

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

*William Iosefa Antonio Morrison**

The 2020 Land and Titles Court (LTC) reforms in Sāmoa were a catalyst for the constitutional crisis that sent shockwaves through the Pacific. This article analyses what the debate surrounding these reforms, as well as the reforms themselves, reveal about fa'amatai (Sāmoa'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 impeded the exercise of customary authority. This article identifies the different hierarchical structures of customary authority in Sāmoa 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.

I INTRODUCTION

Fa'amatai can be understood as the indigenous political system of Sāmoa that governs customary hierarchies between indigenous chiefs, their families and their village.¹ *Fa'amatai* is an integral part of *fa'asāmoa*, the Sāmoan way of life. *Fa'asāmoa* is derived from a set of customary values that have

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1 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. A glossary containing English translations of Sāmoan terms can be found at the end of this article.

been nurtured and developed in the islands since indigenous Sāmoans arrived some 3,500 years ago.² These values are used to inform indigenous political practice in Sāmoa. But, more than this, these values pertain to the core identity of Sāmoan people and dictate the ways in which Sāmoan people carry out our lives.³

Traditionally, *matai* (chief) title succession and land tenure issues in Sāmoa 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.⁴ 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 Sāmoan archipelago from Manu'a in the East to Savai'i in the West is homogenous in the basics of *fa'amatai* relevant to land tenure and titles.⁵

At the dawn of colonisation, the German administration created a Land and Titles Commission in the unified Sāmoa to adjudicate on matters of customary land and *matai* titles.⁶ This institution then continued as New Zealand took the role of colonial administrator in Sāmoa. The Commission then survived Sāmoan independence in the form of the Land and Titles Court (LTC). The LTC has the role of adjudicating on customary land and *matai* title disputes. This role is significant as 81 per cent of Sāmoan land falls under the customary *matai* titles system.⁷ The LTC operates as an indigenous institution with *matai* sitting as judges who are not necessarily legally trained.⁸ However, the LTC

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- 2 Julia Ioane and Keith Tudor "The Fa'asamoa, Person-Centered Theory and Cross-Cultural Practice" (2017) 16 *Person-Centered & Experiential Psychotherapies* 287 at 292.
 - 3 Fa'asaulala Tagoilelagi "The role of the Samoan culture (fa'asamoa) in the development of its childrens' literacy skills" (MA (Education) Thesis, University of Auckland, 1995) at 4; and Lona Laneselota Siauane "Fa'aSamoa: a look at the evolution of the fa'aSamoa in Christchurch" (MA (Pacific Studies) Thesis, University of Canterbury, 2004) at 9.
 - 4 Melanie Anae and others "Transnational Sāmoan Chiefs: Views of the Fa'amatai (Chiefly System)" (2017) 7 *JSS* 38 at 38–39.
 - 5 Tim O'Meara "Samoa: Customary individualism" in Ron Crocombe (ed) *Land Tenure in the Pacific* (3rd ed, University of the South Pacific, Suva, 1987) 74 at 76.
 - 6 Fanaafi Aiono Le Tagaloa "The Land and Titles Court of Samoa 1903–2008 'Continuity amid Change'" (PhD Thesis, University of Otago, 2009) at 56.
 - 7 Tu'u'u Ieti Taule'alo, So'oialo David Fong and Patea Malo Setefano "Samoan customary lands at the crossroads: some options for sustainable management" (paper presented to National Environment Forum, 2003) at 2; and Chris Grant "Accessing land for public purposes in Samoa" in Australian Agency for International Development (ed) *Making Land Work: Volume two: Case studies on customary land and development in the Pacific* (AusAID, Canberra, 2008) 265.
 - 8 Land and Titles Act 1981 (Sāmoa) (repealed), s 28(a).

