary to indigenous custom that the two must operate in parallel, rather than in hybridised form.

If the hearing begins in the morning, as was the case with LC 123, the Court usually takes a lunchtime adjournment before completing its examination of the parties. During such adjournments one sees how costly the whole process of coming to Court is becoming. Many cases are attended by people from the *nuu* (geographical location) who are not connected to the matter. They usually attend in groups of five or ten, but these groups can be much larger depending on the significance of the case. They tend to be comprised of orators (*tulafale*) and sometimes one or two *alii* join them. With the increasing number of Samoans migrating to New Zealand, Australia and America, the number of those who have to fly to Samoa for Court cases is also growing rapidly. Overseas travel is not cheap and although the actual cost to file a petition is still affordable, the extra costs add up, such as providing meals for the relatives who come to the hearing to support and also for the mini-delegations from the *nuu*.

The origins of this practice, of your relatives and your *nuu* arriving en masse in support of your case, is very beautiful and deeply rooted in the Samoan culture. This, however, does not mean that such origins are respected or observed by all Samoans today without abuse. Sadly

the abuse is another factor that has increased costs for those who seek the assistance of the Court. There is a Samoan belief that is captured in the saying: *E le sili le tai i le tapuai*. This roughly translates as: the one who enters the fray is not half as important as the one who sits and waits and observes the act of *tapuai*/*tapuaiga*. To *tapuai* is to make spiritual connection, to pray to God for assistance in a matter. Every endeavour in Samoan life begins with the *tapuaiga* and is supported by the *tapuaiga* until it is completed. That is why the relatives from near and far come to the hearings. They come to *tapuai* while their representative ‘fights’ on their behalf for their heritage. That is also the same sentiment behind the presence of the delegations of *matai* from the *nuu*. As said before, some still observe this very spiritual and sacred practice, while others are there to milk the occasion for what it is worth.

Last minute attempts to avoid the hearing

Another customary practice to which only lip-service tends to be paid today, but which still makes the Court experience all the more unique, is that of *seumalo*. This is carried out by the delegations of *matai* from the *nuu* who are not involved in the matter before the Court. I have noticed that it usually happens while parties are waiting inside the Courtroom for proceedings to begin. The spokesperson for the delegation speaks from outside the Courtroom. Because the Courtroom has an open design one can see and hear what is going on inside from outside and vice versa. The spokesperson addresses the leaders of the various parties who usually respond by going out to hear what the delegation has to say. The speech has variations but the aim is the same: it is a last minute attempt to persuade the parties to return to the *aiga* or *nuu* to resolve the matter instead of bringing it before the ‘Law’. The sentiment behind *seumalo* is that the usual customary practices can perhaps find a solution that will avoid the airing of the *aiga* or *nuu*’s ‘dirty laundry’ in public, so to speak.

The other sentiment behind *seumalo* is the resistance or discomfort Samoans experience at the idea of an ‘outsider’ making decisions concerning their heritage – their land(s) and *matai* titles or *aiga* issues. This feeling is not new; in fact it was noted back in 1903 when the predecessor to the current Court was established by the Colonial German Administration.³³⁷ In this case the ‘outsider’ is anyone who is not part of their *aiga* or *nuu*. Sometimes, *seumalo* is accepted by the parties, who then have to come back into the Courtroom to inform the Court and seek its leave to withdraw the matter while they honour the delegation’s request.

³³⁷ Meleisea, 35-36.

To my knowledge, the Court has always granted such leave. In some cases a time-limit has been imposed. If an agreement is not reached by then, the matter returns to the Court for determination. In most cases *seumalo* is not successful and this is perhaps in situations where lip service is only being paid to it: situations where the ‘abuse’ discussed below is more evident. The usual reason for parties not following through with the *seumalo* is because perhaps the request has come a little too late. For example, the matter may have been brewing for a long time in the *nuu*: everyone there including the *matai* who are in the delegation were aware of it, perhaps they were even notified about it, but they did not attempt to assist or to advise that the matter was better resolved customarily and out of Court. And yet, here they are, espousing ideas of peace and reconciliation and of returning to the *nuu* and supposedly saving face for the *aiga* when they had turned a blind eye to the situation back in the *nuu*. In LC 123 there was an unsuccessful attempt at a *seumalo*.

The occurrence of genuine and not so genuine *seumalo* is another contributor to the rising costs of bringing a matter to the Court. Apart from providing a meal for the delegations at the lunchtime adjournments for however long the case lasts, the delegations are often given monetary gifts worded as their ‘fare’ back to the *nuu* and given in gratitude for the *tapuaiga* which some would have truly observed but which others, perhaps most, have used as an excuse to come for the ride or to satisfy that awful part of human nature that enjoys being a spectator as their fellow-kind bare all. The monetary gifts and meals are provided by all parties, so one can see how it would be more lucrative to attend matters that have many parties, which is becoming very common. Some cases have eleven or thirteen parties. That means a lot of money and a lot of food is required, especially as it will take some days to get through the examination of all the parties. Sadly, some have made almost a career of attending Court cases because the Samoan culture does not allow them to be chased away and it frowns upon any indication of being inhospitable or stingy, should you refuse to feed them, especially if they hold out that they are part of the *tapuaiga* for the resolution of conflict.

Site Visits

Sometimes, especially where land is concerned, the Court visits and inspects the lands concerned. Holding a ‘Court under the trees’ adds another dimension to the experience. Our Case ‘LC 123’ was one where the Court visited two of the land(s) concerned. In the examination Lupe X stated that a site visit was not necessary, while Ve’a Y’s party said it

would be a good idea. The Court agreed with Ve'a Y and the hearing was adjourned until 12 April 2005 when the site visit took place on Land 1 in the *nuu* of Mau.

The same format of questioning used in the Courtroom was used on the site visit. The continuation of the hearing was carried out under one of the trees on Land 1, the land on which Ve'a Y resided. Being removed from the atmosphere of formality in the Courtroom is the most obvious change. The Bench stood under the tree in the shade. Lupe X and Ve'a stood in front of them out in the sun. Groups of people from the *nuu* were scattered around where they could find some shade. Most of those connected to the matter stood or sat behind the Bench. After both parties were examined on Land 1 the site visit moved to Land 2. The questions were not very different to those asked in the Courtroom. The only difference was that there were more people to hear the questions and react to the responses. None of the responses were very different to those made in the Courtroom and being on the lands concerned did not uncover any information the Court had not been made aware of in the Courtroom. My personal observation was that the situation seemed more volatile on the site visit: less predictable and not as muted as in the Courtroom. The physical representation of the western court structure was absent and so too it would seem the check on indigenisation. Western legalism was now being played out on indigenous 'turf' - the *nuu*: the home of custom. At one point in the proceedings, in response to one of the party's responses, a member of the family burst out in annoyance. It was very tense.

Final Remarks

At the end of the questions on Land 2 both parties were given an opportunity to make any final remarks. If there had not been a site visit the opportunity for final remarks would have been given to the parties after they were examined in the Courtroom. Parties take this opportunity to highlight matters that the questioning did not address or that were raised by another party. It is an opportunity for rebuttal. When these were completed the Deputy President adjourned the proceedings to the 15 April 2005 when the Court's decision would be delivered. In most of the cases I have observed the decision is usually delivered a few days after the hearing has been completed but there is the odd case where the decision has been left pending for at least three years.

The Decision

Section 63 of the Act states that the final decision of the Court shall be in accordance with the majority of the members present and in arriving at the final decision every Samoan Judge and Assessor hearing the petition shall have equal voice.³³⁸ 'Equal voice' is qualified in the next section which states that subject to section 63 the concurrence of the Samoan Judges and Assessors is not necessary for any act of the Court, and the jurisdiction of the Court will be exercised in the same manner as if it was sitting without Samoan Judges or Assessors. These provisions read together seem to suggest that it is quite possible for the President or Deputy President to make a final decision on his own. If that is the case, then the President wields a great deal of power, possibly too much power in the decision making of the Court. However, I have not come across a case where the President has made a decision on his own. Nevertheless, the President's 'voice' must strongly influence the final outcome of a case. When the decision is ready it is delivered in open Court by the President or Deputy President presiding.

Section 66 of the Act requires every decision on a petition to include the reasons of the Court, or of the majority of its members. This requirement was introduced in 1981 and is not found in any prior legislation concerning the Court. This provision accounts for the dramatic change in the length of the decisions of the Court since 1981. The final decision of the Court is drawn up under the seal of the Court and is signed by the President or Deputy President and the Samoan Judges and Assessors that concur in the decision.³³⁹ Copies of all decisions are available to the parties and members of the public on payment of a fee.³⁴⁰ However, each party involved in a matter is entitled to one free copy of the decision per party. If extra copies are required thereafter, then the fee applies. As soon as practicable after delivery, the Registrar shall publish the particulars of every final decision of the Court on any petition in the *Savali* (Government Gazette) and the final decision shall be deemed complete upon such publication.³⁴¹

Problems with Publication

This last provision concerning the completion of a decision upon publication, and the actual publication of final decisions, has not been implemented since the Act came into force. The

³³⁸ *Land and Titles Court Act 1981 (Samoa)*, s.63(1) and (3).

³³⁹ *Ibid.*, s.67.

³⁴⁰ *Ibid.*, s.68.

³⁴¹ *Ibid.*, s.69.

reason for this non-compliance with the Act is cost. Prior to the 1981 Act, decisions were short and consisted only of the orders. Since 1981 and the introduction of section 66 requiring reasons for the decisions, they have become very lengthy. Because the *Savali* is a Government Gazette it is not solely at the disposal of the Court to publish its sittings, petitions and decisions. The Court (or the Ministry that administers the Court) also has to pay for their publication. The *Savali* is a small publication and this means that perhaps only one or, at a squeeze, two decisions can be published in the Court-allotted space in the Gazette. Therefore for twenty or so years decisions have not been published.

The failure to publish the decisions raises a question as to whether these decisions are complete under section 69(2) of the Act:

69. Final decision complete on publication –

(1) As soon as practicable after delivery, the Registrar shall publish particulars of every final decision of the Court on any petition, in the Savali.

(2) The final decision shall be deemed complete upon publication under subsection (1).

In 2004, the Ministry of Justice and Courts Administration (MJCA), which is responsible for the administration of the Court, considered amending section 69(2) to read that the final decision shall be deemed complete upon delivery under section 65, coupled with the removal of section 69(1), so that publication was no longer necessary. The other option that was considered was the repeal of section 69 in its entirety. To date, neither of these options has been carried out. According to the Chief Executive Officer of MJCA and Registrar Court, an amendment will be made in the very near future.³⁴² If the ‘completeness’ of the Court’s decisions is dependent on publication, which is not occurring, then the *in rem* nature of the decisions of the Court could be challenged.

Final decisions of the Court, although subject to an appeal, are deemed to be judgments in rem and bind all Samoans who are affected, whether parties to the proceedings or not.³⁴³ On 15 April 2005, the decision, orders and reasons for the decision of the Lower Court in our Case Study ‘LC 123’ were handed down and are reproduced below. This decision, as with all the other decisions since 1981, was not published in the *Savali* (Government Gazette).

³⁴² Personal Interview with CEO, MJCA and Registrar of LTC, October 2006.

³⁴³ *Land and Titles Court Act 1981 (Samoa)*, s.70.

The decision is divided into four parts: introductory remarks, reasons for the decision, general overview, and the ‘decision’ or orders. This decision is three pages long, which is considered short.

Introduction:

This matter came before the Court because Lupe X of Tiasa, Uso, Mau filed a petition seeking the removal of Ve a Y from all lands pertaining to the Lupe title of Tiasa, Uso, Mau, because Ve a Y disregarded a letter dated 12 September 2004 to remove Ve a Y’s fence.

Reasons:

1. The social organisation of Samoa is something that has long been settled. Each person is clear on their points of identity. There is no need to recount the well established aspects of the relationship between the heirs of a title and the one holding the title or the *Sao* of a family. It is well known that the *Sao* is someone to rely on, a guiding light who should be listened to. Every family defers to the *Sao*.
2. Those who are *Sao* have weaknesses or failings as that is the nature of every human being, but there is One who is Judge as to who is right and who has not done what is right. But everyone has their own opinion of what should be done.
3. The Court believes that this conflict between the *Sao* and Ve a Y arose from something trivial but has become very serious. The question is why? Perhaps it was a misunderstanding that caused those concerned to lose sight of their responsibilities and place within the family. Perhaps those concerned have failed to ask themselves: who am I or what am I?
4. According to the written evidence brought before the Court, perhaps it was because there was no access to Land 1 to bury one of the elderly ladies of the family and the locking of the gate to Land 1 which Lupe X said is the burial ground for the family that is the cause of the difference that has arisen between the *Sao* and Ve a Y.
5. The Letter – Exhibit 2A – 23 September 2001. This letter from Lupe X to Ve a Y, asking for the removal of the fences and gates on Lands 1 and 2, was not adhered to. The Letter – Exhibit 2E – of 8 September 2004 was written two years later asking for the removal of the fences and gates on Lands 1 and 2 was still not adhered to.

6. The Letter – Exhibit 3 – of 10 December 2001 was a response from a sibling of Veā Y sent from abroad. In the letter they criticise the *Sao* because the fence cost money to put up and the *Sao* was not recognising their rights as heirs. Veā Y also stated that they had attempted to meet Lupe X and even wrote to Lupe X but no meeting followed.
7. Lupe X was questioned on the verity of the document, a supposed ‘Will’ – Exhibit 1 – 11 March 1986. Lupe X’s response was that the contents are handwritten, it was not witnessed or confirmed, nor was it registered or legalised; the signatures are questionable; the contents are also dubious as they record the expression by Veā Y’s father that he and his children hold the *pule* (authority) over land that is the family’s – including Lands 1, 2, 4, and 5.
8. In the course of the examination in the Courtroom and on Lands 1 and 2 the Court noted graves on Land 1 belonging to Veā Y’s grandfather. There are also permanent houses there, breadfruit trees and cocoa trees which are safe from damage caused by free ranging pigs or cattle or even people. This protection is due to the fence and the gate.
9. The Court believes that Exhibit 1 which Lupe X brought to our attention has not been legalised.
10. Although Veā Y objects to the filing of these proceedings by Lupe X they confirm that Lupe X is the *Sao* of their family. They concede that Lands 1, 2, 4 and all the other lands are those belonging to their family. They are lands pertaining to the Lupe title of Tiasa, in Uso, Mau. Lupe X also confirms that Veā Y is a true heir of the Lupe title.
11. If the Court considers Lupe X’s petition it is clear that the focus is on the removal of Veā Y from lands pertaining to the Lupe title of Uso, Mau, although this issue began with the removal of fences and gates on Lands 1 and 2. This was also the reason for the correspondence between the two parties. However the Court believes that the removal of Veā Y is now the crux of the matter and the point that has been emphasised. The removal is because Veā Y disregarded and did not heed the will of the *Sao* nor did Veā Y acknowledge or recognise the *pule faamalumalu* (authority to look after or protect) of the *Sao* when Lupe X asked Veā Y to remove the fences and gates.

12. **Overview:**

- Those who are in the position of leadership should consider the heirs of the family and see if they are happy, whether they are living at peace with each other and caring for one another.
- A good leader is gracious and loving, a great tree in whose branches birds find rest and shelter from the heat of the sun.
- The heirs and descendants should be at the forefront of doing what is best in support of the *Sao*. They should make all efforts to fellowship and relate to the *Sao* and lend a helping hand, a shoulder so that together they can develop and progress the family as a whole.

13. Because of the foregoing reasons the Judges have reached the following majority conclusion:

Decision:

- (i) Ve'a Y is to leave the lands pertaining to the title Lupe of Tiasa in Uso, Mau within one month from the date of this decision.
- (ii) Cost of the hearing is \$40.00, \$20.00 to be paid by each party and to be taken from the cost of filing the Petition.

The decision is then signed by the Deputy President, two Judges and two Assessors.

It seems in making its decision, the Court took the following into consideration: the Court's approach to custom governing the relationship between the *Sao* and the *suli* (heirs), correspondence between the two parties, answers given to questions asked in the course of the hearing, and observations made by the Court on the site visit. The Court does not seem to attempt to draw any connection between what it took into consideration and the decision it reached. The stated 'reasons' seem more like opinions which are never rounded off to a conclusion. The main decision therefore follows as a final remark that is disconnected from the 'reasoning' that has gone before. Notably, and possibly characteristically, there is no reference to the *Land and Titles Act 1981 (Samoa)* or any other legislation. This could suggest that the matter was decided solely on custom.

Appeals

Part IX of the Act deals with Appeals. Appeal is available to any party to any proceedings. Any final decision or Order of the Court³⁴⁴ (except for an interim order issued under sections 49 and 50, orders for costs under section 72(2), and where an offence has been committed under section 75), can be appealed.³⁴⁵ An appeal can not be lodged without leave of the President.³⁴⁶ In granting leave the President may order a stay of proceedings under the final decision or order pending the hearing of the appeal.³⁴⁷ An application for leave to appeal must be made within twenty one days of the delivery of the Court's final decision or order or two months after the delivery, if that extension of time is allowed by the President, upon application.³⁴⁸ Today SAT\$200 is paid on the day the application is filed as security for the appeal.³⁴⁹ As was the case in the Court of first instance, copies of the application for leave to appeal are served on the parties concerned. In response the parties when served can in turn file a response stating their objection to the application and reasons for it. This has to be done within twenty one after the service of the application for leave to appeal.³⁵⁰ Copies of these responses are served on the applicant as soon as practical.³⁵¹

Grounds for Appeal are found under section 79 (1) (a) to (g) of the Act. It sets out seven grounds. These are:

- (a) That new and material evidence had been found since the hearing of the petition of which the applicant had no knowledge, or which could not reasonably have been adduced at the hearing of the petition;*
- (b) That the successful party had been guilty of such misconduct in relation to the hearing of the petition as to affect the result of the case;*
- (c) That a witness had been guilty of such misconduct in relation to the hearing of the petition as to affect the result of the case;*
- (d) That a member or officer of the Court had made a mistake or misconducted himself in relation to the hearing of the petition as to affect the result of the case;*
- (e) That the Court did not have jurisdiction to make the final decision or order;*

³⁴⁴ Ibid., s.76(1).

³⁴⁵ Ibid.

³⁴⁶ Ibid., s.78(1).

³⁴⁷ Ibid., s.78(2).

³⁴⁸ Ibid., s.81.

³⁴⁹ Ibid., s.82.

³⁵⁰ Ibid., s.84(1).

³⁵¹ Ibid., s.84(2).

- (f) *That the decision or order is wrong in law or not in accordance with custom and usage;*
- (g) *That the decision or order was manifestly against the weight of the evidence adduced at the hearing of the petition.*

Applications for leave to appeal are heard by the President sitting alone. A Deputy President cannot hear an application for leave to appeal. Parties are notified of the date on which the application will be heard.³⁵² All parties may be heard and make submissions.³⁵³ The hearing is not open to members of the public³⁵⁴ and the President may make such order on the application and as to costs or otherwise as he thinks fit.³⁵⁵ The 1981 Act does not state that the President is required to provide reasons for his decision on an application for leave to appeal. Section 66 provides that:

Every decision on a petition shall give the reasons of the Court, or the majority on its members for the decision.

As applications for leave to appeal are not ‘petitions’ and as it is only the President who hears and decides on the applications, one could argue that he is not required by section 66 to provide reasons for his decision on an application for leave to appeal.

Up until 2005 the Chief Justice of Samoa was also the President of the Land and Titles Court. Before the current Chief Justice – Patu Tiavasue Falefatu Maka Sapolu - was appointed (the first Samoan to hold the post) applications for leave to appeal were considered by the President sitting alone in Chambers. The current Chief Justice began the practice of hearing applications for leave to appeal in open Court. The hearing is similar to those in the Lower Court. It is, however, shorter because only the President (Chief Justice) carries out the examination of the parties. In 2005 after an amendment of the Constitution and the Act, a permanent and separate President for the Land and Titles Court was appointed: Hon. Tagaloa Donald Charles Kerslake. He has continued his predecessor’s practice of hearing leave to appeal decisions in open Court.

³⁵² Ibid., ss. 85(1) and 86.

³⁵³ Ibid., s.85(2).

³⁵⁴ Ibid., s.85(3).

³⁵⁵ Ibid., s.85(4).

Backlog – Appeals

Although the leave to appeal hearings are shorter than lower court hearings, it is this area of the Court's work where there are significant delays. There is currently a ten year backlog in appeals. The appointment of a President for the Land and Titles Court, which was long overdue, was expected to address the backlog in appeals, among many other things. Because the President was previously also the Chief Justice, it meant applications for leave to appeal in the Court had to wait until the Chief Justice was available before they could be heard. Circumstances were eased with the appointment of the President, further assisted by the appointment of Justice Lesa Rapi Vaai a few years ago and the more recent appointment of Justice Vui Clarence Nelson as Supreme Court Judges. Under the Act, a Supreme Court Judge can sit as President of the Land and Titles Court and therefore hear applications for leave to appeal.³⁵⁶

The backlog consists mainly of matters at the leave to appeal stage and others where the actual appeal has not been heard. I came across a case where the application for leave to appeal was heard in April 2007, fifteen years after it was filed. It certainly gives a whole new meaning to the adage that: *Justice delayed is justice denied*. In this particular case all but one member of the party appealing had passed away. Needless to say the delays are the cause of much criticism and raise doubt about the Court's efficiency. Recently, a newspaper in Samoa reported a case where the decision of the Court was delivered in May 1995 wherein a certain individual was expelled or banished from their *nuu*. In August of the same year their application for leave to appeal was successful and the President (Chief Justice) ordered a stay of execution of the Court's decision until the Appeal had been heard. But no stay of execution occurred. The man was banished and the Appeal still has not been heard, almost thirteen years after leave was granted. The article goes on to say that what has made the delay even more difficult for the family to bear is that their father, who was banished in the 1995 decision, passed away in 2004.³⁵⁷

The delays at times were unavoidable, especially when the Chief Justice was also the President of the Land and Titles Court and there were no other Supreme Court Judges. Further delays eventuated if the Chief Justice/President was related to one or more of the

³⁵⁶ Ibid., s.26(1)(a).

³⁵⁷ *Samoa Observer*, 'COURT OF APPEALS BACKLOG WORRY', 17 April 2007; Personal Interview with Hon. Le Mamea Ropati Mualia, Member of Parliament, Former Minister of Cabinet, Samoa, August 2006.

parties. This kind of issue frequently arises in the Court. Samoa is very small. There is a belief often expressed by Samoan orators that Samoa's genealogy has met and merged at several points. These *Va* or relationships, discussed in Chapter Two, are protected and recognised. What is the Court to do when familial connections exist at every turn? Ethics, judicial practice and convention state that a judge must declare a conflict and step aside and that is exactly what happened. The result was further delays in the hearing of appeals. Nevertheless, whenever appeals are talked about or become the focus of media attention, the Court comes under attack. Attempts to address the problem have become the concern of everyone who works for or has some connection with the Court.

In 2006, after the general elections, Hon. Unasa Mesi became the Minister for MJCA. One of his first official tasks was to address the backlog in appeals. On examination it was found that a third of the appeals in this backlog had been withdrawn. The decision was then made to follow up on the remaining two thirds. To accomplish this, letters were sent out to the identifiable parties to ascertain where they currently stand regarding the appeals they had filed some five or ten years earlier.³⁵⁸ Hopefully the move is not too late, as it was for the two appeals mentioned earlier, where members of the parties had passed away.

Increase in Appeals

Despite the backlog, applications for leave to appeal are filed in 99% of the cases heard in the Lower Court. This trend began about five years ago. The reason for the increase is not clear, but it will surely put further strain on the Court as the backlog still has not been resolved. Some have suggested that perhaps it is an indication that the Samoan public is becoming more litigious or just more aware of their legal rights. Others say it is more an indication of the lack of confidence the public has in the Court's integrity and the correctness of its decisions. It could be another incidence of modernity. The grounds outlined above could be another cause for the increase in appeals. They are sufficiently wide to allow appeal on virtually any aspect of the decision and decision-making process. The range of grounds of appeal has in the past been interpreted as a reason for the bar on judicial review of the Court's decisions under section 71 of Act. In that argument, the belief is that unfairness, illegality and perhaps even irrationality are possible grounds for appeal under the Act so there is no

³⁵⁸ Personal Interview with: Hon. Unasa Mesi – Minister for MJCA, Samoa, August 2006; CEO, MJCA and Registrar of LTC, October 2006.

need for such grounds to be addressed by way of judicial review. This issue will be discussed further in Chapter Seven.³⁵⁹

As yet, the increase in applications for leave to appeal has not been linked to ultimate success. However, the applications for leave to appeal are mostly granted. There are a few instances where leave has not been granted. One such case was mentioned earlier where there was a fifteen year delay before the application was heard and denied. Because of the delay one would have thought an opportunity to hear the applicant's case was the least the Court could have done in the interests of justice and fairness. There are some who are of the opinion that the reason why applications for leave to appeal are usually granted is not because the applications fall under the grounds of appeal, but because the appellate process is being used as a way to check the competence of the Lower Court.

The Appeal in Case 'LC 123'

An application for leave to appeal the decision in LC 123 was filed on the day the decision was delivered – 14 April 2005. Unlike the cases that are part of the ten to fifteen year backlog, this appeal proceeded quite promptly through the Leave to Appeal stage and on to the full Court of Appeal. There is no evidence indicating why this particular appeal proceeded so promptly. There is nothing particularly unique about the case that would suggest cause for expedience. The Act does not provide any clues as to how the President is to order or prioritise the hearing of applications for leave to appeal. Applications for leave to appeal rarely state the exact ground provided in the Act that is being relied upon. Ve'a Y's application does not identify the exact grounds either. Here are some of the points put forward by Ve'a Y in support of the application for leave:

- They did not cross the line in their relationship with the *Sao* – Lupe X. They did nothing wrong, they did not disregard or disobey the *Sao*.
- Lupe X should not have brought before the Court the supposed 'Will' – exhibit 1.
- I cleared Land 2 therefore it belongs to me not the Lupe X just by virtue of the fact they are the *Sao*.
- Lupe X does not live in the *nuu* and has not fulfilled their duty as *Sao* to keep and maintain the peace in the family.
- Lupe X made untruthful statements before the Court and in their written statement.

³⁵⁹ Chapter Seven will also further discuss whether the backlog in appeals means that 'appeal' is not a real and viable option for a litigant who has just received an unsatisfactory result in the Lower Court.

- Lupe X is not a competent, kind or caring leader.
- The removal of Ve a Y from Lands 1 and 2 is a breach of Ve a Y's rights as an heir who has lived on these lands since birth.
- Ve a Y objects to being removed from Lands 1 and 2.
- Ve a Y seeks leave to appeal Lower Court decision LC 123 – 14 April 2005.

The President examined the Applicant first and then the Respondent. Here are some of the questions he asked the Applicant.

- Is Ve a *matai* title?
- Does your *matai* title belong to the same family as Lupe X?
- Is your title an orator title?
- The first point I want you to clarify is why the *Sao* of your family would file a petition seeking your removal?
- So there are three reasons. The first is the fact you did not allow the burial of the elderly lady of your family on Land 1?
- Second was your refusal to remove the fences and gates from Lands 1 and 2 so that the old lady could be buried?
- What is the third?
- Are these three reasons the cause for the *Sao* seeking your removal?
- I ask because your application seems to cover a wider range of reasons, but if these are the three reasons as you say then the Court will direct its examination accordingly.
- My first question concerns the difference between Tiasa, the residence of the Lupe title, and the other lands pertaining to the title Lupe of Mau.
- Can you tell me again how many lands are there pertaining to the Lupe title?
- So there are four?
- But Tiasa is the residence of the Lupe title?
- Who lives on these lands?
- You say no one lives on Land 2?
- Who lives at Tiasa?
- So no one lives at Tiasa, the residence?
- Are there any graves on Land 3?
- Whose descendants live on Land 3, western and eastern sides?
- Are there any graves on Land 4?
- Who lives on Land 1?

- Are there any graves on Land 1?
- Are there any descendants who are not from the same branch as you buried on Land 1?
- Am I correct in noting that your father and grandfather are buried on Land 1?
- My question is: why have descendants from the other branches of your family been buried on Land 1?
- Is Lupe X the *Sao* of your family?
- Did your father object to having any of these other descendants being buried on Land 1?
- Why do you think the *Sao* of your family wanted to bury the elderly lady of your family on Land 1?
- When the burials on Land 1 in 1985 and 1994 were carried out was Lupe X the *Sao* of your family at the time?
- Is your father's title an orator title?
- Am I right in noting that the *Sao* did not object to your father being buried on Land 1 when he passed away?
- When did your parents pass away?
- Did the *Sao* attend the funerals?
- So you do not accept that you locked the gate to Land 1 and avoided the *Sao*?
- So you would have accepted the *Sao*'s decision for the old lady to be buried on Land 1 if you had known of the *Sao*'s wish?
- What if we *liutofaga* (move the buried to another location) the old lady, would you accept that and have her buried on Land 1?
- ...Now, Vea Y, where are you living at the moment, on Land 1 or in another *nuu*?
- Where do your spouse and children live?
- How old are you?
- Where were you born?
- Have you ever lived elsewhere apart from Land 1?
- So you have lived on Land 1 for 53 years?
- Tell me, how did Land 1 come to be part of the lands of the Lupe title?
- Is it possible that another reason for the *Sao*'s displeasure is the type of language you use towards them? You do use very strong language.
- The *Sao* also notes that you do not render the necessary *tautua* (service). Is this true?
- How is it not true? Please be detailed.

- How many children do you have?
- How old is your eldest and youngest?

At the end of the hearing the President granted Ve'a Y leave to appeal. The President seemed to arrive at his decision by balancing the decision of the Lower Court to banish Ve'a Y, and the reasons the Lower Court gave for its decision, reasons which the President thought expressed a degree of hesitancy that warranted the granting of leave to appeal. In this case, the President gave reasons for his decision although as argued earlier, section 66 of the 1981 Act does not require him to do so.

Hearing an Appeal

Every appeal is by way of rehearing.³⁶⁰ At the appeal hearing the Registrar produces to the Court the full record of the proceedings, and all the evidence given at the preliminary hearing, the hearing of the petition and the hearing of the application for leave to appeal.³⁶¹ The Court has the discretion to rehear the whole or any part of the evidence listed above.³⁶² The form of the appeal hearing is much like that in the Court of first instance. The Court's constitution, however, is different.

When the Court hears appeals it consists of the President and two Samoan Judges (usually senior Judges or Deputy Presidents) appointed by the President.³⁶³ The only requirement expressly made in the Act regarding the Samoan Judges who will sit on an appeal hearing is that they were not part of the Bench that heard the petition in the matter on appeal.³⁶⁴ The same restriction applies to the President/Supreme Court Judge who will preside as President.³⁶⁵ The Court hearing an appeal has all the powers and jurisdiction of the Land and Titles Court.³⁶⁶ On completion of an appeal hearing the Court may: dismiss or uphold the appeal,³⁶⁷ set aside or vary the final decision or order appealed against,³⁶⁸ make such order as to costs as it thinks proper.³⁶⁹ Decisions of the Court on appeal are final.³⁷⁰

³⁶⁰ *Land and Titles Act 1981 (Samoa)*, s.88(1).

³⁶¹ *Ibid.*, s.88(2).

³⁶² *Ibid.*, s.88(3).

³⁶³ *Ibid.*, s.77(1).

³⁶⁴ *Ibid.*, s.77(2).

³⁶⁵ *Ibid.*, s.77(3).

³⁶⁶ *Ibid.*, s.77(4).

³⁶⁷ *Ibid.*, s.89(1)(a)(b).

³⁶⁸ *Ibid.*, s.89(1)(c).

³⁶⁹ *Ibid.*, s.89(1)(d).

The Appeal hearing on 'LC 123'

The appeal hearing for LC 123 was on 20 April 2006 and the Bench was the President, a Deputy President and a senior Judge. The Appellant and the Respondent were examined first by the Senior Judge, then the Deputy President, with the examination completed by the President. The decision of the Appellate Division of the Court was delivered in open Court on 1 May 2006. It decided that Ve a Y would be removed from Land 1 for six months starting on the date of the decision. After the six months, Ve a Y could return to Land 1. Therefore, the appeal was allowed in part. In its decision the Court referred to the need for *suli* (heir) to respect the *Sao* as they are the head or leader of the family, as well as the need for the *suli* (heir) to access land. The Court therefore decided to banish Ve a Y but only for six months, so that he would not be permanently disconnected from the land. The cost of the hearing was \$150 to be taken from the money paid when the appeal was filed. It took the Court a little over a year to hear LC 123 in the Lower Court and the Court of Appeal. If this is the start of a new trend in the Land and Titles Court, it will be a most welcome change.

Enforcement

After the decision was delivered, the Appellant, Ve a Y did not leave Land 1 or any other lands of the Lupe family for the six months as stipulated in the decision of the Appellate Court. Lupe X, the original petitioner, did not seek to have formal charges laid against Ve a Y for not complying with the Court's decision.

This highlights one of the biggest problems facing the Court: the problem of enforcement. Under the Act, every decision or order of the Court shall be enforced in and by the Supreme Court or, as the case may be, by the District Court.³⁷¹ It is also an offence under the Act to disobey a decision of the Court.³⁷² Nevertheless, it is still extremely common for people not to obey decisions or orders of the Court, especially interim orders from the President or the Registrar under sections 49 and 50. This is so common, and the Court's response to disobedience of Court orders has been so weak, that many do not even bother reporting to Court instances where a decision or an order has not been obeyed. A viable solution to the enforcement issues facing the Court is vital for its effectiveness, to convince the public that it is a legitimate authority and that its decisions and orders 'have teeth'!

³⁷⁰ Ibid., s.90.

³⁷¹ Ibid., s.74(1).

³⁷² Ibid., s.75(1)(a).

RECORD KEEPING

Under the Act, the Registrar is required to keep proper records concerning the Court's administration³⁷³ and its proceedings.³⁷⁴ This same section states that no person shall have access to the records of the Court except with the permission of the President, or the Registrar. Access to Court files today is very strictly monitored. There was a time in the past when access was much easier. The result of that 'freedom' is the incompleteness evident in many of the Court files today. A lot of the original documents are missing and in some cases new documents have appeared in the oddest places. It is these records that the staff of the Office of the Registrar must collate to produce a Report for the Court on every matter that it is to hear, as mentioned earlier. This Report is for the Court only; parties are not allowed a copy.

Apart from the records of the Court and the Ministry, the Registrar maintains the Register of Matai. Under section 22 of the Act it states:

There shall be kept in the Court by the Registrar a register to be called the Register of Matai and no entry shall be made or deleted from the Register except by the Registrar, or by his direction

This *Register of Matai* records the names and titles of persons who are the 'rightful holders' of Samoan names or titles, together with other particulars prescribed by any rules, by the Registrar.³⁷⁵ This Register is kept manually. There is no electronic version. *Nuu* (geographical locations) are grouped according to the traditional districts they belong to and then each *nuu's matai* are listed separately. Entry in the Register of Matai is one of the three requirements under the Act that need to be satisfied before one is considered the "rightful holder" of a *matai* title.³⁷⁶ At the traditional bestowal, or shortly thereafter, the details of the appointment are recorded in a Book of Forms that is kept by the *Pulenuu* (Government representative) in the *nuu* to which the title bestowed belongs.³⁷⁷ The form is filled out in triplicate and one copy is relayed to the Office of the Registrar. The details of the bestowal are published in two consecutive issues of the *Savali* (Government Gazette).³⁷⁸ This allows all interested persons the opportunity to object to the bestowal within the period set down in

³⁷³ Ibid., s.93.

³⁷⁴ Ibid., s.94(1).

³⁷⁵ Ibid., s.22(2).

³⁷⁶ Ibid., s.20.

³⁷⁷ Ibid., s.23(2).

³⁷⁸ Ibid., s.23(4).

the publication which is usually three months from the date of first publication.³⁷⁹ If there are no objections then the newly appointed *matai* is entered in the Register of Matai under the *nuu* the title is from. The new appointee will then be recognised as the rightful holder of the *matai* title to which they have been appointed.³⁸⁰ If there is an objection then the objector is required to file a petition to the Court in the way outlined earlier in this chapter³⁸¹ for determining the objection and deciding the rightful holder of that *matai* title.³⁸² It is only after the Court has determined the objection that an entry can then be made, on the order of the Court. One is not a 'rightful holder' of a title if it is not registered. If a person uses a title without being a 'rightful holder' they will be in breach of section 21 of the Act.

Possible Reforms – Problems

Some have raised concern about the length of time for publication and the fact the details of a bestowal are only published in the *Savali* (Government Gazette). The concern is that the length of time and the medium are inadequate. It has been suggested that either the length of time needs to be extended or other media of publication should be utilised, such as radio or television. The usual response to such suggestions is that it will mean an increase in costs which the public will end up having to bear. Proponents of such a change believe that if such added costs are reflected in an increase in cost for filing a petition, it will pose no problems. It will not create an obstacle to those who wish to access the Court. Such a change would mean more interested persons will be made aware of proceedings that are coming before the Court and this will outweigh any extra financial cost.³⁸³

Recording of Judgments

The system by which the records of the Court are kept is referred to in Chapter Five. In the same chapter there is reference to the 'Judgment Book'. This was kept until 1981 when the current Act was introduced with its provision requiring the reasons for the decisions to be given as part of the decision and not just the orders made. The Judgment Book stopped being kept because of cost. The result is that since 1981 there is no central record of the decisions of the Court. Needless to say this causes a number of problems when one needs to make a search. This affects those who wish to access the Court and the Court files. The need to

³⁷⁹ Ibid., s.16, 17.

³⁸⁰ Ibid., ss.20, 22(1) and (2).

³⁸¹ Ibid., s.42.

³⁸² Ibid., s.23(8).

³⁸³ Personal Interview with Hon. Tuisugaletauatele Sofara Aveau, Minister of Works Transport and Infrastructure, Former Minister of Natural Resources and Environment (Lands), Samoa, February 2006.

collate the decisions of the Court in order to create a central record like the Judgment Book is slowly being acknowledged and in 2007 a policy decision was made by the current Registrar of the Court to start by making a central file that holds copies of every decision the Court makes. It will require some work to establish an efficient and well organised system, ensuring that the Court has complete records on which it can rely, as there are no law reports.

The current Card Index system by which the Records are kept is also in dire need of attention. One of the first improvements that can be made is to change the paper index into an electronic one. With an electronic system alterations and cross referencing will be easier. It will also facilitate searches of files. The confusion that often arises with the use of the current card index would be reduced. Making the most of computer technology in cataloguing and organising the Records of the Court would be a simple step in the right direction.

Protecting the Records

The next step that should occur concerns the protection of the Court Records themselves. At the moment they are paper records. Even decisions dating back to the beginning of the Court in 1903 are still in their hard copy state. Much of the material forming the Records of the Court qualify as archival material or perhaps even museum pieces and need to be preserved. In the day to day work of the Court it is these documents, that are over a hundred years old, that are brought out and searched through by the public, the Court and its Staff. This handling of Court Records exposes the documents to damage, loss and sometimes theft. If the documents were copied and stored electronically many of these problems would decrease. Electronic records could then be searched and security measures and checks introduced to determine what could be copied. If an electronic set of the Records could be created then the hard copy, the originals, can be preserved and kept for posterity. Again the obstacle would be costs but there is no shortage of Aid donors wanting to assist in Samoa's development. I am sure there is a donor who would see the value in implementing such a change in the Court. Such aid would definitely reach and benefit all Samoans as most come to the Court at some time.

PRECEDENT

Link between Precedent and the state of the Records

The current state of the Court Records is closely linked to the question of whether the Court should be formally bound by the common law doctrine of precedent. Under this doctrine the

prior decisions of a higher court are binding on a lower one.³⁸⁴ In relation to the Court, this would mean that a decision of the Appellate Division that is analogous to a case arising later before the Lower Court should bind that Lower Court. One needs to ask whether the Court should be bound by the doctrine of precedent, and also whether it would be practically feasible, considering the state of and access to its Records.

‘Historical’ system of precedent observed by the Court

In practice, the Land and Titles Court does not observe the doctrine of precedent as it is followed in the Common Law Courts. Perhaps this is because the Court was established by the Germans who have a Civil Law System which does not observe the same doctrine of precedent.³⁸⁵ Adherence to the Common Law doctrine of precedent is not normally prescribed in a statute which is perhaps why no mention of it is found in any of the legislation relating to the Court or found in the *Constitution* of Samoa.

