

**WILLIAM IOSEFA ANTONIO MORRISON**

**FA'AMATAI AND THE LAND AND TITLES COURT:  
IDENTIFYING SITES OF CUSTOMARY AUTHORITY IN  
CONTEMPORARY SAMOA**

Submitted for the LLB(Hons) Degree

Te Kauhanganui Tātai Ture - Faculty of Law  
Te Herenga Waka - Victoria University of Wellington

2022

***Abstract***

The 2020 Land and Titles Court (LTC) reforms in Samoa were a catalyst for the constitutional crisis which sent shockwaves through the Pacific. This paper analyses what the debate surrounding these reforms, as well as the reforms themselves, reveal about *fa'amatai* (Samoa's indigenous political system). Due to the reforms, LTC decisions can no longer be appealed to the Supreme Court, removing the ability for customary decisions to be balanced against Constitutional individual rights. The debate around these reforms often hinged on whether Constitutional rights impede the exercise of customary authority. This paper identifies the different hierarchical structures of customary authority in Samoa and articulates how they have evolved to accommodate the LTC and Constitutional rights. It argues that as *fa'amatai* has evolved to survive colonisation, the LTC itself and to some degree individual Constitutional rights have come to form a core part of the *fa'amatai* today.

***Key words:*** 'Samoa', 'Fa'amatai', 'Land and Titles Court', 'Customary law', 'Individual rights'

---

\* Taga Savai'i and Tafitoala Safata, Samoa. Thank you to Professor Richard Boast KC for his thoughtful and supportive supervision, it has been a privilege to work with him in bringing this paper to life. I am also very grateful to Emeritus Professor Tony Angelo KC for his kindness and generosity in offering me feedback and advice. Thank you to Caleb Turnbull, Sean Chan, and Atanas Tomovski for the time, support and patience they have given to both myself and to this paper. And thank you to Rebecca Matijevec, Jaidin Parsot, Israel Elkington, and to my family for always being in my corner.

*Contents (References – table of contents)*

<i>Glossary</i> .....	3
<i>I Introduction</i> .....	5
<i>II Customary Hierarchical Structures</i> .....	8
<b>A Fa’amatai and Fa’asamoa</b> .....	8
<b>B Form and Practice</b> .....	10
1. <i>Matai Titles</i> .....	11
2. <i>Village Fono</i> .....	12
<i>III Evolution of The Land and Titles Court</i> .....	14
<b>A Conception and Development</b> .....	14
<b>B Through Samoan Independence</b> .....	16
<b>C LTC Interactions with the General Courts and the Constitution</b> .....	17
<i>IV Land and Titles Court Reforms</i> .....	21
<b>A Political background</b> .....	21
<b>B Controversy</b> .....	22
<b>C Arguments for reform</b> .....	24
<b>D Arguments against reform</b> .....	25
<i>V Fa’amatai in Contemporary Samoa</i> .....	26
<b>A The Land and Titles Court as Fa’amatai</b> .....	27
<b>B Traditionalism in the Face of Evolution</b> .....	28
<b>C Modernism Moving Forwards</b> .....	29
<b>D Customary Authority and Governance Today</b> .....	32
<i>VI Conclusion</i> .....	33
<i>Bibliography</i> .....	36

## Glossary

<i>Aiga</i>	Family
<i>Aiga potopoto</i>	Extended family
<i>Alofa</i>	Love/Compassion
<i>'Autasi</i>	Consensus
<i>Fa'aloalo</i>	Respect
<i>Fa'amatai</i>	Indigenous Samoan political system
<i>Fa'asamoa</i>	Samoan way of life
<i>Fono</i>	Meeting
<i>Fono a matai</i>	Council of chiefs
<i>Mamalu</i>	Dignity
<i>Matai</i>	Chief
<i>Nu'u</i>	Village
<i>O measina a aiga</i>	Family lands, genealogy and titles
<i>Palagi</i>	European
<i>Pule</i>	Authority
<i>Sa'o</i>	Paramount chief title
<i>Suli</i>	Heirs to the chief title
<i>Tautua</i>	Service

## *I Introduction*

*Fa'amatai* can be understood as the indigenous political system of Samoa which governs customary hierarchies between indigenous chiefs, their families, and their village.<sup>1</sup> *Fa'amatai* is an integral part of *fa'asamoa*, the Samoan way of life. *Fa'asamoa* is derived from a set of customary values that have been nurtured and developed in the islands since indigenous Samoans arrived some 3500 years ago.<sup>2</sup> These values are used to inform indigenous political practice in Samoa. But, more than this, these values not only dictate the ways in which Samoan people carry out our lives, it pertains to the core identity of Samoan people.<sup>3</sup>

Traditionally, *matai* (chief) title succession and land tenure issues in Samoa were determined by *fa'amatai*. As well as this, decision-making and dispute resolution concerning *matai* titles and customary land were made pursuant to *fa'amatai* processes.<sup>4</sup> Prior to colonisation, *fa'amatai* was administered solely in individual *nu'u* (villages). The form and practice of the *fa'amatai* varied slightly from *nu'u* to *nu'u*. However, the entire Samoan Archipelago from Manu'a in the East, to Savaii in the West is homogenous in the basics of *fa'amatai* relevant to land tenure and titles.<sup>5</sup>

At the dawn of colonisation, the German administration created a Land and Titles Commission in the unified Samoa to adjudicate matters of customary land and *matai* titles.<sup>6</sup> This institution then continued as New Zealand took the role of colonial administrator in Samoa. The Commission then survived Samoan independence in the form of the Land and Titles Court (LTC). The LTC has the role of adjudicating customary land and *matai* title disputes. This role

---

<sup>1</sup> Aiono Fana'afi "Western Samoa: The Sacred Covenant" in Cema Bolabola (ed) *Land Rights of Pacific Women* (Institute of Pacific Studies of the University of the South Pacific, Suva, 1986) 103 at 103.

<sup>2</sup> Julia Ioane and Keith Tudoe "The Fa'asamoa, Person-Centered Theory and Cross-Cultural Practice" (2017) 16 *Person-Centered & Experiential Psychotherapies* 287 at 292.

<sup>3</sup> Fa'asaulala Tagoilelagi "The role of the Samoan culture (fa'asamoa) in the development of its childrens' literacy skills" (MA Education, University of Auckland, 1995) at 4; Lona Laneselota Siauane "Fa'aSamoa: a look at the evolution of the fa'aSamoa in Christchurch" (MA Pacific Studies, University of Canterbury, 2004) at 9.

<sup>4</sup> Melanie Anae and others "Transnational Sāmoan Chiefs: Views of the Fa'amatai (Chiefly System)" (2017) 7 *J Sāmoan Studies* 38 at 38-39.

<sup>5</sup> Tim O'Meara "Samoa: Customary individualism" in Ron Crocombe (ed) *Land Tenure in the Pacific* (3<sup>rd</sup> ed, University of the South Pacific, Suva, 1987) 74 at 76.

<sup>6</sup> Fanaafi Aiono Le Tagalao "The Land and Titles Court of Samoa 1903 – 2008 'Continuity amid Change'" (PhD Philosophy in Law, University of Otago, 2009) at 56.

is significant as 81 percent of Samoan land falls under the customary *matai* titles system.<sup>7</sup> The LTC operates as an indigenous institution with *matai* sitting as judges who are not necessarily legally trained.<sup>8</sup> However, the LTC has been criticised for inadequate resourcing and protracted litigation.<sup>9</sup> Issues of the efficiency and effectiveness of the LTC have been debated for decades and consequently sparked conversation on reforming the Court.

The Land and Titles Act 1981 also vested in the court an ouster clause which prevents decisions of the LTC being judicially reviewed. However, a series of constitutional cases has subjected the LTC's jurisdiction to enforcement of the Constitution's fundamental rights provisions by the Supreme Court.<sup>10</sup> From this, former Prime Minister Tuilaepa Sailele Malielegaoi, leader of the Human Rights Protection Party (HRPP) which had governed Samoa for nearly 40 years, argued that "the Samoan Constitution [is] more protective of the introduced modern principles such as individual rights, as compared to ... the way of life of the Samoan people".<sup>11</sup> As a result, the HRPP ushered in three pieces of legislative aimed at restructuring the LTC.<sup>12</sup> Under the restructure, the LTC now operates under a separate judicial hierarchical structure of equal stature to the Supreme Court and Court of Appeal, removing the mechanism for customary decisions to be balanced against fundamental human rights.<sup>13</sup>

The reforms created a spirited debate regarding the role of custom in the Samoan legal system. In support of reform, Tuilaepa and the Samoa Law Reform Commission (SLRC) argued that the reforms represented an essential incorporation and promotion of Samoan custom over

---

<sup>7</sup> Tu'u'u Iteti Taule'alo, Soialo David Fong and Patea Malo Setefano Samoan customary lands at the crossroads-options for sustainable management (paper presented to National Environment Forum, 2003) at 2; Chris Grant "Accessing land for public purposes in Samoa" in Department of Foreign Affairs and Trade Making Land Work Volume Two: Case Studies on customary land and development in the Pacific (Pririon Pty Ltd, Australia, 2008) at 265.

<sup>8</sup> Land and Titles Act 1981 (Samoa) (repealed), s 28(a).

<sup>9</sup> Jennifer Corrin "Resolving Land Disputes in Samoa" in Department of Foreign Affairs and Trade Making Land Work Volume Two: Case Studies on customary land and development in the Pacific (Pririon Pty Ltd, Australia, 2008) at 210-212.

<sup>10</sup> *Ulises Aloimaina & Ors v Land and Titles Court* WSSC 4 November 1998 [Aloimaina], cited in *Sefo v Land and Titles Court* [2000] WSSC 47 and *Penaia II v Land and Titles Court* [2012] WSCA 6.

<sup>11</sup> Constitution Amendment Bill 2020 (Samoa) (explanatory memorandum) at [1.5].

<sup>12</sup> Constitution Amendment Act 2020 (Samoa); Land and Titles Act 2020 (Samoa); Judicature Act 2020 (Samoa).

<sup>13</sup> Radio New Zealand "Samoa parliament passes much criticised constitutional reforms" (15 December 2020) Radio New Zealand <[www.rnz.co.nz](http://www.rnz.co.nz)>.

Western legal norms.<sup>14</sup> On the other hand, the Samoan judiciary and other legal practitioners have raised concerns about how the expanded power granted to the Executive could compromise the rule of law and due process in government.<sup>15</sup> Seeing as the LTC is already under-resourced, issues also arise regarding the practicability of administering two entirely new courts in the restructure.<sup>16</sup>

The debates surrounding the reforms led Fiame Naomi Mata'afa to form FAST, a competing political party, to challenge the reforms.<sup>17</sup> FAST won a narrow parliamentary majority in the 2021 election and Mata'afa became Samoa's first woman Prime Minister.<sup>18</sup> Mata'afa was sworn in outside of Samoa's parliament as her and her party were locked out of the building.<sup>19</sup> Her unusual inauguration was a consequence of caretaker Prime Minister Tuilaepa refusing to accept the election results.<sup>20</sup> This resulted in a constitutional crisis which had the effect of undermining Samoa's reputation as a pillar of political stability in the Pacific.<sup>21</sup> On 23 July 2021 the Samoan Court of Appeal ruled FAST to be the legitimate government of Samoa

---

<sup>14</sup> Mata'afa Keni Lesa "LTC bills: Masked PM slams "unfounded palagi thinking" Samoa Observer (online ed, Samoa, 28 April 2020) <[www.samoobserver.ws](http://www.samoobserver.ws)>; and Joyetter Feagaimaalii "LTC's overhaul began in 2016: Law Reform Commission" Samoa Observer (online ed, Samoa, 2 May 2020) <[www.samoobserver.ws](http://www.samoobserver.ws)>.