has been criticised for inadequate resourcing and protracted litigation.⁹ Issues surrounding 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 (LTA) also contained a clause which prevented 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.¹⁰ From this, former Prime Minister Tuila'epa Sa'ilele Malielegaoi, leader of the Human Rights Protection Party (HRPP), which had governed Sāmoa for nearly 40 years, argued that "the Sāmoan Constitution [is] more protective of the introduced modern principles such as individual rights, as compared to ... the way of life of the Sāmoan people".¹¹ As a result, the HRPP ushered in three pieces of legislation aimed at restructuring the LTC.¹² 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.¹³

The reforms created a spirited debate regarding the role of custom in the Sāmoan legal system. In support of reform, Tuila'epa and the Sāmoa Law Reform Commission (SLRC) argued that the reforms represented an essential incorporation and promotion of Sāmoan custom over Western legal norms.¹⁴ On the other hand, the Sāmoan judiciary and other legal practitioners have raised concerns about how the expanded power granted to the executive branch could compromise the rule of law and due process

9 Jennifer Corrin "Resolving land disputes in Samoa" in Australian Agency for International Development (ed) *Making Land Work: Volume two: Case studies on customary land and development in the Pacific* (AusAID, Canberra, 2008) 199 at 210–212.

10 *Aloimaina Ulisese v Land and Titles Court* WSSC, 4 November 1998 as cited in *Sefo v Land and Titles Court* [2000] WSSC 47; and *Penaia II v Land and Titles Court* [2012] WSCA 6.

11 Constitution Amendment Bill 2020 (Sāmoa) (explanatory memorandum) at [1.5].

12 Constitution Amendment Act 2020 (Sāmoa); Land and Titles Act 2020 (Sāmoa); and Judicature Act 2020 (Sāmoa).

13 "Samoa parliament passes much criticised constitutional reforms" *RNZ* (online ed, New Zealand, 15 December 2020).

14 Mata'afa Keni Lesa "LTC bills: Masked PM slams 'unfounded palagi thinking'" *Samoa Observer* (online ed, Sāmoa, 28 April 2020); and Joyetter Feagaimaali'i "LTC's overhaul began in 2016: Law Reform Commission" *Samoa Observer* (online ed, Sāmoa, 2 May 2020).

in government.¹⁵ Seeing as the LTC is already under-resourced, issues also arise regarding the practicability of administering two entirely new courts in the restructure.¹⁶

The debates surrounding the reforms led Fiame Naomi Mata'afa to form Fa'atuatua I le Atua Sāmoa ua Tasi (FAST), a competing political party, to challenge the reforms.¹⁷ FAST won a narrow parliamentary majority in the 2021 election and Mata'afa became Sāmoa's first woman Prime Minister.¹⁸ Mata'afa was sworn in outside of Sāmoa's Parliament, as her and her party were locked out of the building.¹⁹ Her unusual inauguration was a consequence of caretaker Prime Minister Tuila'epa refusing to accept the election results.²⁰ This resulted in a constitutional crisis, which had the effect of undermining Sāmoa's reputation as a pillar of political stability in the Pacific.²¹ On 23 July 2021, the Sāmoan Court of Appeal ruled FAST to be the legitimate government of Sāmoa following numerous court challenges.²² 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.²³