Yet there is evidence in some cases that the Court has taken into consideration previous decisions it has made concerning customary land or *matai* title, at least when the same land or title comes again before the Court. If there have been previous decisions concerning the same land, even if the issues may be different, the Court has on occasion ensured that their determination on a current issue is not inconsistent with previous decisions of the Court even if the previous decisions were not those of the Appellate Division. In such cases it is vital that the Court has a complete record of all its past decisions concerning the land or *matai* title in question. Following this very limited form of precedent (which I refer to as an ‘historical’ system of precedent) has also lead to cases where the Court has been quick to dismiss a petition just because there was already a decision on the matter. For this reason the inaugural President of the Court advised the Judiciary not to be too hasty, but to look carefully into the matter, as this would be an opportunity to assess the previous decision(s) and to confirm them or correct possible errors. Considering a petition even though there are past decisions related to the subject also gives the petitioner the chance to be heard. Having one’s day in court goes a long way in fostering confidence in the Court and its readiness to hear the concerns of the

³⁸⁴ P. Vines, *Law and Justice in Australia – Foundations of the Legal System*, (Oxford University Press, Melbourne, 2005), 52, 299.

³⁸⁵ K. Zweigert and H. Kotz, *An Introduction to Comparative Law*, (3rd Edition, Oxford University Press, Oxford, 1998), 257, 262 -265.

public it serves.³⁸⁶ This ‘informal system’ would suggest that the Court currently will not automatically dismiss a petition because there is a prior decision concerning the same land or *matai* title, but at the same time would be reluctant to reopen matters. What would also assist in observing and refining this ‘historical’ form of the doctrine of precedent are the reasons for the decisions which were required in the 1981 Act. The reasons should reveal and inform the Court’s decision on whether it can or ought to follow a previous decision on the same *matai* title or land.

The ‘Bench Book’ has a part dedicated to ‘Decision Making’.³⁸⁷ It lists principles that a bench should adhere to when making its decisions. Lawfulness, reasonableness, absence of bias and the right to be heard are on this list.³⁸⁸ What is absent is any reference to previous decisions of the Court concerning the same parties or the same *matai* title or customary land. There is a blanket reference to the need to match up the relevant facts with the ‘law’ but previous decisions are not clearly identified as being part of the law to be applied.³⁸⁹ Previous decisions of the Court are also absent in the list of laws to be applied in section 37 of the Act, so one can safely assume that the ‘law’ as referred to in the ‘Bench Book’ is not specifically intended to cover previous decisions of the Court. Even under the New Zealand regime, with the long-standing involvement of New Zealand-trained judges in the Court, precedent played only a very limited role.

A recent decision of the Court³⁹⁰ concerning *matai* title succession confirms the informal ‘historical’ form of the doctrine of precedent the Court seems to have adopted. In this case, one of the arguments put forward by those who petitioned against the bestowal was that it had been carried out in breach of a prior decision of the Court, made in 1939.³⁹¹ In its decision the Court referred to section 80 of the *Land and Titles Act 1981 (Samoa)* which states that the decisions of the Court are judgments *in rem* and bind all those affected by the decision even if they were not parties in the proceedings. The Court in this instance ruled that the bestowal

³⁸⁶ Personal Interview with Hon. Tagaloa D.C, Kerslake, President of the LTC, Former Cabinet Minister and Secretary of Justice, Barrister and Solicitor, Samoa, September 2005.

³⁸⁷ *Bench Book*, Part VII.

³⁸⁸ *Ibid.*, 71.

³⁸⁹ *Ibid.*, 74.

³⁹⁰ Appendix C: LC 853 P1-P39, 18 June 2008.

³⁹¹ *Ibid.*, at page 9.

should be declared void, and one of the reasons given for its decision was that the bestowal was inconsistent with the 1939 decision.³⁹²

Limited access to files limits application of doctrine of precedent

In the Court, because the parties in one matter or file do not have access to the matter(s) or file(s) concerning the affairs of other families, the doctrine of precedent, as observed in the Common Law jurisdiction, is not possible. Petitioners do not know of any possible decisions setting precedents that have been made in circumstances analogous to theirs. They only have access to the files for cases to which they are connected. In the same way the Bench will not necessarily be aware of any other past or recent decisions of the Court on facts similar to those currently before the Court. The fact that a central record like the 'Judgment Book' ceased to be kept after 1981 makes it even harder to locate any like cases that have been previously decided. This is a serious practical impediment to the operation of any doctrine of precedent.

Suggestions concerning the application of the doctrine of precedent

The limited system of precedent that the Court observes in practice can be said to be the product of the meeting of custom (privacy of family matters) and the western common law doctrine of precedent. Concern arises when the system results in confusion or unfairness due to an inconsistent approach being taken when prior decisions are relied upon occasionally. If the system of precedent that is informally observed by the Court is the best that this hybrid process can produce then the only logical response is to reduce, if not remove, the confusion and unfairness which results. Is the Western common law doctrine of precedent contrary to custom, in any case? I do not think so. However, the reality is that due to the requirement for the Court to consider and apply Samoan custom and usage (such as the privacy of family matters), it is possible for a petitioner to be unaware of the existence of a decision in a case similar to theirs that could form a precedent. For this reason it is quite probable that the Court cannot observe the common law doctrine of precedent in its entirety. What then should be done to ensure fairness and clarity of the Court's practice in relation to its past decisions?

Perhaps the legislation governing the Court should require adherence to precedent in specific situations. What would such a provision look like and what would it entail?

³⁹² Ibid., at page 12.

Fairness and Clarity

Under the common law doctrine of precedent decisions of a higher court on points of law are binding on a lower one. This would mean that the decisions of the Appellate Division of the Court should bind the Lower Court. It would be possible to enforce this within a single file. This still leaves open the question of whether the appeal decision for one file should be binding on the Lower Court dealing with the same type of matter from a different file, or a different family, *matai* title or customary land. The fact that not every party has access to other files where relevant precedents have been established would still create an obstacle to the strict observance of the doctrine of precedent.³⁹³ However, this would not preclude providing in the Act for the Lower Court to be bound by decisions of the Appellate Division within a specific file.

A further possible objection to the full application of the doctrine of precedent is the fact that the operation of the doctrine presumes that everyone is operating on and applying the same law in different cases. If 'law' means the *Constitution* and the *Land and Titles Act 1981 (Samoa)* then the Court is already required to apply the same law. However, because this is specialist court that also applies Samoan customs and usage, one could argue that the doctrine cannot be fully applied because the customs and usages that are applicable to the matters that come before the Court are as varied as the matters themselves, as are the possible interpretations of such customary norms. That is, customs, on rare occasions, may differ in different parts of Samoa, or between different families.

Such an objection could be countered by stating that although the practices of one locality or one family may differ in some respects than those of another locality, there is probably sufficient similarity in customary practices to form a body of 'customary law', of a clearly recognisable kind that operates in parallel to the Act and the *Constitution*. This identifiable body of customary rules will satisfy the need, that for precedent to operate, it is necessary to presume the same 'law' is being applied across the country and a variety of cases.

³⁹³ It might be possible that all decisions could be made available to every litigant and the identity of those concerned could be protected by removing their names from the record. This however is probably impossible in the Land and Titles Court purely on practical grounds. I do not think the Court has the resources to do this. Perhaps down the line when the records are in a better state, this option could be considered. It is, however, not currently feasible.

A more particular argument in favour of the operation of a system of precedent can be based on the fact that the same Judges often hear many Lower Court cases. It is relatively easy for them to remember the rationale of a previous decision and then apply it in another sufficiently analogous case. This would compensate for the fact the parties did not have access to that previous decision, as the Judges could inform the parties, during argument, of the tenor of the prior decision.

Possible Position on Precedent

If one was to suggest a position in relation to the doctrine of precedent it could be as follows: decisions of the Appellate Division of the Court concerning matters of interpretation of statute, the Constitution and generic customs and usages should be binding on the Lower Court within a particular file, while earlier decisions of the Lower Court, although not binding, should be viewed as persuasive and should be considered, in the interests of consistency, by the current Bench in the same court. With decisions made by the Court after 1981, which include reasons for the Court's decision, the reasons should help in deciding whether a previous decision should be followed or not. The doctrine of precedent, as in the Common Law courts, should be observed in the above limited manner. This position acknowledges of the mixed origins of the Court in the Civil and Common Law systems and also recognises the Court's specific duty to apply Samoan custom and usage.

The effect of judicial review decisions, made in the general courts, also needs to be considered. This will be dealt with more fully in the next chapter.

Re-litigating the same issue

The principle of *res judicata* is distinct from, but related to, the doctrine of precedent. The essence of the principle is that once a "thing" (or matter) has been decided or adjudicated this is final, meaning the same "thing" can not be re-adjudicated at a later time.³⁹⁴ The doctrine of precedent, in contrast, addresses the question of whether the principle affirmed in the decision is applicable to a later case currently before a court. On the other hand, the principle of *res judicata* establishes that once the issue has been adjudicated and decided on a set of facts, that decision is final. The matter will not be re-opened or re-litigated except in very limited circumstances, such as through an available appeal process. Again, the reasons

³⁹⁴ Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata*, (Butterworths, London, 1996), 4.

provided in decisions after 1981, if they are clearly and properly made, will be central in determining whether an issue being raised has been previously adjudicated. Decisions before 1981, on the other hand, which contained only the orders of the Court, would not be much help in this regard as inferences would have to be drawn as to reasons for the decision.

The question of whether the common law principle of *res judicata* should apply to the workings of the Court was considered in the case discussed below. Before looking at it, however, it is helpful to consider why this principle should be applied in the practice and procedure of this Court.

Certainty and Finality

As outlined earlier, proceedings before the Court are commenced by filing a petition. The petition outlines the orders, or decision, and remedies sought. In practice, the main situation where the principle of *res judicata* is likely to be raised is where the Appellate Division of the Court (the President in particular at the leave to appeal Stage) is contemplating ordering the rehearing of a matter out of time. Then it could be argued that the matter cannot be re-opened because it has already been finally decided. At the centre of this issue may be different views as to what fairness and justice requires. Is it fair and just to have finality in matters or to permit new arguments to be presented out of time? The advantage of finality and certainty are that they give credit and legitimacy to the Court and its decisions. They engender confidence in the Court. The public needs this in order to entrust the Court with the responsibility of adjudicating matters that are close to the heart of the Samoan and being Samoan – customary lands and *matai* titles.

Finality and certainty here do not mean that custom is made so rigid as to not allow for its evolution. A Court of record is expected to be professional and clear in its reasoning because that will determine whether a later Court can decide whether a matter has been fully, fairly and finally determined or whether it needs to be re-opened, or has not been previously considered by the Court. But this does not mean the customs laid down must be inflexibly applied. The Court is a formal structure but applies custom which is not as rigid and settled as matters of precedent and *res judicata* in the (Western) common law tradition.

Asiata Peniamina and Ors v The Land and Titles Court and Anapu Aialii and Ors.

In December 2004, the Samoan Court of Appeal heard the above case.³⁹⁵ In the course of the hearing, the court asked for further submissions on two issues. One of these was whether the principle of *res judicata* should be applied in the Land and Titles Court. Arguments were made for and against its application. According to the Appellant, the Court should not have ordered the rehearing in 1991 of the issue concerning the true heirs of their *matai* title because this issue had already been the subject of two previous decisions in 1916 and 1954. The Appellant argued that the rehearing in 1991 showed disregard for legal principles such as *res judicata*.

The opposing argument was that the Court is an inquisitorial body and not an adversarial one like a Court where the principle of *res judicata* usually applies. It was pointed out that the proceedings are initiated in the Court by the filing of a petition by an interested person and not by commencing an action, where cause of action or issue estoppel would apply. The argument also referred to section 37 of the Act to the effect that the common law does not apply in this context and therefore nor should the principle of *res judicata*. The Act specifically states that Samoan custom and usage are to be applied, and, it was argued, the principle *res judicata* is at odds with that custom and usage. In the alternative it was argued that even if the *res judicata* doctrine applied to the Court, it was not inconsistent with that doctrine for the Court to order the 1991 rehearing because 'special circumstances' warranted it.

After hearing these submissions, the Court of Appeal (perhaps regrettably) sent the question back to the Supreme Court for initial consideration. In 2008, the question still had not been determined although the issues have now been squarely presented for judicial determination.

Possible Position on 'res judicata'

In my view, the finality that is at the core of the principle of *res judicata* is needed in the Court. At the moment, the combination of the non-application of the *res judicata* principle, and the fact the Court is not formally bound by the doctrine of precedent, has resulted in considerable uncertainty when one is approaching the Court. The need for finality, clarity, and certainty does not necessarily require the adoption of the common law doctrines or

³⁹⁵ *Asiata Peniamina & Ors v The Land and Titles Court & Anapu Aialii & Ors*, an unpublished decision of the Samoan Court of Appeal, 12 December 2004, delivered by His Honour, Sir Maurice Casey.

principles in their entirety. The identification of the need, however, does require an adequate response. Something has to be put in place to achieve the same result as *res judicata* and the doctrine of precedent when they are properly observed and applied. The decisions, procedures and processes of the Court should have a degree of certainty, finality and consistency if there is to be an end to litigation. If this is achieved, a sense of fairness is more likely to be attained. As a result, confidence in the Court would grow.

I do not believe that certainty, finality, consistency and fairness are at odds with Samoan custom and usage, in any case. The development of a 'special' form of *res judicata* is conceivable, one that takes into account the specialised character of this Court. It should have exceptions or provisos, to provide flexibility and could then be consistent both with Samoan custom and usage, and the principles of the common law such as the need for natural justice and due process. Such an exception, for example, may allow the rehearing in 1991 of a matter decided in 1916, if circumstances have substantially changed.

CONCLUSION

The Land and Titles Court is a colonial creation that has undergone a process of indigenisation under new Samoan management. Many aspects of the Court's practice and procedure illustrate the move away from strict adherence to Western legalism and closer adherence to the Samoan customs and usages which the Court is required to apply. There are many elements of fusion, some cases where two distinct systems co-exist, and other cases where the tussle between indigenisation and Western common law forms continues. Why has an independent nation retained a creation of colonisation? It is either because the indigenes have voluntarily chosen to adopt the imposed legal forms or because the indigenous systems have been so greatly altered that a return to pre-colonial processes is neither practical nor possible. In the end two things are certain: the survival of the Court depends on its adaptability, and the survival of Samoan customary land and titles law depends greatly on the continued existence of the Court.

CHAPTER SEVEN

RELATIONS WITH GENERAL COURTS: JUDICIAL REVIEW OF LAND AND TITLES COURT DECISIONS

INTRODUCTION

The legal framework of Samoa is typical of a post-colonial, independent nation. It has adopted a Western and indigenous legal mix. A clear indication of this is found in Samoa's 'supreme law' – the *Constitution of the Independent State of Samoa 1960 (Samoa)* ("the *Constitution*"). This *Constitution* encapsulates the vision of the founders of Independent Samoa that the nation's future should lie in the melding of Samoan custom and tradition with Christian and English legal principles, illustrating the Samoan view that the culture or traditions of a people are not obstacles in the path of development. Instead, development is part of a culture. This ability of a culture to accommodate new ideas and practices is notably active in the Samoan context.³⁹⁶ This is a definite strength in a rapidly modernising world. Samoa has adopted much from her former colonial masters while reasserting aspects of Samoan customary ways.

This melding of traditions is relevant to the central question of this chapter: whether the general courts can rule on the legal and procedural correctness of the decisions of the Land and Titles Court. If so, the general courts could quash a decision of the Court and send it back for reconsideration under the correct law or procedure.

This question is difficult because, under Samoa's constitutional arrangements, parallel judicial systems operate that apply largely different systems of law. There is a system of general courts, particularly the primary court of record, the Supreme Court, where general legal principles are applied. Operating in parallel with this general court system is the Land and Titles Court which is a specialist court that deals with matters concerning customary lands and *matai* titles. Unlike the general courts, the Land and Titles Court applies Samoan custom and usage. Samoa's constitutional arrangements therefore require us to consider the relations between these two court systems.

³⁹⁶ Le Tagaloa, *O Motugaafa*, 1997, 31- 32.

The principal question is: does Samoan law provide and allow for judicial review in the general courts of decisions of the Land and Titles Court? The starting point must be the structure of the laws of Samoa. Under this structure, the general legal principles, applied by the general courts, are derived from the *Constitution*, the general statutes of Samoa, and common law principles with origins in the English legal system, such as administrative law principles concerning judicial review. Under the *Constitution*, the Supreme Court has the primary power to grant remedies for breach of the *Constitution*, which includes breach of fundamental rights such as the right to a fair trial, to freedom of movement, and to freedom of religion.³⁹⁷ It also has the power to judicially review the decisions of 'inferior' courts and administrative bodies under general principles of administrative law.³⁹⁸

The continuation of the Land and Titles Court that operated under the New Zealand Administration is also due to the *Constitution*, as is the carving out of its jurisdiction concerning customary lands and *matai* titles. These are provided for in the *Constitution* itself.³⁹⁹ For this reason, it is not entirely clear whether this Court should be considered an 'inferior' court in the administrative law sense, which would permit its review in the general courts.

In accordance with the *Constitution*, the detailed operation of the Land and Titles Court is governed by further legislation, the *Land and Titles Act 1981 (Samoa)* ("the Act"), an ordinary Act of the Samoan Parliament. Significantly, this Act contains a powerfully worded 'ouster clause' that appears to prohibit the review of decisions of the Land and Titles Court by any court or tribunal in any way whatsoever, even their review under general principles of administrative law.⁴⁰⁰ The Act also sets up a separate appellate process for the Land and Titles Court that does not cross over into the general courts.

How then are we to understand the proper relationship between these parallel judicial systems in light of this legal framework as a whole? Are decisions of the Land and Titles Court reviewable in the Supreme Court either under the *Constitution* or under general principles of administrative law or not? In a sense, we are presented with a contest for authority between two legal systems operating within one country: the general legal system, applied through the

³⁹⁷ *Constitution 1960 (Samoa)*, Part II, in particular, Articles 4, 6, 9 and 11.

³⁹⁸ *Ibid.*, Article 73.

³⁹⁹ *Ibid.*, Article 103.

⁴⁰⁰ *Land and Titles Act 1981 (Samoa)*, s.71.

general courts, many of whose principles are derived from Western or English legal sources, and the specialist judicial system of the Land and Titles Court, which is charged with applying the indigenous customs and usages of Samoa to the specific customary land and *matai* title matters within its jurisdiction.

The question of judicial review therefore presents a particular illustration of the general contest between Western and indigenous principles that is characteristic of the Samoan legal order as a whole.

The specific legal question for consideration is whether the powerfully worded 'ouster clause' in section 71 of the Act can effectively exclude the authority of the Supreme Court to review decisions of the Land and Titles Court. If it could, the Supreme Court would be unable to supervise the work of the Land and Titles Court, to ensure it keeps within the *Constitution* and within the jurisdiction conferred on it by the Act. In short, the Supreme Court could not ensure the Land and Titles Court remained within the rule of law.

It seems the key to unravelling this problem is to be found, in the Samoan legal context, in further provisions of the *Constitution* concerning the fundamental right of every person to a fair trial. This fundamental right, along with all other provisions of the *Constitution*, has the status of 'supreme law'.⁴⁰¹ It guarantees to all Samoans who raise relevant issues the right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established under law" (Article 9(1)). Neither this right nor the power of the Supreme Court to grant remedies to enforce it can be set aside by ordinary legislation, because ordinary legislation cannot set aside supreme law.

To the extent that the 'ouster clause' found in the Act purports to oust the power of the Supreme Court to review decisions of the Land and Titles Court for breach of this fundamental right, it would seem that clause is of no force or effect.

The right to a fair trial is fundamental. It is an aspect of 'supreme law'. It must therefore be protected by every court in Samoa, including the Land and Titles Court, because this is a requirement of the *Constitution*, even if it is not expressly restated in the Act. The Supreme

⁴⁰¹ *Constitution 1960 (Samoa)*, Article 2.

Court has the jurisdiction under the *Constitution* to ensure fair trials occur, and that jurisdiction cannot be ousted by a privative clause in an ordinary Act, because that would contradict the structure of the constitutional arrangements as a whole.

To unravel this problem we therefore have to determine the proper relations between different sources of Samoan law: that is, between the *Constitution*, ordinary legislation governing the Land and Titles Court, the common law of judicial review, and the customary laws of Samoa concerning customary land and *matai* title matters that are applied in the Land and Titles Court. We must bear in mind that the Land and Titles Court's existence, and the scope of the laws it is to apply, are themselves prescribed in the *Constitution*. And we must try to determine the limits that the guarantee to all persons of a fundamental right to a fair trial may impose on the whole of the work of the Land and Titles Court.

The remainder of this chapter considers these issues in more depth. We will begin by considering the institutional structure of the Samoan courts. This will be followed by further discussion of the relevant law (including the *Constitution*), recent judicial review decisions where the Samoan Courts have had the opportunity to consider these matters, and suggestions as to the proper resolution of some of the unresolved issues.

INSTITUTIONAL STRUCTURE OF THE SAMOAN COURTS

Because the Land and Titles Court is a specialist court with an exclusive jurisdiction, consideration of the propriety of the judicial review of its decisions should begin by considering the structure of the Samoan Courts. This establishes the context for judicial review and shows the relationship between the Land and Titles Court and other courts within the hierarchy.

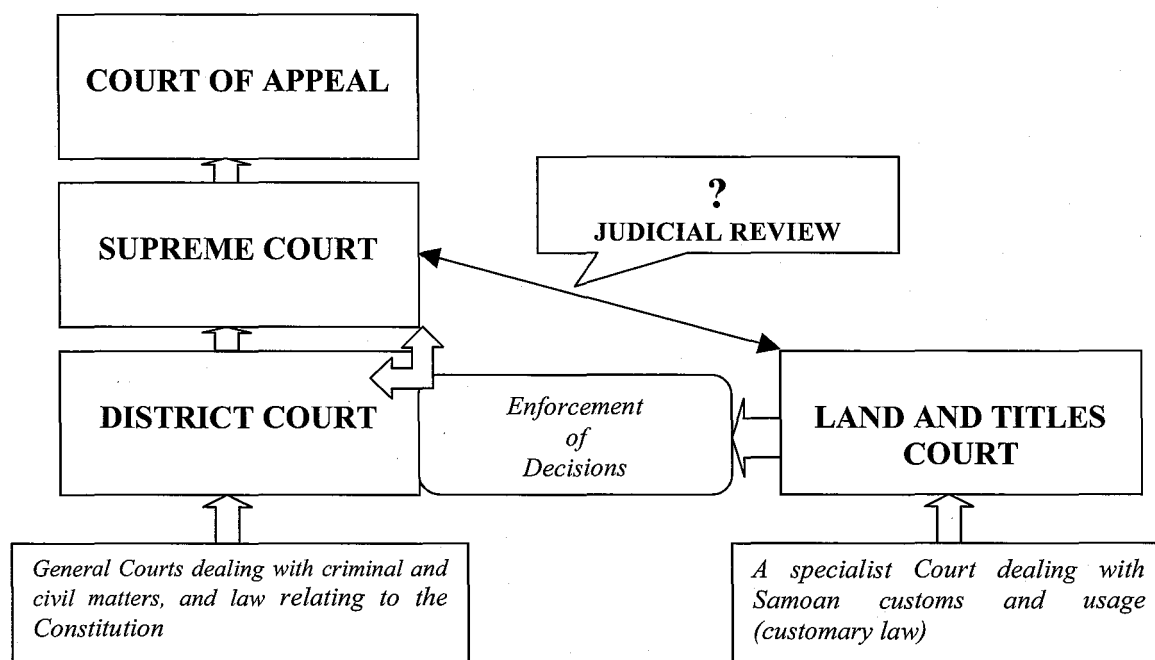


Figure 3: The Structure of the Samoan Courts⁴⁰²

The above structure illustrates the possibility of coexistence or conflict between general legal principles applied in the general courts and Samoan customs and usage applied in the Land and Titles Court. It reflects the merger between Western and indigenous legal principles contemplated by the *Constitution* in what has been described as a ‘dual’ system: one system for Western law and one for indigenous law. It is the two together, coexisting, that form the single legal system for Independent Samoa. Nevertheless, the propriety of the judicial review of Land and Titles Court decisions depends greatly on the extent to which these two systems operate in an independent or interrelated manner.

Some critical questions are these:

- Is there a point (under the *Constitution*, for example) at which they are brought together?
- And, at that point, is judicial review of the decisions of the Land and Titles Court in the general courts possible?
- Or, is the Land and Titles Court not subject to the supervision of the general courts either under the *Constitution* or under general principles of administrative law?

⁴⁰² *Land and Titles Court Bench Book*, Ministry of Justice and Courts Administration, Samoa, 2003, 3, Figure 1. The ‘Judicial Review’ box in this diagram is my addition.

In this discussion, it is also necessary to understand the structure of the Land and Titles Court itself. It has a number of components.

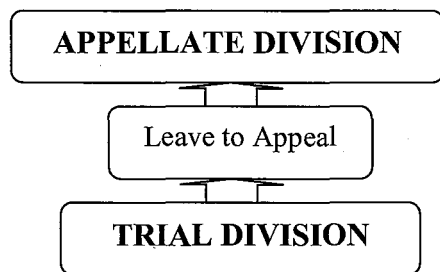


Figure 4: The Structure of the Land and Titles Court⁴⁰³

Proceedings are commenced in the Trial Division. If a party is unhappy with a decision in the Trial Division they can seek leave to appeal the decision on the grounds set out in section 79 *Land and Titles Act 1981 (Samoa)*. An application for leave is heard by the President. If leave is granted, the appeal by way of rehearing is then heard by a three member bench consisting of the President and two (usually senior) Judges of the Court. This is the Appellate Division of the Land and Titles Court. The existence of an appellate process within the structure of the Court, which can rehear a case and reverse errors made in the Trial Division, then raises the question whether this is a sufficient process to exclude judicial review of decisions of the Trial Division in the general courts.

Although the above diagrams illustrate the institutional structures involved, further understanding of these structures is found in the laws of Samoa.

THE RELEVANT LAW

Constitution of the Independent State of Samoa 1960 (Samoa)

The starting point is the supremacy of the *Constitution*. The following Article of the *Constitution* makes it very clear that ‘any’ law, including customary law, that is inconsistent with the *Constitution*, is void.

Article 2 (Part I – The Independent State of Samoa and its Supreme Law)

(1) This Constitution shall be the supreme law of Samoa.

⁴⁰³ Ibid.

(2) *Any existing law and any law passed after the date of coming into force of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.*

This same supreme law also creates the Supreme Court of Samoa as a superior court of record with a general jurisdiction, which includes a judicial review jurisdiction⁴⁰⁴ and continuing power and authority to administer the laws of Samoa.⁴⁰⁵ Such laws clearly include the *Constitution*, Samoan legislation, English common law and equity not excluded by any law of Samoa, and any custom or usage that has acquired the force of law or is part of any Act or judgment of a court of competent jurisdiction.⁴⁰⁶ This is stated in the *Constitution* itself.

Part II of the *Constitution* also needs to be taken into account when considering the reviewability in the general courts of decisions of the Land and Titles Court. This establishes a number of fundamental rights, including freedom of religion,⁴⁰⁷ and freedom of movement.⁴⁰⁸ These rights include the right to a fair trial in Article 9:

Article 9 (1) – Right to a Fair Trial

In the determination of his civil rights and obligations or of any charge against him for any offence, every person is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established under law....

As civil rights and obligations are being determined in the Land and Titles Court, this guarantee would seem to apply squarely to its work. The Supreme Court also has the power under the *Constitution* to enforce this provision and to grant the appropriate remedies where fundamental rights are breached.⁴⁰⁹

⁴⁰⁴ *Constitution 1960*, Articles 65, 73 (1).

⁴⁰⁵ *Ibid.*, Article 73; *Judicature Ordinance 1931 (New Zealand – Samoa)*, section 31.

⁴⁰⁶ *Constitution 1960*, Article 111.

⁴⁰⁷ *Constitution*, Article 11.

⁴⁰⁸ *Ibid.*, Article 13(1)

⁴⁰⁹ *Ibid.*, Article 4.

Land and Titles Court

As well as providing for the Supreme Court and other subordinate courts,⁴¹⁰ the *Constitution* also prescribes the existence of the Land and Titles Court, with its precise jurisdiction concerning *matai* titles and customary land to be provided by Act:

Article 103 – Land and Titles Court

There shall be a Land and Titles Court with such composition and with such jurisdiction in relation to matai titles and customary land as may be provided by Act.

The Act that provides for the detailed operation of the Court, the full scope of its powers, and the law it is to apply, is the *Land and Titles Act 1981 (Samoa)* (“the Act”).

Section 34 (2) of that Act confers on the Court exclusive jurisdiction over matters concerning customary land and *matai* titles. Section 37 sets out the laws it is to apply, which include: custom and usage, law relating to custom and usage, this Act, and any other enactment that expressly applies to the Land and Titles Court. It also states that in all matters, the court must decide in accordance with what is fair and just between the parties. The section notably omits any reference to the *Constitution* as one of the laws to be applied by the Court, although this is hardly required.

As the *Constitution* is supreme law, the Land and Titles Court, like all public institutions in Samoa, is bound by it. In addition, the practice and procedure of the Land and Titles Court, considered more closely in Chapter Six, is determined by the rules of the Supreme Court unless inconsistent or inapplicable, in which case the Land and Titles Court is to act as it considers most consistent with natural justice and convenience.⁴¹¹ But this provision, in an ordinary Act, cannot authorise the Land and Titles Court to follow procedures that do not adhere to the *Constitution*’s guarantee of a fair trial.

After considering the above diagrams and provisions one would think the issue of the reviewability of Land and Titles Court decisions would be simple: the Supreme Court has review jurisdiction. So it should be able to review decisions of the Land and Titles Court and any other public body. Unfortunately, the issue is complicated by the following provision of the *Land and Titles Act 1981 (Samoa)* concerning decisions of the Land and Titles Court:

⁴¹⁰ Ibid., Article 74.

⁴¹¹ *Land and Titles Act 1981 (Samoa)*, section 47.

Section 71– Decisions and Orders not reviewable by other Courts

Subject to this Act, no decision or order of the Court shall be reviewed or questioned in any other Court by way of appeal, prerogative writ or otherwise howsoever.

This section purports to preclude review of Land and Titles Court decisions and its effect is echoed in section 90 of the same Act which states that decisions of the Appellate Division of the Land and Titles Court are final. As judicial review is usually only available where there is no appeal or where the appeal process has been exhausted, to state that the appellate process that is provided is final is another way of saying that review is not possible. Furthermore, section 79, which sets out the grounds of appeal,⁴¹² could be interpreted as absorbing all the traditional grounds for judicial review.

Section 79 (1) (a) to (g) of the Act sets out grounds for Appeal:

- (a) That new and material evidence had been found since the hearing of the petition of which the applicant had no knowledge, or which could not reasonably have been adduced at the hearing of the petition;*
- (b) That the successful party had been guilty of such misconduct in relation to the hearing of the petition as to affect the result of the case;*
- (c) That a witness had been guilty of such misconduct in relation to the hearing of the petition as to affect the result of the case;*
- (d) That a member or officer of the Court had made a mistake or misconducted himself in relation to the hearing of the petition as to affect the result of the case;*
- (e) That the Court did not have jurisdiction to make the final decision or order;*
- (f) That the decision or order is wrong in law or not in accordance with custom and usage;*
- (g) That the decision or order was manifestly against the weight of the evidence adduced at the hearing of the petition.*

Section 79(1)(e), for example, covers decisions beyond jurisdiction, section 79(1)(f) covers errors of law, and section 79(1)(d) covers procedural mistakes in the course of the hearing. These are the main grounds of judicial review. Such an interpretation might lead to the conclusion that in light of the combined effect of sections 71, 79 and 90, the correct place to

⁴¹² *Alaelua Vaalepa Saleimoa Vaai v Land and Titles Court & Ors* WSSC (1992), 514.

consider issues of procedural correctness and legality of decisions of the Land and Titles Court is not the Supreme Court via judicial review but the Appellate Division of the Land and Titles Court itself. These provisions read together, and possibly individually (especially in the case of section 71), purport to oust the Supreme Court’s review jurisdiction when it comes to decisions of the Land and Titles Court.

This position is directly at odds with the supremacy of the *Constitution* that created the Supreme Court as a superior court of record with review jurisdiction and the authority to enforce the *Constitution* and grant appropriate remedies.

Therefore, by way of summary, this inquiry asks: *in light of the supremacy of the Constitution, what is the effect of section 71 of the Land and Titles Act 1981 (Samoa) on the Supreme Court’s review jurisdiction when it comes to decisions of the Land and Titles Court.*

The following attempts to express this question diagrammatically.

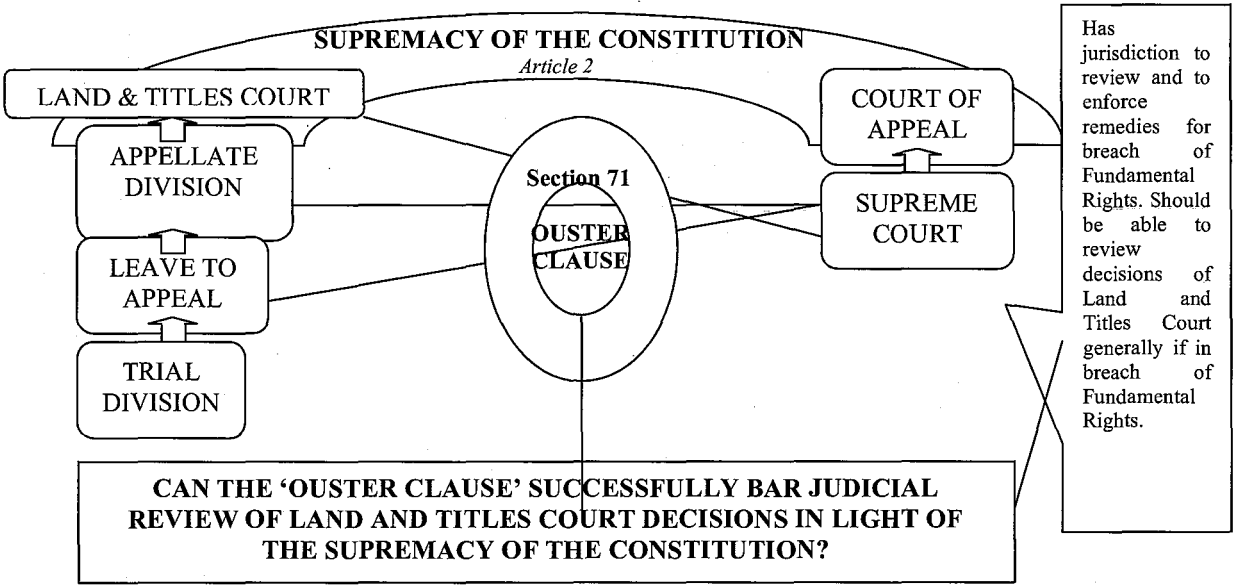


Figure 5: The effect of the ‘ouster clause’ in light of the supremacy of the *Constitution*.

Issues arising from relations between the different bodies of law

Constitutional Review

The total legal framework surrounding the operation of the Land and Titles Court presents a number of issues for inquiry. The main point of contention concerns relations between the constitutional functions of the Supreme Court and the specialist functions of the Land and

Titles Court when the latter court's existence is prescribed by the *Constitution* but the 'ouster clause' protecting it from judicial review (section 71) is only prescribed by ordinary legislation, the *Land and Titles Act 1981 (Samoa)*. The *Constitution* created a superior court of record with review jurisdiction and Parliament then passed specific legislation giving a specialist court supposedly exclusive jurisdiction over a narrow area of law, and purporting to 'oust' the review jurisdiction of the Supreme Court. One has to try to find an interpretation that reconciles the apparent 'conflict' Parliament has enacted. It is inconceivable that Parliament intended ordinary legislation to oust or trump the supreme law of Samoa, because the *Constitution* makes it clear that the resulting enactment as far as it is inconsistent with the *Constitution* would be void. This means there needs to be a way to interpret the purported ousting of the Supreme Court's review jurisdiction that is not inconsistent with the *Constitution* and not void. The only way that such an interpretation is possible is for the 'ouster clause' to be read down, to contain its effectiveness to limited, clearly defined circumstances. Otherwise the 'ouster clause' would be inconsistent with the supreme law.

A possible reading down of the ouster clause that would secure its validity in light of the supremacy of the *Constitution* is that it cannot bar review of Land and Titles Court decisions where there is an alleged breach of the *Constitution*. For example, if a decision of the Land and Titles Court allegedly breaches an individual's fundamental rights protected under Part II of the *Constitution* then the 'ouster clause' in section 71 of the Act (on its own or in combination with sections 90 or 79) cannot preclude judicial review of such a decision.

The most likely fundamental right to be allegedly breached by a decision of the Land and Titles Court is the right to a fair trial under Article 9 (1) of the *Constitution*, set out above. Breaches of this fundamental right could occur in many ways, such as: through an unfair hearing, a hearing that is not public, when the hearing does not occur within a reasonable time, when the Land and Titles Court is biased, or when it is not independent. Of course, the full scope of this fair trial right would need to be determined and defined, as at first glance the wording of the right is very open-textured. However, interpretation of the full content of this right might well be influenced by common law principles of judicial review.

Common law principles may also influence the interpretation of the scope of the 'ouster' clause in section 71 of the Act. For example, reference might be made to the famous decision of the House of Lords in *Anisminic Ltd v The Foreign Compensation Commission and*

*Anor.*⁴¹³ The *Anisminic* principle states that where a body acts outside its jurisdiction, or acts unlawfully, it is not making ‘decisions’ or ‘determinations’ under its empowering provisions at all. Therefore errors of that kind can be judicially reviewed, even in the face of a statutory ‘ouster clause’ protecting its decisions from review. On that view, a decision of the Land and Titles Court that infringed the constitutional right to a fair trial, contrary to the supreme law, should not be viewed as a ‘decision’ or ‘order’ of that Court at all, because that Court goes beyond its jurisdiction whenever it infringes the *Constitution*. That kind of unlawful decision would not be protected by the privative clause that protects its ‘decisions’ from judicial review. Or, to put the matter in the language of Article 9 (1) itself, if the Land and Titles Court violates the *Constitution*, and therefore goes beyond its jurisdiction, it is not at that moment acting as a body “established under law”.

Although *Anisminic* is from a different jurisdiction, Article 111 of the *Constitution* includes English common law and equity, that is not excluded by law, as part of the Laws of Samoa. As *Anisminic* has not been excluded by the law in Samoa, it is relevant to the question of reviewability of decisions of the Land and Titles Court of Samoa by Samoa’s Supreme Court. In any case, this is no more than another way of saying that the Land and Titles Court is governed by the *Constitution of Samoa*.

The *Constitution* not only establishes certain fundamental rights, it provides for reasonable restrictions on the exercise of such rights. Reasonable restrictions are described generally in the *Constitution* as those which are imposed in the interests of national security, public order, health and morals. However, the full scope of those terms is not defined in the *Constitution*. For example, could a Samoan custom that would usually be considered to violate a fundamental right be viewed as a reasonable limit on the right concerned? The Samoan Courts have had the opportunity to grapple with such issues.

The Samoan Court of Appeal, in its decision *In re the Constitution, Taamale v Attorney General*,⁴¹⁴ considered the Samoan custom of banishment. The Land and Titles Court had issued a banishment order against the Appellant, an order which on the face of it clearly infringed the freedom of movement protected by Article 13(1) (d) of the *Constitution*. However, the Samoan Court of Appeal ruled not only that the Land and Titles Court had the

⁴¹³ [1969] 1 All E.R. 208.

⁴¹⁴ [1995] WSCA 1; CA 2/95B.

jurisdiction to make such an order, but that the order itself and the customary practice of banishment were not contrary to the freedom of movement under the *Constitution*.

This is an example where a Samoan custom, which under usual circumstances would be considered an infringement, was instead considered a reasonable restriction on a fundamental right. At the same time, it is arguable that the banishment order was a reasonable restriction in the interests of public order or perhaps even morals! It is therefore clear that Samoan customs may, in some cases, affect the scope of constitutional rights.

In *Pitomoa Mauga and Ors v Fuga Leituala* (“*Mauga v Leituala*”), the Court of Appeal in 2005 upheld the Sureme Court’s decision that a banishment order imposed by the *Fono a Matai* (Council of *Matai*) of a *nuu* (geographical location) was an example of how such an order can be disproportionately harsh and in violation of natural justice.⁴¹⁵ The banishment order however was not made by the Land and Titles Court so this matter did not come to the general courts by way of judicial review proceedings. It is mentioned here as an example of how a custom is seen as a reasonable limit on a fundamental right in one situation and disproportionately harsh and contrary to natural justice in another. The issue of the constitutionality of the custom of banishment was not, I believe, squarely considered in this latter case. Therefore, I believe *Taamale*’s decision referred to above is still current on that particular question.