<sup>15</sup> Letter from Clarence Nelson (Acting Chief Justice) and others to Afioga Teleiai Dr Lalotoa Mulitalo (Executive Director of the Samoa Law Reform Commission) regarding the Land and Titles Court Reform Bills 2020 (6 April 2020).

<sup>16</sup> Craig Land "One Boat, Two Captains: Implications of the 2020 Land and Titles Court Reforms for Customary Law and Human Rights" (2021) 52 VUWLR 507 at 509. See for example Jennifer Corrin "Resolving Land Disputes in Samoa" in Department of Foreign Affairs and Trade Making Land Work Volume Two: Case Studies on customary land and development in the Pacific (Pririon Pty Ltd, Australia, 2008) at 210–212.

<sup>17</sup> Land at 510; Radio New Zealand "Extra seat thrown out, FAST wins Samoa election" (17 May 2021) RNZ <[www.rnz.co.nz](http://www.rnz.co.nz)>.

<sup>18</sup> Matai'a Lanuola Tusani "F.A.S.T. wins case, majority" (17 May 2021) Samoa Observer <[www.samoobserver.ws](http://www.samoobserver.ws)>.

<sup>19</sup> Land, above n 16, at 508; "Samoan election: Swearing in ceremony for FAST party held despite locked Parliament" The New Zealand Herald (online ed, 24 May 2021).

<sup>20</sup> Julia Hollingsworth "The incredible rise of Samoa's first female Prime Minister-elect, and the man still standing in her way" (30 May 2021) CNN <<https://edition.cnn.com>>; and BBC News "Samoa's first female PM locked out of parliament by losing opponent" (United Kingdom, 25 May 2021) BBC <[www.bbc.com](http://www.bbc.com)>.

<sup>21</sup> Iati Iati "Samoa's Price for 25 Years of Political Stability" (2013) 48(4) J Pacific History 443 at 444; and A.H. Angelo "'Steady as she goes': the Constitution and the Court of Appeal of Samoa" (2012) 18 NZ Assoc Comparative Law YrBk 145 at 164-165.

following numerous court challenges.<sup>22</sup> However, Mata'afa and FAST's majority is likely insufficient to be able to repeal the reforms as constitutional amendments require a two-thirds parliamentary majority.<sup>23</sup>

The implications of the reforms have been discussed in detail by the likes of Fiona Ey and Craig Land.<sup>24</sup> I instead look at why the LTC reforms triggered such a large reaction and its resulting discourse. This paper has a specific focus on what the reactions to these reforms reveal about *fa'amatai* and customary hierarchies in Samoa today. First, I identify the ways in which *fa'amatai* and *fa'asamoa* operated prior to colonisation as these hierarchies still exist today and contextualise the importance of the LTC. Secondly, I track the origins and development of the LTC with the intention of illuminating the key functions of the court and therefore the importance of the court to life in Samoa. Thirdly, I identify the political background to the LTC reforms and set out the distinct arguments made for and against reform. Finally, I analyse how the arguments raised in debates regarding the reform and the election, help inform a modern perspective of *fa'asamoa* and *fa'amatai* in a continually developing Samoa. This paper seeks to fundamentally understand the positions of both opponents and supporters to the reforms in order to untangle the different perspectives of what *fa'amatai* today looks like in light of contemporary understanding of fundamental human rights.

## II Customary Hierarchical Structures

### A *Fa'amatai and Fa'asamoa*

*Fa'asamoa* is most commonly translated into English as “the Samoan way of life”.<sup>25</sup> It is the umbrella which all Samoan custom falls under and derives from. Prior to colonisation, *fa'asamoa* guided the lives of indigenous Samoans economically, politically, socially, and culturally. It prescribes traditions, cultural norms and informs Samoan people's relationships

---

<sup>22</sup> Mataia Lanuola Tusani "Court declares F.A.S.T. Government; impasse over" Samoa Observer (online ed, 23 July 2021) <[www.samoobserver.ws](http://www.samoobserver.ws)>; further Soli Wilson "FAST seeks court clarity to resolve impasse" Samoa Observer (online ed, 20 June 2021) <[www.samoobserver.ws](http://www.samoobserver.ws)>.

<sup>23</sup> Samoan Constitution, art 109.

<sup>24</sup> See generally Fiona Ey "Samoa's constitutional crisis: Undermining the rule of law" in Georgeou and Hawksley *State Responses to COVID-19: a global snapshot June 2020* (Report, Western Sydney University, 1 June 2020); and Land, above n 16.

<sup>25</sup> Samoa Law Reform Commission *Pule a le Matai Sa'o* (Final Report 17/18, February 2017).



to one another, and to persons holding *pule* (authority).<sup>26</sup> *Fa'asamoa* is not only a customary body of law, but also the identity of Samoan people and guides how we carry ourselves through the world.<sup>27</sup>

*Fa'asamoa* has existed and has been cultivated by indigenous Samoans for some 3500 years. There is no golden book and there never will be any golden rules that articulate its operation. For the purposes of this paper, *fa'asamoa* can be articulated as a network of values which interact, and which have generated customary practices and usages. These values include: *'autasi* (consensus), *alofa* (love/compassion), *fa'aloalo* (respect) and *mamalu* (dignity).<sup>28</sup> As *fa'asamoa* pertains to the identity of Samoan people and is the basis upon which all customary practice exists, it is treasured by its constituents. Because it is treasured so highly, the traditions which are derived from customary practice are often executed in the same way today as they were hundreds of years ago.<sup>29</sup>

*Fa'amatai* can be understood as the indigenous political system of Samoa and is at the very heart of *fa'asamoa*.<sup>30</sup> The term is derived from the prefix *fa'a* meaning “in the way of”, and *matai* meaning “the titled head of a Samoan extended family” or “chief”.<sup>31</sup> *Fa'amatai* is the customary system which regulates authority and articulates customary governance in Samoa.<sup>32</sup> This section will map traditional *fa'amatai* structures with the intention of illuminating how systems of indigenous law operated in Samoa prior to colonisation, and the forms in which they still exist today.

---

<sup>26</sup> Saleimoa Vaai *Samoa Fa'amatai and the Rule of Law* (National University of Samoa, 1999) at 29-30; George Bertram Milner *Samoa Dictionary* (Pasifika Press, Auckland, 1993) at 191.

<sup>27</sup> Keith Tudor and Julia Ioane “The Fa'asamoa, Person-Centered Theory and Cross-Cultural Practice” (2017) 16 *Pers Centered Exp Psychother* 287 at 292; citing Siauane, above n 3, at 9.

<sup>28</sup> Elise Huffer and Asofou So'o "Beyond Governance in Samoa: Understanding Samoan Political Thought" (2005) 17(2) *The Contemporary Pacific* 311 at 326-327.

<sup>29</sup> *Cultural Practices and Protocols* (Ministry for Pacific Peoples, Information Publication). See generally Aleni Sofara “Traditional Knowledge in Samoa: At Risk of Being Lost” (World Trade Organisation and World Intellectual Property Organisation, Colloquium Papers, 2017) 91.

<sup>30</sup> Samoa Law Reform Commission *Pule a le Matai Sa'o* (Final Report 17/18, February 2017).

<sup>31</sup> Milner, above n 26, at 43 and 137.

<sup>32</sup> Susana Taua'a “The Samoan Fa'amatai System: Social Protection and Governance Issues” (2014) 34 *J Pac Studies* 59 at 59.

## B *Form and Practice*

*Fa'asamoa* is a living and breathing entity which has evolved and adapted to survive the colonial power of multiple administrations.<sup>33</sup> *Fa'asamoa* has historically undergone large and fundamental changes. When Christianity was introduced to Samoa, almost every fundamental practice of *fa'asamoa* was adapted to incorporate prayer and worship to God.<sup>34</sup> Christianity was brought to Samoa in 1830 by John Williams, the missionary pioneer of the Pacific.<sup>35</sup> Prior to missionary ventures, Samoan people had spiritual connections, but this certainly did not manifest itself in Christianity.<sup>36</sup> As Christianity gained momentum and swept across Samoa, the *fa'asamoa* experienced an irreversible shift. Christianity today is a fundamental tenet of *fa'asamoa* and the Samoan connection to God and to their church is one of the most important connections.<sup>37</sup> This shift demonstrates the malleability of *fa'asamoa* which has traditionally occurred when large changes to the nation have occurred.

The maxim *o Samoa ua taoto ao se ia mai moana, aua ole ia Samoa ua uma ona aisa* (Samoa is like an ocean fish divided into sections) is the core principle of Samoan indigenous law which articulates that Samoa is divided hierarchically within families, villages and the larger community.<sup>38</sup> The different hierarchical structures within traditional Samoan society, can be discerned between the micro with the *aiga* (family) and the macro with the *fono a matai* (council of chiefs)

---

<sup>33</sup> Malama Meleisea *The Making of Modern Samoa: Traditional Authority and Colonial Administration in the Modern History of Western Samoa* (Institute of Pacific Studies, 1987) at 16-17.

<sup>34</sup> Ronald James Crawford "The Lotu and the Fa'asāmoa: Church and Society in Samoa, 1830 – 1880" (Doctor of Philosophy Thesis, University of Otago, 1977) at 2.

<sup>35</sup> LF Palenapa "A Study of the Place of Samoan Culture (Fa'asamoa) in Two New Zealand Churches" (MA Thesis, University of Canterbury, 1993) at 1.

<sup>36</sup> Meleisea at 17. Citing Derek Freeman *Margaret Mead and Samoa: The Making and Unmaking of an Anthropological Myth* (Harvard University Press, Cambridge, 1983) at 186-187.

<sup>37</sup> Epli Hau'ofa "Our Sea of Islands" in, *We Are The Ocean: Selected Works* (University of Hawai'i Press, Honolulu, 2008) 27 at 28.

<sup>38</sup> Vaai, above n 26, at 29; Meleisea at 6; Samoa Law Reform Commission, above n 30, at 9.

### 1. *Matai Titles*

As *fa'amatai* encapsulates the social organisation of *matai* titles and the heirs of the *matai* titles, it is salient to first understand what *matai* are.<sup>39</sup> *Matai* are primary instruments of traditional authority in Samoa and are the paramount point of leadership in families, villages, and the nation as a whole.<sup>40</sup> A *matai* is selected by the *aiga potopoto* (extended family) to represent the family's interests within a village and within the *aiga* itself.<sup>41</sup> The *aiga potopoto* is comprised of every *suli* (heir to the *matai* title). The *matai* is committed to the achievement and maintenance of peace within their respective village and family.<sup>42</sup> *Matai* titles are the common property of a lineage consisting of all those who are connected to the said title.<sup>43</sup> They are also the custodians of the family lands, genealogy and titles (*o measina a aiga*).<sup>44</sup> The *matai* is a well-respected individual but just as the family owes them proper *tautua* (service) and obedience, they owe the family the obligation to look after it and to take care of it to the best of their ability.<sup>45</sup>

Through these definitions, it becomes clear how the responsibilities of a *matai* may be described as analogous to that of a trustee for the family.<sup>46</sup> It is a role rooted in duty and stewardship, where the *matai* act as a representative for their constituents at wider village decision making forums. So, in the first identifiable hierarchical structure, the family, the *matai* are the discernible authority.

---

<sup>39</sup> Vaai, above n 26, at 29; Aioana Fanaafi Le Tagaloa "The Samoan Culture and Government" in R Crocombe & others *Culture and Democracy in the South Pacific* (Institute of Pacific Studies of the University of the South Pacific, Suva, 1992) 117 at 117.