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- 15 Letter from Clarence Nelson (Acting Chief Justice) and others to Afioga Teleiai Dr Lalotoa Mulitalo (Executive Director of the Sāmoa Law Reform Commission) regarding the Land and Titles Court Reform Bills 2020 (6 April 2020).
- 16 Craig Land "One Boat, Two Captains: Implications of the 2020 Samoan Land and Titles Court Reforms for Customary Law and Human Rights" (2021) 52 VUWLR 507 at 509. See also Corrin, above n 9, at 210–212.
- 17 Land, above n 16, at 510; and "Extra seat thrown out, FAST wins Samoa election" *RNZ* (online ed, New Zealand, 17 May 2021).
- 18 Matai'a Lanuola Tusani T-Ah Tong "FAST wins case, majority" *Samoa Observer* (online ed, Sāmoa, 17 May 2021).
- 19 Land, above n 16, at 508; and "Samoa election: Swearing in ceremony for FAST party held despite locked Parliament" *New Zealand Herald* (online ed, New Zealand, 24 May 2021).
- 20 Julia Hollingsworth "The incredible rise of Samoa's first female Prime Minister-elect, and the man still standing in her way" *CNN* (online ed, United States, 30 May 2021); and "Samoa's first female PM locked out of parliament by losing opponent" *BBC News* (online ed, United Kingdom, 24 May 2021).
- 21 Iati Iati "Samoa's Price for 25 Years of Political Stability" (2013) 48 *Journal of Pacific History* 443 at 444; and AH Angelo "'Steady as She Goes' – The Constitution and the Court of Appeal of Samoa" (2012) 18 *NZACL Yearbook* 145 at 164–165.
- 22 Matai'a Lanuola Tusani T-Ah Tong "Court declares FAST Government; impasse over" *Samoa Observer* (online ed, Sāmoa, 23 July 2021). See further Soli Wilson "FAST seeks Court clarity to resolve impasse" *Samoa Observer* (online ed, Sāmoa, 20 June 2021).
- 23 Constitution of the Independent State of Samoa [Sāmoan Constitution], art 109.

The implications of the reforms have been discussed in detail by the likes of Fiona Ey and Craig Land.²⁴ I instead look at why the LTC reforms triggered such a large reaction and its resulting discourse. This article has a specific focus on what the reactions to these reforms reveal about *fa'amatai* and customary hierarchies in Sāmoa today. First, I identify the ways in which *fa'amatai* and *fa'asāmoa* 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 Sāmoa. 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'asāmoa* and *fa'amatai* in a continually developing Sāmoa. This article seeks to understand, fundamentally, the positions of both opponents and supporters of the reforms in order to untangle the different perspectives on what *fa'amatai* looks like today in the light of contemporary understandings of fundamental human rights.

II CUSTOMARY HIERARCHICAL STRUCTURES

A *Fa'amatai* and *Fa'asāmoa*

Fa'asāmoa is most commonly translated into English as "the Sāmoan way of life".²⁵ It is the umbrella term under which all Sāmoan custom falls and from which it derives. Prior to colonisation, *fa'asāmoa* guided the lives of indigenous Sāmoans economically, politically, socially and culturally. It prescribes traditions and cultural norms, and informs Sāmoan people's relationships to one another and to persons holding *pule* (authority).²⁶ *Fa'asāmoa* is not only a customary body of law, but also the identity of Sāmoan people, and it guides how we carry ourselves through the world.²⁷

Fa'asāmoa has existed and has been cultivated by indigenous Sāmoans for some 3,500 years. For the purposes of this article, *fa'asāmoa* can be articulated as a network of values which interact, and which have generated customary practices and usages. Some of these values include: *'autasi* (consensus), *alofa* (love/compassion), *fa'aloalo* (respect) and *mamalu* (dignity).²⁸ As *fa'asāmoa* pertains to the identity of Sāmoan people and is the basis upon which all customary practice exists, it

24 See generally Fiona Ey "Undermining Rule of Law: Samoa's COVID Experience and Constitutional Crisis" in Nichole Georgeou and Charles Hawksley (ed) *State Responses to COVID-19: a global snapshot at 1 June 2020* (Western Sydney University, Sydney, 2020) 28; and Land, above n 16.

25 Sāmoa Law Reform Commission *Pule a le Matai Sa'o* (FR18/17, February 2017).

26 Saleimoa Vaai *Samoa Fa'amatai and the Rule of Law* (National University of Samoa, Western Sāmoa, 1999) at 29–30; and George Bertram Milner *Samoa Dictionary* (Polynesian Press, Auckland, 1993) at 191.