The implication is that the customary modifications to procedure may act as a legitimate limit on the constitutional right to a fair trial.

Non-Constitutional Judicial Review

If the scope of the ‘ouster clause’ is restricted, as suggested above, then it cannot bar review where there is an alleged breach of the *Constitution*. Such an interpretation acknowledges the supremacy of the *Constitution*. What meaning can still be given, then, to Parliament’s will, expressed in the ouster provision in the Act. If the ‘ouster clause’ is not effective when the *Constitution* is breached, then perhaps it would be effective when the alleged breaches are of a non-constitutional kind, or only invoke the orthodox grounds of judicial review under the usual principles of administrative law.

⁴¹⁵ *Pitomoa Mauga & Ors v Fuga Leituala*, Court of Appeal of Samoa, unreported judgment, March 2005, 1. Judgment of the Court was delivered by the late Lord Cooke of Thorndon.

But what would such non-constitutional breaches look like? The fundamental right to a fair trial protected by the *Constitution* is very broad in its terms. It is hard to see how any decision of a Court made contrary to law could be viewed as 'fair'. It is therefore very difficult to formulate a breach that falls outside the scope of the words of the *Constitution* and therefore of constitutional review. Take an abuse of discretion by the Land and Titles Court, or failure to act when the law requires, as examples. These would be perfect examples of breaches that could be brought under a traditional ground of judicial review - that of unlawfulness. Yet, they would also come within the scope of the right to a fair trial under the *Constitution*. It is arguable that, if the Land and Titles Court acted beyond its jurisdiction in such a fashion, it would no longer be acting pursuant to its empowering provisions. It would therefore be acting 'unlawfully' and not as a tribunal "established under law". It would then infringe the Article 9(1) right to a fair trial. Its decision would not be a 'decision' in the *Anisminic* sense, which should render the bar to review under section 71 inoperative.

A similar argument could be made where other traditional grounds of judicial review, such as unfairness, unreasonableness, and bias, were put forward. An argument of unfairness can be recast as an infringement on the right to a fair trial, which requires a "fair and public hearing" "by an independent" tribunal. Excessive or unreasonable delay in conducting a hearing is covered by Article 9(1) which requires a hearing to be held "within a reasonable time", and bias is absorbed by the requirement that the hearing be carried out by an "impartial tribunal."

The above examples show that although a breach may initially appear to be covered by a non-constitutional, orthodox ground for judicial review, the open-textured nature of the fundamental rights in the *Constitution*, such as the right to a fair trial, means that in the end virtually all non-constitutional breaches can be recast as breaches of the *Constitution*.

Where does this leave section 71? Does it preclude any forms of review at all? As suggested earlier, perhaps an error in the application of custom concerning lands and titles themselves could be a situation where the 'ouster clause' operates successfully. Such a situation would acknowledge the specialist jurisdiction that the *Constitution* and the Act give to the Land and Titles Court in matters concerning customary land and *matai* titles. However, Article 111 of the *Constitution* also includes custom and usage as part of the Laws of Samoa, and section 37 of the Act includes custom within its definition of 'law'. So, a decision of the Land and Titles Court that is contrary to custom would also be contrary to the law. This might also mean it

was contrary to the right to a fair trial under the *Constitution*. In other words, any error as to the content of customary law might also be an error under the *Constitution*.

This is a contentious concession. It would seem to rid the privative clause of virtually any meaning. But how could we consider a trial to be 'fair' in which a court has made a clear error in the law (here customary law) that it is required to apply? Nevertheless, the Supreme Court would no doubt be most reluctant to intervene on this ground, as matters of custom are within the specialist expertise of the Land and Titles Court, and that Court's authority in this area is recognised in the *Constitution* itself. So, even if the Supreme Court has the *jurisdiction* to review errors in customary law to ensure the right to a fair trial, it might only be prepared to *exercise* that jurisdiction in clear and serious cases: for example, where the Supreme Court considered a fundamental error concerning customary law had been made.

There should be considerable deference, then, to the Land and Titles Court on customary matters, and perhaps that is the message to be drawn from the strong warning of the privative clause in the Act. Review under such circumstances would be carried out only with due deference to the specialist jurisdiction of that Court.

Appeal excludes Judicial Review?

The legal provisions governing the Land and Titles Court as a whole provide that after a matter is heard in the Trial Division an unsatisfied party may apply for leave to appeal. If granted, the appeal, by way of rehearing, is heard in the Appellate Division.

It is an understood principle of administrative law that judicial review is an avenue of last resort. If there is an available avenue for redress, that option has to be taken before judicial review can be sought. The existence of the above Appellate process is an example of an available avenue for redress concerning an alleged error in the Trial Division of the Land and Titles Court. Therefore, in the context of the Land and Titles Court, a party who is unhappy with a decision of the Trial Division would have to take the matter first to the Appellate Division before pursuing judicial review, because the availability of appeal would exclude judicial review in the first instance. As the grounds of appeal are wide and encompass judicial review grounds, the Appellate Division can consider questions that would normally be the subject of judicial review. In this manner, the fact that all available remedies should be exhausted before judicial review is sought could be used as justification for the existence of

the 'ouster clause' in the Act. The rationale could therefore be that, as the Land and Titles Court has an appellate process, judicial review is unnecessary and barred.

So, should judicial review of initial decisions of the Trial Division be precluded because an appeal from such decisions could be heard in the Appellate Division? Perhaps not, if such an appeal will not be heard "within a reasonable time" by the Appellate Division. The principle that appeal excludes review presumes there is a functioning appeals process in place. The fact that there is a ten year backlog in appeals at present can be interpreted as meaning there is no workable or viable appeals process in existence. It can therefore be said that as an accessible appeals process is non-existent all available remedies have in practice been exhausted following the hearing in the Trial Division, and the only practical avenue for redress left is judicial review. To put this in *Constitutional* terms, the failure to provide an appeal "within a reasonable time" would itself be a breach of the right to a fair trial under Article 9(1), authorising intervention by the Supreme Court.

In summary, the structure of the Samoan Courts and the *Constitution* clearly indicates that the Supreme Court has review jurisdiction. Therefore, even if the Appellate Division had reached a decision, that decision would still be reviewable on constitutional grounds, despite the existence of section 71 of the Act (the 'ouster clause'), and of section 90, which states that decisions of the Land and Titles Court's Appellate Division are final.

The supremacy of the *Constitution* therefore challenges the effectiveness and the validity of section 71 of the Act that purports to bar judicial review of Land and Titles Court decisions. It is clear the 'ouster clause' cannot preclude review where breaches of the *Constitution* have been alleged. It is also clear that after the appeals process has been exhausted, decisions of the Appellate Division can be reviewed by the Supreme Court on constitutional grounds despite section 90 that states that such decisions are final. It could even be possible to seek review of a decision of the Land and Titles Court before the appeal process has been exhausted when the appeal cannot be heard "within a reasonable time." Nevertheless, the 'ouster clause' should arguably work to oust review where non-constitutional breaches are alleged.

What is unclear is what would constitute a non-constitutional breach, when the orthodox grounds for judicial review seem to be absorbed and swallowed up in the open-textured

wording of the fundamental rights, such as the right to a fair trial, under the *Constitution*. There may actually be no breach of the law that is not also a breach of the *Constitution*. This position puts the 'ouster clause' on very shaky ground concerning its effectiveness, its validity and its necessity. Perhaps its main effect is to indicate that the Supreme Court should be very reluctant to declare that the Land and Titles Court has made an error concerning customary law.

Case Law

The following cases indicate the position the Samoan Courts have taken on some of the issues discussed. Other issues have yet to be considered and remain unresolved. Initially the Samoan Courts relied on the 'ouster clause' in section 71 of the Act and precluded judicial review of Land and Titles Court decisions, but subsequent decisions have contradicted those earlier rulings.

Ouster effective

In *Alaelua Vaalepa Saleimoa Vaai v Land and Titles Court and Ors*⁴¹⁶ the plaintiff sought to quash a decision of the Trial Division of the Court and two decisions of the President at the leave to appeal stage on the grounds that the procedure adopted by the Court in making these decisions was contrary to the Act and breached the Plaintiff's right to a fair trial under Article 9(1) of the *Constitution*. The plaintiff also sought a declaration, under Article 4 (Remedies for the Enforcement of Rights) of the *Constitution*, that he had been denied the right to a fair trial, and that the three decisions of the Land and Titles Court were vitiated by breaches of natural justice.

The defendants responded that the orders sought would result in unlawful interference by the Supreme Court in matters exclusively within the jurisdiction of the Land and Titles Court and sought to have the application struck out.⁴¹⁷ In resisting that application to strike out, counsel for the plaintiff then raised in turn the *Anisminic* principle, submitting that, notwithstanding section 71 of the Act, the Supreme Court had the power to review decisions of the Land and Titles Court if it had done something which made its decision a nullity.⁴¹⁸

⁴¹⁶ WSSC (1992) 507-521.

⁴¹⁷ *Alaelua Vaalepa Saleimoa Vaai v Land and Titles Court & Ors* WSSC (1992), 509-510.

⁴¹⁸ *Ibid.*, 511.

In this case, Acting Chief Justice (“ACJ”) Lussick held that the *Anisminic* decision was the product of a different legal system and was concerned with the review of a decision in an inferior tribunal entirely dissimilar to the status and nature of the Land and Titles Court.⁴¹⁹ It did not therefore apply to this case or to the decisions of the Court in general.⁴²⁰ His Honour did not seem to put much weight on the fact that the laws of Samoa under Article 111 of the *Constitution* include English common law, nor did he consider the structure of the Samoan Courts, where the Supreme Court is the superior court of record with review jurisdiction over courts such as the Land and Titles Court.

In refusing the orders sought, ACJ Lussick gave effect to the ‘ouster clause’ in section 71 of the Act. He added that the issues raised by the plaintiff lay in the exclusive jurisdiction of the Land and Titles Court which had its own appellate procedures and whose decisions were not questionable or reviewable in any other court.⁴²¹ In doing so, His Honour put much weight on the principle that if appeal is available review is excluded.

His deference to the exclusive jurisdiction of the Land and Titles Court illustrates the tension the general courts have to deal with. On the one hand, there is the supreme law and, on the other, the need to give meaning to Parliament’s enacted will. In the end ACJ Lussick decided that the ‘ouster clause’ successfully barred the Supreme Court from carrying out the review of the Trial Division and the President’s decisions. He concluded that the plain words of section 71 of the Act are capable of having only one meaning: that is, that a decision or order of the Land and Titles Court cannot be reviewed or questioned in any other court for any reason whatsoever, even to enquire whether such decision or order might have been a nullity.⁴²² Although ACJ Lussick was not in an enviable position, his decision was arguably incorrect. He failed to recognise that even a clear legislative provision may be of no effect if it contravenes the *Constitution*, which is a superior source of law.

At the time, *Alaelua*’s case ended any speculation concerning the reviewability of decisions of the Land and Titles Court. ACJ Lussick clearly stated that the only possible interpretation of section 71 of the Act was that it ousts the review jurisdiction of the Supreme Court. Matters concerning want of jurisdiction or violation of natural justice were to be decided in

⁴¹⁹ Ibid., 516.

⁴²⁰ Ibid., 519.

⁴²¹ Ibid., 514.

⁴²² Ibid., 520.

the Appellate Division of the Land and Titles Court, not in the Supreme Court. Sections 71 and 79 of the Act operated together to bar judicial review of Land and Titles Court decisions.

Ouster doubtful

Although the next decision did not rule directly on whether section 71 of the Act successfully ousts the Supreme Court's review jurisdiction or refer to the *Alaelua* decision, it does have great bearing on the question we are considering. In *In re the Constitution, Taamale v Attorney General*,⁴²³ the Samoan Court of Appeal, consisting of Cooke P, Casey and Bisson JJ, heard an appeal from a decision of the Chief Justice in the Supreme Court. The appeal concerned a banishment order made by the Land and Titles Court, judicial review of which was sought in the Supreme Court. In the Supreme Court the Chief Justice ruled that the Land and Titles Court had the authority to make banishment orders and that such orders were not unconstitutional as banishment was a reasonable restriction on the freedom of movement protected under Article 13(1) (d) of the *Constitution*.⁴²⁴ This decision was affirmed by the Court of Appeal.

There are a number of important points this decision brings out. One of the most important is that neither the Court of Appeal nor the Supreme Court expressly addressed the question of whether they had the jurisdiction to judicially review a decision of the Land and Titles Court. Instead, both courts proceeded directly to the merits of the case. There was no mention of the 'ouster clause' or the availability of appeal within the Land and Titles Court itself. There was no reference to the wide grounds of appeal in section 37 of the Act or section 90 that states that decisions of the Appellate Division of the Land and Titles Court are final.

The fact the Supreme Court and the Court of Appeal proceeded directly to the merits of the case can be interpreted as meaning they did not see the 'ouster clause' as an obstacle to judicial review of Land and Titles Court decisions. This was despite ACJ Lussick's clear ruling to the contrary, in *Alaelua's* case. The Court of Appeal did not spell out their position. However, their decision to proceed to the merits of the case signalled that they saw no jurisdictional reason not to judicially review the Land and Titles Court's decision to issue a banishment order.

⁴²³ [1995] WSCA 1; CA 2/95B.

⁴²⁴ *In re the Constitution, Taamale v Attorney General* [1995] WSCA 1; CA 2/95B (Cooke P, Casey, Bisson JJ), 18.

When the Court of Appeal considered the merits of the case, it found banishment was a long established preventative (as opposed to a punitive) customary measure. It also held that although the *Alii* and *Faipule* (Council of *Matai*) often made banishment orders, it was of the opinion that it would be best left to the Land and Titles Court to make such orders,⁴²⁵ as it had the jurisdiction to do so.⁴²⁶ It was clear that the Land and Titles Court had accepted the jurisdiction to make such orders.⁴²⁷ Banishment, the Court of Appeal concluded, was indeed a reasonable restriction, permitted under Article 13(4), on freedom of movement under Article 13(1)(d) of the *Constitution*. This decision shows that the first port of call when it comes to the judicial review of Land and Titles Court decisions may not be section 71 of the Act, which purports to oust review, but the *Constitution* and its enforcement.

This case, as said earlier, is a good example of the type of reasonable restriction on fundamental rights that the Samoan Courts will accept. It also illustrates how the Supreme Court and the Court of Appeal would deal with the meeting of a 'Samoan custom' and a fundamental right enshrined in a Western form such as the *Constitution*. The harmony that was found between custom and a fundamental right in this case could suggest that the indigenisation considered in the last chapter is not limited to the Land and Titles Court but is a hallmark of the entire Samoan legal system. Nevertheless, the starting point is still the supremacy of the *Constitution* in light of which custom is considered acceptable or not.

Ouster effective

The next case to be considered is the first to accord the *Constitution* its supreme status when construing section 71 of the Act. Young J's decision in *Aloimaina Ulisese, Ila Aloimaina & Ors v Land and Titles Court (Tuasivi), Toomata Ropati & Ors, Aloimaina Elekana*, in the Samoan Supreme Court, in 1998, is the clearest decision so far concerning the availability of judicial review of the Land and Titles Court. It also concerns a banishment order of that Court's Trial Division.⁴²⁸

The plaintiffs were banished from their *nuu*. They alleged that the Land and Titles Court (First Defendant) breached the *Constitution* when it banished them and "exercised" its

⁴²⁵ *Ibid.*, 15.

⁴²⁶ *Ibid.*, 18.

⁴²⁷ *Ibid.*, 28.

⁴²⁸ *Aloimaina Ulisese, Ila Aloimaina & Ors v Land and Titles Court (Tuasivi), Toomata Ropati & Ors, Aloimaina Elekana*, WSSC 4 November 1998, (R.L. Young J), 2.

jurisdiction to banish negligently, unreasonably and *ultra vires*.⁴²⁹ They sought judicial review of the Court's decision, a declaratory order that the decision was "wrong in law and fact", and a rehearing.

The Attorney General's office, on behalf of the Court, filed a motion to strike out. This was based on their assertion that judicial review was not available with respect to decisions of the Land and Titles Court and the fact that certain orders that were sought were exclusively within the jurisdiction of that Court. The Attorney General was essentially restating the position accepted in the *Alaelua* case.

Young J, however, proposed an alternative to ACJ Lussick's approach by asking right at the outset whether the decisions of the Land and Titles Court were susceptible to judicial review by the Supreme Court and whether the *Constitution*, in dealing with the authority of the Supreme Court, could assist in answering this question. He also placed the question in the context of the structure of the Samoan courts.

His Honour began his analysis much like this inquiry has, with the creation of the Supreme Court of Samoa in Articles 65(1) and 73(1) of the *Constitution*, with the details of its jurisdiction then spelled out by the *Judicature Ordinance* 1931.⁴³⁰ He then concluded, as I have, that the Supreme Court of Samoa is the superior court of record in Samoa and is the proper court in which to bring judicial review proceedings.⁴³¹ He also considered the genesis of the Land and Titles Court and noted that its existence is also prescribed in the *Constitution*. He then considered section 71 of the Act which purports to oust the Supreme Court's review jurisdiction.⁴³² He concluded by noting that although section 79 of the Act, governing appeals from the Trial Division, includes many judicial review grounds as well as more traditional appeal grounds, it does not preclude judicial review of Land and Titles Court decisions. Instead, it meant that the Land and Titles Court enjoys generally exclusive jurisdiction in a narrow area of law.⁴³³ Through his alternative approach, Young J successfully refuted every part of the decision in *Alaelua*, and set out the law consistently with the *Constitution*.

⁴²⁹ Ibid., 2.

⁴³⁰ Ibid., 3.

⁴³¹ Ibid., 4.

⁴³² Ibid., 5.

⁴³³ Ibid., 6.

Young J's decision endorsed the correctness of the concessions made by the Attorney General at the outset of his submissions that:

- (1) The *Constitution* is the supreme law of Samoa and any law inconsistent with it is void (Article 2).
- (2) "Law" has a wide definition and can include custom and usage acknowledged by the Courts (Article 111).
- (3) Customs and usages that are inconsistent with "fundamental rights" under Part II of the Constitution are void (Article 2(2)).
- (4) The Supreme Court is the sole body charged with enforcing these fundamental rights (Article 4).
- (5) Section 71 of the Act does not preclude Supreme Court jurisdiction to enforce any of these fundamental rights guaranteed under Part II of the Constitution where a breach of these rights is alleged and established (Article 4); and
- (6) The Supreme Court has jurisdiction to hear and determine and make appropriate orders sought by the Plaintiff in so far as they relate to established breaches or infringements of fundamental rights under Part II of the Constitution (Article 4).⁴³⁴

Young J then added that "...the concessions by the Crown on behalf of the first defendant may be seen as accepting at least in part that their motion to strike out the Plaintiff's judicial review proceedings could not succeed...",⁴³⁵ especially as, if the grounds put forward by the plaintiffs were established individually or collectively, they would be contrary to Article 9 (Right to a Fair Trial) of the *Constitution* and thus breach a fundamental right. It followed logically from the concession by the Crown that the Supreme Court had the power to review decisions of the Land and Titles Court where breaches of Part II of the Constitution (Fundamental Rights) were established. Therefore the Supreme Court by Article 4(2) would then have the power to make such orders as would be necessary to ensure the plaintiff's right to a fair trial. It was also clear that such orders could in appropriate cases include ordering a rehearing of a Land and Titles case, with proper directions.

What of section 71 of the Act: the 'ouster clause'? His Honour simply stated that the *Constitution* is the superior law of Samoa and "ordinary" statutory provisions are subject to

⁴³⁴ Ibid., 7.

⁴³⁵ Ibid., 8.

the provisions of the *Constitution*; this is made clear in Article 4 of the *Constitution*. His Honour's position is clearly opposite to ACJ Lussick's in the *Alaelua* case.⁴³⁶

Young J addressed the point made in *Alaelua* that decisions of the Land and Titles Court could not be reviewed by the Supreme Court because the Lands and Titles Court was not an inferior court. The Attorney General had relied on *Alaelua* when he cited this part of ACJ Lussick's decision in his submissions.⁴³⁷ Young J again correctly stated the law when he held that where breaches of Part II rights were alleged, it was irrelevant whether the Lands and Titles Court was an 'inferior' court. He emphasised his point by stating that "...even if these proceedings were truly judicial review and not concerned with Part II rights I would reject the conclusions of Lussick ACJ that the Lands and Titles Court was not an inferior court." However, His Honour also acknowledged "the primacy of the Lands and Titles Court on questions of land, chiefly titles and custom in Samoan life. But such primacy in these narrow, vital, areas of Samoan life does not convert the Lands and Titles Court into a court of superior jurisdiction."⁴³⁸ He concluded that the Lands and Titles Court is an 'inferior' court in a judicial review sense and, therefore, there is no impediment to review proceedings despite the 'ouster clause'. He left aside the question whether section 71 of the Act prohibits judicial review proceedings where the issues are outside Part II of the *Constitution*.⁴³⁹

Aloimaina states categorically that the Supreme Court can review decisions of the Land and Titles Court when that Court has breached Part II of the Constitution, and that for the purpose of review proceedings the Land and Titles Court is an 'inferior' court. But a conclusion has not been reached whether section 71 of the Act ousts the jurisdiction of the Supreme Court to review Lands and Titles Court decisions when the fundamental rights defined by Part II of the *Constitution* would not be breached.⁴⁴⁰

Which approach would prevail?

After this decision, Samoa was left with two conflicting decisions and the question of which one would be followed in subsequent cases. It seems that Young J's decision has prevailed. It was followed in *Punafelutu Solomona Toailoa v Land and Titles Court, Luamanuvae P.*

⁴³⁶ Ibid., 9.

⁴³⁷ Ibid., 12.

⁴³⁸ Ibid., 13.

⁴³⁹ Ibid., 15.

⁴⁴⁰ Ibid.

Asera (Registrar of the Land and Titles Court), Vaiouga Levi, which was heard in the Supreme Court and decided on 11 May 2004.⁴⁴¹ Gaskell J indicates very clearly the position the Samoan Courts have opted to take.

Here, the plaintiff sought orders declaring a decision of the Land and Titles Court – Trial Division, made on the 13 July 2000, to be null and void; that the confirmation by the said Court of the third defendant's *pulefaamau*⁴⁴² was null and void; and that the matter of dispute between the plaintiff and the defendant should be reheard in the Land and Titles Court. The basis for the plaintiff's claim was that the decision of the Trial Division breached his Article 9(1) Right to a Fair Trial and that he had suffered irreparable damage and harm resulting in a grievous miscarriage of justice.⁴⁴³

The Attorney General, as in *Aloimaina*, applied on behalf of the Land and Titles Court (First Defendant) and the Registrar of that Court (Second Defendant) to have the proceedings struck out. The arguments made in support of this proposition included one raised in *Aloimaina*'s case: that the Land and Titles Court was not in the context of judicial review an 'inferior' Court and therefore its decisions were not amenable to judicial review in the Supreme Court. The Attorney General, however, did not cite *Aloimaina*.

In deciding the case, Gaskell J, however, did cite *Aloimaina* and agreed with Young J's conclusion that "for the purpose of review proceedings the Land and Titles Court is an 'inferior' Court."⁴⁴⁴ The Attorney General again, as in *Aloimaina*, argued that section 71 of the Act ousts the jurisdiction of the Supreme Court to entertain review proceedings, adding that it was "contrary to the letter and spirit" of section 71 to allow judicial review of Land and Titles Court decisions. The Attorney General here failed to recall that in the *Aloimaina*'s case the Attorney General properly conceded at the outset of his submissions that section 71

⁴⁴¹ *Punafelutu Solomona Toailoa v Land and Titles Court, Luamanuvae P. Asera (Registrar of the Land and Titles Court), Vaiouga Levi* WSSC (2004) (Gaskell J).

⁴⁴² *Pulefaamau* will be fully considered in Chapter Eight. Suffice to say here that it is a claim of individual ownership of sorts over customary land. In other words, if one holds *pulefaamau* over customary land, it means that individual holds that land separately from the rest of the *aiga*'s customary land. The holder of the *pulefaamau* can pass the same land on to their direct descendants as it is no longer part of the pool of customary land to which all *suli* would usually have rights of access.

⁴⁴³ *Punafelutu Solomona Toailoa v Land and Titles Court, Luamanuvae P. Asera (Registrar of the Land and Titles Court), Vaiouga Levi* WSSC (2004) (Gaskell J), 3.

⁴⁴⁴ *Ibid.*, 4, 5.

did not preclude the Supreme Court's jurisdiction to enforce fundamental rights under Part II of the *Constitution*.

Gaskell J followed Young J and held that the Supreme Court can review decisions of the Land and Titles Court where it has breached Part II of the *Constitution* as to the fundamental rights of a litigant. Her Honour also held that the Land and Titles Court's exclusive jurisdiction, as provided in section 34 of the Act, was subject to Article 4 (Remedies for the Enforcement of Rights) under the *Constitution*. Gaskell J, like Young J, did not rule whether section 71 of the Act ousts the jurisdiction of the Supreme Court to review decisions of the Land and Titles Court where no breach of fundamental rights protected in the *Constitution* would have occurred.⁴⁴⁵ It is clear the Courts have chosen Young J's position over ACJ Lussick's concerning the constitutional issues.

The last case to be considered is that of *Punafelutu R S Solomona Toailoa v Patu Tiavasue Falefatu Maka Sapolu (President LTC) & Sua Rimoni Ah Chong*, a decision of the Samoan Court of Appeal on 26 April 2006. It clearly identifies the unresolved aspect of the question concerning the reviewability of Land and Titles Court decisions in the general courts. Although this appeal initially raised a variety of issues, the appellant by notice in April 2006 advised that his appeal would be confined to the question of whether the Supreme Court has the power to review the decisions of the Land and Titles Court in general,⁴⁴⁶ a question the Supreme Court and Court of Appeal of Samoa had yet to address and previous decisions had left unanswered. The appellant submitted a position similar to that suggested by Young and Gaskell JJ, that the Supreme Court has a general power to review decisions of the Land and Titles Court and, in reliance on *Anisminic*, section 71 of the Act should not be permitted to oust the Supreme Court's jurisdiction to review for excess of jurisdiction.⁴⁴⁷

Unfortunately the Court of Appeal could not answer the question it was asked by the Appellant as it did not arise from the decision that was the subject of appeal. So the Appeal was dismissed. Although the Court of Appeal has the discretion to answer a hypothetical

⁴⁴⁵ Ibid., 6.

⁴⁴⁶ *Punafelutu R S Solomona Toailoa v Patu Tiavasue Falefatu Maka Sapolu (President LTC) & Sua Rimoni Ah Chong*, (Samoan Court of Appeal), (26 April 2006), (Ellis, Gallen, Salmon JJ.), 1, 2.

⁴⁴⁷ Ibid., 3.

question, it decided not to do so in this case.⁴⁴⁸ The reason may be found in the following comment made by the Court of Appeal:

It is essential that such matters be considered by a Samoan Judge sensitive to such concerns before coming to an appellate court consisting of Judges from a different culture. We regard it as of the utmost importance that an issue so central to Samoan tradition and culture should be the subject of consideration first by a Judge immersed in such culture. Such a conclusion seems to refer back to the exclusive jurisdiction of the Land and Titles Court over matters concerning matai titles, customary land and Samoan custom and usage.

The above statement is indicative of the degree of deference that the general courts should afford the Land and Titles Court in matters concerning customary lands and *matai* titles due to its specialist nature. Such deference does not alter the position that the Supreme Court is the superior court of record with review jurisdiction and the authority to enforce the supreme law. But it lends weight to the suggestion made earlier that the circumstances in which the 'ouster clause' may carry significant weight is where the issues concern Samoan custom and usage. This reluctance to intervene on the Courts' part when matters of custom are raised is indicative of the duality present in the Samoan political structure as a whole and in the Land and Titles Court in particular. Here Western legal forms and constructs and Samoan custom co-exist and interact to create a hybrid system unique to the Samoan environment.

After considering the above cases one very important issue has been made clear. That is, the Land and Titles Court is an 'inferior' court in the constitutional sense. Therefore, if its decisions allegedly breach fundamental rights under Part II of the *Constitution*, they can be reviewed in the general courts despite the existence of sections 71, 79 and 90 of the Act which purport individually or collectively to oust the Supreme Court's review jurisdiction. To that extent at least the 'ouster clause' in section 71 of the Act is ineffective. What remains unclear, even after the case law, is whether the 'ouster clause' would be effective where the alleged breaches are non-constitutional and therefore fall under the orthodox grounds for judicial review established by administrative law. Every decision thus far has left this question open. We are still largely in the dark, however, as to what would constitute such a non-constitutional breach, when any breach of the law might be viewed as depriving the litigant of the right to a 'fair trial'.

⁴⁴⁸ Ibid., 4.

CONCLUSION

The key question examined in this chapter has been: in light of the supremacy of the Constitution, what is the effect of section 71 of the *Land and Titles Act 1981 (Samoa)* on the Supreme Court's review jurisdiction when it comes to decisions of the Land and Titles Court? The simple answer to this question is that it is decided law in Samoa that: in light of the supremacy of the Constitution, section 71 of the *Land and Titles Act 1981 (Samoa)* cannot oust the Supreme Court's review jurisdiction when decisions of the Land and Titles Court breach Part II – Fundamental Rights under the Supreme Law of Samoa, the *Constitution*.

Although the answer seems clear cut and settled, there is still a major part that has yet to be determined. That concerns the possibility of review where the alleged breaches are non-constitutional. This part of the question awaits the right set of facts to be considered by the Samoan Courts. However, it is hard to see how any breaches can be formulated on orthodox grounds of judicial review which will not be absorbed by Part II fundamental rights in the *Constitution*. For this reason, perhaps the amendment or replacement of the sections 71 and 90 of the *Land and Titles Act 1981 (Samoa)*, which purport to preclude judicial review of Land and Titles Court decisions in the Supreme Court, is due for consideration. They could be replaced by a strong statutory warning that when questions of custom are raised in judicial review proceedings due deference should be given to the primacy and the specialist expertise of the Land and Titles Court on questions of customary land and *matai* titles. This primacy is given to the Land and Titles Court by the *Constitution*, which is the supreme law of Samoa. Such a change would, I believe, give meaning to Parliament's enacted will, by honouring the supremacy of the *Constitution* and truly reflecting the blend of the Western and the Samoan forms that is present in the political and legal framework of this post-colonial, independent state. Such a change might be unnecessary, however, if the general courts were to adopt this position, of their own volition, as the proper reading of the 'ouster clause'.

CHAPTER EIGHT

RECOGNITION OF CUSTOMARY LAW IN THE DECISIONS OF THE LAND AND TITLES COURT

This Chapter will consider general principles of Samoan customary law concerning customary land and *matai* titles that can be extracted from written orders and decisions of the Land and Titles Court (“the Court”).

Customary law is the social glue of Samoa’s ideal social organisation, the *Faamatai*. When one speaks of an ideal social organisation, one is usually referring to the philosophical underpinnings of a society: the intangible. However, when the Samoan speaks of their *Faasinomaga*, their identity or points of reference, the intangible is pinned onto something tangible. *Faasinomaga* is threefold. It refers to the Samoan language, customary lands and *matai* titles. And when land and titles are considered, we are no longer dealing with philosophy but with identifiable rights and privileges, duties and responsibilities, and the (customary) laws governing them. As the general laws of the Independent State of Samoa maintain law and order within the political structure of a Westminster Parliamentary democracy, customary law in Samoa maintains peace and order along *Faamatai* lines. The *Faamatai* centres on the *suli* or heir. It is therefore expected that customary law in Samoa with regard to lands and *matai* titles will also centre on the *suli* or heir. The chapter therefore considers the content of this ‘customary law’ that the Court applies when it decides disputes concerning lands and titles.

AIM

The methods used to select and access the decisions used in this chapter, as well as the barriers to access, are described in Chapter Five. The aim of this chapter is to identify the customary principles concerning lands and titles that are being applied by the Court. Because decisions used in this chapter constitute only a fraction of those the Court has made, the analysis will be limited in its conclusions. This will not be a fully comprehensive examination of Samoan customary law. Nor does it purport to be the definitive word on the matter. Nevertheless, the selection methods followed have produced 460 decisions of the Court, from 1903-2007, which have been studied. These cover a wide variety of legal issues that are broadly representative of the Court’s work. Most of the decisions are in the Samoan

language, some had English translations and others were in English only. A few decisions, mainly from 1903, were in German but English translations were made in the 1980s and added to the case files.

The periods from which these 460 decisions were drawn can be divided into four. The first is the period from when the Court was established under the German Administration in 1903 until 1920 when, after World War One, New Zealand officially took over from Germany as the colonising power. The second period is under the New Zealand Administration from 1920 until Samoa became independent in 1962. The third period is from independence until 1980, during which time the Court continued to operate under legislation enacted by New Zealand for Samoa. The fourth period is from 1981 to the present, during which time the Court has operated under an enactment passed by Independent Samoa's Parliament - the *Land and Titles Act 1981(Samoa)* ("the Act").

The legal changes made in 1981 are responsible for a major change in the length and content of the decisions. Prior to 1981, the decisions were very brief, consisting only of the orders made. After 1981, and the enactment of section 66 of the Act, which requires the decisions to include reasons, the decisions became considerably longer.

For this reason, detailed analysis of the customary law applied by the Court is only possible for decisions made after 1981. Conclusions on probable customary principles applied before 1981 must be based on inference or assumption. The exact customary principles the Court had in mind cannot be positively identified although the actual orders made can be. This allows for some inferences to be drawn as to the type of issues heard and the remedies meted out to resolve the disputes that came before the Court. This attempt to draw inferences from the Court's recorded orders acknowledges the historical value of this material and the uniqueness of the opportunity presented to access, analyse, evaluate and question 460 decisions of the Court.

CATEGORISATION OF DECISIONS

In analysing the decisions I arranged them first into those made before 1981 and those made after 1981. I then categorised them according to the island (Savaii, Upolu, Manono, Apolima) from which the matter originated. The idea behind this categorisation was to ascertain whether the type of dispute and the orders made varied depending on the island of origin, and

to test whether the customary law applied would vary. The aim was to test the statement made in Chapter Two that Samoa is homogeneous in its language, race and culture from Upolu in the East, across Manono and Apolima, to Savaii, its westernmost island. The next categorisation was by major legal issue: Land or Title. Beyond these broader categorisations, the decisions were classified under more specific headings. Appendix D provides a full list of these.⁴⁴⁹ They include: *Pule* (ownership or authority) over land and *matai* titles, use of land, the process of selection of a titleholder, procedure, evidence and remedies. Some headings are either specific to lands or titles, while others apply to both, and some concern the workings of the Court. There are headings that raise specifically customary issues and others that refer to introduced or Western concepts. This combination reflects the hybrid nature of the Court.

The list of the headings used to classify the decisions indicates clearly the range of Samoan customs and usages the Court has applied. Some basic customary norms in relation to Samoan customary lands and *matai* titles are identifiable. Clear patterns of repetition emerged where the same order was made in relation to similar disputes. This result echoes the social homogeneity that Samoa boasts. When such patterns continue over time, and are found in the reasons for decisions after 1981, then perhaps we can identify and recognise a body of law that can be called the 'customary law' of Samoa in relation to customary lands and *matai* titles.

This classification and analysis of the decisions and the identification of apparent patterns of customary rules or norms will then be related back to the discussion of the *Faamatai*, and of customary land tenure and *matai* titles, found in Chapter Two.

ANALYSIS AND INTERPRETATION

The aim of this chapter, then, is to identify patterns of customary 'rules' or norms that form the customary law concerning land and titles applied in the Court. This part of the chapter focuses on the results of classifying the 460 decisions according to the headings in Appendix D.

⁴⁴⁹ Appendix D: Full list of Extra Categories.

Temporal Categorisation

Two hundred and eighty two of these decisions were made before 1981 and 178 after.⁴⁵⁰ Most of the decisions before 1981 concerned customary land matters while after 1981 most concerned *matai* titles. The decisions do not provide any indication as to the reason for this shift. However, it is possible to attribute the focus on land before 1981 to the fact that the colonial enterprise's primary goal was to regulate land dealings. After 1981, the land issues had perhaps settled and attention shifted to issues concerning *matai* titles. This may have been due to a new focus on voting rights, for 'Matai suffrage' was introduced on Independence which meant that a person not only had to be a *matai* to stand for Parliament, but also had to be a *matai* to vote in the general elections. Another possible explanation for the over representation of *matai* title cases is population growth. With modern advances in science, technology and economic development, Samoans are living longer and infant mortality has decreased. Population growth meant larger *aiga*. Larger *aiga* meant relationships and relating were more complicated. Further complications came in the emphasis on foreign values such as individualism and the capitalist emphasis on the individual accumulation of wealth. This combination of factors probably led to many disputes, especially in decisions regarding *matai* titles and the authority to hold these titles or bestow them. The old 'customary' ways of *soalaupule* (consensus decision making) probably became more difficult to follow. The modern generation was perhaps not so patient, although one can appreciate that the logistics of reaching a consensus in a group became very different when that group doubled or tripled in size. In any case, the whole ideal social organisation, the *Faamatai* and its land tenure and *matai* title system, had to respond. In that response the Court plays a pivotal role. It is a mechanism for mediation, arbitration and adjudication of disputes. It is also a medium for the preservation and enforcement, and a repository of, Samoan customary law.

Geographical Categorisation

The second categorisation of the decisions was according to the island from which the case originated. The vast majority of cases were from Upolu, less than a hundred from Savaii, less than ten from Manono and none from Apolima. The main explanation for this distribution is access to the Court. When it began, the Court was located on Upolu Island, near the capital of Apia. When you lived in Savaii or one of the other islands you had to travel to Upolu if you

⁴⁵⁰ Appendix E: for Table of breakdown of decisions per year.

wanted to appear before the Court. This changed when another courthouse opened in Savaii in the 1970s. The increase in cases from Savaii in the 1980s correlates with the establishment of this second Court. It is also around the same time that the letters 'ALC', preceding the decision number, were used to differentiate Savaii decisions from those of Upolu and other islands, where the decision number was preceded by 'LC'. Those living in Manono and Apolima still have to travel to Upolu for their Court matters.

The purpose of the classification according to the island of origin was to see whether there was a difference in the type of claim, or in the decisions made, in the different islands. Due to low numbers, it is hard to reach categorical conclusions on this. Nevertheless, when I compare the decisions from Upolu with those from Savaii (these two islands lying to the extreme east and west respectively of the four islands), I cannot find any real difference in the types of disputes or the decisions of the Court. Even the few from Manono follow the same pattern as to type of issue and response of the Court. This finding confirms Samoa's claim of homogeneity - one language, one race and one culture, from *Saua* where the sun rises to *Analega* where it sets.

Subject matter Categorisation

The next division made in the decisions was between those concerning customary lands and those concerning *matai* titles. Matters under each of these headings were further sub-categorised, and another category added that relates to the mechanisms of the Court: that is, to matters of jurisdiction, evidence and procedure. The following discussion will deal with each of these headings in turn.

Pule

All the decisions either refer to *pule* (ownership or authority) over land or consider it specifically. *Pule* is a conception of ownership. It is not the same as the English idea of ownership of real property but it shares some of its attributes. This is best seen when we consider the English word that is often used to translate *pule*, which is 'authority'. The authority to allocate land, to dispose of it, to exclude people from it, to use, and allow or end use of it, rests with the holder of *pule*. In total, we might say that the exercise of these forms of authority add up to something like ownership in the English sense. A major difference, however, lies in the fact that, under the *Faamatai*, *pule* is vested in a name, a *matai* title, and not a person. So, how is this 'name' supposed to assert its 'ownership' of the land? How will

it exercise its authority? The *Faamatai*'s response is that *pule* will be exercised by the *matai* – the titleholder. And who is the *matai*? The person, who those who hold *pule* (ownership/authority to decide and bestow) over the 'name', the *matai* title, have unanimously chosen to be the *matai*, or titleholder. The question of the *pule* of a *matai* title is therefore also dealt with by the Court. In the vast majority of the cases considered, the *pule* of the *matai* title was found to be vested in the *suli* (heirs) of the title. This confirms the statement made earlier that central to the *Faamatai* is the *suli* (heir). The *suli* unanimously decide on one of their number to hold the *matai* title. The chosen *suli*, in that person's capacity as the *matai* (titleholder), then exercises *pule* ('ownership'/authority/a bundle of rights or powers) in the 'name' of the title he or she bears over the lands pertaining to that *matai* title. This is the core of Samoan customary law that is consistently given effect in the decisions of the Court. It is therefore not surprising that all the decisions dealt with or referred to *pule*. Nor is it surprising that in every case that dealt with *pule* of customary land, the Court considered *pule* to be vested in a *matai* title.