<sup>40</sup> Vaai, above n 26, at 29; Le Tagaloa at 120; Guy Powles "Chiefly Systems and Pacific Island Constitutions" (2002) 1 J Samoan Studies 119.

<sup>41</sup> Le Tagaloa, above n 39, at 117.

<sup>42</sup> Samoa Law Reform Commission, above n 30 at 9; Vaai, above n 26 at 30.

<sup>43</sup> Malama Meleisea "Governance, Development and Leadership in Polynesia: a microstudy from Samoa" in Elise Huffer and Asofou So'o (eds) *Governance in Samoa: Pulenga I Samoa* (Asia Pacific Press, 2000) 76 at 84.

<sup>44</sup> Ioana Tu'ugālei Chan Mow "The Fa'amatai in the Face of the Winds of Change" in Asofou So'o (ed) *Changes in the Matai System: O Suiga i le Fa'amatai* (National University of Samoa, Apia, 2007) 119 at 121.

<sup>45</sup> CC Marsack *Notes on the practice of the court and the 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 of Western Samoa, Apia, 1961) at 14.

<sup>46</sup> Vaai, above n 26, at 43; Marsack, above n 44, at 14; Guy Powles "The Status of Customary Law in Western Samoa" (LLM Thesis, Victoria University of Wellington, 1973) at 10; Le Tagaloa, above n 40, at 120.

The *aiga potopoto* may have several *matai* titles, and so the next hierarchy is that above the *matai*; the *sa'o*.<sup>47</sup> The *sa'o* possesses the overall governing authority with a multiplicity of functions analogous to legislative, executive, and judicial authority over family estate and members.<sup>48</sup> The governance of family affairs is dictated by and made at the discretion of the *sa'o* who utilises whatever policies and methods are necessary to administer the affairs of the group. The overall purpose of the *sa'o* is to promote the social and economic welfare of the group.<sup>49</sup> In addition to the *sa'o*, other *matai* are established as a part of the family organisation with one or two identified as senior *matai* and the bulk are *matai* of a lesser rank.<sup>50</sup>

## 2. Village Fono

The next identifiable hierarchy is that which occurs within the *nu'u* (village). No two *nu'u* are alike in Samoa and the political structure of each derives from its own unique history.<sup>51</sup> The *fono* is the governing council of a *nu'u* and is made up of its constituent *matai*. Prior to colonisation, the *fono* was the government of the *nu'u*.<sup>52</sup> In the *fono*, every *matai* has *mamalu* and *pule* as the head of his *aiga*, irrespective of their rank or status. However, the *fono* is ranked by the ascribed status of each of its constituent titles.<sup>53</sup> The *fono* could be likened to the local government as they are the deciders of resource management and infrastructure development. Decisions made by the *fono* are the result of rigorous debate, negotiation, and compromise, in which the paramount chief of the *nu'u* is but one voice in the achievement of '*autasi*'.<sup>54</sup>

---

<sup>47</sup> The Editorial Board "Fa'amatai system, measina, and understanding who we are" (3 February 2020) Samoa Observer <[www.samoaoobserver.ws](http://www.samoaoobserver.ws)>.

<sup>48</sup> O'Meara, above n 5, at 78.

<sup>49</sup> Vaai, above n 26, at 43.

<sup>50</sup> At 50.

<sup>51</sup> Meleisea, above n 33, at 11.

<sup>52</sup> At 16.

<sup>53</sup> Alessandro Duranti *The Samoan Fono: A Sociolinguistic Study* (Department of Linguistics of the Research School of Pacific Studies at the Australian National University, Canberra, 1981) at Chapter 4 generally.

<sup>54</sup> Meleisea, above n 33, at 16.

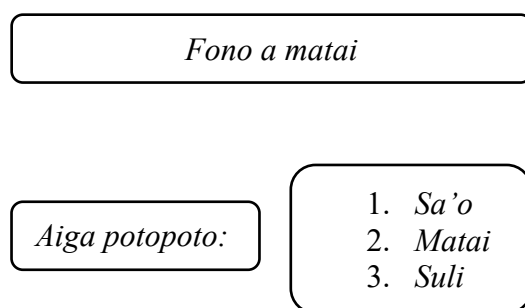
(a) *The Village Fono Act 1990*

The *fono a matai* is a forum of decision making which faced little to no disruption from colonisation. Like many customary practices, the *nu'u* structures of Samoa and the governance within unique *fono* survived both the German and New Zealand administration and has continued through Samoan independence. Today, *fono* are empowered by the Village Fono Act 1990.

The preface of the Village Fono Act 1990 states that it is “AN ACT to validate and empower the exercise of power and authority by Village Fono in accordance with the custom and usage of their villages”.<sup>55</sup> The Act also confers power on the *fono* to make rules governing the development and use of village land for economic betterment.<sup>56</sup> The *fono* is further empowered to punish individuals guilty of “village misconduct”, that is, failing to obey any of the rules made under the law-making powers granted or preserved by the Act.<sup>57</sup>

These functions of the Act demonstrate that customary village governance remains pertinent. So, despite now having a centralised legal system, customary law making, and enforcement mechanisms remain empowered. This demonstrates how the hierarchies identified both within the *aiga* and within the *fono* are important distinctions of power and authority that continue to exist today.

The diagram below illustrates a simplified form of the customary hierarchy within *nu'u* and identifies the different rankings in which every individual sat in Samoa prior to colonisation.



<sup>55</sup> Village Fono Act 1990 (Samoa), long title.

<sup>56</sup> Section 5(2)(a) and (b).

<sup>57</sup> Section 5(3).

The *fa'amatai* is a complex web of hierarchical structures in which every individual is prescribed a specific role which works towards the betterment of the whole. Authority figures such as *matai* are not exempt from hierarchy and are assigned a role of authority to the extent which that lineage has earned *pule*. This authority is derived both from custom and from the history of that *aiga*.<sup>58</sup> The purpose of articulating these structures is to identify the basis on which customary authority in Samoa is asserted. It provides important context to understanding the way in which Samoa accepts national governance as a post-colonial independent state.

### *III Evolution of The Land and Titles Court*

#### *A Conception and Development*

The LTC was originally constituted under the German administration in 1903 and operated as the Land and Titles Commission.<sup>59</sup> The Commission became the first foreign institution to give western legal recognition to *fa'amatai* processes concerning matai titles and customary land.<sup>60</sup> Even then, there were discrepancies between Samoans who did not want disputes decided by the Commission, and others who saw it as official recognition of *fa'amatai*.<sup>61</sup> Samoan custom was generally applied in the Commission, but only to an extent to which the colonial administrators thought acceptable based on their own western morality and justice.<sup>62</sup>

This system of having customary land and titles disputes determined by a tribunal of this kind was continued after the occupation by New Zealand troops in 1914.<sup>63</sup> New Zealand enacted legislation which was more explicit than the German Ordinance and Instructions in its reference

---

<sup>58</sup> Vaai, above n 26, at 43.

<sup>59</sup> Marsack, above n 44, at 3; Land and Titles Commission Ordinance 1903 (LTC Ordinance).

<sup>60</sup> LTC Ordinance, clauses 1 and 2.

<sup>61</sup> Le Tagaloa above n 7, at 56; Meleisea, above n 33, at 35-36; BC Spring "The Land and Titles Court of Western Samoa" (1979) 5 Samoan Pac LJ 41 at 43.

<sup>62</sup> Le Tagaloa at 56-57; *Instruction fuer das Verfahren der Land unter Titel Kommission* ("Instructions" for the Proceedings of the Land and Titles Commission 1903), clause 9.

<sup>63</sup> Samoa Native Land and Titles Commission Order 1920; Marsack, above n 44, at 4

to the application of custom in the Commission.<sup>64</sup> Under this legislation, “customs and usages” remained undefined.<sup>65</sup> This meant that the LTC had a large say in determining the interpretation of custom, despite having predominantly *palagi* adjudicators.<sup>66</sup>

Through the imposition of western law, Samoa still maintained a dual system during the colonial era where inherited law and the *fa'amatai* operated alongside each other.<sup>67</sup> *Fa'amatai* was recognised in the colonial systems in so far as it related to land tenure and *matai* title matters through this specialist court.<sup>68</sup> During the colonial era, there were no formal repugnancy clauses regarding the enforceability of custom.<sup>69</sup>

Although the LTC was conceived with the intention of dealing with customary matters, its scope was limited to land and titles matters. Due to the colonial origins, the initial administration of the court was also colonial in both form and procedure. However, the court considered and applied customary rules, most importantly that customary land could not be sold or alienated from the customary group.<sup>70</sup>

So, the LTC was born from this very peculiar push and pull between colonial rule and the maintenance of *fa'amatai*. Dealing with land and customary authority in this separate way was unusual for the colonial enterprise because western law was often used as a way to extract land from indigenous users to facilitate commodification.<sup>71</sup> Yet, in Samoa, colonial powers carved

---

<sup>64</sup> Le Tagaloa at 63; Samoa Act 1921 (NZ); Samoa Native Titles Protection Order 1928 (NZ); Samoan Land and Titles Protection Order 1934 (NZ).

<sup>65</sup> Samoa Act 1921, s 278.

<sup>66</sup> Le Tagaloa at 64.

<sup>67</sup> Mow, above n 43, at 132; Le Tagaloa, above n 7, at 75.

<sup>68</sup> See generally Corrin, above n 10. This is a brief account of the dual court system in Samoa which provides an illustration of how these dual systems operate in practice.

<sup>69</sup> Meleisea, above n 33, at 40-41.

<sup>70</sup> Berlin Act 1889 (Germany, Britain, USA); Constitution Order 1900 (Germany); L Holmes “Samoa: Custom versus Productivity” in R Crocombe (ed) *Land Tenure in the Pacific* (Oxford University Press) 91 at 98. The rule prohibiting alienation of land outside Apia was initially provided for in the German administration. Samoa Act 1921, s 268(1).

<sup>71</sup> Le Tagaloa, above n 7, at 10; SE Merry “Law and Colonialism” (1991) 25 L Society R 899 at 891.

out this legal enclave where customary principles continued to apply, and customary land did not become a market commodity.<sup>72</sup>

### *B Through Samoan Independence*

Samoa celebrated independence in 1962, and at that date the Constitution of the Independent State of Western Samoa came into effect as supreme law.<sup>73</sup> The Land and Titles Court became a truly separated judicial body from the general courts through independence.<sup>74</sup> The Constitution established Samoa as a parliamentary republic with a Westminster system and responsible government.<sup>75</sup> The Constitution defines ‘law of Samoa’ as “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”.<sup>76</sup>

Part XI of the Constitution provided for the continuation of the LTC.<sup>77</sup> The LTC was directed to apply custom as defined in the Constitution. The Constitution’s definition is vague which indicated highly discretionary power. Meleisea described the post-independent LTC as “[lacking] a clear definition of procedures, principles and directions or even capacity to enforce its own decisions, which considerably restricted the role it was given in defining and upholding *fa’asamoa*”.<sup>78</sup>

It was not until 1981 that Samoa passed the Land and Titles Act to govern the administration of the LTC.<sup>79</sup> *Palagi* (European) judges were phased out during the period of independence and replaced by Samoan judges over time.<sup>80</sup> Now, judges of the LTC must be *matai* but do not

---

<sup>72</sup> Merry, above n 71, at 891.

<sup>73</sup> Constitution of the Independent State of Samoa 1960, art 1 and 2 (Samoan Constitution).

<sup>74</sup> Samoan Land and Titles Protection Ordinance 1934 (NZ, Samoa), s 44.

<sup>75</sup> Richard Herr “Cultural Adaptation and the Westminster Model: Some Examples from Fiji and Samoa” (paper presented to Australasian Study of Parliament Group, Sydney, 2 October 2014) at 4.

<sup>76</sup> Samoan Constitution, above n 73, art 111.

<sup>77</sup> Article 102.

<sup>78</sup> Meleisea, above n 33, at 186.

<sup>79</sup> Land and Titles Act 1981, above n 8.

<sup>80</sup> Le Tagaloa, above n 7, at 69.



need to be legally qualified.<sup>81</sup> The use of non-legally trained judges in the LTC demonstrates how it is a separate body with an importantly separate function from the mainstream judiciary.

In adherence with the Village Fono Act and the LTA 1981, the LTC can hear appeals from the village *fono*.<sup>82</sup> Every person adversely affected by a decision of a *fono* (including a decision as to punishment) has a right of appeal to the Court against such a decision and the Court has jurisdiction to hear and determine the matter.<sup>83</sup>



So, the LTC, which sits with judges who are *matai*, can be likened to a national *fono*. The Court has, to a large extent, become an overseeing body which adjudicates disputes concerning customary land and *matai* titles. Prior to colonisation, the *fono*, was the final site of decision making for issues relating to customary land and *matai* titles. Now, in independent Samoa, the LTC, sits above these *fono* as a point of appeal. In the hierarchies of customary law the LTC presided at the top and represented the pinnacle authority of *fa'amatai*.

### C *LTC Interactions with the General Courts and the Constitution*

The different legal processes adopted in Samoa's transition to independence give salient insight into the continually evolving and modernising form in which *fa'amatai* takes place. The

---

<sup>81</sup> Land and Titles Act, above n 8, s 28(a). Up until 2004 only the President of the Court had to be legally trained but following an amendment to the LTA 1981, a non-legally qualified person can now become President.

<sup>82</sup> Village Fono Act, s 11; See generally Land and Titles Act 1981.

<sup>83</sup> Village Fono Act, s 11.

Constitution encapsulates the vision of an Independent Samoa which melds Samoan custom with Christianity and English legal principles.<sup>84</sup>

There have been two schools of thought about what this continual melding of laws means for *fa'amatai*. These can be distinguished as the arguments for (a) modernism, and (b) traditionalism. The former argues that these developments are a part of *fa'asamoa* and that the ability of the culture to accommodate new ideas and practices is a strength in a rapidly modernising world.<sup>85</sup> It argues that while Samoa has adopted much of her former colonial master's rules, she has done so in a way that reasserts aspects of *fa'asamoa*.<sup>86</sup> The latter argues that the vague assertions of custom in the Constitution were made with the mindset that institutions of *fa'asamoa* would gradually change, and fade away, so therefore should not be codified.<sup>87</sup> Traditionalists take the view that continued modernisation degrades *fa'asamoa* from its former glory and instead assimilates it to the rules of the colonial powers.<sup>88</sup>

The melding of these sources of law is fundamental to understanding the role of the LTC in the broader scheme of the Samoan judiciary. There has generally been an uncertain understanding of the relationship between the LTC and the general courts, and whether the general courts can adjudicate on the legal and procedural correctness of LTC decisions.<sup>89</sup> The laws applied by the general courts are those derived from the Constitution, general statutes of Samoa, and English common law principles such as judicial review.<sup>90</sup> The Constitution enshrines fundamental rights of Samoan peoples and the Supreme Court has the primary power to grant remedies for

---

<sup>84</sup> Le Tagaloa, above n 7, at 16; AF Le Tagaloa *O le Faasinomaga* (Le Lamepa Press, Apia, 1997) at 31-32; Samoan Constitution, art 1.

<sup>85</sup> Guy Powles *The Status of Customary Law in Western Samoa* (LLM Thesis, Victoria University of Wellington, 1973) at 12; M D Olson "Articulating Custom: The Politics and Poetics of Social Transformation in Samoa" (2000) 45 *Journal of Legal Pluralism* 1 at 8.

<sup>86</sup> Powles, above n 85, at 12; and Olson, above n 85, at 8.

<sup>87</sup> Meleisea, above n 33, at 186; CC Marsack *Notes on the practices of the courts and the principles adopted in hearing cases* (Government of Western Samoa, Apia, 1958) at 4.

<sup>88</sup> Meleisea, above n 33, at 186.

<sup>89</sup> Land, above n 16, at 513. Section 71 of the former Land and Titles Act 1981 (repealed) states "no decision or order of [the LTC] shall be reviewed or questioned in any other Court".

<sup>90</sup> C G Powles *Fundamental Rights in the Constitution of Western Samoa* (LLM Research Paper, Victoria University of Wellington, 1970) at 7.

their breach.<sup>91</sup> The Supreme Court also has the power to judicially review the decisions of “inferior” courts.<sup>92</sup>

The question has been whether this power extends to the LTC. Significantly, the LTA 1981 contains a powerfully articulated “ouster clause” that appears to prohibit the review of LTC decisions by any court.<sup>93</sup> A significant trail of constitutional litigation has dealt with the issue of whether the Supreme Court could oversee LTC decisions to ensure they operate in adherence to the Constitution.

The Supreme Court first considered this ouster clause in *Alaelua v Land and Titles Court*, where an LTC decision was challenged on natural justice grounds.<sup>94</sup> It was argued that the s 71 ouster clause could not apply, as non-compliance with the Constitution rendered the LTC’s decision a nullity and thus there was no decision to review.<sup>95</sup> The Supreme Court refused to exercise judicial review, placing emphasis on the role of the LTC as a unique court with exclusive jurisdiction over Samoan titles and customary land.<sup>96</sup> It emphasised in its decision that Samoa has two legal systems which each has its own institutions.<sup>97</sup>

Some years later, *Alomaina v Land and Titles Court* came to a different conclusion and overruled the reasoning in *Alaelua*.<sup>98</sup> In this case, the appellant asserted a breach of the fundamental right to a fair trial<sup>99</sup> when challenging a banishment order issued by the LTC.<sup>100</sup> Young J concluded that the LTC, like the New Zealand Māori Land Court and other specialist

---

<sup>91</sup> Samoan Constitution, above n 73, arts 4-15 (Part II Fundamental Rights).

<sup>92</sup> Article 65.

<sup>93</sup> Land and Titles Act, above n 79, s 71.

<sup>94</sup> Land, above n 16, at 514; *Alaelua v Land and Titles Court* (1992) 3 WSLR 507 (SC Apia).

<sup>95</sup> Land at 515.

<sup>96</sup> At 519.

<sup>97</sup> *Alaelua* at 516.

<sup>98</sup> *Ulise Aloimaina & Ors v Land and Titles Court* WSSC 4 November 1998 (*Aloimaina*), cited in *Sefo v Land and Titles Court* [2000] WSSC 47 and *Panaia II v Land and Titles Court* [2021] WSCA 6.

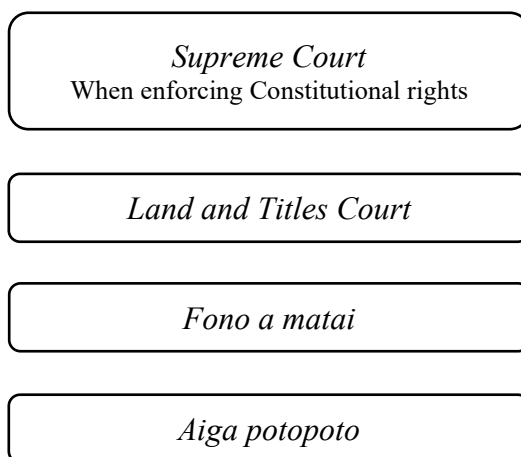
<sup>99</sup> Samoan Constitution, art 9(1).

<sup>100</sup> *Aloimaina* at 8.

inferior courts, was subject to judicial review by the Supreme Court on fundamental rights grounds.<sup>101</sup> This decision sought not to affect the LTC's primacy on questions of land, chiefly titles and custom.<sup>102</sup> Instead, the decision enforces art 2 of the Constitution stating that it is the supreme law of Samoa, and voids any laws (including LTC decisions) inconsistent with its provisions.<sup>103</sup>

*Aloimaina* was subsequently cited as authority for the Supreme Court's judicial review powers over the LTC.<sup>104</sup> So, although the LTC is a special enclave court of the judiciary with a distinct jurisdiction over customary matters, it is not exempt from the bounds of the Constitution. Therefore, the s 71 ouster clause within the LTA 1981 does not apply where an LTC decision breached Constitutional rights.

So, *Aloimaina* added another level to the hierarchy of authorities which adjudicate *fa'amatai*.



This further highlights the interesting push and pull between *fa'amatai* and western principles that has occurred post-independence. Enforcing a judicial review power over decisions of the LTC, which are based in custom, has been argued to have the effect of continuing to colonise *fa'asamoa*. It is this line of argument that leads us to the Land and Titles Court reforms.

---

<sup>101</sup> Land, above n 16, at 514; *Aloimaina*, above n 98, at 13-14.

<sup>102</sup> *Aloimaina* at 13.

<sup>103</sup> Land at 515; Samoan Constitution, above n 73, art 2(1)-(2).

<sup>104</sup> Land, at 515. See for example *Sefo v Land and Titles Court*, above n 11; and *Land and Titles Court v Lautogia* [2018] WSCA 4.

## IV *Land and Titles Court Reforms*

### A *Political background*

In 2020, the precedent set by *Aloimaina* led the then Prime Minister Tuilaepa Sa'ilele Malielegaoi to argue that “the Samoan Constitution [is] more protective of the introduced modern principles such as individual rights, as compared to ... the way of life of the Samoan people”.<sup>105</sup> As such, his government ushered in a set of constitutional reforms which sought to establish the LTC as an autonomous court hierarchy with equivalent status to the Supreme Court and Court of Appeal, thus enabling the growth of an independent customary jurisprudence.<sup>106</sup> The 2020 LTC reforms are contained in three Acts passed by the Samoan Legislative Assembly on 15 December 2020 and assented to by the Head of State on 5 January 2021: Constitution Amendment Act 2020; Judicature Act 2020; and Land and Titles Act 2020.

The reforms prompted Fiame Naomi Mata'afa, former deputy leader of the Human Rights Protection Party (HRPP), to form *Fa'atuatua i le Atua Samoa ua Tasi* (FAST) as a competing political party.<sup>107</sup> FAST campaigned on the repeal of the Acts and won a narrow parliamentary majority in the April 2021 elections, disrupting the HRPP who had been in government for nearly 40 years.<sup>108</sup> However, a two-thirds parliamentary majority is needed to enact constitutional changes. Therefore, FAST's current majority is not sufficient to repeal the legislation in the immediate future.<sup>109</sup>

The legislation created the following parallel hierarchical structures in Samoa:

Dealing with customary matters:

*Land and Titles Court of Appeal  
and Review*

Dealing with civil and criminal matters:

*Court of Appeal*

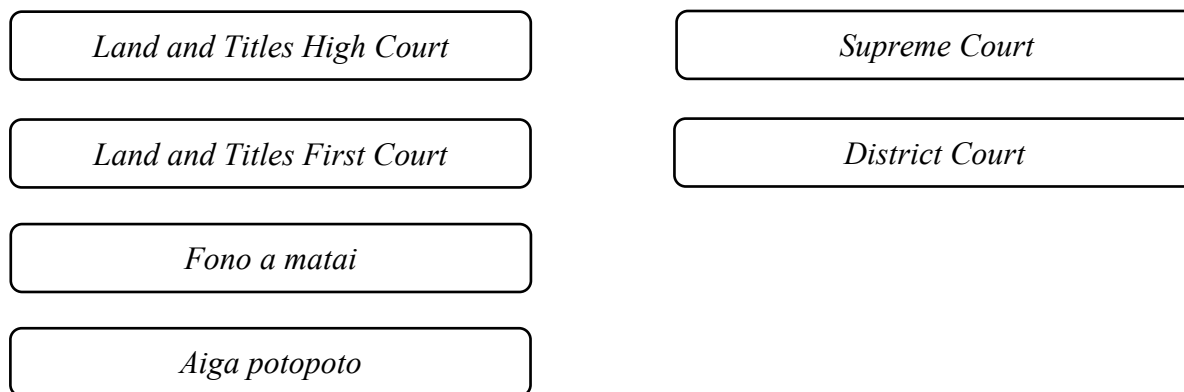
<sup>105</sup> Constitution Amendment Bill, above n 11, (explanatory memorandum) at [1.5].