A related custom which the Court also considers is *pulefaamalumalu*. This custom relates to an overarching or protective form of authority. The word *faamalumalu* literally means to provide covering, protection or shade. *Pulefaamalumalu* is also used to refer to the protective authority of the *nuu* (collective of *matai*) over the lands and people residing in the *nuu* (geographical location).⁴⁵¹ This meaning should differentiate it from *pule* which is a more substantive form of authority or ownership. Perhaps *pulefaamalumalu* could be called the shadow of *pule*.

Examples of decisions that referred to *pulefaamalumalu* are cases where land did not belong to a particular *matai* title but to the *nuu* (collective of *matai*). In such cases the land was like public land. The *nuu* may have obtained such land from the Government or the Crown. Once they could have obtained it by conquest. In any case, the *nuu* (collective of *matai*) would hold *pulefaamalumalu* over such land as no single *matai* title would hold *pule* of it. The *nuu* can allocate such land in three ways: it can divide it equally among all the titleholders, or among all the *matai* titles of the *nuu* (geographical location), or it can allow anyone to claim part of the land by clearing and developing it. In the last case, landholding will depend on the strength of one who clears the land. However the 'public' land is divided the recipient of the

⁴⁵¹ ALC 5246/5246P1-P4 (1999).

parcel of land, or the clearer of the land, will acquire *pule* over it. If you clear the land and you do not hold a *matai* title, then you clear the land in the name of or on behalf of the *matai* title of which you are an heir. Such labour would be considered part of your *tautua* (service) to the *aiga*.

Pulefaamalumalu is also found in decisions concerning authority over the bestowal of some *matai* titles. Here *pule* of the *matai* title may be initially vested in the heirs (*suli*) of that title, and these heirs make the initial decision regarding succession, but their decision is then validated or approved by another *matai* titleholder who holds *pulefaamalumalu*.⁴⁵² This form of authority is akin to a power to endorse or confirm an appointment. As with *pule*, one finds *suli* (heirs) selecting the titleholder, and a *matai* titleholder exercising the additional *pulefaamalumalu*. As with *pule*, *pulefaamalumalu* of this kind is exercised over both land and titles.

Disposition

Today, Article 102 of the *Constitution of the Independent State of Samoa 1960 (Samoa)* (“the *Constitution*”) permits customary land to be alienated only in very limited circumstances, for which Parliament provides. The permitted alienations are: leases, licences and the taking of land for public purposes. This rule reflects the general understanding that Samoan customary land is inalienable.

Because colonisation had occurred, I expected to find that a number of decisions before independence would concern the alienation of land. That was not the case; instead I found one decision from 1914 that mentioned the sale of land.⁴⁵³ It prohibited this unless there was consensus among the heirs (*suli*), suggesting that as far as the Court was concerned, sale of land was consistent with custom as long as it was pursuant to another Samoan custom, that of *soalaupule* (consensus decision making). However, in a 1955 decision,⁴⁵⁴ the Court held that sale or mortgage of the land concerned was prohibited even by the holder of *pule*.

Many of the decisions involving dispositions of land deal with issues relating to leases of land. These decisions illustrate the hybrid nature of the Court, because leases are usually

⁴⁵² LC 10138 (1999).

⁴⁵³ LK 353 (1914).

⁴⁵⁴ LC 1391 (1955).

Western in form, but influenced by custom. The Court must therefore juggle custom and introduced law. It is expected to apply custom with an eye on the requirements of introduced law and through an introduced judicial system. For example, the Court considers the applicability of custom, and *pule* of the land to be leased, and plays a role in the leasing process, as specified by legislation. It publishes the proposed lease and hears any objections that may be lodged, according to the legislation, and it determines *pule* of the land to be leased according to custom. Some of the decisions concern *pule* of the land or the amount of rent due and to whom it should be paid.⁴⁵⁵ In all the decisions that considered rent, the Court decided this was to be paid to the holder of *pule*.⁴⁵⁶ Other decisions concern whether a lease should proceed, or the boundaries of the land to be leased.⁴⁵⁷ From these decisions it seems the Court allows a lease to proceed if the holder of *pule* of the land has consented to the lease,⁴⁵⁸ while *pule* of land was again, in the majority of cases, vested in a *matai* title.⁴⁵⁹

Another form of disposition the Court deals with is “gifts” of land. These are not true alienations, because according to Samoan custom the intention is that the land should revert to the customary owners once the purpose for which the land was gifted has ceased. The Samoan term for these “gifts” of land is *igagato*. An *igagato* (gift of land) is usually given in recognition of kindness or assistance of an ‘outsider’ or a non-*suli*. The unspoken understanding is that when the person dies to whom the *igagato* was made, so too does the gift. The gifted land then reverts to the holder of *pule*. In other words, the descendants of the recipient of the *igagato* have no claim to the *igagato* land. A gift of land is therefore not a permanent alienation according to Samoan custom. In the same way, a gift of a *matai* title is possible. Such a gift is called a *matupalapala*. The return of a *matupalapala* (gift of title) on death is also expected.⁴⁶⁰ Therefore the descendants of the *matupalapala* holder cannot succeed to the title. Today these two customary gifts are mixed up.

One of the major departures from custom is that the Court does not enforce the reversion of the gift. In fact, in some of the decisions considered, descendants of a *matupalapala* (gift of title) holder are considered *suli*. Their genealogies, which trace back to a *matupalapala* (gift

⁴⁵⁵ LC 838 (1939).

⁴⁵⁶ LC 1430 (1955), LC 937 (1945).

⁴⁵⁷ LC 940 (1945).

⁴⁵⁸ LC 593 (1920), LC 935 (1945), LC 944P2 (1951), LC 1881 (1961), LC 3501 (1951), ALC 4799/4799P1/P2 (1994).

⁴⁵⁹ LC 624 (1930).

⁴⁶⁰ LC 8361/8361P1/P2 (1989).

of title) holder, are considered able to found a legitimate claim by the Court.⁴⁶¹ The *aiga* therefore loses the land that was the subject of the *igagato* (gift of land) and non-heirs have a claim to succession. As a result such customary gifts have now become rare,⁴⁶² and, if they are made, the requirement of reversion is made extremely clear. From a legal point of view, the Court's failure to enforce the reversion is problematic. Not only is it in breach of Samoan custom which the Court is required to apply; these gifts are also in breach of the non-alienation rule in the *Constitution* and earlier colonial legislation. It seems that this issue has not been raised before the Court.

Many of the gifts of land have been made to the Church. As is well known, in Samoa the Church has been grafted onto the customary structures of society. This is evidenced by the massive church buildings one cannot help but notice when one visits Samoa and the stereotypical classification of Samoans as very religious. Ever since the acceptance of Christianity in Samoa in 1830, land has been gifted to the Church, which has become one of the major land owners in Samoa. As in any disposition, the donor has to have *pule* to make the gift. Judging by the decisions considered, it was usual for the land to revert to the holder of *pule* once the Church's use of it had ended.⁴⁶³

In the case of the Church, however, some of these gifts of land were intended to be in perpetuity. In other words, they were not *igagato* (gifts of land) in the strict customary sense, where reversion was expected. Instead, in such cases, a permanent disposition, or a true alienation took place. Most of these gifts to the Church were made before the adoption of the *Constitution* or any colonial legislation limiting the alienation of customary land. They would therefore not have fallen foul of the prohibition on alienation. Nor would it necessarily have been in breach of Samoan custom if the expectation was that the Church's use of the land would not cease. The *suli* may also have agreed to make non-reversion a term of the gift. As stated above, alienation by customary processes did sometimes occur.

In breach of custom, however, the status of these gifted lands was changed from customary to freehold by simply being registered as freehold land in the name of the Church. The Court has not considered the process by which the status of this gifted land was changed nor has it

⁴⁶¹ ALC 5606/5606P1-P14 (1999).

⁴⁶² LC 1428 (1955).

⁴⁶³ LC 1718 (1961).

addressed the legality of the change. It has merely dealt with land the Church 'holds' in order to confirm the *pule* of the land that was gifted or who exactly gifted it to the Church. In none of the decisions considered was the Church awarded the land by way of court grant, which was one route through which the customary status of gifted land could have been converted to freehold. Court grants were made by the Supreme Court, usually pursuant to the findings of a Land Commission, for example in the 1890s and the early 1900s. This would probably support the proposition that court grants were outside the Land and Titles Court's jurisdiction as the land concerned was not in customary title and jurisdiction over it resided elsewhere, in the Supreme Court. Alternatively, reverence or respect for the Church may have meant it obtained freehold title over gifted land without anyone objecting. The legality of the Church holding 'gifted' customary land in perpetuity and whether such lands should be returned is yet to be questioned in the Land and Titles Court.

Use

The uses of land objected to and considered by the Court reflect the changes brought by colonisation and modernity. There are the usual customary uses of land, for houses or homes and growing crops, and new uses such as shops, schools and church buildings. In all these uses the question of *pule* can arise: whether the person has *pule* to build a house, plant crops, or have a shop, school or church on certain land. Who can build a house or have a shop or plant crops is a question that concerns *suli*. If you are an heir of the *matai* title that 'owns' the land on which you wish to build a house or plant crops or have a shop, this use of the land will usually be allowed. If you are not, then the use will not be allowed. However, if the dispute concerns other uses, such as the building of schools and churches, such matters will depend on whether a gift of the land to be used was properly made: in other words, whether the holder of the *pule* of such land had made the gift and allowed this use of land.

Customarily, the *matai* allocates land for the use of all other heirs. If you can show you are an heir to a particular *matai* title, you can approach the current holder of the title and ask to be allocated some land to use or live on, regardless of how long you have been away from the *aiga* (family) or whether you were born and raised elsewhere. Access and use of land is your right as a *suli*.

The major leveller in the relationship between the *suli* who is the *matai* and the other *suli*, who are eligible to hold the title and have access and use rights to the lands of the title, is the

concept of *tautua*. The oft quoted Samoan principle of leadership is encapsulated in the saying “*O le ala i le pule o le tautua*”. This means the way to *pule* (authority/leadership) is *tautua*. *Tautua* is often translated as ‘service’ but should not connote servitude. It is a privilege and an honour that only an heir would render. In one decision,⁴⁶⁴ the Court used *tautua* as evidence confirming a person’s status as a *suli*. *Tautua* can also be rendered in the form of public service, such as service to schools and churches. Gifting land to enable the provision of ‘public’ services such as education and spiritual nourishment is seen as a form of service to the community. *Tautua* within the *aiga* is rendered to the *matai*. *Tautua* is also rendered to the *nuu* as a whole on behalf of the whole *aiga* or through other measures on behalf of the *matai*. For example, a *suli* could meet the contributions of the *matai* in a church or *nuu* event instead of the *matai* (titleholder) having to make the contribution. *Tautua* is not ‘rent’ for the use of the land for the *suli* has a right to use the land. *Tautua* covers everything good that you do which reflects well on the *matai*, and on the *matai* title of which you are an heir, and on all other *suli*. Again the gift of land for schools and churches confirms this, for it would reflect very well on the *aiga* if it is your *aiga* that gifted the land for the benefit of the whole community. It is also an expression of affluence, for it means your *aiga* has prime land to gift.

In the decisions considered the question of *tautua* arose when someone using the land was not rendering it,⁴⁶⁵ so their removal from the *aiga*, or from *aiga* lands, was sought.⁴⁶⁶ *Tautua* was also put forward in some cases as a way to establish a claim to a *matai* title or land by claiming to be descendants of a *matupalapala* or an *igagato* recipient.⁴⁶⁷ The connection between *igagato* (gift of land) or *matupalapala* (gift of title) and *tautua* exists because these gifts are usually made in recognition of a service (*tautua*) by a non-*suli*, whereas a *suli* has a right to access *aiga* land and to hold the *matai* title of which they are an heir. *Matupalapala* and *igagato*, as noted earlier, are given to non-*suli* in recognition of an act of *tautua*, which is not expected of a non-*suli*. These decisions show that *tautua* or its absence is something the Court definitely considers when deciding questions of succession or use of land. In disputes concerning land or *matai* titles, where the Court finds that *tautua* is not being rendered, it almost always orders it to be observed. This is because *tautua* is a very important custom

⁴⁶⁴ LC 10053/10053P1-P3 (1998).

⁴⁶⁵ LC 930 (1945), LC 1434 (1955), LC 1855 (1960), LC 2111 (1962), LC 3621 (1972), LC 3880 (1972), ALC 3357P1 (1996).

⁴⁶⁶ LC 3357P1 (1996), LC 1434P1/P2 (1997), ALC 5652/5652P1 (1999), LC 1876P4/P5 (2004).

⁴⁶⁷ LC 7280 (1982).

when considering succession to *matai* titles and the use of customary land. The fact *tautua* is not seen as payment acknowledges the fact that access to land is the right of the *suli* (heir). Perhaps it would be better to call it an expectation, although, even if you never rendered *tautua*, it would not make you any less of an heir; you would just be a very poor example of an heir. When the Court takes it into account, I do not think it is making *tautua* a legally enforceable remedy, instead I think the Court is appropriately considering it as an aspect of the Samoan customary arrangements when issues arise concerning the breakdown of various *Va* (relationships) within an *aiga* (extended family), among *suli* (heirs) and the *matai* (titleholders), over land or *matai* title matters.

Succession

Further disputes considered by the Court concern *pule* of *matai* titles, the process of selection of titleholders, and eligibility and confirmation of appointments or bestowals. The above consideration of *pule* and *tautua* lead well into this question of succession to *matai* titles. A *matai* title usually becomes vacant because the titleholder has died. Sometimes it is because the titleholder has voluntarily relinquished the title, usually for health reasons.⁴⁶⁸ In a few cases the titleholder has been stripped of the title.⁴⁶⁹ Voluntary relinquishment is not common because it denies the right of the *suli* to decide a successor if the titleholder relinquishes the title to someone that the *suli* have not chosen. It would not be a surprise, therefore, if a voluntary relinquishment to someone in particular was followed by a move to strip the new titleholder of the title on the grounds that a consensus of *suli* was not obtained! Removal of a title from a titleholder is rare and only happens if all the *suli* are behind the decision. Again the *suli* and consensus play a pivotal role in decision making. So how is succession determined in the majority of cases where a title falls vacant due to death?

To reiterate a basic tenet of the *Faamatai*, both *pule* to select and eligibility for selection to hold a *matai* title rest with the *suli* of the title. *Suli* can include adopted heirs.⁴⁷⁰ This does not present eligibility problems as adoption in the customary context rarely involves the adoption of someone with absolutely no connection to the *aiga*, unlike the case of those who receive *matupalapala* (gift of title) who have no 'blood' connection with the *aiga* and therefore

⁴⁶⁸ LC 1874 (1960).

⁴⁶⁹ LC 7400P3 (1989).

⁴⁷⁰ LC 1580P29, 33, 35-39 (2003).

normally have no claim to succession.⁴⁷¹ However, the Court on occasion has ruled otherwise by including descendants of a *matupalapala* recipient in the *suli* group⁴⁷² and therefore giving them eligibility for succession. It is possible that such a departure from custom was because of the degree of involvement in and the *tautua* the *matupalapala* recipient had rendered the *aiga* made them more a *suli* than an alien.

The decisions show that the groupings of *suli* from which selection of the titleholder is made and the group which makes the actual selection may differ. The difference seems to depend on the *matai* title that is vacant. For example, the selection of a paramount chief (discussed in Chapter Two) is made by groups of *matai* while the successor to that title is selected from the *suli* (heirs) of a particular genealogical line of the title concerned.

Then there are titles within an *aiga* in which the selection of the *suli* to hold them is made by the *Sao* (main *matai*) of the *aiga* alone.⁴⁷³ The *Sao* is also the one who bestows a *matupalapala* (gift of title) which suggests that these titles are of the same kind as those the *Sao* can decide to bestow on their own.

Then there is the *matai* title held by the *Sao* (an example of which is also referred to in Chapter Two). This type of *matai* title is the subject of the majority of the decisions considered. The holder of this title is the head of the respective *aiga* in a *nuu* and the holders are selected from all *suli* by all *suli* of the title concerned.⁴⁷⁴ However, the groupings of *suli* may be divided into *itupaepae* (branches)⁴⁷⁵ or *fuaifale* (sub-branches).⁴⁷⁶

Regardless of the type of *matai* title that is vacant, the requirement of being a *suli* to participate, and the unanimity of the decision, are still central to matters of succession.

⁴⁷¹ LC 5649/5649P1 – P8 (1999).

⁴⁷² ALC 5606/5606P1-P14 (1999)

⁴⁷³ LC 585 (1920), LC 828 (1937), LC 915 (1945), LC 3552 (1971), ALC 4991P1-P3 (1995), ALC 5143/5143P2-P4 (1997), LC 3284 (1998), LC 7280P1/P4 (1998), ALC 5456P1-P2 (1999), LC 6195P3/P4 (2002).

⁴⁷⁴ LC 589 (1922), LC 581 (1932), LC 541P2 (1936), LC 821 (1938), LC 919 (1945), LC 852 (1949), LC 1047 (1954), LC 1433 (1955), LC 3500 (1972), LC 1815 (1959), LC 1860 (1960), LC 1580 (1960), LC 3806 (1972), LC 1558P1 (1981), LC 7300P1/P2 (1982), LC 3484P1 (1982), LC 1395P1/P2 (1982), LC 2507 (1984), LC 6060P1-P13(1985), LC 8361/8361P1.P2 (1989), LC 1790P10P6 (1992), ALC 4774/4774 P1-P3 (1994), LC 6040P1-P9, LC 10053/10053 P1 – P3 (1998).

⁴⁷⁵ LC 913 (1943), LC 8281P8 – P14 (1988), LC 1790P1-P11 (1995), ALC 5417P1/P2 (1999), ALC 5443/5443P1-P3 (1999).

⁴⁷⁶ LC 1421 (1955), ALC 4665/4665P4-P6 (1994), ALC 4978 (1994), LC 5597P1-P12 (1998), LC 1932 (1999), LC 5500/5500P1-P5 (1999).

Apart from the need to be a *suli* the other major criteria for selection for all these different types of *matai* title is evidence of *tautua*. Here again *tautua* is not limited to acts of service but extends to every way in which the ‘candidate’ has maintained and added to the good name of the *aiga*.⁴⁷⁷ *Tautua* is considered by the Court even in cases where it makes the appointment because the *suli* cannot reach a consensus.⁴⁷⁸ In some of these cases being well educated and serving as a Member of Parliament are considered *tautua*.

The issue of succession comes before the Court at different points in the process of selecting a *matai*. It seems that if a particular *matai* title has not been the subject of a previous case, and regardless of how the dispute came to the Court, it will always address the question of *pule* as a preliminary matter. Often, the determination of *pule* ends the dispute, either by addressing the core of the dispute or by parties withdrawing their dispute because they do not want an ‘outside’ institution determining questions of *pule* over their land and *matai* titles. Points in the process at which the matter may come before the Court are therefore when *pule* is questioned, or when the identity of the *suli* or the different *itupaepae* (branches) or *fuaifale* (sub-branches) is in doubt, or if consent or consensus is questioned. For these reasons an appointment may not take place, or it may be made void if it was not pursuant to *pule*, if the appointee was not a *suli*, or if the required consent/consensus was not obtained.⁴⁷⁹

Sometimes a petition is heard by the Court because consensus could not be reached. In such a case the Court may make an appointment itself, as outlined above.⁴⁸⁰ Consensus is the mode of decision making according to the *Faamatai*. It is the ideal and this is understood. For this reason there are titles that have remained, and those that will remain, vacant for decades because consensus cannot be reached. The Court’s involvement is not sought in these cases. This, I believe, confirms the central role of *suli* in decision-making in the *Faamatai* and the ongoing adherence of Samoans to this customary process. *Soalaupule* is the Samoan decision making process which has been translated as consensus decision making. *Soalaupule* acknowledges the equal footing of all *suli*. It states that, because all *suli* have the same rights, when decisions are made each *suli*’s position on the issue will be sought. Respect for and

⁴⁷⁷ LC 1387 P1-P5 (1985), LC 708P8 (1999).

⁴⁷⁸ LC 914 (1943), LC 1395 (1955), LC 1387 (1955), LC 1815 (1959), ALC 4754/4754P1-P11 (1994), LC 1646P42-P53 (1997).

⁴⁷⁹ LC 1377 (1955), LC 1374 (1956), LC 1828 (1960), LC 1870 (1960), LC 2166 (1962), LC 3806 (1972), ALC 3557P1/P2 (1982), LC 150P1-P4 (1982), LC 1387P1-P5 (1986), LC 8690 (1989), LC 7844P5-P7 (1991), LC 8984/8984P1/P2 (1991), ALC 4970P1/P2 (1994), LC 1646P42-P53 (1997).

⁴⁸⁰ LC 444P1-P4 (1982).

acknowledgment of the different positions will occur. So a decision that is not agreed to by all will be in breach of the *pule* that is held collectively and individually by the *suli*. In a recent decision of the Court concerning succession, the custom of *soalaupule* or consensus decision-making, when determining a successor, was confirmed. The decision also confirmed that *pule* of the title in dispute rested with the *suli*.⁴⁸¹ *Soalaupule* and exercising it as a decision-making process within the Court and with the customary context in Samoa would be ideal. Every time the Court confirms its practice it re-enforces its value. The Court's decisions are vital for the protection and continuation of *soalaupule* and any other Samoan custom. The hope is that the Court will not undermine this custom by overlooking it when making its decisions.

There are cases where the dispute concerns the customary requirements of the *saofai* (bestowal ceremony).⁴⁸² The manner in which the Court deals with such disputes is a further illustration of its hybrid nature. This is because the requirements of the *saofai* are dictated by custom while at the same time the 1981 Act, that now governs the Court, defines the rightful holder of a title as *inter alia* a person who has had a *saofai*.⁴⁸³ This is an example of where a custom is also a 'legal' requirement that the Court has to consider when it makes its decisions. On the one hand it is compelled by custom and on the other it is bound by its governing legislation.

Remedies

The Court has a range of remedies at its disposal. The decisions show that remedies concerning the use of land include: the confirmation or denial of a lease, the continuation or cessation of certain land uses, the setting or confirmation of boundaries, and the removal of houses or people. In relation to *matai* titles, remedies include: the determination of heirs of titles, and the confirmation or cancellation of appointments or bestowals. Determining the location of *pule* is a remedy that addresses both lands and titles. Some remedies have an obvious link to a Samoan custom: for example, when an appointment is confirmed or use of land is continued because the appointee or user of the land is found to be a *suli* (heir). Others do not relate to a Samoan custom, such as being struck off the *Matai* Register if an appointment is made void, or when the Court, instead of the *aiga*, makes the appointment.

⁴⁸¹ Appendix C: LC 853 P1-P39, 18 June 2008, at page 9 of 16.

⁴⁸² LC 1388B (1955), LC 1558P1 (1981), ALC 4949/4949P1-P2 (1994), LC 7400 (1996).

⁴⁸³ *Land and Titles Act 1981 (Samoa)*, s. 20(1)(b); LC 7400/7400P1 (1982), LC 7506 (1982), LC 10030-33, 59-61P1, P2 (1999).

The variety of remedies points to the hybrid nature of the Court. It is, after all, a foreign form or structure for resolving customary disputes by applying indigenous customs and usages and the law relating to such customs, within a non-customary forum.

By way of illustration, this discussion will focus on one of the most powerful orders the Court can make, which is for the banishment or removal of a person or their family from *aiga* land and sometimes from the *nuu* itself. Banishment is considered for three reasons: firstly, it is a form of Samoan customary punishment; secondly, it is a perfect illustration of the balancing act the Court has to undertake when applying both custom and the 'law'; and, thirdly, it illustrates how the Court has taken over some customary roles almost entirely. The result may be that banishment will cease to be ordered in a customary context within the *nuu* and will exist only in future as an order of the Court.

Banishment is one of the heaviest Samoan customary punishments. Several Samoan terms are used to refer to it. *Tafi ma le eleele* literally means to be wiped off the land or exiled, while *soloia i le aufuefue* and *oso ma le lau* carry the same connotation. It keeps company with other punishments such as *ai ma le teve* - slow death resulting from having to eat a poisonous plant, and *mu le foaga* - everything you own is burnt to the ground. That people may be in buildings when they are burned down will not stop the execution of this punishment. They will die in the fire if they do not escape. Such a devastating and permanent impact means something rather grievous would have to occur to warrant it.

Commonly, banishment can be ordered within an *aiga* by the *Sao* (main *matai*) or by the *Alii* and *Faipule* (Council of *Matai*). Banishment by *Alii* and *Faipule* can either mean removal from the *nuu* (geographical location) or removal from the *nuu* (Council of *Matai*). The latter means you and your family cannot participate or have a voice in the affairs of the Council of *Alii* and *Faipule*. Therefore you have no say in how your community is run or in the decisions that will affect your daily life. Such persons may still, however, have access to their lands. For ease of distinction I will use the terminology accepted in *Taamale's* case,⁴⁸⁴ and refer to the first type of banishment as 'extra-jurisdictional' and the second as 'ostracism'. Customarily both types of banishment are indefinite. Often the punishment ends when a

⁴⁸⁴ *In re the Constitution, Taamale v AG* [1995] WSCA 1, 23.

formal apology is given to the Council or where ‘fines’ are met.⁴⁸⁵ Sometimes the banishment is permanent. Whether it is at the *nuu* level or within an *aiga*, banishment orders are not made lightly because of the devastating impact on an individual or family.

Banishment orders made by the Court reflect the various ways in which the need for banishment can arise. It also reflects the various forms or requirements of banishment. People can be asked to vacate land upon which they are encroaching, in which case they would pull back behind a boundary line.⁴⁸⁶ In other cases they are asked to leave the particular *aiga* land they are wrongfully occupying or using. Often they still have other *aiga* land they have been allocated and will move there. At other times they are being asked to leave *aiga* land altogether. Unless they have another *aiga* connection in that *nuu* (geographical location), such a removal would mean leaving the *nuu*. In a few cases they are removed because they do not have a right to be on the land as they are not *suli* of the *matai* title that holds *pule* of such land.⁴⁸⁷ These banishment cases concern *aiga*. However, sometimes it is the *Alii* and *Faipule* or the *Fono a Matai* (Council of *Matai*) who seek removal that is ‘extra-jurisdictional’ or by ‘ostracism’. It is clear that when it is the *Alii* and *Faipule* who have made the banishment order the case must be serious.

Banishment from an *aiga* or *nuu* comes before the Court usually because the person ordered to leave files an objection. Alternatively, the *Alii* and *Faipule* may come to the Court asking for assistance in enforcing or supporting the banishment order they have made. There are also situations where the Court has been asked to make a banishment order to add to one that has been made through the customary process or instead of going through the customary process.

In response the Court has either made a banishment order or has dismissed the petition. In one interesting decision the Court ordered the removal of an individual but not his children, then suspended the order until the petitioner asked in writing, at least six months after the order was made, for it to be executed.⁴⁸⁸ In other cases the Court did not make the order but allowed the petitioner to return for an order if the person whose removal was sought breached the conditions set by the decision.⁴⁸⁹ One of the most common conditions was that *tautua*

⁴⁸⁵ LC 7827 (1982).

⁴⁸⁶ LC 5757 (1977), LC 6383 (1979), LC 7294/7295 (1982).

⁴⁸⁷ ALC 3712P3/P4 (1999).

⁴⁸⁸ LC 1853 (1960).

⁴⁸⁹ LC 1855 (1960).

should be rendered.⁴⁹⁰ In one case the petitioner returned two years after the initial decision seeking the order for removal as the conditions set by the Court had been breached.⁴⁹¹ In the decisions considered there were very few cases where removal was sought by the *Alii* and *Faipule* (Council of *Matai*). Most of them were *aiga* matters perhaps because population growth was putting a strain on relationships within *aiga*.

It is interesting to note the reasons for the Court's decision in banishment cases. In *aiga* matters the reasons were: not rendering *tautua*,⁴⁹² that removal would restore peace and harmony;⁴⁹³ the person seeking removal holds *pule* of the land concerned;⁴⁹⁴ or banishment was in accordance with a past decision of the Court.⁴⁹⁵ There were also decisions where removal was granted for reasons that cannot be inferred. Those removed were permitted to take their crops from the land and take down their homes as long as they did not damage the land.⁴⁹⁶ In only two decisions was 'extra-jurisdictional' banishment ordered by the Court. This probably reflects public awareness of fundamental rights protected in the *Constitution* and the Court's increased reluctance to make banishment orders in recent years. The main reason for the first was that the petition from *Alii* and *Faipule* was supported by the *matai* (titleholder) of the *aiga* to which the removed individual belonged.⁴⁹⁷ The reasons for the second order, which saw the removal of a whole family, were: disturbing the peace, drunken behaviour, selling 'lava' rock without permission, stealing pigs, not rendering *tautua*, and non payment of fines imposed by the *Alii* and *Faipule*. One member of the family had been charged with carnal knowledge in the criminal courts, the *Alii* and *Faipule* had petitioned the Court twice before but withdrew the petitions because the accused had promised to behave, but he did not, and finally the head of the family had expressed his acceptance of the 'will' of the *Alii* and *Faipule*.⁴⁹⁸

The reasons why an order was not granted may be equally important. In *aiga* matters the reasons were: the land was being occupied legitimately;⁴⁹⁹ the person seeking the order

⁴⁹⁰ LC 1434 (1955), LC 3880 (1972).

⁴⁹¹ LC 1434 (1957).

⁴⁹² LC 3888 (1972), ALC 3357P1 (1996).

⁴⁹³ ALC 5771/5771P1 (2002), LC 1832P4-P5(2004).

⁴⁹⁴ LC 1375P1 (1995), ALC 5771/5771P1 (2002).

⁴⁹⁵ LC 1403 (1955).

⁴⁹⁶ LC 858 (1939), LC 1400 (1955), LC 1975 (1960).

⁴⁹⁷ LC 10138 (1999).

⁴⁹⁸ ALC 5652/5652P1 (2000).

⁴⁹⁹ LC 3624 (1972), LC 9338 (1997), LC 10063 (1998), LC 1993P1-P3 (1999).

contributed to the problem;⁵⁰⁰ *pule* of the land in question must be determined first;⁵⁰¹ and no grievous wrong had been shown to warrant an order.⁵⁰² One of the decisions of this kind was very helpful because it pointed out the types of grievous wrong that would warrant an order. It added two wrongs to the list: murder and adultery. In some cases the petitions were withdrawn⁵⁰³ but only one gave a reason for this which was that the respondents had agreed to depart!⁵⁰⁴

There are two decisions where a petition by *Alii* and *Faipule* for an ‘extra jurisdictional’ banishment order was not granted. I believe these decisions best illustrate the balancing act the Court has to conduct between custom and legislation. The first of these decisions⁵⁰⁵ was the first of the 460 decisions studied to cite the *Constitution*. It dealt with a petition for the removal of three individuals. In two of these cases the Court did not grant the order. In the third, it ordered the *Alii* and *Faipule* to reconsider their decision to banish. In the reasons for the decision the Court emphasised the freedom of movement enshrined in the *Constitution*⁵⁰⁶ that was emphasised in *Taamale*’s case.

It is interesting that this case was cited in a decision where a banishment order was not made because it would breach freedom of movement, when *Taamale*’s case actually ruled that banishment was a Samoan custom that was not inconsistent with freedom of movement, so it was not unconstitutional for the Court to make ‘extra-jurisdictional’ banishment orders.⁵⁰⁷ The Court’s decision that the *Alii* and *Faipule* should reconsider their decision to banish was probably in light of *Mauga v Leituala*, decided in 2005, where the Court of Appeal had stated that banishment can be harsh and contrary to principles of natural justice.⁵⁰⁸

The second decision⁵⁰⁹ dealt with another freedom, that of religion. The case concerned an individual whose ‘extra-jurisdictional’ removal had been ordered by *Alii* and *Faipule* because, among other reasons, he had introduced a ‘new’ denomination into the *nuu*. The *nuu*

⁵⁰⁰ LC 1876P4/P5 (2004).

⁵⁰¹ ALC 3172/3172P1 (1992).

⁵⁰² LC 1826 (1960), LC 1874 (1960), LC 1434P1/P2 (1997).

⁵⁰³ LC 1820 (1960), LC 1835 (1960), LC 1840 (1960), LC 2926 (1972).

⁵⁰⁴ LC 1403 (1955).

⁵⁰⁵ LC 10872/10872P1 (2005).

⁵⁰⁶ *Constitution of the Independent State of Samoa 1960 (Samoa)*, Article 13(1)(d).

⁵⁰⁷ *Taamale*, 28.

⁵⁰⁸ *Mauga v Leituala*, 1.

⁵⁰⁹ LC 11017/11017 (2007).

had a rule prohibiting the introduction of any 'new' denominations. In its decision the Court ordered the introduction of the 'new' denomination to be put on hold because it thought freedom of religion meant the 'new' denomination could not be barred, only delayed. According to the Court, the only reason for the delay was because those who had *pule* of the land on which the new church would be built had not met or agreed to this use of the land. The other reason the Court gave for its decision was based on the *Village Fono Act 1990 (Samoa)*. It stated that the *Alii* and *Faipule* had no power under this Act to make a banishment order.

It is questionable whether this kind of power needs to be conferred by legislation, however. The *Village Fono Act* is not a code of powers for the *Faamatai*, or for the *Alii* and *Faipule*, or the *Fono a Matai*, or for all its processes. Its purpose is to validate the exercise of power and authority by *Alii* and *Faipule* in accordance with the custom and usage of their *nuu*; to confirm or grant certain powers; and to provide for incidental matters, including ways by which hygiene, public health and agricultural development can be promoted in the various *nuu*.⁵¹⁰ It is not surprising that a power to make a banishment order is not expressly mentioned in this legislation. I would think this power would be covered by the 'custom and usage' of the *nuu*, which this legislation purports to confirm in general terms. Banishment is probably not mentioned because the matters with which this Act is mainly concerned, matters of hygiene and economic forms of planting, and so on, are not the stuff of grievous wrongs that would warrant 'extra jurisdictional' banishment. In short, banishment is not the focus of this Act.

These two decisions nevertheless illustrate the fact that it is getting harder and harder for *Alii* and *Faipule*, or even the *matai* of an *aiga*, to make a banishment order. It is becoming more difficult to have the Court's support. The Court's position has arisen, I believe, from its increasing awareness of the law relating to fundamental rights and its current preference to err on the side of enforcing such rights rather than 'custom'. Where once not rendering *tautua* was sufficient to warrant removal, now it is not enough. It is these observations that have led me to believe that banishment could soon exist only as an order of the Court. If that happens, *Alii* and *Faipule* will not have punishments or sanctions at their disposal, which means their decisions will not be taken seriously. They might then stop making banishment decisions

⁵¹⁰ *Village Fono Act 1991 (Samoa)*, section 5.

altogether. If they do, that will be the end of banishment in a customary context. And if that happens a customary process that was normally performed by the *Alii* and *Faipule* will have been taken over by the Court and may very rarely be exercised. It is possible the Court took its cue from the *Taamale* decision and Lord Cooke's following comment:

*...we are not called upon in this case to consider whether village councils, as distinct from the Land and Titles Court, have authority to order this kind of banishment.... We go no further than saying that the Land and Titles Court has jurisdiction to make this kind of banishment order, a jurisdiction which should only be exercised for truly strong reasons, and that a village council minded towards banishment from the village would be well advised to petition that Court for an order rather than to take an extreme course on their own responsibility.*⁵¹¹

This suggestion, to relieve the *Alii* and *Faipule* of such an onerous responsibility, has been taken up. In doing so the Court has moved from a role wherein it resolves customary disputes to a position wherein it takes over customary processes and makes customary decisions and orders. It has in a way stepped outside its jurisdiction and mandate, which is to resolve and mediate, or to step in when customary processes have not worked. The move seems innocuous. It may even seem logical and fair. Some may even argue that it will be easier to maintain consistency if decision making is left to the Court (a small group of *matai*) as opposed to different groups of *Alii* and *Faipule*. My apprehension is that the move will be at the expense of custom and the ability of the *nuu* to enforce customary norms.

Procedure

My apprehension concerning the custom of banishment is slightly alleviated when I note the degree of deference to customary processes that is usually evident in the Court's procedures. Many of the decisions considered show that petitions have been withdrawn. The main reason such withdrawals occur is that customary procedures have overtaken events: for example, *maliega*, where the parties have agreed to resolve the dispute out of Court;⁵¹² *faaleleiga*, where the parties have reconciled their differences amicably and without the Court's involvement;⁵¹³ and *seumalo*, which was discussed at length in Chapter Six. This refers to a request by the *nuu* (collective of *matai* titleholders) for the parties to withdraw and settle their

⁵¹¹ *Taamale*, 27-28.

⁵¹² LK 370 (1914), LC 7506 (1982), LC 1897P1-P3 (1989), LC 939P1 (1992), LC 9822P1-P5 (1999), LC 5649/5649P1-P8 (2000).

⁵¹³ LC 7406 (1982), LC 845 (1987), LC 1387P6/P7 (1990), LC 3626P1-P3 (1991), LC 1385P1-P3 & LC 8557P1-P4 (1992), LC 1871P2-P8 (1999), LC 7400P5-P9 (1999), LC 7268P5-P7 (2000).

dispute out of Court through the usual customary processes of *soalaupule* – consultation, deliberation and consensus decision-making.⁵¹⁴ Although these three grounds for withdrawal can be found in a slightly different form in Western legal procedures, they are recognised, accepted and applied by the Court as Samoan customs.

Chapter Six also discussed the fact that the Court was not formally bound by the doctrine of precedent and that Samoa is still waiting for the Supreme Court to hear and determine whether the principle of *res judicata* should be applied to the proceedings of the Land and Titles Court. Although neither the principle of *res judicata* nor the doctrine of precedent are Samoan customs, the certainty and finality they facilitate are outcomes that custom or customary processes would welcome and probably aim for. What the decisions show is that the Court has been observing something like the principle of *res judicata* and has been upholding the doctrine of precedent in its own way. It does this every time it states that a previous decision, or the outcome of a prior *maliega* or *faaleleiga*, should be upheld.⁵¹⁵ In a recent decision, the Court took a step closer to openly committing to a position on observing the doctrine of precedent and the principles of *res judicata* when it invalidated a title bestowal because it was made in breach of a previous decision of the Court in 1939, concerning succession to the title in dispute.⁵¹⁶ This recent decision is in line with what seems to have been the Court's practice from as far back as 1920 until as recently as 2004 regarding prior *maliega* and *faaleleiga*. A larger sample of decisions would I believe show evidence of this practice even earlier than 1920. The Court may not have had the exact principle of *res judicata* in mind when it refused re-litigation of an issue, but the outcome is the same as if it was applying the principle. I also came across decisions where a previous decision was either

⁵¹⁴ LC 1367 (1954), LC 1408 (1955), LC 7509 (1982), LC 7282 (1982), LC 2757/P1/P2 (1993), LC 10263P1 (2001); Appendix C: LC 853 P1-P39, 18 June 2008, at page 9 of 16, the Court confirms the custom of *soalaupule* or consensus decision-making.

⁵¹⁵ LC 590 (1920), LC 541P3 (1936), LC 851 (1939), LC 576 (1941), LC 847 (1948), LC 852 (1949), LC 1412 (1955), LC 1393 (1955), LC 1387 (1955), LC 1441 (1955), LC 1374 (1956), LC 1434 (1957), LC 1878 (1960), LC 1861 (1961), LC 3617 (1972), LC 236 (1972), LC 3624 (1972), LC 3624 (1972), LC 3500, LC 3638 (1972), LC 5757 (1977), LC 1558P1 (1981), LC 150P1-P4 (1982), LC 3484P1 (1982), LC 1580P5-P14 (1982), LC 1385P1/P2 (1982), LC 6060P1-P13 (1985), LC 1733P1 (1985), LC 1387P1-P5 (1986), LC 444P5-P8 (1987), LC 8281P8-P14 (1988), LC 1841 (1988), LC 444P5-P8 (1989), LC 5761 (1991) LC 7300P3-P5 (1991), LC 1790P1-P6 (1992), LC 4952/4952P1-P4 (1994), LC 1375P1 (1995), LC 1832P1-P3 (1995), ALC 3357P1 (1996), LC 7268P3/P4 (1998), LC 3284P1 (1998), LC 1580P25-P28(1998), LC 1993P1-P3 (1999), LC 5285P5/P9 (1999), ALC 3712P3/P4 (1999), LC 1828P1/P2 (1999), ALC 5409P1 (2000), ALC 3981P6-P18 (2000), ALC 6718P1/P2 (2000), LC 5875P9-P13 (2000), LC 1580P29,33,35-39 (2003), LC 1876P4/P5 (2004).

⁵¹⁶ Appendix C: LC 853 P1 – P39, 18 June 2008, at page 12 of 19.

partly overturned or defined and clarified.⁵¹⁷ Such a find is of course not entirely inconsistent with adherence to the principle of *res judicata* or the doctrine of precedent.