<sup>106</sup> Ey, above n 24, at 28-29.

<sup>107</sup> Land, above n 16, at 510.

<sup>108</sup> See Radio New Zealand, above n 17.

<sup>109</sup> Samoan Constitution, above n 73, art 109.



## *B Controversy*

The reforms resulted in significant controversy and were condemned both within Samoa and internationally. The concerns predominantly stem from the fact that the reforms seemingly compromise Samoan democracy and due process.

The Samoa Law Society was one of the first entities to express concern about the Bills being passed under urgency through Parliament as the then Government did not engage in public consultation.<sup>110</sup> According to The president of the Samoa Law Society, the Samoan government used the COVID-19 pandemic to covertly make changes to the country’s Constitution and its judiciary.<sup>111</sup> In tabling the Bills and passing them through their second reading, the Law Society alleged that there was a lack of due process due to the absence of public consultation.<sup>112</sup> Moreover, the Attorney-General and the Samoa Law Reform Commission (SLRC), which is where the Bills were likely drafted, are prescribed specific processes within their mandates which include public consultation.<sup>113</sup> Leiataualesa stated that when major legislative reform is undertaken, such as this, village-wide consultation usually

---

<sup>110</sup> Joyetter Feagaimaali’I “Constitutional amendments worries Law Society” (9 April 2020) Samoa Observer <[www.samoobserver.ws](http://www.samoobserver.ws)>.

<sup>111</sup> Dominic Godfrey “Samoa Govt pushes major change under cloak of Covid-19 – law society” (18 April 2020) Radio New Zealand <[www.rnz.co.nz](http://www.rnz.co.nz)>.

<sup>112</sup> The Samoan legislative process is largely the same as New Zealand’s. See generally *Practice and Procedure Manual* (Legislative Assembly of Samoa)

<sup>113</sup> Godfrey, above n 111.

takes place.<sup>114</sup> This was especially important for these reforms as they directly impact the LTC which affects everyone, in every village.<sup>115</sup>

Similarly, Samoa's judiciary expressed "grave concerns" with the proposed constitutional amendments, via a letter from the Acting Chief Justice Vui Clarence Nelson and co-signed by all judges of the Supreme and District Courts.<sup>116</sup> The letter cautioned against the separating of the nation's court system and warned about the need to safeguard the Constitution and the wisdom with which Samoa's ancestors wrote it.<sup>117</sup> The letter stated that "[a]ny structure that separates the interpretation and protection of Constitutional rights between two Court systems is in our respectful view flawed, unworkable and carries significant inherent risks".<sup>118</sup> These include that it compromises the rule of law as well as undermines the Constitution.<sup>119</sup> Samoan Ombudsman Maiava Lulai Toma, in his capacity as head of the National Human Rights Institution in Samoa, also formally opposed the bills on the basis that they threatened freedom of religion.<sup>120</sup>

The bills faced international scrutiny from the United Nations, Amnesty International, and the New Zealand Law Society. The United Nations special rapporteur on the Independence of Judges and Lawyers wrote an open letter to the Samoan government stating that new provisions relating to the dismissal of judges would breach international standard on judicial independence. It would also violate article 14 of the International Covenant on Civil and Political Rights.<sup>121</sup> Amnesty International criticised the bills on the basis that they compromise

---

<sup>114</sup> Godfrey, above n 111.

<sup>115</sup> Godfrey, above n 111

<sup>116</sup> Radio New Zealand "Judges warn Samoan govt about judicial reform" (13 April 2020) RNZ <[www.rnz.co.nz](http://www.rnz.co.nz)>; Nelson, above n 15.

<sup>117</sup> Radio New Zealand, above n 116.

<sup>118</sup> Radio New Zealand, above n 116; Nelson, above n 15.

<sup>119</sup> See generally Ey, above n 24; see also Radio New Zealand "Samoa court changes would undermine rule of law – fiamē" (14 September 2020) RNZ <[www.rnz.co.nz](http://www.rnz.co.nz)>. This is because the two different systems would apply different rules and in theory could reach different rulings on the same set of facts.

<sup>120</sup> Radio New Zealand "Samoa's Ombudsman voices opposition to divisive bills" (18 May 2020) RNZ <[www.rnz.co.nz](http://www.rnz.co.nz)>. Substantive footnote required.

<sup>121</sup> Joyetter Feagaimaali'I "Withdraw constitutional change: U.N. Human Rights Council" (29 May 2020) Samoa Observer <[www.samoobserver.ws](http://www.samoobserver.ws)>.

the application of fundamental human rights enshrined in the Constitution. The New Zealand Law Society also criticised the bills in solidarity with the Samoa Law Society as compromising essential elements of democratic government: proper process, the rule of law, the independence of the judiciary, and the availability of judicial review.<sup>122</sup>

The controversy was largely fuelled by Tuliaepa's offensive response to opponents of the reforms. He argued that the Westminster system of law does not and cannot dictate to Samoa what micro and macro applied customary practices should be, and criticised opponents of the bills as "not Samoan".<sup>123</sup> He also sharply criticised the New Zealand Law Society's statement as an inappropriate lecture and interference with Samoan democratic processes.<sup>124</sup>

The reforms brought the role of customary law in Samoa into sharp contention. Two distinct camps were forged because of the constitutional reforms: those in support, and those against.

### *C Arguments for reform*

The arguments in support of reform are rooted in traditionalism. It is a line of arguments which view the adopted western legal principles as diminishing of *fa'asamoa* and *fa'amatai*. It seeks to return authority to the customary bodies and principles which existed prior to colonisation.

Former Prime Minister Tuilaepa and the SLRC argue that the reforms represent an essential incorporation and promotion of Samoan custom over Western legal norms.<sup>125</sup> Telei'ai Lalotoa Mulitalo Ropinisone Silipa Seumanutafa, the Executive Director of the SLRC, suggests an "overwhelming desire" for greater acknowledgement of custom within the Samoan legal

---

<sup>122</sup> Tiana Epati "Serious concerns raised about constitutional law changes in Samoa" (4 May 2020) New Zealand Law Society – Te Kāhui Ture o Aotearoa <[www.lawsociety.org.nz](http://www.lawsociety.org.nz)>.

<sup>123</sup> Joyetter Feagaimaali'I "L.T.C. opponents "not Samoan": P.M." (24 September 2020) Samoa Observer <[www.samoobserver.ws](http://www.samoobserver.ws)>.

<sup>124</sup> Tiana Epati, above n 126.

<sup>125</sup> Mata'afa Keni Lesa "LTC bills: Masked PM slams "unfounded palagi thinking" *Samoa Observer* (online ed, Samoa, 28 April 2020) <[www.samoobserver.ws](http://www.samoobserver.ws)>; and Joyetter Feagaimaali'I "LTC's overhaul began in 2016: Law Reform Commission" *Samoa Observer* (online ed, Samoa, 2 May 2020) <[www.samoobserver.ws](http://www.samoobserver.ws)>; Land, above n 16, at 509..



system.<sup>126</sup> She argues that since there are no mechanisms to determine where custom should be applied, common-law trained legal professionals default to applying common law doctrines without considering customary practice.<sup>127</sup>

Mulitalo's argument is underpinned by the assumption that the Constitution and common law are built upon "different philosophies" to customary law.<sup>128</sup> This argument is not unique to Samoa in terms of identifying the differences between Pacific customary laws and adopted western laws.<sup>129</sup> She argues that Samoan custom's foundation is communalism and it is a strict hierarchy which seeks to preserve peace and harmony in the *nu'u*.<sup>130</sup> This is argued to directly contradict the individual rights expressed in the Constitution and therefore these rights are inapplicable and have limited relevance for many Samoans.<sup>131</sup> Mulitalo evidences this with a case where a village *fono* enforced a banishment order despite its revocation by the LTC demonstrating that despite State oversight, *nu'u* continue to operate customarily.<sup>132</sup>

#### *D Arguments against reform*

Opposition to reforms suggest that reformists significantly understate the already existing role of Samoan customary law. The Samoan judiciary rejected the proposition that the general courts "control and interfere" with the LTC in a submission made advising against the reforms.<sup>133</sup> The Supreme Court then discussed the mechanisms which mitigate the diminishment of custom as Tuilaepa and Mulitalo suggest. The submission highlighted the Supreme Court's conservative use of its judicial review powers and emphasised the Court's

---

<sup>126</sup> Teleiai Lalotoa Mulitalo Ropinisone Silipa Seumanutafa *Law Reform in Plural Societies* (Springer, 2018) at 58-59; Samoa Law Reform Commission *Fetuunai Muniao: Lipoti o suesuega* (Research Report 1, 2019) at 4-8.

<sup>127</sup> Seumanutafa at 62-65.

<sup>128</sup> Seumanutafa at 50; Land, above n 16, at 516.

<sup>129</sup> New Zealand Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP17, 2006) at 75-78.

<sup>130</sup> Seumanutafa at 50; Elise Huffer and Asofou So'o "Consensus versus dissent: Democracy, pluralism and governance in Samoa" (2003) 44(3) *Asia Pacific Viewpoint* 281 at 291.

<sup>131</sup> Seumanutafa at 53-55.

<sup>132</sup> At 55.

<sup>133</sup> Joyetter Feagaimaali'i "Judges caution Government about judicial overhaul" *Samoa Observer* (online ed, Samoa, 12 April 2020) <[www.samoobserver.ws](http://www.samoobserver.ws)> at [26].

inability to review the merits of LTC decisions as two mechanisms upholding customary law.<sup>134</sup> This proposition is supported in *Penaia II v Land and Titles Court*, where the Court was “reluctant to intervene” in LTC disputes unless it was necessary to enforce the Constitution.<sup>135</sup>

Moreover, if a judicial review succeeded, the Supreme Court usually sends matters back to the LTC for reconsideration on the customary merits.<sup>136</sup> This mechanism retains and respect the LTC’s specific expertise on Samoan custom. Furthermore, when the Court has dealt with matters concerning customary land, such as cases challenging historic land confiscations, it has relied on evidence of *matai* and historians to draw conclusions on customary issues.<sup>137</sup>

Fundamentally, the tension between these two schools of thought arises from their disagreement regarding the role of *fa’amatai* in the law moving forwards. The arguments emerging from the reform provide a springboard to ask: why are there such fundamentally divergent views on the role of custom and the future of the LTC? And, as a result, why did these reforms generate the controversy that they did?

## V *Fa’amatai in Contemporary Samoa*

In this section I seek to identify what the recent LTC reforms and subsequent constitutional crisis tell us about *fa’amatai* and *fa’asamoa* in contemporary Samoa. In doing so I will address the fundamental discrepancies between traditionalists and modernists. I will also identify what the 2020 Samoan Election indicates about Samoa’s perception of *fa’amatai* today.

---

<sup>134</sup> Feagaimaali’i, above n 133, at [27] – [29].

<sup>135</sup> *Penaia II v Land and Titles Court* [2012] WSCA 6 at [17].

<sup>136</sup> Land, above n 16, at 517; Feagaimaali’I, above n 131, at [28]; and see for example *Esekia v Land and Titles Court* [2017] WSSC 145 at [44].

<sup>137</sup> *Ahi and Faipule of Laulii v Trustees of the Estate of Jacob Helg* [2011] WSSC 48 [Laulii v Helg] at [31]-[32].

### A *The Land and Titles Court as Fa'amatai*

The LTC is of crucial importance to Samoans because of its central role in protecting Samoan custom and resolving disputes in accordance with customary law.<sup>138</sup> The Court was born from colonial rule and survived the two different colonial administrations. It then survived Samoan independence and has since grown into a cornerstone of customary law in Samoa.<sup>139</sup> It sat at the head of the customary hierarchy for over a century, and I argue that as Samoa has evolved, the LTC has become a part of *fa'amatai*. As discussed above, *fa'asamoa* is a living and breathing entity that has morphed and adapted alongside Samoa herself. *Fa'amatai* as the heart of *fa'asamoa* must be accepted to do the same.

Prior to colonisation, Samoan society was predominantly rural and for this reason there was likely to have been a far stronger consensus around *fa'asamoa*.<sup>140</sup> Once Samoa was unified under colonial rule, it was inevitable that new hierarchies which worked broadly across the islands would develop and LTC was the form that this took. In this forum it was also inevitable that there would be competing, and contradictory interests represented across different *nu'u*, but because *matai* sit on the LTC it operates in the same way that the *fono* operates, just on a larger scale. Therefore, it engages in the exact same rigorous and robust debate as the *fono*.

Before colonisation, *matai* title succession, dispute resolution processes, and land tenure in Samoa was determined by the *fa'amatai*.<sup>141</sup> The LTC now fulfils this function and has been accepted to fulfil this function for decades.<sup>142</sup> The LTC's function is undisputed. It is on this basis that the LTC must be seen to form an integral part of the *fa'amatai* today.

---

<sup>138</sup> Taulapapa Anesi and Auelua F Enari "The Land and Chiefly Titles Court of Western Samoa" in Guy Powles and Mere Pulea (eds) *Pacific Courts and Legal Systems* (University of the South Pacific in association with the Faculty of Law Monash University, Suva, 1988) 107 at 107-108.

<sup>139</sup> Sharon W Tiffany "The Land and Titles Court and the Regulation of Customary Title Successions and Removals in Western Samoa" (1974) 83 *Journal of the Polynesian Society* 35 at 37-38.

<sup>140</sup> Meleisea, above n 33, at 188.

<sup>141</sup> Vaai, above n 26, at 29; See generally AF Le Tagaloa "Samoan Village Society" (1986) 99 *The Courier* 1; Le Tagaloa, above n 38, at 75; M Meleisea and P Schoeffel "Saving Pacific Islanders from themselves: Eurocentric Bias in Marxist Socialist Theory" (1984) 10 *Journal of Pacific Studies* 92 at 94; M Meleisea and P Schoeffel (eds) *Lagaga* (Institute of Pacific Studies of the University of the South Pacific, Suva, 1987) at 24-38.

<sup>142</sup> Le Tagaloa, above n 38, at 75.

This is why the LTC, and its functions, have become the subject of such intense debate and scrutiny. Also, it is an institution which has become not only a fundamental instrument of the law, but also of Samoan identity, as the governing body which adjudicates the *matai* and customary land.

The two camps of traditionalism and modernism are then focussed, at their roots, on the future of *fa'amatai* through the lens of these reforms. A key distinction between the two camps generally seems to be the background on which the worldviews are built. For traditionalism, advocates have usually lived their entire lives in the *nu'u*.<sup>143</sup> For modernism, advocates are often professionals who have received formal education from western institutes. Below I will discuss how these different backgrounds inform the divergent views on the reform.

### *B Traditionalism in the Face of Evolution*

A traditionalist view would likely disagree with my assertion that the LTC has formed part of the *fa'amatai*. It might do so on the basis that some *nu'u* have foundationally not accepted state oversight since colonisation began.<sup>144</sup> Where family and village interests clash with national interests, many Samoans put their *aiga* and *nu'u* first.<sup>145</sup> This is evidenced by the rejection of some LTC findings as discussed above.<sup>146</sup> The continual administration of nation-wide customary bodies could be argued to erode the fundamental relationship between *fono a matai* and their constituent *aiga potopoto* as the *fono* no longer has the final say in customary dispute resolution and *matai* succession, as their ancestors intended. So, though the way that *fa'amatai* has been administered by the state has adapted, it arguably has not shifted at its roots for many Samoans. On this view, these roots which their ancestors planted have not moved and therefore neither have their perceptions of *fa'amatai*.

---

<sup>143</sup> Taua'a, above n 32, at 62.

<sup>144</sup> Lagi Tuimavave "A Response to the Report of the Special Inquiry Committee's on matters pertaining to the Land and Titles Court" (LLM, Victoria University of Wellington, 2017) at 5; Jennifer Corrin and Don Paterson *Introduction to South Pacific Law* (4<sup>th</sup> ed, Intersentia Limited, Cambridge, 2017) at 318.

<sup>145</sup> Unasa L F Vaa "Samoan Custom and Human Rights: An Indigneous View" (2009) 40 VUWLR 237 at 241; R P Gilson *Samoa 1830 to 1900: The Politics of a Multi-Cultural Community* (Oxford University Press, London, 1970).

<sup>146</sup> Seumanutafa, above n 126 at 55.

As discussed above, the traditional view of *fa'amatai* in modern Samoa argues that the fundamental rights enshrined in the Constitution are in inherent conflict with custom.<sup>147</sup> The likes of Tuilaepa and Mulitalo argue that *fa'amatai* and *fa'asamoa* have been undermined as they are only valid insofar that they do not impinge on Constitutional rights. This is an inherently historic focussed line of thinking and works on the assumption that *fa'amatai* and *fa'asamoa* have not evolved in the century since colonisation began. Instead, they seek to return authority over customary decisions to the *fono* and institutions alike to the *fono* by shutting out interference from the Constitution, common law and equity.<sup>148</sup>

It is important not to minimise the importance and relevance of Samoans who do adhere to the traditional understanding of *fa'amatai*. As Tuilaepa correctly cited, in some *nu'u* today, the likes of fundamental Constitutional rights are not discussed on the *fono*.<sup>149</sup> Though traditionalism looks to the past to seek how to interpret *fa'amatai* today, this does not necessarily mean it is archaic or invalid. Particularly elders and those who have lived in the *nu'u* their entire lives, tradition is the world that revolves around them.<sup>150</sup> To adapt and to change those traditions and condition them to foreign principles seemingly strips them and their ancestors of control over *fa'amatai*. As well as this, *matai* rooted in the *nu'u* no longer sit under other *matai*, but in the case of judicial review of LTC decisions, they potentially sat under foreign judges. This seems to diminish the *pule* vested in *matai* by their *aiga*. To the traditional mind, these reforms are not about undermining constitutional rights. Instead, the focus is on retaining the traditional authority of the *matai* which was gifted to them by their ancestors.

### C *Modernism Moving Forwards*

The foundation of the modernist argument against the reforms is that they act to deprive litigants of effective human rights protections and undermine the rule of law.<sup>151</sup> Western

---

<sup>147</sup> Vaai, above n 26, at 62; Vaa at 247.

<sup>148</sup> Ey, above n 24.

<sup>149</sup> Constitution Amendment Bill, above n 11, (explanatory memorandum) at [1.5]; Tiffany, above n 139, at 36.

<sup>150</sup> Tiffany at 36.

<sup>151</sup> Lanuola Tusani Tupufia "UN criticism of LTC changes endorsed by Law Society" Samoa Observer (online ed, Samoa, 6 June 2020) <[www.samoaoobserver.ws](http://www.samoaoobserver.ws)>; Lanuola Tusania Tupufia "LTC Committee's 'misleading' handouts: Law Society" Samoa Observer (online ed, Samoa, 24 July 2020) <[www.samoaoobserver.ws](http://www.samoaoobserver.ws)>; and

principles have guided much of the discussion about the reforms and therefore about the role of custom in Samoa. In removing the Supreme Court's supervisory jurisdiction, the changes seek to abolish the application of fundamental human rights over village *fono* decisions in the pursuit of instead uplifting "communal rights".<sup>152</sup> The intention of this reform is fundamentally flawed as it unjustifiably simplifies the distinction between custom which existed prior to colonisation, and individual rights enshrined in the Constitution. The notion of pitting individual human rights against traditional communal values is rejected by eminent Samoans.<sup>153</sup> Professor Malama Meleisea has criticised the false dichotomy of individual versus traditional communal rights, illustrating that when individual rights are protected, the community is protected.<sup>154</sup> Samoan Ombudsman, Maiava Iulai Toma reported that human rights are not foreign ideals, but in fact have their roots in Samoan cultural values, and that the two taken together make a more harmonious society.<sup>155</sup>

So, what does this tell us about a modernist view of *fa'amatai* today? *Fa'amatai* is not rooted in procedure. *Fa'amatai* cannot be identified by solely by pointing to village *fono* decisions or by pointing to the organisation of the *nu'u*. Instead, *fa'amatai* as a key subset of *fa'asamoa* herself, is rooted in a network of values inherited by Samoans from our ancestors.<sup>156</sup> It is these values of *alofa*, *tautua*, *fa'aaloalo*, and *usita'i* which provide mandate to the *matai* to administer *pule* and exercise dispute resolution functions. These values must then be the basis on which *fa'amatai* continues to exist today. If it is accepted that fundamental human rights are not in tension with the values of *fa'asamoa*, I argue that these human rights form a part of *fa'amatai* today. As well as this, *fa'amatai*, as an exercise of *pule* and a representation of customary hierarchy, can be identified more broadly than the traditional procedures and can instead be articulated as the way in which Samoans accept authority.

---

Lanuola Tusani Tupufia "Delayed decisions and what could happen if LTC bills passed" Samoa Observer (online ed, Samoa, 30 August 2020) <[www.samoaoobserver.ws](http://www.samoaoobserver.ws)>.

<sup>152</sup> See generally Constitution Amendment Bill, above n 11, at (explanatory memorandum).

<sup>153</sup> Ey, above n 24.

<sup>154</sup> Meleisea, above n 33, at 17.

<sup>155</sup> Radio New Zealand, above n 120.

<sup>156</sup> Meleisea at 17.

The 2021 Samoan election provides insight as to what authority Samoan people accept today. The HRPP had governed Samoa for nearly 40 years and these reforms which adversely affect constitutional human rights were the catalyst for their electoral demise.<sup>157</sup> Prime Minister Fiame stated that when she formed FAST to campaign against the reforms, she did not think that FAST was going to win the election.<sup>158</sup> However, FAST did win and in doing so illuminated the public discomfort with Tuilaepa's plans to undermine the Constitution and the rights that it affords Samoan people. It is doubtful that those who voted for FAST would accept any kind of proposition that they voted for the degradation of *fa'amatai* or *fa'asamoa*. Fiona Ey strongly refutes any suggestion that Samoan lawyers and judges who resisted the reforms, many of whom hold *matai* titles, are not "sufficiently Samoan".<sup>159</sup>

Instead, the rights enshrined in the Constitution can now be understood as a fundamental part of how Samoan's perceive the law and accept authority. Like the LTC, these rights have been a part of life in Samoa for over a century and have been the supreme law of independent Samoa for 60 years. Samoans have come to understand these rights as being protected and as also being authoritative over Samoan life.