In a way these decisions of the Court have answered the question that is yet to be heard by the Supreme Court of Samoa. The Land and Titles Court already applies something like the principle of *res judicata* and the doctrine of precedent. The Court may not have formal terms for these concepts but its practices acknowledge the need for consistency, and generally to decide like cases alike, and that it is undesirable to re-litigate issues that have already been decided. Of course, just as in jurisdictions that apply and adhere to the principle of *res judicata* and the doctrine of precedent, this does not mean the Court always gets the decision right, and it may in exceptional cases be convinced to vary its prior decisions when compelling arguments are made.

Evidence

Perhaps the best way to assess whether the Court has ‘got it right or wrong’ is to look at the evidence it relies upon when making its decisions. When a petition is filed and the matter proceeds to a hearing, each party has to lodge written statements. These statements are meant to encapsulate the party’s case, so they include: maps or sketches;⁵¹⁸ correspondence; forms for the registration of appointments; previous decisions on the issue; genealogies; and the party’s argument. The designated leader for each party is also their spokesperson at the hearing. She or he may be accompanied by other members of the *aiga* or *nuu* (*Fono a Matai*), who are called *molimau*, which may be loosely translated as ‘witnesses’, and literally means the bearers of a position or stance or submission, or the embodiment of a claim. The leader fields the questions from the Bench, and the Bench may also question the *molimau*. Usually, only the leader is questioned.

Apart from Court documents, such as official forms and previous decisions, much of the evidence presented in these written statements, and in oral responses to questions from the Bench, is oral history that has been passed down from generation to generation: for example, genealogies. This oral history is usually elicited by the Court when it asks questions concerning the origins of a *matai* title or the correct name of land that is in dispute, and when it inquires who gave the land to whom or who first held the *matai* title. In one decision in

⁵¹⁷ LC 444P1-P4 (1982), ALC 4665/4665P4-P6 (1994).

⁵¹⁸ ALC 3984P6-P22 (2000).

1989 the Court considered accounts of ancient battles and conquests as evidence supporting the claims by various *matai* titles of *pule* of a particular title of the *nuu*.⁵¹⁹ In the decisions considered it is evident that the most common form of evidence the Court mentions in its decisions are genealogies and the responses made by parties when questioned about the genealogies they have submitted as part of their written statements.⁵²⁰

Reasons given for decisions

As stated earlier, reasons for the decisions of the Court were only required to be given after 1981, following the enactment of section 66 *Land and Titles Act 1981 (Samoa)*. I therefore did not expect the decisions before 1981 to shed any light on the reasons for the decisions or the evidence considered by the Court. I hoped, however, that the decisions made after 1981 would be more enlightening. This was not the case. Instead, in most cases, the 'reasons' are a record of certain points in the oral or written statements that the Court found interesting.⁵²¹ One still has to infer the connection (if any) between the decision (the orders) and these statements of the Court. They do not resemble the reasons that would usually be given by a judge in a Western court.

The result is that one has to treat the post-1981 decisions much like the pre-1981 ones. First, it is necessary to read the orders the Court made and then read backwards using the orders as clues from which to infer the reasons for the decision. If one reads the decision along with the written statements and the transcript of the Court proceedings, perhaps one can decipher the reasons for the decision with some ease. Relying on the decision alone is a guessing exercise, however. The decisions reveal this is the way they have been written since 1981. The only change is that the decisions have become longer. No clearer statement of the judicial reasoning is included.

The Court's recent decision on succession to the *Malietao* title, however, shows a radical change in the type of decision the Court is handing down. Although it is the same length as

⁵¹⁹ LC 5355P2/P3.

⁵²⁰ LC 8361 (1989), LC 8690 (1989), LC 7407/7407P1 (1982), LC 7268P1/P2 (1982), LC 5686P1-P3 (1981), LC 8361/8361P1/P2 (1989), LC 8690 (1989), LC 1790P1-P6 (1992), ALC 4774/4774P1-P3 (1994), LC 6040P1-P9 (1996), LC 1646P42 – P53 (1997), LC 7280P1/P4 (1998), LC 1932 (1999), LC 9794P1-P6 (1999), LC 4290P4/P5 (1999), LC 5500/5500P1-P5 (2000), LC 5472/5472P1-P3 (2000), LC 5443/5443P1-P3 (2000), ALC 5456P1-P2 (2000), LC 5456P1-P2 (2000), LC 6719P1/P2 (2000).

⁵²¹ ALC 4396P5-P9 (1994), ALC 4978 (1994), LC 8290P8-P14 (2000), LC 1828P3-P5 (2004), LC 1874P6-P7 (2005).

other post-1981 decisions, it is much more systematic in its approach. It firstly sets out all the fifty one parties involved, then it summarises the arguments put forward. What is most helpful about the decision is that it sets out the customs as well as the law relevant to the case. It then discusses the custom, the law and the arguments made to provide the reasoning for the decision it has reached.⁵²² If this is an indication of future decisions then I believe that the Court will be well on the way to resolving questions of precedent, *res judicata* and the identification and preservation of relevant Samoan custom and usages.

The earlier style of reasoning in the Court's decisions has been attributed to the fact that the judges of the Court, except for the President, have not had Western legal training and therefore do not employ a legalistic approach in their reasoning or style. I think there is another reason as well: the Court may use an intuitive approach in its decisions. This is illustrated by decisions that refer to genealogies. In one decision in 2002 the Court stated that conflicting genealogies were becoming more and more common in cases heard.⁵²³ Nevertheless, the Court picks one genealogy and accepts it over the others without explaining its choice. The Court seems to decide according to how it 'feels' about the evidence or the people it heard from. This 'feeling' is translated into the orders. Then the Court turns to the task of justifying this 'feeling'. This results in the cryptic 'reasoning' that precedes the final orders. The fact one has to read the orders and then use them as a guide to infer the reasons is confirmation of this process - orders first, reasons after. This seems to be how many decisions are made.

This, however, does not mean that the customs identified earlier are no longer considered. *Pule* is still at the top of the list of issues in dispute. *Suli* is still central to the question of *pule*, succession, and use or disposition of land. *Tautua* is still relevant to the reasons for the decisions. Genealogies are still required to back up a claim to land or title. *Maliega*, *faaleleiga* and *seumalo* are still recognised; as is the need for consensus and deliberation – *soalaupule*. These are all referred to in the final orders of the Court before and after 1981. Nevertheless, the reasons given have not added much to the decisions because they are more descriptive than explanatory. It is still hard to know how the Court came to the conclusion that A, B and C are all heirs, as opposed to D and E, or how the Court concluded one genealogy was legitimate and the other not. One cannot determine why *tautua* was found to

⁵²² Appendix C: LC 853 P1-P39, 18 June 2008.

⁵²³ LC 10232/10232P1-P8 (2002).

be a good ground for eviction in one case and not in another. In other words the connection between the orders and the reasons often remains unclear. The customs the Court applies can be inferred from the orders, but how they came to their decision, or their reasoning, when applying those customs to the facts, is often difficult to infer. The recent *Maliotoa* decision,⁵²⁴ with its systematic approach, provides a stark and welcome contrast to the 'intuitive' reasoning characteristic of previous decisions. Hopefully, this sets the trend for future decisions. Clearer and better reasoned decisions will foster greater confidence in the Court and possibly greater acceptance of the decisions with a reduction in the number of appeals.

How custom should be applied

This chapter has tried to glean from decisions and orders of the Court the type of Samoan customs it takes into account and applies when its decisions are made. It has however not been able to consider how the Court determines how custom should be applied to resolve particular disputes. If one were to speculate, I would say that today the Court does not ask that question either. Instead, it applies the custom it has inherited from previous decisions of the Court. It is therefore possible that the only Court that could have asked the question of how custom should be applied was the 1903 German Commission. All Commissions and Courts that followed probably just did as their predecessors did.

The reasons provided by the Court for its decisions, that were required from 1981, if done properly and diligently, should indicate how the Court is determining how custom should be applied. Perhaps dissenting judgments could also shed light on the matter as well. An appeals process that considers such questions and challenges the decisions of the trial division on points of procedural or legal correctness would also assist.

CONCLUSION

The 460 decisions of the Court, from 1903-2007, reveal the 'customs' the Court has applied: *pule*, *tautua*, *suli*, *soalaupule* and others. That these same customs are applied throughout the islands is evidence of homogeneity of custom concerning customary lands and *matai* titles throughout Samoa. That the same customs were applied in decisions from 1903 right through to 2007 suggests they have not changed significantly over time and that political, social and

⁵²⁴ Appendix C: LC 853 P1 – P39, 18 June 2008.

legal changes have not significantly altered them. One could even say these customs represent the core principles concerning customary land tenure and *matai* titles in Samoa, especially as they reflect the tenets of the *Faamatai* concerning land and *matai* titles as outlined in Chapter Two. However, due to the nature of the reasoning usually employed in the Court's decisions, it is often hard to know how and why the Court determines how custom should be applied to the facts to resolve a particular dispute.

Because the Court deals with matters at the core of Samoans' identity, their *Faasinomaga* (customary lands and *matai* titles), the Court's value as a repository of custom is growing with each wave of change and ideas that crashes onto Samoa's shores. In response to these changes Samoans have looked to the Court not only as a mechanism for dispute resolution but also as a bastion of custom. The Court has been woven into the fabric of Samoan society, much like Christianity, through a process of indigenisation. It is now an important mechanism for maintaining and strengthening social cohesion. That is why it is vital that the Court should describe what it is doing in relation to custom in the clearest possible manner, so that every Samoan can come to the Court with some degree of certainty that their customary rights and identity will be considered and determined with competency, efficiency and fairness. Inexplicable decisions generate uncertainty and do not translate into a sense of confidence in the Court's reliability and effectiveness. I do not believe it is an overstatement to say that the future of custom in general, and of custom in relation to customary lands and *matai* titles in particular, depends on the Land and Titles Court. It should therefore make every effort to explain as clearly as possible, in its decisions, why it endorses certain customs in the particular case, and how it has applied those customs to the facts to resolve the case.

CHAPTER NINE - THE FUTURE

PRESSURE FOR CHANGE

INTRODUCTION

In the previous chapters we have looked to the past and examined the present concerning the Land and Titles Court. This chapter looks at pressures for change bearing on the Court. These pressures directly affect customary land, which in turn concerns the Court.

ECONOMIC DEVELOPMENT, LAND AND THE COURT

Most pressure for change facing the Court today relates to economic development. Economic issues, proposals and plans often turn on the question of access to land, 80% of which is customary and under the jurisdiction of the Court. Because of this connection, whatever affects customary land invariably affects the work of the Court. As land is Samoa's major natural resource, ways by which it can be used to generate revenue are vital to its economic development.

Because the *Constitution* prohibits the sale of customary land, some outside observers have concluded that customary land is a 'dead asset'.⁵²⁵ Furthermore, the observation has been made that the key to development for Samoa lies in opening customary land to economic enterprise.⁵²⁶ For this reason, the main pressure for change bearing upon customary land and the Court concerns the commercialisation of customary land. Individuals and organisations are exerting pressure, because they see the untapped revenue-generating capabilities of the land. International aid agencies and financial institutions are exerting similar pressure, because they do not want to provide indefinite financial support to developing countries such as Samoa.

The difficulty for potential investors are that they do not know who to deal with in relation to customary land, and that they have no long term prospects in relation to it because of the non-alienation provision and limited leasing periods. Investors would prefer customary land to be individualised so that they know who to deal with. Commercial investors want longer term leasing rights to land than the law currently provides. Without either of these, customary land

⁵²⁵ Comments made during a discussion of a World Bank Report at a training session for the Samoan Bar in 2004, which I attended.

⁵²⁶ *Report for Cabinet on the Economic Use of Customary Land*, VINSTAR Consulting, January 2006.

is seen as a poor investment. There is therefore considerable pressure to change the nature of customary land tenure.

Whether commercialisation and individualisation of customary land would be desirable depends on one's point of view. From a Western, capitalist point of view, land is an economic factor of production, and an asset: that is why it is valuable. According to the *Faamatai*, however, land is one's *tofi* (heritage); land is life. Samoan words for land, *fanua* (placenta) and *eleele/palapala* (blood), not only counter the belief that land is a 'dead' asset, they also show the inextricable association between land, life and heritage. Hence the customary constraints on alienation. This association puts real limits on how customary land can be used. Instead of seeing land as something that can be traded and used economically, this association of land with life and heritage means there will be reluctance to release land despite the promise of economic gain. These two differing positions explain the difference in opinion that comes to the fore when commercialisation or individualisation of customary land is discussed.

COMMERCIALISATION AND INDIVIDUALISATION OF CUSTOMARY LAND

Because 80% of Samoa's land is customary and because the *Constitution* prohibits its sale, there are very few options available for its commercialisation or individualisation. In fact there are only three ways at present by which customary land can be commercialised or individualised: by *pulefaamau* pursuant to the *Land and Titles Act 1981 (Samoa)*; by lease pursuant to the *Alienation of Customary Land Act 1965 (Samoa)*; and by compulsory acquisition of land by the Government under the *Taking of Land Act 1964 (Samoa)*. In aid of economic development, the question then is: how can these existing options for the commercialisation or individualisation of customary land be used to facilitate greater economic activity and revenue generation? The further question for current purposes is: how would the facilitation of economic activity and the generation of revenue from customary land impact on the functions of the Land and Titles Court?

These issues will be examined in relation to each of the three disposition options.

Pulefaamau

Current Practice

A *pulefaamau* involves the allocation of customary land to the exclusive use of an individual by the Court but this does not permit the land's lawful sale as it retains its customary status. The notion of a *pulefaamau* first entered the customary land scene as a provision of the *Native Land and Titles Protection Ordinance 1934 (New Zealand)*, and is currently provided for in sections 14 to 19 of the *Land and Titles Act 1981 (Samoa)*. These sections restate sections 21 to 26 of the 1934 Ordinance. It is unclear why *pulefaamau* was enacted by the colonial administration in 1934. It has been suggested that it was enacted to encourage the registration of customary land, but that simply has not been how it has been used or viewed. Furthermore, if it were enacted to encourage the registration of customary land, the majority of customary land would still not be registered as *pulefaamau* land only makes up a small proportion of customary land.

Pulefaamau is a coined term; no such word exists in the Samoan language. This is because *pulefaamau* is not part of Samoan custom. This becomes more evident when the statutory definition of *pulefaamau* is considered. The part of the definition of *pulefaamau* that is relevant for our purposes is in section 2 of the 1981 Act:

"Pulefaamau" means the ownership of any customary land...by a person in his sole right.

As explained in Chapter Two, ownership of customary land by a person in his 'sole right' is contrary to customary principles of land tenure under the *Faamatai* where the land is held by the *matai* title, not an individual. *Pulefaamau* claims might be made when one family has occupied a particular piece of customary land for the purposes of running a business or shop for an extended period of time; or where an immigrant family, for example people from outside the area, have come to run a business on customary land, become the exclusive occupants of the land. Many Chinese immigrants or Chinese-Samoans have successfully made *pulefaamau* claims for this reason.

The process for filing a claim to a *pulefaamau* is relatively simple. The claim is filed with the Office of the Registrar of the Court.⁵²⁷ Its particulars are then published in two consecutive issues of the *Savali* (Government Gazette).⁵²⁸ If an objection to the claim is lodged, the Registrar prepares and files a petition for the Court's determination.⁵²⁹ If there are no objections, the Registrar files a petition for the confirmation of the claim.⁵³⁰ The Court has jurisdiction, *ex parte*, to confirm a *pulefaamau* claim where no objection is lodged.⁵³¹

Pulefaamau is the only example I have come across where a statute directly allows the individualisation of customary land. In practical terms, if customary land is subject to a successful *pulefaamau* claim, it means the land is no longer part of the pool of customary land that the *matai* titleholder can designate for use and access by other *suli* (heirs). Instead the *pulefaamau* holder can pass the land directly to his or her descendants. The land, however, retains its customary status, meaning it is still subject to the constitutional prohibition on its sale. It appears, however, that a *pulefaamau* holder can deal with the land in all ways, except via sale, without having to be accountable to the other *suli* or the *matai* titleholder, and to this extent the land has been individualised.

The existence of *pulefaamau* is puzzling for two reasons. Firstly, because a claim to sole right over customary land is contrary to *Faamatai* customary land tenure principles. Once a *pulefaamau* over customary land is confirmed then that land is no longer under the jurisdiction of the *matai* title whose *suli* would have had a right to access and use it. Instead a single individual obtains the sole right to use the land to the exclusion of all other *suli*. Secondly, it is puzzling because *pulefaamau*, a coined term and concept, is provided for in the Court's governing legislation, even though this is a Court that is meant to apply custom and usage. Therefore, the Court, charged with applying Samoan custom and usage, is called upon to recognise a claim that is contrary to customary land tenure principles whenever it considers and confirms a *pulefaamau*.

Furthermore, *pulefaamau* is arguably contrary to the non-alienation rule in Article 102 of the *Constitution*. Although *pulefaamau* is not one of the forms of alienation expressly prohibited

⁵²⁷ *Land and Titles Act 1981 (Samoa)*, s.14.

⁵²⁸ *Ibid.*, s.15.

⁵²⁹ *Ibid.*, s.17.

⁵³⁰ *Ibid.*, s.18.

⁵³¹ *Ibid.*, s.19.

in Article 102, the fact that there is no provision for the reversion of a *pulefaamau* to the original holder of *pule*, and the fact that *pulefaamau* land can be inherited by the *pulefaamau* holder's descendants, makes it look very much like a permanent alienation prohibited in Article 102.

That the concept of *pulefaamau* was created by a colonial administration is understandable, but this does not explain why the Independent Samoan Parliament retained it in the *Land and Titles Act* in 1981. Neither Hansard nor the Attorney General's explanatory memorandum that accompanied the Bill in 1981 made mention of the *pulefaamau* provisions. It seems they were continued without controversy and without consideration of their constitutional validity.

Pressure

Pulefaamau presents two pressures. First, it is easier to obtain a *pulefaamau* than to lease customary land, but the legal consequences of *pulefaamau* are more far-reaching than for leases. *Pulefaamau* has become an avenue for the erosion of land of the original *pule* holder with a consequential loss of land to which all *suli* have access. This erosion is because the *pulefaamau* holder obtains more rights than a lessee. Unlike a lease, where the term is limited, the term of a *pulefaamau* is indefinite. Furthermore, the descendants of the *pulefaamau* holder can inherit the *pulefaamau* land. This pressure exists even though *pulefaamau* is contrary to custom and arguably also the *Constitution*.

Second, there are the reported illegal activities of *pulefaamau* holders. They are informally leasing out customary land instead of going through the statutory process set out in the *Alienation of Customary Land Act 1965 (Samoa)*. They are also informally selling customary land in direct breach of the *Constitution*. These activities appear to be unique to holders of *pulefaamau*. Unlike holders of *pule*, holders of *pulefaamau* are not subject to the accountability process of *sul* (heirs).

Implications for the Land and Titles Court

The abuse of *pulefaamau* has earned it specific attention in the planned review of the *Land and Titles Act 1981 (Samoa)*.⁵³² The repeal of the *pulefaamau* provisions is proposed. Apart from halting the abuse, this would also bring the *Land and Titles Act 1981 (Samoa)* into line

⁵³² Personal Interview with Masinalupe Tusipa Masinalupe, CEO of MJCA, October 2006, Apia, Samoa.

with customary land tenure principles and the *Constitution*'s prohibition on alienation. It means a court that is meant to apply custom and usage would no longer have to confirm claims of land ownership that were contrary to custom. Such a move could be read as further indigenisation of the Court and its processes. Legislative amendment would be used in response not only to pressure to prevent evasion of the law but would also effectively (although possibly inadvertently) remove evidence of the Court's colonial origins. A practical outcome would be that the Court would have one less job to do. It would also remove one of the three statutory options currently available for the individualisation or commercialisation of customary land. That might in turn increase pressure on the remaining options.

One thing the abuse of *pulefaamau* indicates is that there are individuals who want to make money out of customary land without going through the statutory leasing process. The question is why? Is there something wrong with the leasing process?

Leasing of customary land

Current practice: law on leasing and process

Article 102 of the *Constitution* states the following concerning the leasing of customary land:

It shall not be lawful or competent for any person to make any alienation or disposition of customary land...

Provided that an Act of Parliament may authorise –

(a) the granting of a lease or licence of any customary land or of any interest therein.

The process for leasing customary land is provided, as the *Constitution* requires, by the *Alienation of Customary Land Act 1965 (Samoa)*. Section 4 grants the Minister for Natural Resources, Environment and Meteorology the power to grant a customary land lease. The process for leasing is therefore begun in and facilitated by the Ministry for Natural Resources, Environment and Meteorology (MNREM), and is under the control of the Executive government. A proposed lessor ("the applicant") files an application for a proposed customary land lease with the Chief Executive Officer for MNREM.⁵³³

⁵³³ *Alienation of Customary Land Act 1965 (Samoa)*, s. 5.

The application must include: the lessee's details, the purpose of the lease, the duration and any right of renewal, the rent and any possible review of it, and the beneficial owner(s) or their agent(s) to whom the rent will be paid by MNREM.⁵³⁴ It is unlawful for the lessee to pay rent directly to the beneficial owner(s) or the applicant.⁵³⁵ Rent is to be paid to MNREM which then pays it out to the beneficial owner(s).⁵³⁶ The duration of a lease for a hotel or for an industrial purpose is, subject to the Minister's approval, for a term up to but not exceeding 30 years with a right of renewal for a further term or terms up to 30 years in aggregate: a maximum of 60 years in total.⁵³⁷ For a non-industrial purpose, the term of the lease is not to exceed 20 years with a right of renewal for a term or terms up to 20 years in aggregate: a maximum of 40 years in total.⁵³⁸

As the land is customary, the applicant lessor has to be the holder of *pule* over the land. The particulars of the proposed lease are published by MNREM in order to notify interested persons who can file any objections to the proposed lease with the Court.⁵³⁹ The purpose of the notice is to ensure that the applicant holds *pule* of the land to be leased and acknowledges the right of *suli* to access and use the land that is the subject of the proposed lease. If there are any objections, the Registrar of the Court will inform MNREM and the applicant.⁵⁴⁰ The Court will then hear and make the necessary determination concerning the objections. If there are no objections, the Court bears the responsibility of confirming that the *pule* of the land to be leased is with the *matai* title that the applicant holds. Section 8(3) of the *Alienation of Customary Land Act 1965 (Samoa)* states that if the Court has already determined *pule* of the land to be leased, and the applicant is the holder of that *pule*, publication of the application for lease is not required. Despite the existence of this provision, every application for lease is currently published in fact by MNREM even if the Court has determined *pule* of the land. While this practice may prolong the process, advertising has the advantage of raising awareness of the proposed lease. The current *matai* titleholder would not be able to lease out *aiga* (family) land without the knowledge of other *suli* who have access and use rights to the land. This form of publicity may become even more important if customary land is brought under the Torrens system. There may be good reason for amending the legislation governing

⁵³⁴ Ibid., s.6.

⁵³⁵ Ibid., s.11(2).

⁵³⁶ Ibid., s.11(1).

⁵³⁷ Ibid., s.4(b).

⁵³⁸ Ibid., s.4(c).

⁵³⁹ Ibid., s.8.

⁵⁴⁰ Ibid., s.9.

leases of customary land to provide for publication of all lease applications, even if *pule* has been determined by the Court.

The proposed lessee bears the cost of preparing lease documents.⁵⁴¹ The draft lease is approved by the applicant, the proposed lessee and the Chief Executive Officer of MNREM. Once approved, copies of the lease are executed first by the proposed lessee and then submitted to the Chief Executive Officer for execution by the Minister for MNREM.⁵⁴² Upon execution, it is the applicant's responsibility to register the lease with the Registrar of Land,⁵⁴³ at the Land Registry, which is also located in MNREM.

The determination or confirmation of the *pule* of the customary land involved is the only role the Court plays in the leasing process. The question is whether the Court's role in the leasing process should change and, if so, how?

Pressure

Because leasing is one of only two forms of alienation of customary land expressly permitted under the *Constitution*, it has been put under the economic microscope to see if there are ways in which it can be improved to promote economic activity and revenue generation. In a report released in January 2006, there were only 245 registered leases of customary land.⁵⁴⁴ These are leases that have gone through the statutory process. This part of the discussion focuses on the question posed earlier as to whether there is anything wrong in the leasing process, and whether we could find ways to improve the use of customary land for the purpose of revenue generation. There are two problems with leasing, one is of a practical nature and other is a legal obstacle.

The practical problem is the lack of publicly available information on possible lessors and on customary land that can be leased. Also, as alluded to earlier, the potential investor has no guarantee that the person they are dealing with has the authority to make decisions concerning the land. This makes it difficult to identify who to negotiate with regarding land that can be leased, furthermore, the lease obtained could be vulnerable to challenge.

⁵⁴¹ Ibid., s.10(1)(a).

⁵⁴² Ibid., s.10(1)(b).

⁵⁴³ Ibid., s.10(1)(c).

⁵⁴⁴ Report for EUCLP, 12.

The second problem is legal in nature. It relates to the limited tenure of leases under the current law. An investor is an economic agent not a philanthropist. An investor will carefully weigh the costs and returns of an investment before making it. When confronted with Samoa's prohibition on the sale of customary land, the investor will either be put off straight away or will consider using the mechanism of limited alienation provided by lease. The key to the investor's decision will be security of tenure and the opportunity not only to recover their investment but make a profit.⁵⁴⁵ Another draw for the investor would be the ability to use the leasehold interest as security: in other words, to mortgage a lease of customary land.

The investor's desire for security of tenure and tenure as security raise two major issues. Firstly, the maximum term of 60 years for a lease may be insufficient for the lessee to recover on big investments such as hotels. Secondly, the insecurity of tenure associated with customary land, due to the relatively short term of a lease and the fact that customary land cannot be sold, reduces the chances of an investor being able to use customary leasehold interest as security. These issues in combination with the practical problem outlined above makes formal leases of customary land unattractive. Because these issues are closely related, solutions for the practical as well as the legal problems need to be found in order to properly address their combined effect. Viable solutions would ultimately lead to an increase in leases of customary land and therefore an increase in revenue generated from it. I will address proposed solutions to each of the issues in turn and, finally, the implications of the proposed solutions for the Court.

Lack of Publicly Available Information on Potential Lessors of Customary Land

It is clear that a complete public register of customary land would solve the problem of identifying potential lessors and customary land available for lease. Under Article 101 of the *Constitution* all land in Samoa is customary land, freehold land or public land. Apart from the rule about non-alienation of customary land in Article 102, there is no other mention of land in the *Constitution*. There is no mention of registration of land, customary or otherwise. However, registration of land is provided for in the *Land Titles Registration Act 2008 (Samoa)* ("LTRA"). The system of registration set up by the LTRA introduces the 'Torrens System'. It replaces the 'Deeds System' under the old *Land Registration Act 1992/1993 (Samoa)* ("LRA").

⁵⁴⁵ Ibid., 6.

Dealings in customary land were often not registered in the Land Registry and registration under the old 'Deeds System' did not grant indefeasibility of title. The register was therefore incomplete and unreliable. The pressure for the increased commercialisation of land meant a spotlight was turned on the system used to register interests in land in Samoa, which includes customary land. That led to a proposal for a change in the system of Land Registration in Samoa mainly because of the unreliability of the register, which resulted in the enactment of the LTRA in June 2008. The hope is that this new system will offer security of tenure through the granting of indefeasibility of title upon registration and that it will help to identify those with whom potential lessees can negotiate with concerning customary land that can be leased. The World Bank, which reputedly made the statement that customary land was a 'dead asset', funded a Samoan Government project to change the land registration system from a 'Deeds System' to one based on the 'Torrens System'.⁵⁴⁶

The 'Torrens System', unlike the 'Deeds System', grants indefeasibility of title upon registration.⁵⁴⁷ Under the 'Torrens System' title is acquired by registration and if registered without fraud on the part of the registered proprietor, it provides a guarantee to anyone dealing with the registered proprietor that the latter is the indisputable owner of the land and has the authority to deal with it.⁵⁴⁸ Such a guarantee is not available with registration under the 'Deeds System'. Furthermore, registration under the 'Torrens System' generally cures defects in title and can defeat unregistered interests.⁵⁴⁹ For such indefeasibility that is associated with the 'Torrens System' to apply in the Samoan context, the provisions of the *Land Transfer Act 1952 (New Zealand)* that were interpreted in *Frazer v Walker*⁵⁵⁰ as granting immediate indefeasibility upon registration need to have been carried over into the LTRA. As the LTRA contains provisions equivalent to the core provisions of the *Land*

⁵⁴⁶ Land Equity International Newsletter August 2005 - <http://www.landequity.com.au/publications/LEI%20Newsletter%2005.pdf>, 3-4.

⁵⁴⁷ *Frazer v Walker* [1967] NZLR 1069; [1967] 1 AC 569 (PC); Woodman R.A. and Grimes, P.J., *The Torrens System in N.S.W.*, Sydney, 1974, 176, 179; *The New Zealand Torrens System – Centennial Essays*, G.W. Hinde, ed., Wellington, 1971, 49; Francis, E.A., *The Law and Practice relating to Torrens title in Australasia*, Sydney, 1972, vol.1., 572, *The Law and Practice relating to Torrens Title in Australasia*, Sydney, 1972, vol.1., 572, Cooke, E., *Modern Studies in Property Law*, Reading, 2005, 56.

⁵⁴⁸ *Frazer v Walker*, 652; Woodman & Grimes, 178; Hinde, 50; Schick, Blair C., and Plotkin, I.H., *Torrens in the United States – A Legal and Economic History & Analysis of American Land Registration systems*, Massachusetts, 1978, 21; Mapp, T.W., 'Torrens Elusive Title', *Alberta Law Review Book Series*, Alberta, 1978, vol.1., 61, 66.

⁵⁴⁹ *Land Transfer Act 1952 (New Zealand)*, ss. 182, 183.

⁵⁵⁰ *Frazer v Walker* was a landmark decision of the Privy Council in 1967 concerning a New Zealand case. It marked the change in judicial interpretation of certain provisions of the *Land Transfer Act 1952 (New Zealand)* from granting deferred indefeasibility to granting immediate indefeasibility upon registration under a 'Torrens System'.

Transfer Act 1952 (New Zealand), relating to indefeasibility of title,⁵⁵¹ it must be presumed that immediate indefeasibility is intended to apply in Samoa as well.⁵⁵² If so, it seems likely that the *Frazer v Walker* principle will also be followed.

The core of the Torrens system is the register. It is deemed to be accurate and complete. But that aim will not be achieved in Samoa, at least not in relation to customary land.

Section 9 of the LTRA states:

Inclusion of land

(1) *Where after the commencement day any land becomes public land, freehold land, or customary land leased or licenced under the provisions of the Alienation of the Customary Land Act 1965, it shall be the duty of the Registrar to include such public land, freehold land or customary land lease or licence in the Register.*

(2) *The Registrar may also include in the Register customary land in respect of which judgment has been made by the Land and Titles Court under the provisions of the Land and Titles Act 1981.*

(3) *When including land in the Register pursuant to subsections (1) and (2), the Registrar may create an ordinary folio of the Register for such land.*

(4) *No provision of this Act may be construed or applied to:*

(a) *permit or imply the alienation of customary land in a manner prohibited by Article 102 of the Constitution; or*

(b) *permit or deem ownership in any customary land to vest in a person otherwise than as determined under any law dealing with the determination of title to customary land.*

(5) *Nothing in this Act shall permit the exercise of any power or affect any interest in customary land that could have been applied by law prior to the commencement of this Act.*

Although this provision compels the Registrar of Land to register freehold and public land and leases of customary land, section 9 is limited in scope. Firstly, the LTRA still leaves the

⁵⁵¹ Section 32 of the *LTRA 2008 (Samoa)* is equivalent to s.62 of the *Land Transfer Act 1952 (N.Z.)* ("the *LTA*"), deals with paramountcy of the estate of the registered proprietor; s.76 of the *LTRA* is equivalent to s.63 of the *LTA* dealing with the protection of the registered proprietor from ejection; s.33 of the *LTRA* is equivalent to s.182 of the *LTA* where the purchaser from a registered proprietor is not affected by notice and s. 35 of the *LTRA* is equivalent to s.183 of the *LTA* where a bona fide purchaser from a registered proprietor is protected.

⁵⁵² *LTRA 2008 (Samoa)*, Part 7, s.76.

actual registration up to the landowners or, in the case of customary land leases, the lessors.⁵⁵³ While an unregistered interest will not attract the protection of indefeasibility that the Torrens registration system provides, it will be enforceable as between the parties to the lease. Unregistered leases are not invalid, but they are vulnerable to challenge and may be defeated by the registration of a competing lease. Secondly, compulsory registration of customary land is confined to leases or licenses. There is no provision for compulsory registration of customary land generally. Thirdly, compulsory registration is confined to leases and licenses granted after the Act comes into force.⁵⁵⁴ There is no provision for the compulsory registration of leases granted before the Act came into force. The LTRA will therefore not provide comprehensive registration of customary land.

The provision for a compulsory and comprehensive registration of customary land is undermined by the non-mandatory wording of section 9(2) of the LTRA and the non-compliance with sections 11 and 12 of the *Land and Titles Act 1981 (Samoa)*. Section 9 states that customary land that is the subject of a decision of the Court **may** be included in the Land Register. Under section 11 of the *Land and Titles Act 1981 (Samoa)* (“the Act”), the Registrar of the Court is required to transmit to the Land Registrar every decision of the Court concerning customary land. When such decisions are transmitted to the Land Registry, section 12 requires the Land Registrar’s duty to register the effect of the transmitted judgments. The very few entries in the Land Register concerning customary land, other than the leases, indicate that sections 11 and 12 of the Act are not being complied with.

However, even if sections 11 and 12 of the Act and section 9(2) of the LTRA were followed, registration of customary land would still not be compulsory or comprehensive. Registration would be piecemeal as it would depend on whether the particular customary land in question had been the subject of a decision of the Court or had been formally leased. Nevertheless, if sections 11 and 12 of the Act had been complied with since their enactment in 1981, it is possible that today we would have a clearer picture of potential lessors and customary land that could potentially be leased, because most customary land has been subject to a Court decision at some point.

⁵⁵³ *Land Titles Registration Act 2008 (Samoa)*, s.26, *Alienation of Customary Land Act 1965 (Samoa)*, s.10(1)(c).

⁵⁵⁴ The commencement date for the *LTRA 2008 (Samoa)* is yet to be determined. It will probably be some time in 2009.

This brief examination of the law on the registration of land shows that land that becomes freehold, public or is the subject of a lease of customary land should have been registered in the Land Register at the Land Registry located in MNREM. Judgments of the Court concerning customary land interests should have been transmitted to the Land Registrar to be so registered but this has not been done. This means that currently Samoa does not have a complete publicly available register of customary land.

The ‘Torrens System’ and customary land

A land register based on the ‘Torrens System’, if it were complete, would have some advantages with regard to customary land. It would clearly identify what land was customary and what land was not. Therefore, nobody intending to deal with such land could claim to be ignorant of its status. The constitutional restrictions on the alienation of customary land would then be easy to enforce, because prohibited alienation could not be registered. Even if it was, it would be void, because the indefeasibility principles of the ‘Torrens System’ are subject to the *Constitution*’s prohibition on alienation. The land registration regime set out in the LTRA 2008 which is based on the ‘Torrens System’ will not result in a comprehensive or complete customary land register.

Aside from the register not being complete in regard to customary land, the ‘Torrens System’ of land registration is incompatible with customary land tenure because it requires that the title to land be registered in the name of natural or legal persons whereas, according to the *Faamatai*, customary land is ‘owned’ by *matai* titles (names), not persons. If a natural person were to become the registered proprietor of a certain piece of customary land under the ‘Torrens System’, that individual would seem to acquire an entitlement to the land that he or she would not have according to custom. Although registration does not alter the status of the land; it will still be customary, the fact only one *suli*’s name will be on the register could look like that one individual had obtained an indefeasible title to the land to the exclusion of all other *suli*. The perceived indefeasible title could also mean that the registered proprietor could deal with the land in any way they chose within the legal constraints concerning customary land.

One such legal constraint is the prohibition on the alienation of customary land in Article 102 of the *Constitution*. Although a change in the land registration system per se might not breach the *Constitution* or allow the sale of customary land, the proposal for registration of

customary land under the 'Torrens System' is seen by some as a step in that direction.⁵⁵⁵ The fear is that if there are enough registered 'owners' with indefeasible title to customary land who are keen to make money, and investors who want to buy, they could influence a change in the *Constitution* to permit the alienation of customary land. This would be a welcome change for those who see land as an asset but arguably the death knell for the *Faamatai* under which land is seen as Samoa's *tofi* (heritage) and every *suli*'s life blood, which suggests such land should not be sold. In response to the voicing of such fears, section 9(4) was inserted into the LTRA 2008. Although this provision merely echoes Article 102 and does not legislate for anything new, the fact it was inserted emphasises the value of customary land to the Samoans.

This incompatibility and fear did not arise with the 'Deeds System', because under the 'Deeds System' title did not depend on registration. It merely registered the legal interest that the proprietor had in the land, whatever that interest was. The register did not guarantee the accuracy of its entries or preclude challenge to title. This incompatibility, and the fears, real or imagined, associated with the introduction of the 'Torrens System', and the fact that such a system will not necessarily increase the number of customary land entries in the Land Register, means it may not be the best solution for the problem of identifying those with whom potential customary land lessees can negotiate with concerning land that can be leased. So, is another solution available?

Customary Land Register and the Land and Titles Court

A public register of all customary land would solve the problem of identifying potential customary land lessors and customary land available for lease. If a separate specialist court is required to deal with customary land and *matai* titles, perhaps there is also a need for a separate register for customary land. This separation would acknowledge the difference between customary and Western land tenure principles. In this light, I suggest the following: the legal connection between the current Land Registry and the Court should be severed. Sections 11 and 12 of the Act that require Court judgments concerning land to be sent to that Land Registry, have not been complied with since the enactment of the legislation, in any case. It may be better therefore to remove customary land from the *Land Titles Registration Act 2008 (Samoa)* and remove the reference to the Land Registry from the 1981 Act.

⁵⁵⁵ *The Samoa Observer*, Letter to the Editor - 'Objection to the Land Bill', 17 December 2007.

Already in existence in the Court is a Register of *Matai*, entry on which proves that a person is the rightful holder of a *matai* title. In Chapter Eight and preceding chapters it has been shown that ownership of customary land rests with the *matai* title, while the land is administered by the *matai* titleholder. As the Court already keeps the Register of *Matai*, it is logical for the Court also to keep a Register of the lands pertaining to those *matai* titles.

It would initially require a lot of work for the Court to establish a complete register of customary land ownership but the Court is best placed for the job because it has access to the necessary information. It is the Court that hears and determines disputes concerning ownership and *pule* of customary land. Because it does not have to rely on communication with an outside body, it could proceed with its recording promptly. Of course there is a risk of abuse, for example fraudulent registration, but every system comes with such risk, including the 'Torrens System'.⁵⁵⁶ That just means a system of checks and balances needs to be set in place and vigorously monitored.

In order to facilitate the building of a more comprehensive record of customary land interests in Samoa, the suggested separate register for customary land would have to be accompanied by a process whereby decisions of the Court on customary land are automatically entered in the register. The Court can refer to its past decisions to begin building such a register for customary land. This register would not be complete as it would not be able to register customary land unless it came before the Court and some customary land might never be the subject of such a dispute. Nevertheless, it would still be an improvement on what currently exists.

Term of Customary Land Leases

The second aspect of the leasing process that makes it unappealing to potential investors concerns the duration of a customary land lease. Security of tenure requires a significant length of lease: the longer the better in order to recover and make a profit on the investment. At the moment, the longest commercial lease of customary land is 60 years. Such a term may not be appealing to an investor who wants to build a multi-million dollar resort. They would probably prefer a term of 90 years or more. This could be simply achieved by amending the *Alienation of Customary Land Act 1965 (Samoa)* to increase the maximum term of a lease.

⁵⁵⁶ Even the Torrens system encounters this risk. See for example the provisions addressing it in ss. 62 and 63 *Land Transfer Act 1952 (New Zealand)*.

However, what should be kept in mind is the rule prohibiting the alienation of customary land in Article 102 of the *Constitution*. The relatively short duration of customary leases that is currently permitted makes sense in light of this rule. *Suli* can look forward to regaining their land within one to two generations. But if *suli* are going to be denied access and use of their land for three or more generations, the lease begins to look more like a de facto 'alienation' of the land, which is contrary to the spirit of the constitutional rule. At present there is no case law on the meaning of the constitutional prohibition on alienation that helps resolve this issue. When should a long lease be considered a prohibited alienation?