It is through the Samoan public's, as well the diaspora's, discomfort with compromises to the Constitution that these human rights can be understood as a part of the *fa'asamoa* and *fa'amatai*. Just as *fa'amatai* has evolved to incorporate the LTC as an accepted institution of customary dispute resolution, fundamental human rights have become accepted to be a source of customary governance accepted by Samoan peoples. Moreover, seeing as these human rights are not in conflict with *fa'asamoa*, but instead are in harmony, individual human rights are arguably inherent in *fa'asamoa* as they protect the collective. Either way, the 2021 election has demonstrated that constitutional rights are an authority which Samoan's accept and as a result, may be said to form a part of the *fa'amatai* in contemporary Samoa.

---

<sup>157</sup> Land, above n 16, at 508; Radio New Zealand, above, n 17.

<sup>158</sup> Julia Hollingsworth "The incredible rise of Samoa's first female Prime Minister-elect, and the man still standing in her way" CNN <[www.edition.cnn.com](http://www.edition.cnn.com)>.

<sup>159</sup> Ey, above n 24.

### D *Customary Authority and Governance Today*

The issue of where customary authority and governance presides in contemporary Samoa is an extremely vexed question which would likely garner different answers from *aiga* to *aiga*, in the same way that *fa'amatai* varies from *nu'u* to *nu'u*. At its roots *fa'asamoa* governs the behaviour of Samoan people and *fa'amatai* is the administrative skeleton which dictates the authority afforded to each individual, family, and village in pursuit of collective peace and success. But Samoa does not have customary laws in the sense that its customs or practices are prescribed and formally recognised as binding or enforced by a controlling authority.<sup>160</sup> Instead Samoa has hundreds of protocols which govern the behaviour of Samoan people, whether they live in traditional villages governed by *fono* or elsewhere.<sup>161</sup>

Although these protocols, which have been practiced for centuries, place little value on individualism, I argue that the contemporary discussions, from the likes of Tuliaepa regarding customary governance, creates illusory competition between individual and collective interests.

Samoan customary protocols relating to the individual govern kinship relationships, social status, age, gender relations, dress, manners, seating arrangements at gatherings, gift giving, order of precedence in serving food and drinks, and forms of speaking (for example to speak with a 't' or a 'k', the 't' fork being reserved for formal or polite speech) and many other aspects of life.<sup>162</sup> I have also discussed in length the extent to which customary protocols dictate resource allocation and land distribution matters. *Fa'asamoa* and *fa'amatai* as sources of customary social organisation govern how the individual behaves in order to achieve the betterment of the community. Whereas the western form of social organisation, to which the Constitutional rights find their origin, govern how the individual behaves to achieve a betterment of self.

---

<sup>160</sup> Malama Meleisea and Penelope Schoeffel "Sāmoan Custom, Individual Rights, and the Three 2020 Acts: Reorganizing the Land and Titles Court" (2022) ahead of print, *Journal of Pacific History* 1 at 11.

<sup>161</sup> Meleisea and Schoeffel at 11.

<sup>162</sup> Meleisea and Schoeffel at 11.



So, despite western and Samoan frameworks being built on different foundations they intersect in the respect that they govern the individual's behaviour in relation to the world around them. And it would be false to articulate these frameworks as being void of similarity. Since 1921 Samoans have lived under a legal system that more or less successfully mixes Samoan custom with modern laws that grew from historic bedrock of British common law and the United Nations Declaration of Human Rights.<sup>163</sup> Most Samoans are satisfied with this system<sup>164</sup> because it honours them as autonomous individuals without compromising the authority and practices of the *nu'u*.

In spite of Constitutional human rights, and in spite of the Supreme Court appeal power, the *nu'u* retains the customary authority powers articulated in the Village Fono Act. And each *matai* remains empowered to manage their customary land in accordance with *fa'amatai* and *fa'asamoa* for the betterment of their *aiga potopoto*. So individual rights in the Constitution do not exist at the expense of customary authority. Instead, it behaves as a final point of protection for the individual in the rare circumstance that the *fono* compromises their rights. And although nothing akin to this mechanism existed prior to colonisation, it is argued to exist with ardent political support because it aligns with the way that Samoans accept customary governance today.

We have yet to see how the new LTC legislation will operate in practice or if it will be overturned. But the legislation gives the LTC powers to make decisions without reference to the provisions of the Constitution which has disturbing implications for these fundamental rights nowadays accepted by most Samoans as their due.<sup>165</sup>

## VI Conclusion

*Fa'amatai* has always been a very complex web of relationships, all balanced with the values of *fa'asamoa* and enforced using *pule* over land and titles. Through colonisation, this web has become even more complex with the state enforced oversight of first, the LTC, then the

---

<sup>163</sup> Meleisea and Schoeffel, above n 160, at 12.

<sup>164</sup> Meleisea and Schoeffel at 12.

<sup>165</sup> Meleisea and Schoeffel at 12.

Constitution when enforcing fundamental rights. The purpose of this paper has not been to oversimplify how complex this system is, nor has it been to undermine the line of traditionally minded thinking.

Instead, the purpose has been to direct attention to the way in which Samoan thinking has shifted in relation to customary governance and changed since its conception. *Fa'asamoa* and *fa'amatai*, evolved to survive and incorporate Christianity, and Christianity continues to live at the heart of Samoan culture today. Similarly, *fa'asamoa* and *fa'amatai* also survived colonisation. This is not to suppose that Christianity and colonisation have similar effects on indigenous cultures, instead they both represent the implementation of foreign objects onto customary Samoan practices.

In the aftermath of independence *fa'amatai* and *fa'asamoa* remained intact, both in practice and in theory. However, what had changed was the different legal mechanisms colonial rule had left behind to adjudicate custom. In the facet of customary law, the LTC existed as a protective institution to ensure that Samoa as a now independent Westminster system did not invalidate customary practices of *nu'u*. The LTC has come to form a fundamental cornerstone of customary practice regarding customary land and *matai* titles. Prior to colonisation, each *nu'u* understood that their *fono* reserved the final decision in disputes which concerned the *nu'u* and its constituents.

But, over the course of the last century, the LTC has added another important point of appeal from the *fono*. It is an accepted and respected institution for its expertise in customary matters. In fact, through the debates regarding the reforms, both those in support and those against argue for the existence of the court. It is because of this significance that the LTC can be argued to have formed a part of the *fa'amatai*. In the same way that *fa'asamoa* has shifted to incorporate Christianity, it is argued here that *fa'amatai* has adapted to incorporate the LTC, an originally colonial institution.

The other important lens for this debate relevant for *fa'amatai* and *fa'asamoa* has been the one unjustifiably labelled as a battle between collective rights and individual rights. To create a blanket distinction between these two kinds of rights is entirely reductive of their complexity and cross over. This paper has argued that because the 2021 election results demonstrated a political shift against the norm in order to rebut these reforms, there must be a large Samoan

conscience which accepts the individual rights enshrined in the Constitution as a balance against customary law and the LTC.

Despite this criticism, supporting the proposition that fundamental human rights should be protected, does not compromise the Samoan identity. This is because when every individual has rights, the collective is uplifted as a result.<sup>166</sup> This must then be aligned with *fa'asamoa* as it is an assertion of communal responsibility and embodies fundamental customary values. So, this debate cannot be simplified as a challenge between customary law versus adopted law. It is not that simple because understanding what *fa'amatai* looks like today to many Samoans requires attention to *both* customary and adopted principles because colonisation has left an indelible mark on Samoa and her people. This debate has generated such a large conversation because the reforms and subsequent election have attacked the question of what it really is to be Samoan. And the answer is that, that identity – always rooted in *fa'asamoa* – is ever-changing and adapting to survive in the world around it.

### ***Word count***

The text of this paper (excluding table of contents, glossary, footnotes, and bibliography) comprises approximately 7982 words.

---

<sup>166</sup> Meleisea, above n 33, at 17.

## ***Bibliography***

### ***A Cases***

*Ahi and Faipule of Laulii v Trustees of the Estate of Jacob Helg* [2011] WSSC 48

*Alaelua v Land and Titles Court* (1992) 3 WSLR 507 (SC Apia).

*Esekia v Land and Titles Court* [2017] WSSC 145

*Land and Titles Court v Lautogia* [2018] WSCA 4

*Penaia II v Land and Titles Court* [2012] WSCA 6

*Sefo v Land and Titles Court* [2000] WSSC 47

*Ulises Aloimaina & Ors v Land and Titles Court* WSSC 4 November 1998

### ***B Legislation***

#### ***I Statutes***

Berlin Act 1889 (Germany, Britain, USA)

Constitution Amendment Act 2020 (Samoa)

Constitution of the Independent State of Samoa 1960

Judicature Act 2020 (Samoa)

Land and Titles Act 1981 (Samoa)

Land and Titles Act 2020 (Samoa)

Samoa Act 1921 (NZ)

Village Fono Act 1990 (Samoa)

#### ***II Subordinate Legislation***

Constitution Order 1900 (Germany)

*Instruction fuer dad Verfahren der Land under Titel Kommission* (“Instructions” for the Proceedings of the Land and Titles Commission 1903)

Samoa Land and Titles Protection Ordinance 1934 (NZ, Samoa)

Samoa Native Titles Protection Order 1928 (NZ)

Samoa Native Land and Titles Commission Order 1920

Land and Titles Commission Ordinance 1903 (LTC Ordinance).

### **III Bills**

Constitution Amendment Bill 2020 (Samoa)

### **C Books and Chapters in Books**

Aiono Fana'afi "Western Samoa: The Sacred Covenant" in Cema Bolabola (ed) *Land Rights of Pacific Women* (Institute of Pacific Studies of the University of the South Pacific, Suva, 1986)

Aiono Fanaafi Le Tagaloa "The Samoan Culture and Government" in R Crocombe & others *Culture and Democracy in the South Pacific* (Institute of Pacific Studies, Suva, 1992)

AF Le Tafaloa *O le Faasinomaga* (Le Lamepa Press, Apia, 1997)

Alessandro Duranti *The Samoan Fono: A Sociolinguistic Study* (Department of Linguistics of the Research School of Pacific Studies at the Australian National University, Canberra, 1981)

CC Marsack *Notes on the practice of the court and the 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 of Western Samoa, Apia, 1961)

Derek Freeman *Margaret Mead and Samoa: The Making and Unmaking of an Anthropological Myth* (Harvard University Press, Cambridge, 1983)

Epeli Hau'ofa "Our Sea of Islands" in, *We Are The Ocean: Selected Works* (University of Hawai'i Press, Honolulu, 2008)

George Bertram Milner *Samoa Dictionary* (Pasifika Press, Auckland, 1993)

Ioana Tu'ugālei Chan Mow "The Fa'amatai in the Face of the Winds of Change" in Asofou So'o (ed) *Changes in the Matai System: O Suiga i le Fa'amatai* (National University of Samoa, Apia, 2007)

Jennifer Corrin and Don Paterson *Introduction to South Pacific Law* (4<sup>th</sup> ed, Intersentia Limited, Cambridge, 2017)

L Holmes "Samoa: Custom versus Productivity" in R Crocombe (ed) *Land Tenure in the Pacific* (Oxford University Press)

Malama Meleisea “Governance, Development and Leadership in Polynesia: a microstudy from Samoa” in Elise Huffer and Asofou So’o (eds) *Governance in Samoa: Pulenga I Samoa* (Asia Pacific Press, 2000)

Malama Meleisea *The Making of Modern Samoa: Traditional Authority and Colonial Administration in the Modern History of Western Samoa* (Institute of Pacific Studies, 1987)

M Meleisea and P Schoeffel (eds) *Lagaga* (Institute of Pacific Studies of the University of the South Pacific, Suva, 1987)

R P Gilson *Samoa 1830 to 1900: The Politics of a Multi-Cultural Community* (Oxford University Press, London, 1970).