Mortgages on leases of customary land

The third issue to consider is the possibility of mortgaging a customary leasehold interest to facilitate the generation of revenue from customary land. The argument is that investors will be more likely to lease customary land if they can then use their leasehold interest as security. Therefore, if mortgaging of leases on customary land is facilitated this is likely to increase the number of formal leases of customary land and revenue generation.

Article 102 of the *Constitution* states:

No alienation of customary land

It shall not be lawful or competent for any person to make an alienation or disposition of customary land or of any interest therein, whether by way of sale, mortgage or otherwise howsoever, nor shall customary land or any interest therein be capable of being taken in execution or be assets for the payment of the debts of any person on his decease or insolvency:

Provided that an Act of Parliament may authorise –

- (a) the granting of a lease or licence of any customary land or of any interest therein;*
- (b) the taking of any customary land or any interest therein for public purposes.*

Article 102 generally prohibits mortgages of customary land. On the other hand, it allows for the leasing of customary land, albeit through an involved, statutorily regulated process, under the *Alienation of Customary Land Act 1965 (Samoa)*. The question is whether Article 102 allows the mortgaging of a leasehold interest in customary land. In my view it does not for a number of reasons. First, if the *Constitution* had intended to allow for the mortgaging of a

leasehold interest in customary land it could have stated so expressly in Article 102. In fact Article 102 prohibits mortgages in the general part of the provision. Secondly, the proviso in Article 102 permits leasing of customary land only in accordance with an Act of Parliament. The relevant statute is the *Alienation of Customary Land Act 1965 (Samoa)*. That Act does not provide for the mortgaging of customary land leases. It would be illogical to have a stringent process in place for obtaining a customary land lease and then allow the unchecked mortgaging of such leases. The mortgagee would have powers to sell the leasehold estate but there are not provisions in the 1965 Act that would govern such sales. The mortgagee could then confer leasehold interests on third parties that would be outside the Act's regulatory regime. That suggests that the mortgages of customary land leases are illegal.

Furthermore, there are practical obstacles to using leases as a security interest. For a bank, on-selling a customary land lease may not be very easy, especially if the period remaining on the lease is short. A situation where it could be difficult to on-sell a customary land lease is as follows: a lease might be made of 100 acres inland where all the surrounding land is owned by the same family; the lease is mortgaged, and the lessee defaults on that mortgage. The mortgagee bank may find it difficult to sell such a lease because of the size and location of the land and the possibly short remaining term of the lease.⁵⁵⁷ So, as long as the constitutional prohibition on the alienation of customary land remains, commercial banks will probably remain reluctant to accept mortgages on leases of customary land because of their limited economic viability.⁵⁵⁸

These realities in the Samoan legal context should raise concern when it is suggested that encouraging mortgages on leasehold interests in customary land will provide a legal means of facilitating economic development and revenue generation. It is therefore not surprising the Samoan public has not warmed to the idea of using customary leases as security.⁵⁵⁹ Their apprehension is justified and highlights the fact that, apart from the illegality of mortgages of customary land leases, they may also be impractical.

⁵⁵⁷ Personal Interview with: His Honour Chief Justice Patu Tiavasue Falefatu Maka Sapolu, Apia, Samoa, 17 August 2006, Faamausili L. Tuimalealiifano, Former Director of Lands, Apia, Samoa, 01 August 2006.

⁵⁵⁸ *Report EUCLP*, 48; Personal Interview with: Dr. Iutisone Salevao, Secretary Congregational Christian Church of Samoa, Barrister and Solicitor, Apia, Samoa, 08 August 2006.

⁵⁵⁹ *The Samoa Observer*, 'Leasing of Customary Land and ADB', 26 March 2007.

Implications for the Land and Titles Court

At the moment the only role for the Court in the process of leasing customary land is determining the *pule* of the land to be leased. What might be the implications then, for the Court, of altering the land registration and leasing systems?

Theoretically speaking, a change in the system of registration alone should not affect the Court, especially if it continues non-compliance with the provisions in its own legislation by not forwarding judgments about interests in land to the Land Registrar. However, if a separate register for customary land was set up at the Court, that change would increase the Court's workload, but it would also address some of the inefficiencies in the current performance of its role, and it would facilitate the leasing process. If the Court itself administered a specialist system for the registration of customary land, it would then be in a position to provide the necessary information to potential investors concerning who has *pule* over relevant land. Such a separate register would solve the lack of information about customary land available in the Land Register. Vital information would be accessible while avoiding the risks, real or imagined, of the sale of customary land associated with the 'Torrens System'. Such a separate register would also be compatible with customary land tenure principles unlike certain aspects of the 'Torrens System'.

If the Court was to comply with sections 11 and 12 of the Act, how would the change in the system of land registration to a 'Torrens System' of land registration impact on the Court? As the LTRA does not create any new role for the Court regarding the registration of customary land, the Court's role may remain limited to determining *pule* over land. If customary land is registered under a 'Torrens System', presumably the current *matai* titleholder will be registered as the proprietor of the land. Technically, he or she could deal with the land and the question is whether he or she would be under any customary restrictions. The land would be registered as 'customary land' and this would alert anyone dealing with the registered proprietor that there could be restrictions. The question then is which court would have jurisdiction to determine the existence and scope of those restrictions. In other words, which Court would determine content of the *pule*. Arguably, the Land and Titles Court would have that role as the Court authorised to apply custom. The LTRA, however, does not provide for this, nor does the 1981 Act. The LTRA could be amended to specify that the Land and Titles Court has jurisdiction to determine any matters of custom relating to the registered customary

land. That would ensure conformity with the Constitution.⁵⁶⁰ Alternatively, if a separate register for customary land were established, as suggested, matters concerning custom and customary land would be removed from the 'Torrens System' of land registration.

If the maximum term for a customary land lease was increased, I believe the Court should assume a monitoring or supervisory role to ensure all *suli* are aware of the impact longer leases will have on their access to and use of the land. The Court could ensure the accountability and consultation mechanisms central to customary processes were observed.

Introducing these reforms would require changes to the Court's empowering legislation, the *Land and Titles Act 1981 (Samoa)*. Implementing a customary land register based at the Court could still be implemented swiftly, possibly as part of the review of the *Land and Titles Act 1981 (Samoa)* that is currently planned.

COMPULSORY ACQUISITION

Current Practice

The third way by which customary land can be individualised or commercialised is through compulsory acquisition by the Government. This is the second exception to the non-alienation of customary land allowed under Article 102 of the *Constitution*. Under the *Taking of Land Act 1964 (Samoa)*, customary land can be compulsorily acquired by Government for public purposes.

*"Public purpose" includes aerodromes and adjuncts, public health, education, public recreation, the burial of the dead, forestry, production and distribution of electricity, provision of postal, telegraph and telephone services, the control of coasts and rivers, the safeguarding of water, soil and forest resources, water supply, drainage lighting, defence, the provision of reserves for erosion control and water catchment, the provision of roads, wharves, harbours and all lawful purposes and functions of the Government of Samoa.*⁵⁶¹

The 'owner' of the customary land is financially compensated.⁵⁶² When the public purpose has ceased, however, the customary land that was taken is not necessarily returned to the *matai* title that owned it prior to its compulsory acquisition. Sometimes the land remains

⁵⁶⁰ *Constitution 1960 (Samoa)*, Article 103.

⁵⁶¹ *Taking of Land Act 1964 (Samoa)*, s. 2.

⁵⁶² *Ibid.*, s.25.

public (or Government) land. It can then be leased out or sold and if it is sold its status changes from public to freehold land. In this manner customary land is individualised and loses its customary status.

The role of the Court in the compulsory acquisition process is the same as its limited role in the leasing process. It identifies whether the *pule* of the customary land to be taken has been determined and identifies where *pule* lies, so that the correct *matai* title, through the current titleholder(s), is compensated.

Pressure

A number of features of this process deserve mention. Firstly, compulsory acquisition of customary land is the only form of permanent alienation of customary land allowed under the *Constitution*. Furthermore, it seems 'easier' for the Government to take customary land for the public good and then individualise it through sale than to make the leasing of customary land more attractive. Most importantly, leasing does not change the status of customary land whereas compulsory acquisition does. But the Court plays only a very limited role in this process. Arguably, any process that affects customary land so significantly calls for greater involvement of the Court, as it exists above all to determine matters pertaining to customary lands and *matai* titles. The role the Court currently plays is probably too limited in light of the fact that this is the most significant avenue through which the scope of customary land in Samoa is being reduced.

Secondly, the Court's role should perhaps also be greater in relation to determining the level of compensation to be paid when customary land is compulsorily acquired, and, more specifically, when the value of customary land is considered. The value of land is central to determining how much compensation is paid on compulsory acquisition. For instance, pursuant to the *Taking of Land Act 1964 (Samoa)*, 2,872 acres of customary land at Salelologa on the island of Savaii was taken by the Samoan Government in 2000. The land was to be the site of the proposed Salelologa Township. As required under legislation, *pule* of the land had to be determined, as compensation for the taking would be paid to the holders of *pule*. The negotiating parties were the Samoan Government - Ministry of Natural Resources, Environment and Meteorology (MNREM), through the Minister, pursuant to the legislation,

and the *Alii* and *Faipule* of Salelologa.⁵⁶³ The 2,872 acres of customary land, originally owned by *matai* titles of Salelologa, became vested in the Government on the 27th June 2000.⁵⁶⁴

This matter came before the general courts in Samoa. The *Pauli Elisara* (2004) and *Pauli Koki* (2006) cases concerned compensation for this land taken at Salelologa. *Pauli Elisara* challenged the amount paid, while the *Pauli Koki* case concerned non-receipt of compensation by potential beneficiaries. After several meetings between the negotiating parties, compensation of SAT\$4 million had been agreed to for the 2,872 acres of land, on 25 March 2002.⁵⁶⁵ In both the *Pauli Elisara* and the *Pauli Koki* cases the Supreme Court of Samoa held that the Plaintiffs were bound by this Agreement and by the quantum of compensation they agreed to.⁵⁶⁶ That would mean that one acre was valued at SAT\$1,392.76 which seems a low price. Furthermore, the legislation does not require the Government to be involved in the distribution of the compensation among the holders of the *matai* titles that owned the compulsorily acquired customary land.

Pauli Elisara's case touched on the question of the value or worth of customary land. Section 25 of the *Taking of Lands Act 1964 (Samoa)* states that the Minister for MNRE is required to pay fair and just compensation for the land, while section 26 requires the Minister to make an offer of a sum he thinks fit as compensation.⁵⁶⁷ The difficulty the Judge in *Pauli Elisara's* case faced was the vast difference between the valuation provided by the Government valuer (SAT\$3.2 million) and the Plaintiff's valuer (SAT\$45 million).⁵⁶⁸ According to Justice Vaai the rationale behind the Government valuer's calculation was the belief that "because customary land cannot be sold it has no market value".⁵⁶⁹ His Honour disagreed with this position. He instead stated that the Plaintiff's valuation, that came to about SAT\$15,668.52 per acre, "represents a fair market value of the subject land". His Honour based his view on prior compensation for takings and previous Government valuations of nearby areas.⁵⁷⁰

⁵⁶³ *Pauli Koki v Attorney General*, 23 March 2006, Supreme Court of Samoa, Vaai, J., 2-3.

⁵⁶⁴ *Pauli Elisara v Attorney Genral* [2004] WSSC 29 (25 June 2004), Vaai, J., 1.

⁵⁶⁵ *Pauli Koki*, 3; *Ibid.*, 3

⁵⁶⁶ *Pauli Koki*, 5; *Pauli Elisara*, 4.

⁵⁶⁷ *Pauli Elisara*, 5.

⁵⁶⁸ *Ibid.*, 6.

⁵⁶⁹ *Ibid.*, 7.

⁵⁷⁰ *Ibid.*, 9.

Nevertheless, because his Honour held that the Agreement between the Government and Salelologa was valid and binding, the Government valuation stood.⁵⁷¹

When *Pauli Elisara*'s case subsequently came before the Samoan Court of Appeal, that Court decided that the SAT\$4 million compensation in the Agreement would be set aside as it was "not reached by an authorised agreement or correct valuation principles". It also added that this did not mean that the final amount would necessarily be greater.⁵⁷² Although the Samoan Court of Appeal did not agree with all Justice Vaai's reasoning, it did not expressly disagree with his conclusion that compensation for customary land should, like freehold land, be based on market value.⁵⁷³ In fact the Court of Appeal leaves open the question of the correct basis for the valuation of customary land.⁵⁷⁴

In the end, the Samoan Government only kept the number of acres that SAT\$4 million could 'buy' at market value. The balance of the 2,872 acres was returned to Salelologa. In this way, the renegotiation of the SAT\$4 million compensation, allowed by the Samoan Court of Appeal, has not occurred but much less land has been taken. Such action on the Government's part seems to support Justice Vaai's approach to 'valuation' and the notion that the market value of customary land in 2000 was closer to SAT\$16,000.00 per acre than SAT\$1,500.00.

Recent questioning of the value of customary land resurfaced with the occupation of government land near the International Airport by people from the *nuu* of Satapuala.⁵⁷⁵ It is Satapuala's claim that they own the land on which the airport is built; that it should be returned; and that it was taken without fair and just compensation. The current airport is on the site of an old American Air Base from World War II. How the question of compensation and valuation of this land will be handled in this dispute remains to be seen.

Implications for the Land and Titles Court

The fact that the compulsory acquisition of customary land is the only lawful way by which customary land can be permanently alienated at present warrants, I believe, greater

⁵⁷¹ *Ibid.*, 11.

⁵⁷² *Pauli Elisara v Attorney General* [WSCA] 4 (17 December 2004), Cooke, P., Casey, Bisson JJ., 11.

⁵⁷³ *Ibid.*, 5.

⁵⁷⁴ *Ibid.*, 2.

⁵⁷⁵ *The Samoa Observer*, 'Hire a Lawyer: STEC', 26 October 2007.

involvement of the Court in the process, due to its role as a guardian of custom and customary land. It could play a role in determining the value of customary land and the level of compensation considered fair and adequate. It could also supervise the distribution of the compensation. It might even be involved when the public purpose for which the land was taken has been exhausted. Given the importance of customary land to Samoan society, there are strong reasons for reverting the land to its customary status and returning it to the *matai* from which it was taken. At the very least, the *matai* should be given the option of having the land revested in them. If land had been improved, there may be a price to pay for returning the land, but that is preferable than simply offering it to the highest bidder. The Court could supervise the offering back of the land, at a reasonable price, depending on the improvements that have been made to the land, to the original customary owners. As the land was compulsorily acquired for a 'public purpose' it would not sit well to sell it on for development by private enterprise. It should probably continue as public land, or be used for a different public purpose that is administered by Government, if it is not returned to its original customary owners.

If any of these possibilities is pursued it would mean a significant change in the Court's role concerning the compulsory acquisition of customary land. It would also mean further constraints on the only way in which customary land can currently be sold. These constraints might in turn reduce revenue generation from customary land. Nevertheless, such changes in the role of the Court are consistent, I believe, with the spirit of the non-alienation rule in Article 102 of the *Constitution*. At the moment there is nothing in the *Taking of Land Act 1964 (Samoa)* preventing the Government compulsorily acquiring any customary land for public purposes and then selling it to once the public purpose for which it was acquired has ceased.

CONCLUSION

This Chapter dealt with the pressure on customary land to expand its economic use. This in turn generates pressure on the Court that deals with disputes concerning this land which is 80% of Samoa's future and heritage. The source of this pressure is individuals or international aid agencies who want to generate revenue from customary land. This pressure highlights the tension that exists between continuity and change, indigeneity and modernity, or Samoan custom and Western development, that impacts on the structure and processes of the Court. The Court's current involvement, and the need for its greater involvement, in the

commercialisation of customary land, shows the Court's continuing relevance and confirms the Court's vital place in Samoa's judicial and social structure. This place warrants all efforts to ensure the Court's survival and continuation.

Changes in the Court's processes and in the role it plays in the commercialisation of customary land must be achieved through legislative amendment. At times, legislative amendments that affect the Court seem to be little more than a reaction to the popular mood of the times. For example, because indigenisation is to the fore at present, the anomalous character of *pulefaamau* has been highlighted and this way of dealing with land will probably be repealed. Legislative amendment should perhaps be more deliberate and principled, however. It should ensure the Court is sufficiently involved in matters within its jurisdiction, namely customary lands and *matai* titles. For example, because an increase in economic activity is desired and can be achieved by freeing up customary land as security, an expanded role for the Court in the leasing process should be considered. In addition, the manner in which problems with this leasing process and with the Land Registration system affect the Court need to be examined. Legislation providing for the Court could either expand or review the Court's current roles as the situation required. This institution, out of all those in the Samoan court structure, is best suited to deal with customary land matters. Therefore, if legislation expands the Court's roles or gives it new roles, it should provide ways to strengthen the Court, through improvements in its budget, staff and infrastructure.

Regardless of the changes contemplated in response to the pressure on customary land for economic use, the constitutional prohibition on the alienation of customary land remains highly significant. The existence of the non-alienation rule in Article 102 of the *Constitution* explains why alternative legal mechanisms that permit the commercialisation of customary land have been put under such pressure. These alternative legal mechanisms should be examined for ways in which they can support increased revenue generation from customary land without breaching the *Constitution*. The options include: the creation of a transparent and complete land register and greater potential for leasing. Compulsory acquisition by Government has also been given some attention because it is the only way by which customary land has been fully alienated in a way that circumvents the constitutional bar on the sale of customary land. The possibility of the sale of compulsorily acquired customary land once the public purpose for which it was acquired has ceased, indicates that further constraints on what Government does with acquired customary land need to be put in place.

There should be limits on the extent to which these possibilities can be pursued. For, as well as ensuring compliance with the *Constitution*, the principles of the *Faamatai* concerning customary land tenure need to be taken into account when contemplating ways to increase revenue generated from customary land. This land is held according to principles of the *Faamatai* and the Court is required to apply custom and usage in its determinations. So, if increased economic use of customary land is desired, greater regulation of this development, through the mechanisms of the Court, would be required. If such changes are to be successful and lawful they must adhere to the non-alienation rule in Article 102 of the *Constitution* and uphold the principles of the *Faamatai*. What is required is a compromise position, therefore, wherein economic use of customary land is promoted, but the *Constitution* and the *Faamatai* are also honoured.

It seems the Government is at a crossroads. Most of the land in Samoa is held on customary tenure and has the potential to be used more economically. There is pressure from aid agencies and investors to make better use of customary land, but this runs the risk of undermining custom. The Government appears to have conflicting intentions in this regard. On the one hand, it is contemplating the abolition of *pulefaamau*, which would bring some land back into the customary fold. This would affirm the importance of custom. On the other hand, the introduction of the 'Torrens System', and the possibility of greater compulsory acquisition of customary land, would undermine custom, and may erode the protective role of the Court. The introduction of the 'Torrens System' of land registration may lead to the individualisation of customary land ownership and may give registered proprietors an indefeasible title, enabling them to deal with the land without regard to their customary obligations. This would be contrary to custom and could lead to pressure to repeal the non-alienation rule. If that were to happen, then registered proprietors of customary land under the 'Torrens System' could sell customary land at the expense of other *suli* and in breach of their customary obligations as *matai*. Furthermore, if the 'Torrens System' does not achieve the desired objective, the Government may be persuaded to use its compulsory acquisition powers more liberally to satisfy economic objectives. That would change the status of customary land and could eventually reduce substantially its extent. Both methods would not only undermine custom and the role of the Court but would draw the life blood out of Samoa's indigenous culture.

Therefore, in order to ensure that the *Faamatai* is respected, the prohibition on alienation is continued, and the crucial role of the Court in supervising dealings with customary land is maintained, while some economic development is still promoted, it is suggested, that the following measures be taken. *Pulefaamau* should be abolished. The Court should maintain a specialist register of customary land, and efforts should be made to ensure this is well maintained and complete. Longer leases might be contemplated, provided these are supervised by the Court and consultation with and agreement of current *suli* is verified. Compulsory acquisition could be promoted, as long as close Court supervision of this process is maintained. Furthermore, land compulsorily acquired should be offered back to those with the original *pule* when the public purposes for which it was taken have ceased.

These suggestions would be a better way of satisfying the economic drivers while maintaining the integrity of customary land tenure. What is notable is that all of these suggestions require the involvement of the Court. These suggestions are more likely to work in practice. They would utilise the existing institution of the Court which was established to determine matters concerning customary land and *matai* titles. They would also mesh with the existing land tenure and judicial systems, and so be more likely to be accepted by the Samoans. The aim should be to regulate greater economic use of customary land, so as to permit development to occur when desired by the *suli*, but not to permit it to proceed in a manner that is inconsistent with the fundamentals of the *Faamatai* or the *Constitution*. This would require significant modernisation of the Court's role without abandoning its core function in supervising dealings in customary land. In fact, that core function would be strengthened by the changes proposed. We could then see both continuity and change in the institution of the Court.

CHAPTER TEN – CONCLUSION

‘CONTINUITY AMID CHANGE’

This thesis has been a study of the Land and Titles Court of Samoa and its predecessor, the Land and Titles Commission. The Court is a creature of colonisation that was introduced to impose a Western process for the resolution of disputes concerning Samoan custom. Yet it has become a central feature of Samoan life that has allowed the *Faamatai* and Samoan custom to survive. The overarching theme for this study of the Land and Titles Court has therefore been one of continuity amid change. These two contrasting notions capture the tension, or the ebb and flow that has occurred, over time, between the competing demands of colonisation, decolonisation and commercialisation in the area of customary land.

These demands have first produced, and then influenced, the work of this specialist Court, which was created in the colonial era, to resolve disputes concerning Samoan customary lands and *matai* titles, but has survived the transition to indigenous government in Samoa. The need to respond to these competing demands has produced the need for procedural compromise within the Court, or for hybridisation within its processes of colonial and customary forms. This hybridisation is a striking feature of the current operation of the Court. Such a willingness to compromise and hybridise has sustained the Court’s position in Samoan society and may be the key to its future.

Before European colonisation, disputes concerning customary lands and *matai* titles in Samoa were resolved according to the processes of the *Faamatai*. The foreign structure of a Commission or Court was then imposed to deal with disputes, within customary groups, concerning land and title matters. In this manner, a non-customary mechanism, modelled on the European judicial process, was introduced. Nevertheless, for two main reasons, the impact of this Court on the *Faamatai* was limited: firstly, because its role was not to apply the principles of European land law but to apply Samoan customary norms concerning lands and titles; and, secondly, because the Court was to address only disputes that could not be resolved at the level of the *Nuu* or the *aiga*: that is, it did not supplant the original decision-making processes at the level of the customary group. As a consequence, the Court’s imposition involved only a partial form of colonisation of Samoa’s own customary principles and processes concerning land and titles.

However, the colonisation process and the associated 'land grabbing' of the 19th century did lead to the introduction in Samoa of a market in land, including the introduction of the concepts of 'buying' and 'selling' and individual ownership of land. The notions of private land title, of Crown or state title, of leasehold interests, and other forms of land tenure alien to the *Faamatai*, were introduced. The 1889 *Berlin Act*, for instance, provided a mechanism to investigate and validate foreign land claims and it led to the establishment of the infrastructure necessary for the introduction of a Western system of land tenure, including a system for the registration of private interests in land. In addition, it produced the formal adjudicative structure of the Court.

These developments concerning land tenure proceeded in parallel with the establishment of a centralised system of national government, which was also markedly different to the decentralised system of social administration that operated at the level of the *Nuu* under the *Faamatai*. These new structures for government and land tenure were the foundation upon which the German Administration built the Land and Titles Commission in 1903, which was to provide a specialised process for inquiring into and resolving disputes concerning native land and titles. At the same time, however, the potential for confrontation between the principles of the *Faamatai* and those of private land tenure was greatly reduced via strict regulation by the colonial administration of the sales of land from Samoans to foreigners. Here, vitally, the colonial administration appeared to endorse a crucial prior customary rule: that land could not to be alienated from the customary group, except in very limited circumstances. This rule against alienation has been consistently followed since. It has now been entrenched in the *Constitution* and is an exceptionally important rule. It is this rule, more than any other, that has guaranteed that the great majority of Samoan land remains in customary hands.

Nevertheless, this prohibition on the alienation of customary land also presents challenges, because it imposes certain limits on the ability of customary land owners to use their land for commercial purposes. It therefore indirectly limits the possibilities for the economic development of Samoa. This is the tension that Samoans must negotiate, between maintaining the indigenous concept of customary ownership, on the one hand, and seeking greater opportunities for commercial use of their lands, on the other. This tension lies at the heart of many current pressures on the Court.

The examination in this thesis of the legal structure of the Court (its jurisdiction, structure and process), which was traced through a century of legislation, spanning three different administrations, showed that, despite dramatic changes in Samoa's social, cultural and political environment, there have been few major changes in the functions of the Court. The main changes that have occurred gained their impetus during the decades preceding Samoan independence. During those years, progressive indigenisation occurred in the Court's membership and procedure. These developments led to greater acceptance by Samoans of this colonial creation, to the point where the Court has now become an integral part of the Samoan legal order, its existence entrenched in the *Constitution* that Samoans gave to themselves in 1960. It can be said today, therefore, that the Court operates with Samoans' consent, especially when the judges of the Court are *matai*, the Court's hearings are conducted in the Samoan language, and many elements of Samoan custom and protocol are followed in the Court's procedure.

As a consequence, the vitality of the *Faamatai* is now, perhaps ironically, expressed through the functions of Court, particularly through the Court's role in defining and applying Samoan custom and usage in land and title matters, issues that remain at the heart of the *Faamatai*. Since 1981, the Court, in carrying out this duty, has undergone an even more intensive process of indigenisation, now that it is operating under fully Samoan management. The Court's practice and procedure continue to move away from strict adherence to Western forms, towards the adoption of even more extensive elements of Samoan protocol. Many elements of fusion between indigenous and Western legal forms are now evident, as well as the co-existence of parallel forms in other aspects of the Court's functioning, while in further aspects of its functioning the tussle continues between these two forms.

Why, then, has Independent Samoa retained this creation of colonialism? Either, it seems, because the indigenes have chosen to adopt this imposed legal form (suitably modified) as their own, or because the indigenous legal system has been so greatly altered that a return to the pre-colonial process is neither practical nor desirable. In the end, two things are certain: that the survival of the Court depends on its adaptability, and that the survival of Samoan customary norms concerning land and titles depends largely on the continued existence of the Court.

The continued existence of the Court depends on the security of its place in the Samoan legal order. The manner in which it has become embedded within the Samoan customary social order, along with the recognition of custom as a formal source of law within Samoa's *Constitution*, goes a long way towards maintaining the Court's special and protected place in the Samoan legal system. The separation from the general courts of the Land and Titles Court, as a specialist institution, also supports its continued existence. The separation of these two court systems is emphasised by the inclusion of the 'ouster clauses' in the legislation concerning the Court, which purport to bar judicial review in the general courts of its decisions. Recently, however, the effectiveness of these ouster clauses has been challenged. The resolution of this controversy shows that all systems of law, and all public institutions in Samoa, are now subject to the requirements of the 'supreme law' that Samoans have also given to themselves through the adoption of their *Constitution*. This 'supreme law' requires compliance with certain fundamental rights, including the right to a fair trial. So, despite the clear separation of the two court systems, the Land and Titles Court must comply with this fundamental guarantee, because this guarantee prevails over the provisions of ordinary legislation, and it is clearly enforceable through the constitutional jurisdiction of the Supreme Court. Nevertheless, this controversy usefully reveals the tension that is likely to be experienced at certain points within a dual legal system, in which two sources of law – the customary and the Western – co-exist.

In total, the legal arrangements concerning the two court systems suggest that the Land and Titles Court must be reviewable in the general courts, at least on constitutional grounds. There are arguments against this proposition, the most significant of which is that the existence of the 'ouster clause' in section 71 of the *Land and Titles Act 1981 (Samoa)* bars the review of any decisions of the Court in the general courts. Such arguments are not convincing, however, in the face of the clear provisions of the *Constitution* which has the status of supreme law. The better view of the position, therefore, is that, when a breach of the *Constitution* is alleged, the general courts must have the jurisdiction to consider such a claim.

This does not mean that this jurisdiction should be readily exercised. On the contrary, even though they may have the jurisdiction to review decisions of the Land and Titles Court on constitutional grounds, the general courts should still show considerable deference to the specialised knowledge of that Court. So, only when convinced the Land and Titles Court has significantly erred in the fairness of its procedure, or in the scope of its jurisdiction, or in the

rules of customary law applied, should the general courts intervene. Such intervention should therefore be rare but it should not be considered completely blocked, in light of the supremacy of the *Constitution*. Nor should it necessarily be blocked by the existence of the appellate process within the Land and Titles Court, when unacceptable delays of up to 10 years occur in the hearing of appeals.

In sum, the appropriate compromise position, which recognises both the supremacy of the *Constitution* and the specialist nature of the Land and Titles Court, is to concede to the Supreme Court a judicial review jurisdiction, on constitutional grounds, but to insist that that jurisdiction should be exercised sparingly and with due deference to the Land and Titles Court. This establishes an appropriate point of intersection between customary and Western sources of law while showing proper deference to the specialist character of the Court and to the Samoan customs it applies.

The examination of more than 400 decisions of the Court, from 1903-2008, has showed that customs such as *pule*, *tautua*, *suli*, *soalaupule* and others have been continually applied by the Court. That these same customs are applied throughout the islands is evidence of homogeneity of custom concerning customary lands and *matai* titles throughout Samoa. That the same customs were applied in decisions from 1903 right through to 2007 suggests these customs have not changed significantly over time and that political and social changes, and changes elsewhere in the law, have not significantly altered them. This degree of continuity may also indicate how successfully the Court has executed its duty to apply Samoan customs in the disputes it hears. However, the Court's success in this regard is undermined to some extent by the nature of the reasoning usually employed in stating the Court's decisions. The opaque character of this reasoning makes it difficult to know, with sufficient certainty, how the Court has decided which custom should be applied to the facts to resolve a particular dispute. The future confidence of Samoans in the Court, and in custom may therefore rest on the quality of the reasoning demonstrated by the Bench. The clearest possible explanation of the choice and application of custom is required.

The continuity of the Court's decisions concerning 'core' customs about land and titles despite changing contexts has meant that Samoans have looked to the Court not only as a mechanism of dispute resolution, but also as the bastion of custom. The Court has been woven into the fabric of Samoan society, much like Christianity, through a process of

indigenisation. It is now an important factor in maintaining and strengthening social cohesion. It is all the more important, therefore, for the Court to be explicit in its reasoning concerning the customs to be applied, and therefore preserved, in the matters it considers. This would foster greater confidence in the competency, efficiency and fairness of the Court. The 2008 decision concerning the *Malietao* title and the clarity of its attempt to identify and describe the customs relevant to the Court's decision is hopefully a sign of things to come. After all, the use of clear and sound reasoning means there is less chance of a successful challenge to the correctness of the Court's decisions, and a greater chance of safeguarding custom.

The Court and custom have survived many onslaughts from pressures of many forms. It has responded by adapting, hybridising and indigenising. As we look to the future we see that the greatest change the Court and custom face is from pressure to commercialise customary land. This in turn generates pressure on the Court that deals with disputes concerning this 80% of the land: 80% of Samoa's future and heritage. The proposals to promote the individualisation and commercialisation of customary land that may follow from the adoption of the 'Torrens System' of land registration highlight the tensions between continuity and change, indigenisation and modernisation, and Samoan custom and Western development, that are impacting today on the structure and processes of the Court.

These developments also draw attention to the role of legislative amendment as an agent of either continuity or change. Legislative amendment that concerns the Court should be considered and principled, and mesh with the overall structure of the Samoan legal order, and not simply be a reaction to pressures for change. Because of the vital place the Court holds in relation to land and titles, legislative amendment affecting it should be more considered. Changes in the law should also ensure the Court is sufficiently involved in all matters within its jurisdiction: that is, all major dealings or controversies concerning customary lands and *matai* titles. Legislation providing for the Court could, if the situation required, create new roles for the Court. Instead of scrambling to bolt the stable door once the proverbial horse of custom has bolted, procedures could be set in place through legislation to ensure the continued centrality and efficiency of the Court in matters of custom. Such an approach would show that the Court and its mandate to apply custom, which are both sanctioned by the *Constitution*, have been consciously considered by Parliament. Through such considered legislative amendments as are discussed in the last chapter, both custom and the Court could

adapt to an increasingly commercial reality while ensuring the continuing vitality of underlying customary values. This is the kind of compromise position needed to promote economic development while still honouring the *Constitution* and the *Faamatai*.

As a feature of colonisation, the Court began with the potential of being the bane of custom. However, by applying Samoan customs consistently and by gradually indigenising its process, the Court has become a hybrid institution of vital importance to Samoan culture and custom. Despite its colonial origins the Court has, in this manner evolved and been decolonised to become an institution in which Western and indigenous forms are grafted. The significance of its role is evidenced by its entrenchment in the *Constitution*, by 'ouster clauses' that emphasise its specialist function, and by the concerns raised recently among people concerning the implications of the recent introduction of the 'Torrens System' of land registration. The Court has become a bastion of hope, in the face of the tides of change, for those who favour the continuation of what sets Samoa apart: the *Faamatai* and its customs. I do not believe it is an overstatement to say that the future of custom in general, and of customary lands and *matai* titles in particular, depends on the future of the Court. These vital features of Samoan life will be secure, as long as the Court bridles with firm finesse the fleet-footed steed of change.⁵⁷⁶

⁵⁷⁶ A.F. Le Tagaloa referred to change as a 'fleet-footed steed' that could only be reined by or through education, in *O Motugaafa*, (Le Lamepa Press, Apia, 1996).

GLOSSARY

<i>Aiga/Aigapotopoto:</i>	family; extended family.
<i>Ao/Papa/Tama a Aiga:</i>	paramount title/titleholder.
<i>Alii:</i>	chiefly title/titleholder.
<i>Atunuu:</i>	country; nation.
<i>Aumaga:</i>	untitled sons of <i>matai</i> .
<i>Eleele:</i>	land.
<i>Faalupega:</i>	honorifics of a <i>matai</i> title, <i>nuu</i> , <i>itumalo</i> and <i>atunuu</i> .
<i>Faasinomaga:</i>	Samoan identity which is rooted in the <i>matai</i> titles of which the individual is a <i>suli</i> , the land belonging to those titles and the Samoan language.
<i>Faamatai:</i>	Samoan social organisation where groups within the society are determined in relation to the <i>matai</i> title and <i>matai</i> titleholders of the <i>aiga</i> and/or the <i>nuu</i> .
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<i>Fanua:</i>	land; placenta.
<i>Faletama/Ituaiga:</i>	individual family lines within the <i>aiga potopoto</i> of a <i>matai</i> title.
<i>Faletua & Tausi:</i>	wives of <i>matai</i> .
<i>Feagaiga:</i>	covenant; female <i>suli</i> of an <i>aiga potopoto</i> .
<i>Fono/Fono a Matai:</i>	meeting or a gathering; Council of <i>Matai</i> of a <i>nuu</i> .
<i>Fuaifale:</i>	sub-branch of an <i>itupaepae</i> .
<i>Gagana Samoa:</i>	the Samoan language.
<i>Igagato:</i>	customary 'gift' of land.
<i>Itumalo:</i>	district.
<i>Itupaepae:</i>	branch of a <i>matai</i> title.
<i>Laoa:</i>	residence of an orator title.
<i>Maota:</i>	residence of a chiefly title.
<i>Matai:</i>	<i>alii</i> or <i>tulafale</i> title (name); titleholder.
<i>Matupalapala:</i>	customary 'gift' of a <i>matai</i> title.

<i>Nuu:</i>	a social – political – geographical unit. It is also used to refer to the group of <i>matai</i> in the social structure. The word ‘village’ has been used to translate it, however to use ‘village’ is to limit its meaning to a geographical location alone.
<i>Palapala:</i>	soil; blood.
<i>Pule:</i>	authority.
<i>Pule faamalumalu:</i>	supervisory authority.
<i>Sao:</i>	main <i>matai</i> title, head of an <i>aigapotopoto</i> .
<i>Saofai:</i>	title bestowal ceremony.
<i>Seumalo:</i>	an attempt to persuade parties in a dispute to retire and reconsider/seek possible resolution.
<i>Suli:</i>	an heir of a <i>matai</i> title. If you have Samoan blood you are a <i>suli</i> of the <i>matai</i> title of which you are a descendant.
<i>Soalaupule:</i>	<i>Faamatai</i> process of consensus decision-making.
<i>Tamaitai:</i>	daughters of the <i>matai</i> ; female <i>suli</i> of an <i>aiga potopoto</i> .
<i>Tamaiti:</i>	children.
<i>Tapuai/Tapuaiga:</i>	the act of making a spiritual connection with God, for the success of an endeavour; to support.
<i>Tautua:</i>	service rendered by a <i>suli</i> to the <i>aiga</i> and the <i>matai</i> .
<i>Tulafale:</i>	orator title/titleholder.
<i>Tulafono:</i>	law; constitution (delineation of power or authority).
<i>Va:</i>	relationship, connection, affiliation, boundaries, separation, space, standing, obligation, state of being and much more.

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PERSONAL CORRESPONDENCE

- **Professor Peter Hempenstall**, University of Canterbury, Christchurch, New Zealand, 22 November 2006.
- **Aiono Dr. Fanaafi**, Former Director of Education for Government and Congregational Christian Church of Samoa, 18 April 2007.

PERSONAL INTERVIEWS

- ***His Worship Alapati Mataeliga*** - Roman Catholic Archbishop of Apia, Samoa.
- ***His Highness Tuiatua Tupua Tamasese Efi*** - One of the Council of Deputies and former Prime Minister, at the time of the interview, and the current Head of State of Samoa.
- ***Hon. Tuilaepa Lupesoliai Sailele Malielelegaoi*** - The current Prime Minister of Samoa.
- ***Patu Tiavaasue Falefatu Maka Sapolu*** - The current Chief Justice and former Attorney General of Samoa.
- ***Hon. Tagaloa Donald Charles Kerslake*** - The first and current President of the Land and Titles Court and former Minister of Natural Resources and Environment (MNRE - includes Lands) and former Secretary of Justice.
- ***Hon. Unasa Mesi*** - The current Minister for MJCA in Samoa, whose portfolio includes the Land and Titles Court.
- ***Hon. Tuisugaletauatele Sofara Aveau*** - The current Minister of Works Transport and Infrastructure (MWTI) for Samoa, and former Minister for MNREM. The leasing and compulsory acquisition of customary land is administered by MNREM.
- ***Hon. Le Tagaloa Dr. Pita*** - Former Member of Parliament and Minister of Economics and Development, Post Office, Telecommunications and Tourism, for Samoa.
- ***Aiono Dr. Fanaafi*** - Professor of Samoan Language, Culture and Philosophy, former Member of Parliament, and former Director of Education for the Samoan Government and the Congregational Christian Church of Samoa, current President of '*Le Iunivesite o le Amosa o Savavau – The Samoan Indigenous University*'.
- ***Hon. Le Mamea Ropati Mualia*** - Current Member of Parliament and former Minister of Education and former Leader of the Opposition in the Samoan Parliament.
- ***Asiata Dr. Saleimoa Vaai*** - Current Member of the Samoan Parliament, Barrister and Solicitor and former Deputy Leader of the Opposition.
- ***Faamausili Leinafo Tuimalealiifano*** - Former Director of Lands for Samoa.
- ***Fonoivasa Lolesio Ah Ching*** - One of five current Deputy Presidents of the Land and Titles Court and former Registrar of the Land and Titles Court.
- ***Masinalupe Tusipa Masinalupe*** - The current Chief Executive Officer for MJCA and Registrar of the Land and Titles Court of Samoa.
- ***Dr. Iutisone Salevao*** - The Secretary of the Congregational Christian Church of Samoa (CCCS).

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1904

LK 14; LK 1561/LTC 1448.

1905

LK 16.

1914

LK/LC 240; LK/LC 279; LK/LC 286; LK 305; LK 315; LK 320; LK 321; LK 322; LK 329; LK 344; LK 345; LK 349; LK 353; LK 354; LK 356; LK 362; LK 363; LK 372; LK 379.

1918

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1920

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1922

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1929

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1930

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1932

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1936

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1937

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1938

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1939

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LC 858; LC 862; LC 863; LC 864; LC 865.

1943

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1945

LC 915; LC 916; LC 919; LC 920; LC 921; LC 922; LC 923; LC 924; LC 926; LC 927;
LC 929; LC 930; LC 931; LC 932; LC 933; LC 935; LC 936; LC 937; LC 939; LC 940;
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1946

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1948

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1949

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1950

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1951

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1953

LC 1247.

1954

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1955

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1385; LC 1386; LC 1387; LC 1387; LC 1389; LC 1388B; LC 1389B; LC 1391; LC 1392;

LC 1393; LC 1395; LC 1397; LC 1399; LC 1400; LC 1403; LC 1404; LC 1405; LC 1407; LC 1408; LC 1412; LC 1417; LC 1419; LC 1420; LC 1421; LC 1422; LC 1425; LC 1428; LC 1429; LC 1430; LC 635; LC 1433; LC 1434; LC 1439; LC 1441; LC 1442.

1956

LC 1374.

1957

LC 1554; LC 1434.

1958

LC 1434; LC 1395.

1959

LC 1815.

1960

LC 1820; LC 1580; LC 1826; LC 1827; LC 1828; LC 1829; LC 816; LC 1832; LC 1833; LC 1835; LC 1836; LC 1840; LC 1841; LC 1842; LC 1843; LC 1844; LC 1846; LC 1849; LC 1718; LC 1850; LC 1769; LC 1853; LC 1854; LC 1855; LC 1856; LC 1857; LC 1858; LC 1859; LC 1860; LC 1861; LC 1863; LC 1864; LC 1865; LC 1777; LC 1866; LC 1867; LC 1868; LC 1869; LC 1870; LC 1871; LC 1872; LC 1873; LC 1874; LC 1875; LC 1876A; LC 1877; LC 1878; LC 1879; LC 1880; LC 1882; LC 1884; LC 1885; LC 1889; LC 1891; LC 1892; LC 1893; LC 1894; LC 1897; LC 1898; LC 1900.

1961

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1962

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1963

LC 2138.

1964

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1966

LC 2757.

1969

LC 3251.

1970

LC 3284.

1971

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1972

LC 2926; LC 3617; LC 3621; LC 3626; LC 3627; LC 3624; LC 3653; LC 3654; LC 3638; LC 3284; LC 3489; LC 3500; LC 3501; LC 3579; LC 3612; LC 3640; LC 3666; LC 3682; LC 3687; LC 3592; LC 3689; LC 3629; LC 3805; LC 3306; LC 3468; LC 3490; LC 3563; LC 3674; LC 3623; LC 3806; LC 3880; LC 3888; LC 4314; LC 3510; LC 4318; LC 3881.

1973

LC 3623; LC 3881; LC 3806B.

1977

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1978

LC 5757.

1979

LC 6383.

1981

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1982

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1983

LC 7793; LC 1247 & 1830; LC 1846P1 & P2; LC 7400P2.

1984

LC 2507P2-P4.

1985

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1986

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1987

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1988

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1989

LC 5355 P2/P3; LC 8361, 8361 P1/P2; LC 8690; LC 1897P1-P3; LC 7400P3.

1990

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1991

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1992

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1993

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1994

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1995

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1996

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1997

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1998

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1999

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2000

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2003

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2004

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2005

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2006

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2007

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2008

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- *Pauli Koki v Attorney General*, March 2006.

Court of Appeal of Samoa

- *Alaelua & Others v Land and Titles Court & Ors*, November 1992.
- *In re the Constitution, Taamale v Attorney General* [1995] WSCA 1; CA 2/95 B, 18 August 1995.
- *Aisata Peniamina & Ors v Land and Titles Court, Anapu Aialii & Ors*, 17 December 2004.
- *Pauli Elisara v Attorney General* WSCA 4, 17 December 2004.
- *Pitomoa Mauga and Ors v Fuga Leituala and Ors* Unreported Judgment, March 2005.
- *Punafelutu R.S. Solomon Toailoa v Patu Tiavasue Falefatu Maka Sapolu (President Land and Titles Court) & Sua Rimoni Ah Chong*, 26 April 2006.

Decisions from other Jurisdictions

- *Frazer v Walker* [1967] NZLR 1069; [1967] 1 AC 569 (PC).
- *Anisminic Ltd v The Foreign Compensation Commission and Anor* [1969] 1 All E.R. 208.

TREATIES

- *Final Act of the Berlin Conference on Samoan Affairs ("Berlin Act")* 1889 (Germany, Britain, USA).
- *Treaty of Versailles* 1919.
- *Mandate for German Samoa* 1920 (League of Nations).

LEGISLATION

United Kingdom

- *New Zealand Constitution Act 1852.*

German Colonial Administration

- *Verordnung des Gouverneurs betreffend die Ernennung einer Land und Titel Kommission 1903 – Land and Titles Commission Ordinance 1903; Instruction fuer das Verfahren der Land und Titel Kommission 1903 – Instructions for the Proceedings of the Land and Titles Commission 1903.*

New Zealand and New Zealand Colonial Administration of Samoa

- *Samoa Constitution Order 1920 (NZ).*
- *Existing Local Laws Continuance Ordinance 1920 (NZ-Samoa)*
- *Samoa Crown Estates Order 1920 (NZ).*
- *Samoa Land Registration Order 1920 (NZ).*
- *Samoa Native Land and Titles Commission Order 1920 (NZ).*
- *Samoa Native Land and Titles Commission Amendment Order 1920 (NZ).*
- *Samoa Act 1921 (NZ).*
- *Vacant Titles Ordinance 1921 (NZ-Samoa).*
- *Land Surveys Regulation Ordinance 1922 (NZ-Samoa).*
- *Samoa Offenders Ordinance 1922 (NZ-Samoa).*
- *Sale of Apia Native Land Ordinance 1923 (NZ-Samoa).*
- *Samoa Women Property Ordinance 1923 (NZ-Samoa).*
- *Samoa Native Land and Titles Commission Order 1924 (NZ).*
- *Native Regulations (Samoa) Order 1925 (NZ).*
- *Samoa Individual Property Ordinance 1925 (NZ-Samoa).*
- *Samoa Native Titles Protection Order 1928 (NZ.)*
- *Judicature Ordinance 1931 (NZ-Samoa).*
- *Samoa Land and Titles Protection Ordinance 1934 (NZ-Samoa).*
- *Samoa Status Ordinance 1934 (NZ-Samoa).*
- *Samoa Land and Titles Repeal and Savings Order 1935 (NZ).*
- *Native Land and Titles Protection Amendment Order 1937 (NZ).*
- *Samoa Native Regulations 1938 (NZ).*
- *Samoa Judges Ordinance 1950 (NZ-Samoa).*
- *Samoa Amendment Act 1951 (NZ).*
- *Land Transfer Act 1952 (NZ).*

- *Land and Titles Protection Amendment Ordinance 1952 (NZ-Samoa).*
- *Samoa Amendment Act 1953 (NZ).*
- *Land and Titles Protection Amendment Ordinance 1957(NZ-Samoa).*
- *Land and Titles Protection Amendment Ordinance 1958 (NZ-Samoa).*

Independent State of Samoa

- *Constitution of the Independent State of Samoa 1960.*
- *Taking of Land Act 1964.*
- *Alienation of Customary Land Act 1965.*
- *Samoa Land and Titles Protection Amendment Act 1968.*
- *Land and Titles Act 1981.*
- *Village Fono Act 1990.*
- *Land Registration Act 1992/1993.*
- *Land Titles Registration Act 2008.*

APPENDICES

APPENDIX A

Map of Samoa

Samoa

- ★ National capital
- District boundary
- Road

Administrative districts are used only in the operation of government services and have no capitals.

0 10 20 Kilometers
0 10 20 Miles

Lambert Conformal Conic Projection, SP 9 20S/14 40S



SOUTH PACIFIC OCEAN

SAMOA

ISLANDS



SOUTH PACIFIC OCEAN

APPENDIX B

Verordnung des Gouverneurs betreffend die Ernennung einer Land und Titel Kommission 1903 – Land and Titles Commission Ordinance 1903; Instruction fuer das Verfahren der Land und Titel Kommission 1903 – Instructions for the Proceedings of the Land and Titles Commission 1903.

SAMOANISCHES
GOVERNEMENTS-BLATT
HERAUSGEGEBEN VOM KAISERLICHEN GOVERNEMENT

BAND III. No 19.

APIA.

DEN 28. FEBRUAR 1903.

Gouvernements-Verordnung.

Auf Grund des § 2 der Verfügung des Reichskanzlers vom 17. Februar 1900, betreffend die Ausübung konsularischer Befugnisse und den Erlaß polizeilicher und sonstiger die Verwaltung betreffender Vorschriften in Samoa wird hierdurch verordnet was folgt:

§ 1.

Jeder Eigenthümer oder Besitzer eines Grundstücks ist verpflichtet, die auf dem Grundstück wachsenden Lantanapflanzen auf seine Kosten auszurotten und zu vernichten.

§ 2.

Der Polizeivorsteher von Apia hat jährlich mehrere Lantana-Inspektionen zu veranstalten und ihren Zeitpunkt vorher öffentlich und rechtzeitig bekannt zu machen.

Die inspizirenden Beamten sind befugt, jedes Grundstück in den Tagesstunden von 6 Uhr Morgens bis 6 Uhr Abends zu betreten.

§ 3.

Der Eigenthümer oder Besitzer eines Grundstücks, auf dem bei einer Inspection Lantana gefunden wird, wird mit Geldstrafe bis zu 40 Mark und im Nichtbeitreibungsfalle mit Haft bestraft. — Auch kann in einem solchen Falle der Kaiserliche Bezirks-Richter die Ausrottung der Lantana auf Kosten des Zuwiderhandelnden anordnen.

§ 4.

Diese Verordnung tritt mit dem Tage ihrer Verkündung in Kraft. Zugleich werden sämmtliche früheren Lantana-Verordnungen aufgehoben.

Apia, den 24. Februar 1903.

Der Kaiserliche Gouverneur

gez. Sdf.

Verordnung des Gouverneurs betreffend die Ernennung einer Land- und Titel- Kommission.

1. Zur Entscheidung samoanischer Land- und Titel-Streitigkeiten tritt vorübergehend eine Kommission zusammen, die aus dem Kaiserlichen Bezirksrichter als Vorsitzenden und zwei Beisitzern besteht.

2. Die Beisitzer und deren Stellvertreter werden von dem Kaiserlichen Gouverneur ernannt, der auch fuer die Fuelle der Behinderung des Vorsitzenden Bestimmung trifft.

3. Das Amt der Beisitzer ist ein Ehrenamt. Nicht beamtete Beisitzer erhalten eine Entschädigung fuer ihre Muehewaltung und auf Antrag Reisekosten, falls die Sitzungen der Kommission ausserhalb Apia stattfinden.

4. Die Kommission hat die Streitachen zu entscheiden, die ihr vom Kaiserlichen Gouverneur zur Entscheidung uueberwiesen werden. Das Verfahren wird durch eine besondere Instruction geregelt.

5. Die Entscheidungen der Kommission sind endgueltig.

6. Der Kaiserliche Gouverneur ernannt eine Kommission von Samanern, die von der Land- und Titel-Kommission ueber samoanisches Recht und samoanische Sitten und Gewohnheiten gehoert werden kann.

7. Den Zeitpunkt des Zusammentritts der Kommission bestimmt der Kaiserliche Gouverneur.

Apia, den 25. Februar 1903

Der Kaiserliche Gouverneur
gez. *Solt.*

Instruction fuer das Verfahren der Land- und Titel-Kommission.

In Ausfuehrung des § 4 der Verordnung vom heutigen Tage, betreffend die Ernennung einer Land- und Titel-Kommission ergaht folgende Instruction:

1. Das Verfahren ist unendlich. Jedoch koennen zur Vorbereitung der unendlichen Verhandlung Schriftsaetze der Parteien eingefordert werden.

2. Die Parteien muessen zur Verhandlung rechtzeitig geladen werden.

und selbst erscheinen. Eine Vertretung durch Freunde als Anwälte (Bach-
wetter) ist nicht gestattet, doch kann die Kommission von Anwälten einer
oder beider Parteien einen Beistand bestellen.

3. Der Vorsitzende hat die auf die Prozessleitung bezüglichen Vor-
fragungen zu stellen. Die Beisitzer nehmen nur an der mündlichen Ver-
handlung und Urtheilssprechung Theil. Jedes Mitglied hat gleiches Stimm-
recht. Die Entscheidungen werden nach Stimmmehrheit gefasst.

4. Der Kläger, der trotz gebührender Ladung ohne vorherige Genehmigung
Klagescheidung ausbleibt, wird mit dem erhobenen Anspruch abgewiesen
und ist von dem weiteren Prozessverlaufe fernzuhalten. Bei nachträglicher Klagescheidung wird das Prozessverlaufs-
aufgehoben und die Verhandlung wieder eröffnet, wenn die Klagescheidung
innerhalb 3 Monaten nach der Klagescheidung eingeht und nicht gegenwärtig
revidiert wird.

5. Der Beklagte, der trotz gebührender Ladung ohne vorherige genehm-
igte Klagescheidung ausbleibt, ist vorzulassen.
6. Zeugen, die trotz gebührender Ladung ohne vorherige Genehmigung
Klagescheidung ausbleiben, können vorgeladen oder in Absicht auf
M. 500 genommen werden.

7. Die Kommission ist befugt, Fälle von Ungehörigkeit und Ungebühr-
lichkeiten oder mündlich während des Verfahrens begangenen Vergehen
vorbehaltlich der strafrechtlichen Verfolgung, mit Geldstrafe bis M. 300
oder mit Haft bis 3 Wochen zu ahnden.

8. Eine nicht beizutretende Geldstrafe ist in Haft bis 3 Wochen um-
zuwandeln.
9. Falls die Kommission die Einleitung einer Auskunft von der Ein-
gekauften Kommission für erforderlich erachtet, steht ihr die Auswahl
eines oder mehrerer Mitglieder derselben oder die Befragung der gesamten
Klingebewerben-Kommission frei.

10. Im Urtage ist die Kommission bezüglich der Erforschung der
Wahrheit an keinerlei Formvorschriften gebunden und kann sich innerhalb
der Grenzen der allgemeinen Beweisregeln jedes Mittel zur Bildung ihrer Über-
zeugung bedienen.

11. Die verlorene Partei hat die Kosten des Verfahrens und die ent-
standenen Ausgaben zu tragen. Eine Erstattung der vom Kläger vor Ein-
leitung des Verfahrens bezahlten Copialien und der Gebühr von M. 50
findet nicht statt, doch kann diese Summe dem unterliegenden Kläger auf
die Gerichtskosten angerechnet werden. Die müssige Partei hat die durch
die Summen entstandenen Ausgaben zu tragen.

12. Das Register über die gefällten Entscheidungen hat zu enthalten:
Namen und derzeitigen Wohnort der Parteien, Namen und Beschreibung des
erstrittenen Landes und Theils, Inhalt und Datum der Entscheidung, Akten-
zeichen, sowie eine Rubrik für Bemerkungen. Die Entscheidungen sind

chronologisch einzutragen und mit fortlaufenden Nummern zu versehen. Ausserdem sind die Entscheidungen nach Districten zusammenzustellen. Versaeumnissurtheile sind erst einzutragen, wenn sie unanfechtbar geworden sind.

18. Die den Parteien zuzustellende Ausfertigung der Entscheidung ist von der Kommission zu unterzeichnen und dem Gouverneur zur Kenntnissnahme vorzulegen. Der Gouverneur versieht die Ausfertigung mit einem entsprechenden Vermerk. Versaeumnissurtheile sind in dieser Form erst zuzustellen, wenn sie unanfechtbar geworden sind.

14. Saemmtliche Kosten und Gebuehren werden bei der Kasse des Kaiserlichen Bezirksgerichts eingezahlt, von den sonstigen Einnahmen aber getrennt gehalten und getrennt gebucht. Es wird ein Einnahme- und Ausgabe-Journal, sowie ein Kostenregister gefuehrt.

15. Bei der Kommission ist ferner ein Register zu fuehren, in das die Klagen nach der Reihenfolge ihres Einganges und unter Bezeichnung der Parteien eingetragen werden. Bei Beginn eines Jahres beginnt eine neue Nummerfolge. Die Registernummer mit der Jahreszahl und den Buchstaben L. K. bildet das Aktenzeichen.

16. Die Festsetzung der EntschaeDIGung fuer die nicht beamteten Besitzer, sowie der Reisegebuehren erfolgt durch den Kaiserlichen Gouverneur.

Apia, den 24. Februar 1903.

Der Kaiserliche Gouverneur.

gez. Solj.

APPENDIX C

LC 853 P1-P39 - 18 June 2008



FAAMASINOGA O FANUA MA SUAFA SAMOA

LC. 853 P1-P39

MATAUPU NA SUEINA: E UIGA I LE FIA FAAMAONIA PO O LE SOLOIA
O LE NOFO A FAAMAUSILI PAPALII MOLI NA FAIA I LE
ASO 14 IUNI 2007 I LE SUAFA "MALIETOA" I MALIE:

ITU NA TALOSAGA:

1. Le-Tagaloa Pitapola, Faamausili Lauuluovini Tamaau Salusalu, Faamausili Lauuluovini Talitu Pale Toelupe, Maualaivao Alesana Faamausili Tamaau, Suiolefonofaavae Faamausili Lauuluovini Leapai Sefo. (LC. 853 P1)
2. Aiono Suamataia Fanaafi, Lealainuanua Sooaemalelagi Leato Avia (LC. 853 P2)
3. Elielia Taulapapa (LC. 853 P3)
4. Uitualagi Masuigamalie Pita Meaole, Fuaoletoelau Kalala Masuigamalie, Sepā Malio Leaso, Sepā Vaiola, Lauauafolasa Popea. (LC. 853 P4)
5. Papalii'i Malesi, Tunu Leilua Morgan, Papalii Tanumafili Silivaai, Ane Tovio Leilua Siavii, Papalii Viliamu Silivaai, Vivian Betham Leota Suatele, Iakopo Galumalemana Isaako, Fatima Luamanuvae Laupepa, Seiuli Vaai Silivaai (LC. 853 P5)
6. Malietau Malietoa, Papalii Pešamino, Siavii Tuatagaloa Papalii, Lalolagi Heini (LC. 853 P6 & P39)
7. Taimalelagi Naotala, Taupau Sione Papalii, Leva'a Ulumasui Sauaso, Sa'u Siaosi, Aea Aita, Tupuivao Naoupu, Taulapapa Iosia, Alaimoana Ifbpo (LC. 853 P7)
8. Nu'uiali'i Pea Tavita, Mugi Satui, Tanuvasa Faletagoa'i, Alaimalo Palau, Palau Tatupu, Sa'u Moamaga Tanumafili Talimatasi, Maotua Levi, Lafaele Ailolo, Taufono Vaosaoalii Mo'a, Mo'a Tofilau Sanele (LC. 853 P8)
9. Leuafaalanumaaveaveaileigasatuala Faalata, Leaupepe Tausooolemalo (LC. 853 P9)
10. Leiataua Alailima Vaiao, Leiataua Eteuati Steven (LC. 853 P10)
11. Aeoainu'u Hivi Lene, Aeoainuu Aleki Sosene Feagai, Muaausa Lolani Lene AINU'u, Muaausa Pau Sao, Papalii Hori Aeoainuu (LC. 853 P11)
12. Papalii Siliva Taouma, Papalii Isei Tuiletufuga, Papalii Lauoletolo Toomalatai, Papalii Talavou Tago, Fatu Tafaifa Taouma, Papalii Talamesi Fitisemanu, Papalii Merelini Fitisemanu, Epenesa Pouesi, Galumalemana Alema Fitisemanu, Lagi Papalii, Apoua Papalii, Peni Pouesi, Lauoletolo Toomalatai, Faalataitaua Toomalatai, Fagasavali Toomalatai. (LC.853 P12)
13. Leiataualesa Tuilaepa Seiuli Alualu II, Leiataualesa Seiuli Ueligitone Tuilaepa (LC. 853 P13)
14. Papalii Petoni, Soava'a Pouvi Faalata, Talavou Unasa, Auapaau Aperaamo (LC. 853 P14)



FAAMASINOGA O FANUA MA SUAFA SAMOA

15. Muagututia Maeaeafe (LC.853 P15)
16. Papalii Natuitasina, Ualeteñese Papalii Taimalelagi, Taimalie Kiwi Tamasese, Lemalu Figota Ioane, Papalii Sootaga, Muliaga Saumani, Taulapapa Fanaafi, Lave Fatialofa (LC. 853 P16)
17. Leiatauaalesa Filimaloata Faau'i II, Leiatauaalesa Filimaloata Misimoa, Filimaloata Senio Filimaloata, Katalina Leiatauaalesa Filimaloata, Lele Fālō, Su'a Viane Leiatauaalesa (LC. 853 P17)
18. Toomata Aki Tuipe'a, Toomata Tua Afamasaga, Lepue Leaupepetele Tautai Faamausili, Leota Sofia Faamausili, Leaupepetele Atoagaugaatuitoga Faamausili, Sauvao Poesa Papalii Leaupepetele Tautai (LC.853 P18)
19. Saena Tialino Penaia, Savea Sano Malifa, Leulua'iali'i Tautalatasi Malifa, Mataafa Ola Peni, Ututaaloga Lolo (LC. 853 P19)
20. Tuilaepa Niusila, Tuilaepa Fuava (LC. 853 P20)
21. Papalii Taimalelagi Afele, Papalii John Taimalelagi, Papalii Tipaaleia Muliagatele, Papalii David Suisala, Papalii Oliva Taimalelagi, Talalafai Mataia Faatau, Fuimaono Gafatasi Camillo P T Afele, Tofilau Henry Afeleti P T Afele (LC.853 P24 & P38)
22. Aiono Tile Gafa, Leaupepe Farani, Moe Leaupepe, Feagaimaleata Aiono, Tofoi Tuimauga (LC. 853 P31)
23. Sailimalo Vesi Maeataanoa, Tai Maeataanoa, Iliui Sisigafu'a Tuu Lavea (Itu Faaopoopo)
24. Su'a Maeataanoa Seumanutafa (Itu Faaopoopo)

ITU NA TETE'E:

1. Papalii Saitumua, Papalii Oloigogo, Maika Papalii, Tofilau Kalama Tualaulelei (LC.853 P20)
2. Laupa Petelo II (LC. 853 P22)
3. Papalii Taeu Masipau, Papalii Ene, Lesina Leilua, Mele Papalii, Sineva Papalii, Eliepa Papalii, Galumalemana George Betham, Galumalemana Ioane, Etevisa Papalii Aiono (LC.853 P23)
4. Si'a Mano'o Kato Ulu Kini, Faamausili Poutasi, Faamausili Semi, Faamausili Faiga, Sauni Ofisa, Maligiapu Simi, Leupolu Seso, (Mo Alii ma Faipule o Malie) (LC.853 P27)
5. Saofia Omeli, Talaitupu Lofipo, Levaopolo Failautusi, Faasiu Sealiimalietoa, Rev Setu Setu (LC. 853 P29)
6. Maualaivao Neru II, Sauniaau Talitiga, Tuiatafu Iafeta, Aolele Maualaivao Faamausili, Suesue Tuiatafu, Nifo Tuiatafu, Sene Sauni, Faamausili Leinafo Tuimalealiifano (LC. 853 P28)



FAAMASINOGA O FANUA MA SUAFA SAMOA

7. Sulusulumaivasa Aiva II, Papalii Ioane Papalii, Greta Tuilaepa Alesana (LC. 853 P32)
8. Tofilau Lupematasila Nanai Misa Faamanu Ivara, Tofilau Nanai Misa Malae Liua, Tuisila Tea Paulo Ulberg (LC. 853 P34)
9. Tupai Soalo H. Richard Tuimalealiifano Lavea, Nua Alualu (LC.853 P36)
10. Faamausili Papalii Taogaga Tonumaivao Moli Malietoa, Papalii Malama Talamaivao Saveaalii Malietoa, Papalii Penehuro Saveaalii Malietoa, Seiuli Moala, Monalisa Saveaalii Malietoa, Papalii Neemia Poutoa, Papalii Momoe Von-Reiche Malietoa (LC.853 P37)
11. Vitaoa Peleiupu Fuatai, Fonoti Iupati Fuatai, Samalaulu Eseta (LC.853 P25)
12. Fata Pemila, Maulolo Faavevela, Laamalefolasa Tolova'a, Maulolo Tavita Amosa, Maulolo Toevai, Ututaaloga Uria, Leu Vaetolu Uria, Fata Simone, Vaotuu Tipasa, (Mo Alii ma Faipule o Afega) (LC. 853 P30 & P35)
13. Marilyn Manumanuititotama Toomalatai Figiel (LC. 853 P33)
14. Tuimalealiifano Va'alet'o'a Sualauvi II, Toleafoa Gutu, Fuailefau Lote Naseri, Toleafoa Kolisi Naseri, Kuini Lafaele (Itu Faaopoopo)
15. Leota Leuluaialii Ituau Ale, Leota Leuluaialii Savaiinaea, Lemafaituuga Tilo Leota. (Itu Faaopoopo)
16. Papalii N. Kome, Papalii Mema Fuimaono Tasi, Iuni Papalii Ah Kuoi, Faavaoga Faleono Fuimaono Vo'a (Itu Faaopoopo)
17. Mauinatu Roy Etuati Malietoa, Togia Laeli Atonio Mauinatu, Hector Mano Fuimaono, Seu Lu Sua Togia Mauinatu, Fa'alagiga Mano Hunt (Itu Faaopoopo)
18. Fuimaono Puletiuafoa Ipu Anae Polataivao (Itu Faaopoopo)
19. Savea Loto Mataitai, Papalii Memea Samuelu Petaia, Tuilaepa Saiiga, Sala'a Isaako, Masame Iakopo, Lototau Foe, Lio Matua Ekeroma, Salima Amilale, Masame Sulu (Itu Faaopoopo)
20. Seiuli Saoaumaga Lino, Seumanu Guy Meredith (Itu Faaopoopo)
21. Lio Saveatama Toeileu Tusiofo, Saveatama Maila (Itu Faaopoopo)
22. Seupule Faaoloseu, Alalamua Iosia, Faatupu Pasi (Itu Faaopoopo)
23. Lamatoe Leuluaialii, Mapu Samasoni (Itu Faaopoopo)
24. Tofilau Filimaua Tofilau Maosi, Tofilau Faalaitaua Tofilau Maosi (Itu Faaopoopo)
25. Lio Matua Fetalaiga Kirisome, Lio Matua Faausuusu Folau, Seiuli Leilani Folau (Itu Faaopoopo)
26. Solomona Misikopa (Itu Faaopoopo)



FAAMASINOGA O FANUA MA SUAFA SAMOA

27. Faamausili Lafituanai Ale, Muagututagata Peter Ah Him, Momoemaaitu Faalafi, Tuala Anesi Ale (Itu Faaopopo)

O Le Faamasinoga o Fanua ma Suafa na faatuina e le Tulafono Faamamaluina o Fanua ma Suafa Samoa atoa ma le Faavae o le Malo Tutoatasi o Samoa ua uma nei la latou faaiuga e faapea:

1. UPUTOMUA:

- I le matau atu i le vevesi ua tulai mai nei, o le toe fa'aluaina lea o le fete'enaiga i le 1939. I lenei vaitau, ua faae'e e ni isi le suafa Malietoa ia Faamausili Moli, a ua le o malilie iai isi. O le mea foi lava lenei e tasi na fai i le 1939 na ala ai ona lotea le suafa Malietoa e le Faamasinoga i le va o suli o Malietoa Talavou, Malietoa Moli ma Malietoa Natuitasina.
- Mai le aso 3 Aokuso 2007 i le aso 19 Setema 2007, ua atoa le 39 talosaga ua fa'aulu mo lenei mataupu. E 23 talosaga tete'e i le nofo a Moli. E 10 talosaga lagolago ma le isi 7 e le'i fa'aalia ni o latou finagalo.
- E 12 Itu faaopopo na talia i lalo o le Vaega 46/81 o le Tulafono ma ua atoa ai le 51 o itu auai o lenei Faamasinoga. E 24 itu ua fa'aitu-tagai ma le 27 ua fa'aitu-tete'e.

2. O ITU FA'AMASINOGA:

- Itu Tagi 1 – LC.853 P1 (04/07/2007). O Letagaloa Pitapola o Alafua ma Faamausili Salusalu o Malie e ona le talosaga. O le agaga o le talosaga, e tete'e i le nofo. O le itu lenei o suli o Malietoa Talavou. O Letagaloa na ta'ita'i ae molimau i latou e toafa (4) ua fa'amaui i luga o latou suafa.
- Itu Tagi 2 – LC.853 P2 (04/07/2007). O Aiono Suamataia Fanaafi o Alafua, Lealainuanua So'oaemalelagi Uitime o Vaitele ma Leato Avia o Sapapalii e ona le talosaga. E tete'e le talosaga i le nofo. O lenei itu e suli mai ia Malietoa Moli. O Aiono lava na ta'ita'ia la latou itu ma ana molimau e pei ona taua i luga.
- Itu Tagi 3 – LC.853 P3 (30/07/2007). O le tama'ita'i matua o Elielia Taulapapa e ana le talosaga e teena ai le nofo. O ia o le suli o Malietoa Taulapapa. E le'i fa'aauauina le su'esu'ega o Elielia ona ua mautinoa e le o atoatoa lona mafaufau.
- Itu Tagi 4 – LC. 853 P4 (14/09/2007). O Fuaoletoelau Kalala M. Keyes o Maninoa Siumu na ia fa'auluina le talosaga e tete'e i le nofo, ona e lei iai se maliega o i latou o suli o Malietoa Fuaoleto'elau. O Uitualagi Masuigamalie na ta'ita'i ma ana molimau e toafa (4) ua fa'aalia i luga o latou suafa.
- Itu Tagi 5 – LC. 853 P5 (17/10/2007). O Papalii Malesi o Faleula e ona le talosaga e tete'e i le nofo a Moli, a ia tofia loa o ia i le Malietoa. O Papalii lava na ta'ita'i ae molimau i latou e toaiva (9) ua fa'aalia i luga o latou suafa. O i latou nei o isi suli o Malietoa Moli.



FAAMASINOGA O FANUA MA SUAFA SAMOA

- Itu Tagi 6 – LC.853 P6 (28/09/2007). O Malietau Malietoa e a ia lea talosaga tete'e i le nofo. O ia o le suli o Malietoa Moli. Na ta'ita'i lava Malietau ma ana molimau e to'atolu (3) e pei ona fa'amauiina o latou suafa i luga.
- Itu Tagi 7 – (LC.853 P7 - 04/10/2007). O Taimalelagi Naotala Talataulima Tilialo o Mulifanua e ana le talosaga tete'e i le nofo. O lana fa'aaliga mulimuli ane, o ia e suli mai ia Natuitasina a ua toe suia lona tete'e i le lagolago o le nofo. O Taimalelagi na taitai ma le toafitu ua avea ma ana molimau e pei ona fa'amauiina i luga o latou suafa.
- Itu Tagi 8 – (LC.853 P8 – 19/10/2007). O Nu'uialii Pea Tavita Tua Afele o Ausetalia e ana le talosaga e tete'e i le nofo. O ia lenei e suli mai ia Malietoa Ganasavea. O Nu'uialii na ta'ita'i a ua fa'aopoopo isi e toasefulutasi (11) e fai ma molimau e pei ona fa'aailoa i luga o latou suafa.
- Itu Tagi 9 – LC.853 P9 (25/10/2007). Leuafaalanumaaveaveaiaigasatuala e ana le talosaga e tete'e i le nofo. Na o Leuafaalanu ma Leaupepe Tausololemalalo la la itu. O isi ia suli o Malietoa Talavou.
- Itu Tagi 10 – LC. 853 P10 (25/10/2007). O Leiatua Nuualititia Alailima o Falevao, Leiatua Utu o Am. Samoa ma Kilali Tupuasā Alailima o Vaivasetai na o latou fa'aulu le talosaga e teena le nofo. O Leiatua Vaiao Alailima na ta'ita'i, molimau Leiatua Eteuati Stephen.
- Itu Tagi 11 – LC.853 P11 (26/10/2007). O Aeoainu'u Mua'ausa Uatisone Toma, Aeoainu'u Hivi, Aeoainu'u Pule, Aeoainu'u Aleki, Aeoainu'u Misi, Aeoainu'u Iva Chan Chui, Mua'ausa Lolani, Mua'ausa Pau Sao, Mua'ausa Joseph Walters, Seiuli Tupe, Vaipule V. Vaai, Papalii Hori, Hon. Taua Sao Faraimo ma Hon Asiata Saleimoa na fa'auluina le talosaga e tete'e i le nofo. O suli i latou nei o Malietoa Tia. O Aeoainu'u Hivi Lene na ta'ita'i. Ua leai le to'atele a ua na o i latou e toalima (5) ua fa'aalia o latou suafa i luga, na molimau.
- Itu Tagi 12 – LC.853 P12 (26/10/2007). O Papalii Siliva Taouma, Papalii Alema, Papalii Pita Taouma, Papalii Isei, Papalii Talamesi, Papalii Tommy, Papalii Merelini ma Tooa Runa Curry na fa'auluina le talosaga mo suli o Malietoa Talavou e tete'e i le nofo. O Papalii Siliva lava na ta'ita'i ae lagolago iai i latou uma ua taua i luga.
- Itu Tagi 13 – LC.853 P13 (26/10/2007). O Leiatuaalesa Seiuli Tuilaepa Taulapapa Alualu II e a ia le talosaga tete'e i le nofo. Muliai toe lagolago le nofo. E agai foi le talosaga i le pule ma suli fa'avae. Na o Leiatua Alualu ma Leiatua Seiuli Ueligitone la la itu.
- Itu Tagi 14 – LC.853 P14 (26/10/2007). O Papalii Petoni o Pouesi Sapapalii e ona le talosaga tete'e i le nofo. O Papalii Petoni na taitai ae molimau le to'atolu (3) ua fa'aalia i luga o latou suafa. O suli i latou o Malietoa Talavou.
- Itu Tagi 15 – LC. 853 P15 (26/10/2007). O Muagututia Maeaefe o Las Vegas e ana le talosaga e tete'e i le nofo. Ua na o ia lava lana itu a ua leai lana molimau. O le tasi lea suli o Malietoa Talavou.



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- Itu Tagi 16 – LC.853 P16 (26/10/2007). O Papali'i Natuitasina Poumau ma isi e toasefululua (12) na o latou fa'aulu le talosaga tete'e i le nofo. O isi ia suli o Malietoa Natuitasina. O Papali'i Natuitasina lava na taitai ma ana molimau e toafitu (7) ua fa'aalia i luga o latou suafa.
- Itu Tagi 17 – LC.853 P17 (27/10/2007). O Leiatauaalesa Filimaloata Iosefo Faau'i ma Lele Falo o Faleu Manono e a laua le talosaga. E manao le talosaga ia aloa'ia le pule fa'amalumalu i le agaga fa'amatua moni o Aiga i le Tai. O Leiataua Fa'au'i na taitai a ua molimau le toalima (5) ua fa'aalia i luga o latou suafa.
- Itu Tagi 18 – LC.853 P18 (29/10/2007). O To'omata Alapati Poesē ma To'omata Aki e a laua le talosaga e tete'e i le nofo. Ua toe fa'aalia e To'omata Aki lona lagolago i le nofo. O To'omata Aki na taitai ae molimau le to'alima ua fa'aalia i luga o latou suafa – mo suli o Malietoa Taulapapa.
- Itu Tagi 19 – LC.853 P19 (29/10/2007). O Saena Tialino Penaia o Malie ma Tuanai ma Savea Sano Malifa o Afega e ona le talosaga e tete'e i le nofo. O Saena Tialino na taitai ma le toafa (4) o ana molimau ua fa'aalia i luga o latou suafa. O i latou nei e suli mai ia Malietoa La'auli.
- Itu Tagi 20 – LC.853 P21 (07/03/2008). O Tuilaepa Niusila o Apai Manono na ia fa'aulua le talosaga e tete'e i le nofo, a ia tofia loa o ia i le suafa Malietoa. E na o Tuilaepa Niusila ma Tuilaepa Fuava la la itu.
- Itu Tagi 21 – LC.853 P24 & P38 (01/04/2008) ma (22/04/2008). O Talosaga nei a suli o Malietoa Taimalelagi Tinai Natuitasina e tete'e i le nofo. O Papalii Taimalelagi Afele na taitai ma molimau e toafitu (7) ua fa'aalia i luga o latou suafa.
- Itu Tagi 22 – LC.853 P31 (18/04/2008). O Aiono Tile Gafa, Aiono Mose Sua, Leaupupe Farani, Alauni Tasi Caffarelli ma Feagaimaleata Aiono na sainia le talosaga e tete'e i le nofo a Moli, a ia tofia se nofo mai suli o Malietoa Natuitasina. O Aiono Tile na taitai ae molimau le isi toafa (4) ua fa'aalia o latou suafa i luga. O i latou nei e suli mai ia Malietoa Natuitasina.
- Itu Tagi 23 – O le itu fa'aopoopo lenei a Sailimalo Vesi Maeata'anoa ma ana molimau e to'alua (2) ua taua i luga. O Itu Tagi 23 ma le 24 – ua faigata po o fea le aiga tupu o Samoa e tatau ona fa'asino iai. Ae ua talia lava e auai i nei taualumaga ona o le aiātatau e pei ona aiaia i le fa'avae o le Malo Tuto'atasi o Samoa.

ITU TETE'E:

- Itu Tete'e 1 – LC.853 P20 (31/01/2008). O Papalii Saitumua ma Papalii Oloigogo o Sapapalii e a laua le talosaga e lagolago i le nofo. O Papalii Saitumua na taitai a ua fa'aopoopo Tofilau Kalama Tualaulelei ma Maika Tofilau ia Papalii Oloigogo e avea ma molimau. O i latou o suli o Malietoa Natuitasina.
- Itu Tete'e 2 – LC.853 P22 (24/03/2008). O Malalatea Emau, Laupa Sauva'o, Laupa Petelo, Tupai Tavita, Toetu Tupa'ia ma Malalatea Arona mo suli o Malietoa Savea. Na o Laupa Petelo lana itu e lagolago i le nofo. O Laupa Petelo o lo o te'a ma le nuu po ua silia le 20 tausaga, ai o le ala lea ua toe sosola ese ai ana molimau.



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- Itu Tete'e 3 – LC.853 P23 (14/03/2008). O Papalii Lio Taeu Masipau e ona le talosaga e lagolago i le nofo. O Papalii Taeu lava na taitai ae molimau le toaiva (9) ua fa'aalia i luga o latou suafa. O i latou nei o suli o Malietoa Moli.
- Itu Tete'e 4 – LC.853 P27 (14/04/2008). O Si'a Kato, Maligiapu Simi, Auimatagi Saoloto ma Faamausili Faiga na o latou fa'aulu le talosaga mo Alii ma Faipule o Malie e lagolago le nofo. O Si'a Kato na taitai ae molimau le isi toaono (6) ua fa'aalia i luga o latou suafa.
- Itu Tete'e 5 – LC.853 P29 (15/04/2008). O Saofia Omeli Sealiimalietoa o Pu'apu'a e ona le talosaga e lagolago i le nofo, a o ia o le suli o Malietoa Natuitasina. O le tala tete'e a Saofia ua toe suia ai lana lagolago i lona toe tete'e i le nofo. O Saofia Omeli na taitai ma ana molimau e toafa ua fa'aalia i luga o latou suafa.
- Itu Tete'e 6 – LC.853 P28 (15/04/2008). Na o Mauala Neru lana talosaga e lagolago i le nofo. O ia o le suli o Malietoa Moli. Na taitai Mauala ae molimau le isi toafitu (7) ua fa'amauiina i luga o latou suafa.
- Itu Tete'e 7 – LC.853 P32 (21/04/2008). Na o Greta Alesana o Salelologa e ana le talosaga e lagolago le nofo. O Sulusulumaivasa Aiva II na taitai ma ana molimau e toalua ua fa'aalia i luga o la suafa. O i latou nei e suli mai ia Malietoa Ti'a.
- Itu Tete'e 8 – LC.853 P34 (22/04/2008). O Tuisila Paulo Tea Ulberg, Tofilau Nanai Misa Malaeliua, ma Tofilau Lupematasila Nanai Misa F. Ivara e a latou le talosaga e lagolago i le nofo. E manao lea itu'ia saili suli faavae o le Malietoa. O Tofilau N.M.F.Ivara na taitai ae molimau le toalua (2) ua fa'aalia o la suafa i luga.
- Itu Tete'e 9 – LC.853 P36 (23/04/2008). O Sooalo R. Tuimalealiifano Lavea o Moataa e ana le talosaga e lagolago le nofo. O ia lea e suli mai ia Aigaevalu. E na o Sooalo ma Nua Alualu la la itu.
- Itu Tete'e 10 – LC.853P37 (22/04/2008). O Faamausili Papalii Moli Malietoa Tanumafili II, ma Monalisa Saveaali'i Malietoa Tanumafili I, na o la fa'aulu le talosaga mo suli o Malietoa Moli e tali atu i itu o lo o teena le nofo. O Faamausili Moli na taitai ma ana molimau e toaono (6) ua fa'aalia o latou suafa i luga.
- Itu Tete'e 11 – LC.853 P25 (02/04/2008). O Vitaoa Peleiupu o Moataa e ona le talosaga. O Tiute faa-Fuataogaga sa faamamafa e le talosaga. O le tala tete'e a Vitaoa ua matua tete'e lava i le nofo. O Vitaoa lava na taitai ae molimau le isi to'atolu ua fa'aalia o latou suafa i luga.
- Itu Tete'e 12 – LC.853 P30 & P35 (15/04/2008). O Laamalefolasa o Afega e ona le P30 a o Fata Pemila, Manuavaia Perefoti, Mataafa Koroseta, Leu Vaetolu ma Fata Enoka na fa'auluina le P35 mo Alii ma Faipule o Afega. Ua tutu fa'atasi nei talosaga e lua e teena le nofo. O Fata Pemila na taitai ma le toavalu ua fa'aalia i luga o latou suafa na avea ma molimau.
- Itu Tete'e 13 – LC.853 P33 (21/04/2008). O Marilyn Manumanuititotama Toomalatai Figiel o Vaivaseuta na fa'aulua le talosaga mo suli o To'omalatai Lauolefiso Faalataitaua Malietoa Talavou, e teena le nofo. Ua na o Marilyn lava lana itu.