Saleimoa Vaai *Samoa Fa’amatai and the Rule of Law* (National University of Samoa, Apia, 1999)

Taulapapa Anesi and Auelua F Enari “The Land and Chiefly Titles Court of Western Samoa” in Guy Powles and Mere Pulea (eds) *Pacific Courts and Legal Systems* (University of the South Pacific in association with the Faculty of Law Monash University, Suva, 1988) 107

Teleiai Lalotoa Mulitalo Ropinisone Silipa Seumanutafa *Law Reform in Plural Societies* (Springer, 2018)

Tim O’Meara “Samoa: Customary individualism” in Ron Crocombe (ed) *Land Tenure in the Pacific* (3<sup>rd</sup> ed, University of the South Pacific, Suva, 1987) 74

## **D Journal Articles**

AF Le Tagaloa “Samoan Village Society” (1986) 99 *The Courier* 1

A.H. Angelo “Steady as she goes’: the Constitution and the Court of Appeal of Samoa” (2012) 18 *NZ Assoc Comparative Law Yearbook* 145

BC Spring “The Land and Titles Court of Western Samoa” (1979) 5 *Samoa Pac LJ* 41

Craig Land “One Boat, Two Captains: Implications of the 2020 Land and Titles Court Reforms for Customary Law and Human Rights” (2021) 52 *VUWLR* 507

Elise Huffer and Asofou So’o “Beyond Governance in Samoa: Understanding Samoan Political Thought” (2005) 17(2) *The Contemporary Pacific* 311

Elise Huffer and Asofou So’o “Consensus versus dissent: Democracy, pluralism and governance in Samoa” (2003) 44(3) *Asia Pacific Viewpoint* 281

Guy Powles “Chiefly Systems and Pacific Island Constitutions” (2002) 1 *J Samoan Studies* 119

Iati Iati “Samoa’s Price for 25 Years of Political Stability” (2013) 48(4) *J Pacific History* 443

Julia Hollingsworth “The incredible rise of Samoa’s first female Prime Minister-elect, and the man still standing in her way” CNN <www.edition.cnn.com>.

Julia Ioane and Keith Tudoe “The Fa’asamoa, Person-Centered Theory and Cross-Cultural Practice” (2017) 16 Person-Centered & Experiential Psychotherapies 287

Keith Tudor and Julia Ioane “The Fa’asamoa, Person-Centered Theory and Cross-Cultural Practice” (2017) 16 Pers Centered Exp Psychother 287

M D Olson “Articulating Custom: The Politics and Poetics of Social Transformation in Samoa” (2000) 45 Journal of Legal Pluralism 1

Malama Meleisea and Penelope Schoeffel “Sāmoan Custom, Individual Rights, and the Three 2020 Acts: Reorgnaizing the Land and Titles Court” (2022) ahead of print, Journal of Pacific History 1

M Meleisea and P Schoeffel “Saving Pacific Islanders from themselves: Eurocentric Bias in Marxist Socialist Theory” (1984) 10 Journal of Pacific Studies 92

Melanie Anae and others “Transnational Sāmoan Chiefs: Views of the Fa’amatai (Chiefly System)” (2017) 7 J Sāmoan Studies 38

SE Merry “Law and Colonialism” (1991) 25 L Society R 899

Sharon W Tiffany “The Land and Titles Court and the Regulation of Customary Title Successions and Removals in Western Samoa” (1974) 83 Journal of the Polynesian Society 35

Susana Taua’a “The Samoan Fa’amatai System: Social Protection and Governance Issues” (2014) 34 J Pac Studies 59.

Unasa L F Vaa “Samoan Custom and Human Rights: An Indigneous View” (2009) 40 VUWLR 237

## ***E Parliamentary and Government Materials***

*Cultural Practices and Protocols* (Ministry for Pacific Peoples, Information Publication)

*Practice and Procedure Manual* (Legislative Assembly of Samoa)

## ***F Reports***

Aleni Sofara “Traditional Knowledge in Samoa: At Risk of Being Lost” (World Trade Organisation and World Intellectual Property Organisation, Colloquium Papers, 2017) 91

Chris Grant “Accessing land for public purposes in Samoa” in Department of Foreign Affairs and Trade Making Land Work Volume Two: Case Studies on customary land and development in the Pacific (Pririon Pty Ltd, Australia, 2008)

Jennifer Corrin "Resolving Land Disputes in Samoa" in Department of Foreign Affairs and Trade Making Land Work Volume Two: Case Studies on customary land and development in the Pacific (Pririon Pty Ltd, Australia, 2008)

New Zealand Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP17, 2006)

Samoa Law Reform Commission *Fetuunai Muniao: Lipoti o suesuega* (Research Report 1, 2019)

Samoa Law Reform Commission *Pule a le Matai Sa'o* (Final Report 17/18, February 2017).

## **G      *Dissertations***

C G Powles "Fundamental Rights in the Constitution of Western Samoa" (LLM Research Paper, Victoria University of Wellington, 1970)

Guy Powles "The Status of Customary Law in Western Samoa" (LLM Thesis, Victoria University of Wellington, 1973)

Fa'asaulala Tagoilelagi "The role of the Samoan culture (fa'asamoa) in the development of its childrens' literacy skills" (MA Education, University of Auckland, 1995)

Fanaafi Aiono Le Tagaloa "The Land and Titles Court of Samoa 1903 – 2008 'Continuity amid Change'" (PhD Philosophy in Law, University of Otago, 2009)

Lagi Tuimavave "A Response to the Report of the Special Inquiry Committee's on matters pertaining to the Land and Titles Court" (LLM, Victoria University of Wellington, 2017)

LF Palenapa "A Study of the Place of Samoan Culture (Fa'asamoa) in Two New Zealand Churches" (MA Thesis, University of Canterbury, 1993)

Lona Laneselota Siauane "Fa'asamoa: a look at the evolution of the fa'asamoa in Christchurch" (MA Thesis, University of Canterbury, 2004)

Ronald James Crawford "The Lotu and the Fa'asāmoa: Church and Society in Samoa, 1830 – 1880" (Doctor of Philosophy Thesis, University of Otago, 1977)

## **H      *Internet Resources***

BBC News "Samoa's first female PM locked out of parliament by losing opponent" (United Kingdom, 25 May 2021) BBC <[www.bbc.com](http://www.bbc.com)>.

Dominic Godfrey "Samoa Govt pushes major change under cloak of Covid-19 – law society" (18 April 2020) Radio New Zealand <[www.rnz.co.nz](http://www.rnz.co.nz)>.

Fiona Ey "Samoa's Constitutional Crisis: Undermining Rule of Law" (8 May 2020) The Interpreter <[www.lowyinstitute.org](http://www.lowyinstitute.org)>



Joyetter Feagaimaali'i "Constitutional amendments worries Law Society" (9 April 2020) Samoa Observer <[www.samoaoobserver.ws](http://www.samoaoobserver.ws)>.

Joyetter Feagaimaali'i "Judges caution Government about judicial overhaul" Samoa Observer (online ed, Samoa, 12 April 2020) <[www.samoaoobserver.ws](http://www.samoaoobserver.ws)>

Joyetter Feagaimaali'i "LTC's overhaul begins in 2016: Law Reform Commission" *Samoa Observer* (online ed, Samoa, 2 May 2020) <[www.samoaoobserver.ws](http://www.samoaoobserver.ws)>.

Joyetter Feagaimaali'i "L.T.C. opponents "not Samoan": P.M." (24 September 2020) Samoa Observer <[www.samoaoobserver.ws](http://www.samoaoobserver.ws)>.

Joyetter Feagaimaali'i "Withdraw constitutional change: U.N. Human Rights Council" (29 May 2020) Samoa Observer <[www.samoaoobserver.ws](http://www.samoaoobserver.ws)>.

Julia Hollingsworth "The incredible rise of Samoa's first female Prime Minister-elect, and the man still standing in her way" (30 May 2021) CNN <<https://edition.cnn.com>>

Lanuola Tusani Tupufia "Delayed decisions and what could happen if LTC bills passed" Samoa Observer (online ed, Samoa, 30 August 2020) <[www.samoaoobserver.ws](http://www.samoaoobserver.ws)>.

Lanuola Tusani Tupufia "UN criticism of LTC changes endorsed by Law Society" Samoa Observer (online ed, Samoa, 6 June 2020) <[www.samoaoobserver.ws](http://www.samoaoobserver.ws)>

Mata'afa Keni Lesa "LTC bills: Masked PM slams "unfounded palagi thinking" Samoa Observer (online ed, Samoa, 28 April 2020) <[www.samoaoobserver.ws](http://www.samoaoobserver.ws)>

Mataia Lanuola Tusani "Court declares F.A.S.T. Government; impasse over" Samoa Observer (online ed, 23 July 2021) <[www.samoaoobserver.ws](http://www.samoaoobserver.ws)>

Matai'a Lanuola Tusani "F.A.S.T. wins case, majority" (17 May 2021) Samoa Observer <[www.samoaoobserver.ws](http://www.samoaoobserver.ws)>.

Radio New Zealand "Extra seat thrown out, FAST wins Samoa election" (17 May 2021) RNZ <[www.rnz.co.nz](http://www.rnz.co.nz)>.

Radio New Zealand "Judges warn Samoan govt about judicial reform" (13 April 2020) RNZ <[www.rnz.co.nz](http://www.rnz.co.nz)>

Radio New Zealand "Samoa court changes would undermine rule of law – fīame" (14 September 2020) RNZ <[www.rnz.co.nz](http://www.rnz.co.nz)>.

Radio New Zealand "Samoa's Ombudsman voices opposition to divisive bills" (18 May 2020) RNZ <[www.rnz.co.nz](http://www.rnz.co.nz)>. Substantive footnote required.

Radio New Zealand "Samoa parliament passes much criticised constitutional reforms" (15 December 2020) RNZ <[www.rnz.co.nz](http://www.rnz.co.nz)>.

“Samoa election: Swearing in ceremony for FAST party held despite locked Parliament”  
The New Zealand Herald (online ed, 24 May 2021).

Soli Wilson "FAST seeks court clarity to resolve impasse" Samoa Observer (online ed, 20 June 2021) <[www.samoobserver.ws](http://www.samoobserver.ws)>.

The Editorial Board “Fa’amatai system, measina, and understanding who we are” (3 February 2020) Samoa Observer <[www.samoobserver.ws](http://www.samoobserver.ws)>.

Tiana Epati “Serious concerns raised about constitutional law changes in Samoa” (4 May 2020) New Zealand Law Society – Te Kāhui Ture o Aotearoa <[www.lawsociety.org.nz](http://www.lawsociety.org.nz)>.

### *I Other Resources*

Letter from Clarence Nelson (Acting Chief Justice) and others to Afioga Teleiai Dr Lalotoa Mulitalo (Executive Director of the Samoa Law Reform Commission) regarding the Land and Titles Court Reform Bills 2020 (6 April 2020).

Richard Herr “Cultural Adaptation and the Westminster Model: Some Examples from Fiji and Samoa” (paper presented to Australasian Study of Parliament Group, Sydney, 2 October 2014)

Tu'u'u Ieti Taule'alo, Soialo David Fong and Patea Malo Setefano Samoan customary lands at the crossroads- options for sustainable management (paper presented to National Environment Forum, 2003)