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- Itu Tetee 14 (Itu Faaopoopo). O Tuimalealiifano Vaaletoa Sualauvi II na taitai i lea itu ma ana molimau e to'atolu ua fa'aalia o latou suafa i luga. O suli i latou o Malietoa Fitisemanu, e lagolagoina le nofo.
- Itu Tetee 15 (Itu Faaopoopo). O Leota Leuluaialii Ituau Ale na taitai maia lea itu ma ana molimau e to'atolu (3) ua fa'aalia i luga o latou suafa. O i latou o suli o Malietoa Taulapapa e lagolago i le nofo.
- Itu Tetee 16 (Itu Faaopoopo). O Papalii Nautu Kome na taitai ae molimau le isi to'atolu ua fa'aalia o latou suafa i luga. O isi ia suli o Malietoa Moli e lagolago i le nofo.
- Itu Tetee 17 (Itu Faaopoopo). O Mauinatu Roy na taitaia la latou itu ma le isi toafa (4) ua fa'amauiina i luga o latou suafa na molimau. O Malietoa Aeoainuu e sau ai lenei itu – e lagolago i le nofo.
- Itu tetee 18 (Itu Faaopoopo). O Fuimaono Puletiuaatoa Ipu Anae Polataivao na o ia lana itu e lagolago i le nofo. O lenei itu e suli mai ia Malietoa Toatulaepa.
- Itu Tetee 19 (Itu Faaopoopo). O Savea Loto Mataitai na taitaia lenei itu ae molimau isi matai e toavalu (8) ua fa'amauiina i luga o latou suafa e fai ma sui o Alii ma Faipule o Sapapalii. E lagolago i latou nei i le nofo.
- Itu Tetee 20 – (Itu Faaopoopo). O Seiuli Saoaumaga Lino na taitai i la la itu ma Seumanu Meredith e tete'e i le nofo ona o le fa'atinoga o le saofa'i ae manao e fa'aaoga le Malietoa o Moli.
- Itu tete'e 21 – (Itu Faaopoopo). O Lio Saveatama Toeileu Tusiofo ma Saveatama Maila la la itu mai Siumu. E lagolago i la'ua i le nofo ae fia fa'aailoa mai foi e iai le aia a Siumu i Papā.
- Itu Tete'e 22 (Itu Fa'aopoopo). O Seupule Faaoloseu ma Alalamua Iosia la la itu. O laua o suli o Malietoa Savea e tete'e i le nofo.
- Itu Tetee 23 (Itu Fa'aopoopo). O Lamatoe Leuluaialii ma Mapu Samasoni lea itu – o suli i laua o Saena Poao e lagolagoina le nofo.
- Itu Tete'e 24 (Itu Fa'aopoopo). O Tofilau Filimaua ma Tofilau Faalaitaua e ana lea itu a Sa Tofilau e tusa ma lo la gafa. E lagolago e i laua le nofo.
- Itu Tete'e 25 (Itu Fa'aopoopo). O Li'omatua Fetalaiga Kirisome ma ana molimau e toalua (2) ua fa'aalia o la suafa i luga e ana lea itu. O le osigafeagaiga i le va o Li'omatua ma Malietoa le feau na molimoli mai. Ae lagolago i laua i le nofo.
- Itu Tete'e 26 (Itu Fa'aopoopo). O se avanoa fa'apitoa ua tuuina i si alii o Solomona Misikopa. O lana feau, ia fa'aaoga le nofo a Moli.
- Itu Tete'e 27 (Itu Faaopoopo). O Faamausili Lafituanai Ale ma ana molimau e to'atolu (3) ua fa'amauiina i luga o latou suafa, ua avea ma itu mulimuli o lenei faigasuega. O i latou e suli mai ia Malietoa Uitualagi, ma e lagolagoina le nofo.



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3. MAFUA'GA O LENEI FA'AMASINOGA:

- O le fa'ae'eina atu o le suafa Malietoa ia Faamausili Papalii Moli i le aso 14 Iuni 2007, ua tulai mai ai ni fe'ese'esea'iga e matatolu i le matau atu iai:-
 - (i) O le fete'ena'iga i le va o i latou o lo'o fa'apea mai, o i latou o sulii o le suafa Malietoa.
 - (ii) O le fete'ena'iga i le va o nu'u po'o afio'aga o lo'o fa'apea mai – o i matou o le nu'u o Malietoa.
 - (iii) O le fete'ena'iga i le va o Faleupolu ona o o latou nafatauave, ma tiutefai i lo latou va nonofo ai ma le Malietoa.

4. O TU MA AGANUU E AAFIA I LENEI MATAUPU:

- O le filifilia o se tasi i le suafa matai Sa'o o lona aiga, e faia lea i le pule a sulii o lea suafa.
- E talanoa sulii, e moe le toa ma toe talanoa seia maua lava le autasiga o finagalo.
- E pule le matai Sa'o i lona filifiliga, i le po'o ni isi, ua ia finagalo e fa'amatai i suafa matai tautua o lona aiga.
- O suafa maualuluga o le atunu'u e pei o Tama a Aiga, e tele ina tofia po'o le mavaeaina. Peitai, sa tutupu ai taua ma fevaevaea'iga i le va o nu'u ma aiga. O se mea e le o toe mana'omia i nei ona po.

5. O MAU NA TUUINA MAI MA FINAGALO FA'AALIA O ITU FA'AMASINOGA:

- I se vaaiga aototetele i talosaga ma manatu na fa'aatu iai ia talosaga taitasi, ua maua ai le tu'ufa'atasiga e fai ma MAU AUTU o nei finauga. O se faiga lea ua manatu le Faamasinoga, o le a fa'afaigofie ai le fefa'aaliaiga o finagalo, ma le fetalia'iga a itu-Faamasinoga.

❖ MAU 1 MAI ITU NA TALOSAGA:

O le faanofoina o Faamausili Moli i le suafa Malietoa, e lei faataunuaina se filifiliga e tusa ma le Vaega 3 o le faaiuga LC.853 aso 14 Tesema 1939:

- E faavae le mau i le talitonuga, e lei logoina i latou pe na talo foi se feiloaiga a sulii o ituaiga e 3, e pei ona fai mai ai le fa'aiuga LC.853 (3) 1939.
- E lagolago atili i le mau le fa'apea mai, e lei maua foi se feiloaiga aloa'ia a sulii o Malietoa Moli lava latou.
- I le tali mai a i latou o loo tete'e, ua manatu i latou sa usita'ia lava le fa'aiuga o le 1939. Na auai sui o Malietoa Talavou ma Malietoa Natuitasina, fa'atasi ma sulii o Malietoa Moli i talanoaga na faia a o lumana'i le saofa'i.



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- O se tasi mea taua sa fa'amamafa mai i le tete'e, o le fa'apea mai lea – O le fa'avae o le fa'auga o le Malietoa, e filifili mai i le ULU O LE VAI ae le o magavai. O le faavae lava lea o loo mulimulita'i iai.

❖ MAU E 2 MAI ITU NA TALOSAGA:

Na pulepuletutu ma faanatinati le nofo a Papalii Moli:

- E fa'avae le mau i le manatu, ua vavalalata tele le falelauasiga o Malietoa Tanumafili II, ma le toe lagaia o le nofo a Papalii Moli.
- O le talitonuga, o le fa'anatinati e mafua ona o le fono o lo o loma a le Palemene, o le a palotaina ai se Ao o le Malo o Samoa.
- E fa'amalosia le mau, i le mataupu na fono ai Sapapalii i le Aso Gafua 04/06/2007. O le mataupu e faapea:- Ua logoina atu e le Faletuamasaga ua maua la latou tasi, o le a e'e le Malietoa ia Moli – ina ia maua ai sona avanoa i le sailiga o se Ao o le Malo, pe a fono le Palemene.
- I le tali mai a i latou o loo fa'asaga iai le mau, latou te teena le mau i la latou ta'utinoga sa fai talanoaga na filifili ai Moli i tulaga masani.
- E faafitia e Alii matutua o Sapapalii i le mau, ae ioe le itu a Alii ma Faipule – Sa talanoaina faamataupu i le fono a lo latou nu'u le nofo a Moli i le suafa Malietoa.
- E iai foi le isi talitonuga na fa'aalia e Itu Tete'e. E pule le Faletuamasaga i le suli ua latou filifilia e e'e iai le Malietoa, ae leai se leo o suli.
- E iai le fete'enaiga o taofi o i latou na tete'e. E manatu Alii ma Faipule o Malie; E leai lava sa latou aia i le filifiliga o se Malietoa. O le pule lava a suli e fai ai la latou filifiliga.
- A maea le filifiliga a suli ua maua sa latou tasi – Logo loa le toafitu ma Auimatagi mo le faatinoga o le Fotu Tupu o le Malietoa.
- O le mau foi lea a Fata ma Maulolo ma Tuisamau. E filifili lava suli a ua na o le eeina o papa, o la latou lea matafaioi.

❖ MAU E 3 MAI ITU NA TALOSAGA:

E faasolitulafono le faia o le nofo a Moli, ma e le o tusa foi ma aganuu:

- E fa'avae le mau i le le'i fa'atinoaina o le vaega 3 o le fa'aiuga LC.853 14/12/1939. Ua solia le Tulafono, e ala i le le usita'ia o le fa'aiuga o le 1939 (3).
- E manatu i latou na talosaga – Maumau ana sei feiloa'i ituaiga e 3 o le suafa Malietoa e tusa ma le fa'aiuga, po o natia i vao le matagā ma le felautoa'i i luma o le Faamasinoga.



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- Na fa'aalia le matua tete'e o ni isi itu i le fa'aiuga o le 1939, ona ua momotu'ese ai la latou aiatatau, ao i latou o suli o isi Malietoa na muamua atu.
- O isi foi ua fa'apea mai, ua le o se Faamasinoga na fai i le 1939, a ua na o se fa'aleleiga i le va o le fanau a Malietoa Fitisemanu.
- E tete'e isi suli o Moli i le a'afia o Talavou ma Natuitasina i le fa'aiuga o le 1939, ona e fa'apea e leai se isi o Talavou ma Natuitasina na Malietoa.
- E faamamafa foi i le tete'e le talitonuga e fa'apea – O suli TAMA O LE PO ma i latou e le o ni suli o se fuafuataga, e le aofia i le filifiliga o se Malietoa.

❖ MAU E 4 MAI ITU NA TALOSAGA:

la sailia sulimoni o Moli, Natuitasina ma Talavou e filifilia se Malietoa e tusa ma le fa'aiuga LC.853 (3) 1939):

- E fa'avae le mau i le talitonuga, ua so'ona aia ni isi i le mataupu lenei, ae le o i latou o ni suli o Malietoa Moli, Malietoa Talavou po o Malietoa Natuitasina.
- E lagolago i le mau le fa'apea mai – Ua le o fa'aalia mai e le fa'aiuga o le 1939, se pule e faia le filifiliga o se Malietoa, nei ma le lumana'i.
- E manatu suli o ituaiga e 3 ia na faa-faaiugaina i le 1939, ua na o i latou lava sulimoni o le Malietoa, ona e leai ni isi suli na finau i sa latou aiatatau, e ese mai i suli o Talavou, Moli ma Natuitasina.

❖ MAU E 5 MAI ITU NA TALOSAGA:

E sese le faatinoga o le nofo a Papalii Moli ma e le o talafeagai foi le e'eina o papa:

- E faavae le mau i le manatu – E le gata ina sese le ala na filifili ai Moli, ae sese foi le e'eina o papa, sese foi le taimi o le saofai.
- E lagolago i le mau le fa'apea mai – O le saofa'i a Moli na fai i le vaveao a o lei malamalama. O ni faiga sese ua taumafai e ufiufi i le Pogisa.
- E fa'amalosia le mau i le fa'apea mai – Ua na o se vaega o Malie na faia le saofa'i a Moli. O i latou foi ia na alagaina ma e'e papa ia Moli, ae le o sa latou fatuaiga lea e tausi.
- E manatu i latou na tete'e – E leai ni sese po o ni faiga na fa'anana i le Pogisa, ona o faiga masani lava ia o le e'eina o le Malietoa i auganofo ua mavae.
- O le talitonuga, e e'e papa i le taeao sesegi a o lei vevela le la. O Malie e fa'atinoa ia mea, aua o Malie o le nu'u tonu lea e fa'asino iai le suafa Malietoa.



FAAMASINOGA O FANUA MA SUAFA SAMOA

- A fa'ae'e le Malietoa I se tasi po'o se isi, e tuuina fa'atasi atu ai ma papa o le Natoaitale ma le Vaeotamasoalii. Aua o ia papa ua avea o ni meatotino tau i le suafa Malietoa.
- E manatu le toafitu ua na o i latou lava e alofisa ma le Malietoa, ae sa ona auai so o se tasi.

6. O LE FAAFETAUIINA O MAU I TU MA AGANUU A SAMOA MA LE TULAFONO:

(I) TULAFONO

- O le Tulafono o le Faamasinoga o Fanua ma Suafa Samoa, ua fa'amatalaina i lona vaega 1 e faapea:-

"O TU MA AGAIFANUA a Samoa, ua talia e pei ona faamamaluina i taimi e fa'asino iai ma e aofia ai:-

- (a) tulaga faavae tau aganuu ma agaifanua, ua talia e tagata i le tulaga aoao ma
- (e) o aganu'u ma agaifanua e pei ona o lo o fa'amamaluina, e fa'atatau i se nofoaga po o se mataupu fa'apitoa.

- I le gagana Peretania o lo o fa'amatalaina ai lenei tulafono i nai upu ia:-

CUSTOM AND USAGE – O Aganu'u ma le Fa'aaogaina.

- O su'esu'ega ma iloiloga a le Faamasinoga, e fa'avae i Aganu'u ma le fa'aaogaina o na aganu'u. O le Tūlāfono lea.
- E mafai lava ona sa'o le aganu'u na afua ai se faamoemoe. Ae fa'ato'a maua le amiotonu ina ua tonu ma sa'o le fa'aaogaina o lena aganu'u.

(II) FAAIUGA LC.853 ASO 14 TESEMA 1939:

- O fa'aiuga ua tumau ma mausali a le Fa'amasinoga, o le Tulafono lena e fa'ialaina tagata uma o se aiga po o se nu'u.
- O le vaega e 70/81 o le Tulafono o lo o fa'aaogaina ai le upu ititi – IN REM. E fa'amatalaina faapea:- TAUNUUGA O LE FAAIUGA TUMAU:- "I le noatia ma le fai fuafua i se talosaga mo le toe iloilo ina i lalo o le Vaega IX, o fa'aiuga tumau uma a le Faamasinoga i luga o se talosaga, o le a fuafuaina o se fa'aiuga e a'afia ai tagata uma, ma o le a noatia ai tagata Samoa uma, o i latou ia e a'afia ai pe sa avea ma ni vaega auai o le taualumaga pe leai."
- O tete'e na fa'aalia nei e agai i le fa'aiuga LC.853, ua tau tuapega. Ua noatia i latou na soifua i tala atu o le fa'aiuga. Ua aafia atu ai ma i tatou uma na fananau i luma mai o le 1939. E le afaina pe tau i le Malietoa pe leai.

(III) O SE TOE TEPA I LE VEVESI NA TULAI I LE 1939:

- O le Aso To'ona'i 8.Oketopa 1939, na taunu'u ai i le Ofisa o Faamasinoga le vevesi ona o le suafa Malietoa.



FAAMASINOAGA O FANUA MA SUAFA SAMOA

- Na tagi mai Pouesi F.S. ona ua fai e ni isi le nofo a loane i le suafa Malietoa i le vaveao.
- Ae fai mai Pouesi oi latou ma Mauala, Faamausili ma Auimatagi na latou fa'anofoa Fiti i le suafa Malietoa.
- O le aso Lua 17 Oketopa 1939 na amata ai su'esu'ega a le Faamasinoga, ma toe tolo ai i le Aso Faraile 20 Oketopa mo le molimau a Fiti.
- Na faia se fa'aiuga fa'ataitai a le Faamasinoga ma toe tolo ai i le aso Lua 14 Novema 1939 ae se'i toe mafaufau i latou na finau.
- O le aso Gafua 11 Tesema 1939 le molimau a Papalii Poumau. (Pg 66) Fai mai a ia; "Ou te manatua la'u tautoga, o lea ou te tautala ai i mea ua matou iloa, na o mea tonu lava."
- Ua iloa i nei fa'amaumauga – na tauto i latou na molimau, na fesiligia itu uma na auai – e pei foi ona tatou faia i lenei tausaga e 2008.
- Mai le aso 8 Oketopa 1939 sei o'o i le aso 14 Tesema 1939 lea na lau a le fa'aiuga LC.853 – E 64 aso po o le 2 masina ma aso e 4 na feagai ai lena Faamasinoga, ma le lauliliuina o la latou mataupu. Ae sa fa'aaoga foi e na i toeaia ma Aso Toonai e faigaluega ai.
- I le matau atu la i le mea na tupu, na fai lava le Faamasinoga ma na le talia le nofo a loane. E lei talia foi le nofo a Fiti, a ua fai le fa'aiuga a le Faamasinoga lena, e pei ona iai le LC.853 aso 14 Tesema 1939.
- E talitonu le Faamasinoga lenei, o le ala lea o le fa'amatai o Tanumafili II ae le o se isi auala e pei o molimau na tuuina mai.

(IV) NI ISI MEA TAUA NA LAGA I NEI TAUALUMAGA:

(a) TOFIA – FILIFILIA

- O Mavaega o anamua, o lo o atagia ai tofiga na faia e alii-sa'o, i se ua ia finagalo la te soso'o pe a mavae lana Nofoaiga.
- E tele Mavaega ma tofiga e afua i le tu'ualalo a le Tina po o le faletua, ina ia so'oso'o le gafa o lana fanau moni – Po'o ia foi e ala i sana tamafai.
- A le o lea foi e unaia e tulafale Mavaega ma Tofiga, ina ia fa'amalieina o latou faiva faa-faleupolu.
- O le filifilia o se tasi e fa'ae'e iai suafa taua o aiga, o le matafaioi lava lea a sul i lena suafa.
- E talitonu tagata Samoa, a autasi le filifiliga i se tasi, o ia lena e manuia ma fa'atamaoagaina lana Nofoaiga.
- A faamalosi ona fai se nofo, o le fa'aailoga lea o le manatu fa'atauva'a ma le va'ai Maulalo i isi usoatagata.



FAAMASINOGA O FANUA MA SUAFA SAMOA

(V) LOGO – LE LOGOINA:

- E lua auala na logo pe fofogaina ai mea ua tutupu, po o le a tutupu i nu'u ma aiga anamua:-
 - i. MANU: E alaga le avefeau i le ala se'i paia le tuaoi ma le isi nu'u. E fa'aauau e le avefeau o le nu'u tuaoi le SAVALI seia oo i le isi foi nu'u tuaoi, ona fa'aauau ai lava lea o le logo.
 - E foi avefeau i o latou aiga ma nu'u moni, ae alu pea le logo, e pei o le upu – "E tu manu ae le tu logologo."
 - ii. LOGO PUIALII. O le logo lenei e le manaomia le fa'alaua'itele e pei o aga o le manu. E tu'umumusu le feau i tagata ua mana'omia, e aunoa ma le fa'ailoa atu i isi e le tatau ai.
 - O aso nei ua fa'aaoga le Leitio ma le Televisi po o nusipepa e logo ai i tagata, fa'asilasilaga fa'alaua'itele.
 - Ua fa'aaoga le telefoni ma le tele o auala faatekonolosi, e logo tu'umumusu ai feau i le va o tagata.
- E le lelei pe a logo se tasi, e tau ina ta'u i ai se faamoemoe ua uma ona fuafua.
- E le lelei foi le logo o se isi ina ia oo mai i le aso ma le taimi ua fuafua, e fa'ataunu'u ai se faamoemoe o lona aiga.
- O le logo e aupito taua e tusa ma le va nonofo o tagata Samoa, e mana'omia lona auai mai, ona o le a talanoa ma fuafua le faamoemoe o lona aiga.
- E taua le iai o le leo o le tagata i tonufai o lona aiga.

IV. TULAFONO O LE FONOA NUU – (Village Act 1990)

- O le Vaega 5 o le Tulafono o le Fono a nuu o lo o faapea mai:-
"PULE O LE FONOA LE NUU – E fa'asino i le Tumama ma le atiinaae o le Tamaoaiga.
- O le faafuaiupu 2 o lo o faapea mai –
 - (a) O le PULE e faia ai tulafono mo le tausia o le tumama i totonu o le nuu.
 - (e) Le PULE e faia ai tulafono e faatonutonuina ai le atiinae, ma le fa'aaogaina o fanua i nu'u mo le fa'aleleia o le tamaoaiga i nu'u.
 - (i) Le PULE e faatonuina ai soo se tagata ia faia so o se galuega ua mana'omia, ina ia faia e tusa ai ma PULE ua fa'amatu'uina atu, po ua tausisia e palakalafa (a) ma le (e) o lenei fuaiupu."
Ua malamalama le aganu'u, ua manino mai foi i le Tulafono o Fono a Nu'u 1990, mataupu e tatau ona lotea i fono a nuu.
- E le tatau ona fesopoa'i le Pule ua tuuina atu e le Tulafono i Alii ma Faipule o so o se nu'u, ma le PULE fa'aleaganuu o lo o umia i aao o suli o aiga, e fa'afae ai a latou faigafilifiliga.



FAAMASINOGA O FANUA MA SUAFA SAMOA

- A tausisi i le Tulafono, e le maua se solitulafono.

(VII) AIGA O LE MALIETOA:

- Mai anamua sei paia le 1939, sa taulagia lava le valu (8) o aiga o le Malietoa. O le taulotoaiga o le '80' sei oo mai i le taimi nei 2008, ua agiga le numera 9 ma le 10 o Aiga o Malietoa.
- Ua manatu le Faamasinoga, o le a leai sana upu i lea vaega, ona e lei aumaia fa'amataupu e su'esu'eina.
- Pau lava le itu ua afea ai lea vaega, ona e tau aliali mai i manatu fa'aalia, le aia fa'anuu po o aiga na usuia e le Malietoa, i le filifilia o se nofo i le suafa Malietoa.

(VIII) PAPA O LE NATOAITELE MA LE VAEOTAMASOALII:

- E malosi fete'ena'iga ma talitonuga i nei mea paia tau tupu. E manatu Fata ma Maulolo o laua e e'eina papa nei e lua. Ae aliali mai foi ma Safata latou i tua o le Vaeotamasoalii.
- O le mau a le Toafitu ma Auimatagi ua na o i latou e aiaina ia mea. Ua fa'aalia e Sapapali'i o i latou e ona ia papa, ma ua na o Seiuli ma Tuilaepa, o alo o Malietoa e e'eina papa.
- O le fa'aaliga a le tagata e igoa ia Sauni i le Faamasinoga o le 1939, ua na o ia e pule i papa – o ana lava mea paia sa teu.
- Ua manatu le Faamasinoga e taofa ai ia fa'apea ia mea. O ai lava e fa'atinoia ia mea mamalu; Ae a faia i le feavata'i ma le va fealoaloa'i, o laei ia mo se nofo, a o ni 'ula ia mo Samoa o loo maimoa.

(IX) FA'AIUGA LC.853 14 TESEMA 1939:

- O le fa'aiuga lenei o lo o fa'amauiina i le pepa a le Faamasinoga o Fanua ma Suafa Samoa – N.D-4. E fa'apea le fa'aupuga o le fa'aiuga:-
 1. O le itu a Malietoa Talavou ma le itu a Malietoa Gatuitasina ma le itu a Malietoa Moli, o suli uma i latou o e sa au i nofo i le Malietoa.
 2. O se nofo o le a soso'o ma Malietoa Tanumafili, o le a malolo suli o Malietoa Talavou, malolo suli o Malietoa Gatuitasina a ua lafo se nofo i se alo o Malietoa Tanumafili.
 3. A mavae le nofo o se alo o Malietoa Tanumafili, o le a toe filifilia mai se nofo mai nei ituaiga e tolu.
- E manino lava i le fa'aiuga – Na Malietoa Talavou ma Gatuitasina e pei foi o Moli ia.
- O le upu "toe filifilia" o lo o fa'aaoga i le vaega 3 o le fa'aiuga, o se veape faifaiepa. Ua fa'asino mai foi e le vaega 3 o le fa'aiuga suli latou te faia le filifilia o se Malietoa nei ma ieluā.



FAAMASINOGA O FANUA MA SUAFA SAMOA

(X) TAMA O LE PO – TAMAFAI – ULU O LE VAI:

Ua manatu le Faamasinoga o le a maua se tali i nei mea – taua e 3 mai Tala o Samoa Anamua.

- O La'auli o le Tama o le po, e pei lava o lona igoa – LAA I LE POGISA. Na suafa Laauli i le Malietoa e ui ina o ia o le tama o le po.
- O Tupua Fuiavaillili na tupu tafaifa e ui ina o ia o le tamafai, a o lo o soifua foi le atalii moni o Muagututia.
- O le tamaitai o Salāmasina, o le uii ia o le fanau a Tuiaana Tamaalelagi i ana usuga e 10. Na Tupu Tafaifa Salamasina, e ui ina o ia o le Tamafai (a Levalasi) ae le o ia foi o se uluolevai.

7. FA'AIUGA MA POLOAIGA A LE FAAMASINOGA:

O lenei fa'aiuga, o le autasiga lea o finagalo o Alii o le Faamasinoga, e fua i mau na tuuina mai ma le manaoga o le Tulafono i lona vaega 79 (g) ma e fa'apea lona faitauina:-

FA'AIUGA AUTU:

1. E tusa ma le vaega 1 o le fa'aiuga LC.853 aso 14 Tesema 1939, ua faamaonia ai e lenei Fa'amasinoga.
 - O sulī o Malietoa Talavou na auai i lenei Faamasinoga e fa'asino lea i le Itu Tagi 1, 9, 10, 12, 14, 15 ma le Itu Tete'e 13.
 - O sulī o Malietoa Natuitasina na auai i lenei Faamasinoga – O le itu Tagi 16, 21, 22 ma Itu Tete'e 1 ma le 5.
 - O sulī o Malietoa Moli na auai i nei taualumaga – O le Itu Tagi 2, 5, 6 ma Itu Tete'e 3, 6, 10 ma le 16.
2. Ua faamaonia e le Faamasinoga lenei, ua maea fa'atino le Vaega 2 o le fa'aiuga LC.853 aso 14 Tesema 1939, lea na suafa ai Malietoa Tanumafili II.
3. Ua talitonu lenei Faamasinoga, e lei fa'amalieina le Vaega 3 o le fa'aiuga LC.853 o le 1939. Ma o le nofo a Faamausili Papalii Moli na faia i le suafa Malietoa, ua soloia i le pule a le Faamasinoga.
4. O le totogi o le Faamasinoga e \$1,530.00 ia toesea tai \$30.00 mai tupe na fa'aulu ai itu e 51 na su'esu'eina e le Faamasinoga.

Faailoga o le Faamasinoga
O Fanua ma Suafa Samoa

O lenei fa'aiuga e matua tumau ma le mausali e faamamalu i ai le Malo afai e solia e se tasi ona molia lea i le Tulafono mo le Faasalaga

18 Iuni, 2008
MULINUU

Tusani F Reti Simanu
SUI PERESETENE

Su'a M Suapi Palasi III
FA'ATONU

FA'ATONU

Sala Sanele Setiu
FA'AMASINO SINIA

Luamanuvae P. Asera
FA'AMASINO

Sevealii Panapa Ve'e
FA'AMASINO

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PATA MEAFODU
ASSISTANT REGISTRAR

20/6/08
MULINUU

APPENDIX D

Full list of Extra Categories used
for
the analysis of 460 decisions from 1903 – 2007.

DIVISION 1	DIVISION 2	DIVISION 3	DIVISION 4
Pre 1981	Pre 1981 – S	Pre 1981 – S - L	Pre 1981 – S – L - EC
Post 1981	Pre 1981 – U	Pre 1981 – U - L	Pre 1981 – U – L - EC
	Pre- 1981 – M	Pre- 1981 – M - L	Pre- 1981 – M – L - EC
	Pre-1981 - A	Pre-1981 – A - L	Pre-1981 – A – L - EC
	Post 1981 – S	Post 1981 – S - T	Post 1981 – S – T - EC
	Post 1981 – U	Post 1981 – U - T	Post 1981 – U – T - EC
	Post 1981 – M	Post 1981 – M - T	Post 1981 – M – T - EC
	Post 1981 - A	Post 1981 – A - T	Post 1981 – A – T - EC

Extra Categories

Land

1L. Pule

1L.1: Claim to *pule*

1L.1.1: Claim to *pulefaamalumalu*

1L.1.2: Name of land

1L.2: *Pule* with *matai* (title)

1L.2.1: *Pule* with *suli*

1L.2.2: *Pule* with *nuu*

1L.2.3: *Pule* divided by the Commission/Court

1L.2.4: Acquire *pule* and ‘name’ land you develop/clear

1L.3: *Pulefaamalumalu* - protective *pule*/overarching/underlying confirmed/not

2L – Disposition

2L.1: *Pulefaamau*

2L.2: Leases

2L.2.1: Lease not to proceed

2L.2.2: Lease to proceed

2L.3: Sale of Land

2L.4: Gift

2L.5: Removal from land – banishment/expulsion/vacate

3L – Boundaries

3L.1: Boundaries within *aiga* land

3L.1.1: Boundaries with another *aiga*’s land

3L.1.2: Boundaries between *nuu* (including original boundaries)

3L.1.3: Boundaries between *itumalo*

3L.2: Boundaries confirmed

3L.2.1: Boundaries set

3L.2.2: Land divided/designated/allocated by authority of the Commission

4L – Use

4L.1: Objection to use of land

4L.1.1: Particular use to cease

4L.1.1.1: Use should not breach statute

4L.1.2: Use of land to continue/ with conditions

4L.1.2.1: Proposed use to proceed/with conditions

4L.1.2.2: Use of land to continue until death/then reverts to *pule*

4L.1.2.3: End of use then land reverts to *pule*

4L.2: *Tautua*

4L.2.1: *Tautua* to be rendered for use of land

4L.2.1.1: *Tautua* hasn't been rendered

4L.2.1.2: *Tautua* should be rendered

4L.3: Houses

4L.3.1: Objection to height of house

4L.3.2: Losing party to remove house from land

4L.3.2.1: House remains until totally dilapidated then land reverts to holder of *pule*

4L.3.3: Objection to building of house withdrawn

4L.4: Churches

4L.4.1: Church on land/Church use of land

4L.4.1.1: Building churches that *nuu* object to on land of a *matai* of the *nuu*

4L.5: Shops

4L.5.1: Shop on land

4L.5.2: Notice published about shop to be on land

4L.5.2.1: Notice about shop confirmed/not

4L.6: Schools

4L.6.1: School on land

4L.7: Agriculture

4L.7.1: Remove crops from land

4L.7.2: Use crops but do not damage land

4L.7.3: Can not harvest crops/cease to use crops on land

4L.8: Fences

4L.9: Proper location of Residence of Titles (*maota/laoa*)

Titles

1T - *Pule*

1T.1: *Pule faavae* of title

1T.1.1: Claim to *pule*

1T.1.2: Claim to *pulefaamalumu*

1T.1.3: Correct title (name)

1T.2: *Pule* with *matai*

1T.2.1: *Pule* of one title is another title

1T.2.2: *Pule* with *suli*

1T.2.3: *Pule* with *aiga potopoto*

1T.2.4: *Pule* divided by Commission/Court

2T – *Succession*

2T.1: *Title becoming vacant*

2T.1.1: Death

2T.1.2: Voluntary relinquishment – *faui le ula*

- 2T.1.3: Removal of title from titleholder
- 2T.1.4: Titleholder doesn't live in *nuu* therefore Court/Commission allows for the appointment of a replacement
 - 2T.1.4.1: Titleholder must reside permanently in the *nuu* - remedy also?
- 2T.1.5: Struck off Matai Register
- 2T.2: *Eligibility*
 - 2T.2.1: Determining Branches (*itupaepae*) of Title
 - 2T.2.2: Determining Sub-branches (*fuaifale*) of Title
 - 2T.2.3: Determining *suli faavae* (founding heirs) or *suli* of Title or descendants of a particular heir
 - 2T.2.3.1: Claim to be heirs (*suli*)
 - 2T.2.3.2: *Suli tamafai* – 'adopted' heirs
 - 2T.2.4: Determining *aiga potopoto*
- 2T.3: *Process of selection of a Titleholder*
 - 2T.3.1: Confirmation of bestowal(s) of Title(s)
 - 2T.3.1.1: Objection to bestowal
 - 2T.3.1.2: Withdrawal of objection to bestowal
 - 2T.3.1.3: Bestowal made void
 - 2T.3.2: Appointment made by Court/Commission
 - 2T.3.2.1: Choosing from candidates put forward as to who will hold title
 - 2T.3.2.2: Objection to Court/Commission's appointment
 - 2T.3.2.3: Court/Commission of opinion that there should be only 1 titleholder/appointment
 - 2T.3.3: Who is entitled to deliberate for a successor
 - 2T.3.3.1: Who is entitled to select
 - 2T.3.3.1.1: Once selected, then for another title to approve selection
 - 2T.3.4: Proposed bestowal
 - 2T.3.4.1: Intention to appoint
 - 2T.3.4.1.1: Bestowal not to be made (injunction?) – remedy?
 - 2T.3.5: Bestowal wrongly made
 - 2T.3.5.1: Bestowal not pursuant to *pule*
 - 2T.3.6: Division of title/splitting i.e. where once there was only 1 titleholder now more than 1 of the same title
 - 2T.3.6.1: Proliferation
 - 2T.3.7: No consensus for bestowal
 - 2T.3.7.1: Consensus reached
 - 2T.3.7.1.1: Consensus couldn't be reached
 - 2T.3.7.1.2: Consent of those required to consent not obtained
 - 2T.3.8: Requirements of custom for a bestowal ceremony

Other

2O - Remedies

- 2O.1: Petition dismissed/rejected/struck out/declined/disallowed claim
 - 2O.1.1: Petition partly dismissed
 - 2O.1.2: Petition allowed/granted
- 2O.2: *Pulefaamau* confirmed/not
 - 2O.2.1: *Pulefaamalumu* confirmed/not
- 2O.3: Both parties hold *pule* of land/title
- 2O.4: Order to stop interfering with land/title

- 20.5: Notice of an Agreement confirmed/not
- 20.6: Order to return to consult/deliberate/talk it over
- 20.7: *Tautua* to be rendered
- 20.8: Losing party to remove house from land
- 20.8.1: Remove fences
- 20.9: Remove crops from land
- 20.9.1: Use crops on land but do not damage land
- 20.10: Order of where *maota/laoa* should be (residences)
- 20.11: Order to cease a wrongful use of land
- 20.11.1: Conditions for continued use of land
- 20.12: Land divided by authority of Commission/Court
- 20.12.1: Boundaries set by Court/Commission
- 20.13: Order to leave land by authority of Commission
- 20.13.1: Order to vacate land encroaching upon
- 20.14: Lease not to proceed
- 20.14.1: Lease to proceed
- 20.15: Confirmation of bestowal(s) of Title(s)
- 20.15.1: Confirmation of removal of title
- 20.15.2: Bestowal made void
- 20.15.2.1: Bestowal not to be made (injunction?)
- 20.15.3: Intention to appoint confirmed/not
- 20.15.3.1: Notice of bestowal confirmed/not
- 20.15.4: Selection of title at a later date ordered by Commission/Court
- 20.15.5: Order to allow a replacement appointment to be made
- 20.15.6: Titleholder required to permanently reside in the *nuu*
- 20.15.7: Court/Commission orders only 1 titleholder/appointment
- 20.15.8: Appointment of title made by Court/Commission
- 20.15.9: Strike off Matai Register
- 20.15.9.1: Order to alter sponsor of appointment noted on '*Pepa Saofai*'

30 – Incidents of Title

- 30.1: *Tuiga (Taupou)* – ceremonial headdress
- 30.2: *Faavae o le nuu* – Constitution of a *nuu*
- 30.3: Objection of one *matai* of the *nuu* against another one's participation in the *nuu*
- 30.4: Honourifics of a *nuu*

40 - Procedure

- 40.1: Settlement /Agreements – *Maliega*
- 40.1.1: Prior *Maliega* enforced
- 40.1.2: Prior *Maliega* made void
- 40.2: *Faaleleiga* – Reconciliation
- 40.2.1: Prior *Faaleleiga* enforced
- 40.3: Prior decision upheld
- 40.3.1: Prior decision fully over-turned/overruled
- 40.3.1.1: Prior decision partly over-turned/overruled
- 40.3.1.2: Prior decision clarified/defined
- 40.3.1.3: Prior decision already in existence and if breached then matter should go to highest court for 'native' affairs.
- 40.3.1.4: Prior order of President upheld
- 40.4: Withdrawal of petition

- 40.4.1: Petition partly withdrawn (amended?)
- 40.4.2: Matter adjourned
- 40.4.3: *seumalo* of *nuu* has resulted in parties agreeing to return to the *nuu* to seek possible settlement of matter customarily (out of Commission/Court)
- 40.4.4: Allow to return to seek order to remove person or building from land without going through another hearing
- 40.5: Application for rehearing/leave to appeal
- 40.5.1: Leave/Rehearing granted/not
- 40.5.2: Previous decision vacated
- 40.6: Jurisdiction
- 40.6.1: Court Grant
- 40.6.2: Land belongs to a German Company – DHPG

50 – Evidence

- 50.1: *Documentary*
- 50.1.1: Genealogies
- 50.1.2: Relevance of *Mavaega* 'Last wishes/ will'
- 50.1.3: Secondary sources
- 50.1.4: Survey/ Map/ Legal Description – evidence?
- 50.2: *Oral History*
- 50.2.1: Second hand accounts of those who have passed away
- 50.2.2: Second hand accounts of those who are still alive
- 50.3: *Secret*
- 50.3.1: Report prepared by Office of the Registrar
- 50.4: Witnesses
- 50.5: Insufficient evidence to rule/consider petition/no good reason(s) shown
- 50.5.1: Failure to establish *pule*/case/application

APPENDIX E

Table of breakdown of Land and Titles Court decisions per year.

2007	1						
2006	2	1980		1954	3	1928	
2005	1	1979		1953	1	1927	
2004	6	1978		1952		1926	
2003	2	1977		1951	1	1925	
2002	5	1976		1950	3	1924	
2001	2	1975		1949	3	1923	
2000	20	1974		1948	2	1922	1
1999	24	1973		1947		1921	1
1998	15	1972	35	1946	2	1920	8
1997	6	1971	2	1945	21	1919	1
1996	3	1970	1	1944		1918	10
1995	7	1969	1	1943	11	1917	
1994	14	1968		1942		1916	
1993	1	1967		1941	1	1915	2
1992	5	1966	1	1940		1914	18
1991	7	1965		1939	14	1913	
1990	2	1964	2	1938	3	1912	
1989	5	1963	1	1937	3	1911	
1988	4	1962	9	1936	1	1910	
1987	7	1961	2	1935		1909	
1986	4	1960	58	1934		1908	
1985	6	1959	1	1933		1907	
1984	1	1958	2	1932	1	1906	
1983	4	1957	2	1931		1905	1
1982	22	1956	1	1930	1	1904	2
1981	2	1955	41	1929	1	1903	6
	178		168		70		48