27 Ioane and Tudor, above n 2, at 292, citing Siauane, above n 3, at 9.

28 Elise Huffer and Asofou So'o "Beyond Governance in Sāmoa: Understanding Samoan Political Thought" (2005) 17 *The Contemporary Pacific* 311 at 326–327.

is treasured by its constituents. Because it is treasured so highly, the traditions that are derived from customary practice are often executed in the same way today as they were hundreds of years ago.²⁹

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

B Form and Practice

Fa'asāmoa is a living and breathing entity that has evolved and adapted to survive the colonial power of multiple administrations.³³ *Fa'asāmoa* has historically undergone large and fundamental changes. When Christianity was introduced to Sāmoa, almost every fundamental practice of *fa'asāmoa* was adapted to incorporate prayer and worship to God.³⁴ Christianity was brought to Sāmoa in 1830 by John Williams, the missionary pioneer of the Pacific.³⁵ Although *fa'asāmoa* included inherently spiritual elements prior to missionary ventures, the arrival of Christianity was entirely foreign.³⁶ As Christianity gained momentum and swept across Sāmoa, the *fa'asāmoa* experienced an irreversible shift. Christianity today is a fundamental tenet of *fa'asāmoa* and the

29 Ministry for Pacific Peoples *Cultural Practices and Protocols* (The Policy Project). See generally Aleni Sofara "Traditional Knowledge in Samoa: At Risk of Being Lost" (2017) 8 WIPO-WTO Colloquium Papers 91.

30 Sāmoa Law Reform Commission, above n 25.

31 Milner, above n 26, at 43 and 137.

32 Susana Taua'a "The Samoan Fa'amatai System: Social Protection and Governance Issues" (2014) 34 JPacS 59 at 59.

33 Malama Meleisea *The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa* (Institute of Pacific Studies of the University of the South Pacific, Suva, 1987) at 16–17.

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

35 LF Palenapa "A Study of the Place of Samoan Culture (Fa'asāmoa) in Two New Zealand Churches" (MA (Religious Studies) Thesis, University of Canterbury, 1993) at 1.

36 Meleisea, above n 33, at 17, citing Derek Freeman *Margaret Mead and Samoa: The Making and Unmaking of an Anthropological Myth* (Harvard University Press, Cambridge (Mass), 1983) at 186–187.

Sāmoan connection to God and to the church is one of the most important connections.³⁷ This shift demonstrates the malleability of *fa'asāmoa* when large changes to the nation have occurred.

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

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.³⁹ *Matai* are primary instruments of traditional authority in Sāmoa and are the paramount point of leadership in families, villages and the nation as a whole.⁴⁰ A *matai* is selected by the *'aiga potopoto* (extended family) to represent the family's interests within a village and within the *'aiga* itself.⁴¹ 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.⁴² *Matai* titles are the common property of a lineage consisting of all those who are connected to the said title.⁴³ They are also the custodians of the family lands, genealogy and titles (*o measina a 'aiga*).⁴⁴ The *matai* and *'aiga* owe one another reciprocal obligations of *tautua* (service) and obedience.⁴⁵

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

38 Vaai, above n 26, at 29; Meleisea, above n 33, at 6; and Sāmoa Law Reform Commission, above n 25, at 9.

39 Vaai, above n 26, at 29; and Aioana Fanaafi Le Tagaloa "The Sāmoan Culture and Government" in Ron Crocombe and others (eds) *Culture and Democracy in the South Pacific* (Institute of Pacific Studies of the University of the South Pacific, Suva, 1992) 117 at 117.

40 Vaai, above n 26, at 29; Le Tagaloa, above n 39, at 120; and Guy Powles "Chiefly Systems and Pacific Island Constitutions: Comparative Trends Relevant for Samoan Studies" (2005) 1 JSS 119.

41 Le Tagaloa, above n 39, at 117.

42 Sāmoa Law Reform Commission, above n 25, at 9; and Vaai, above n 26, at 30.

43 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 Sāmoa* (Asia Pacific Press, Canberra, 2000) 189 at 191.

44 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 Sāmoa, Apia, 2007) 119 at 121.

45 CC Marsack *Notes on the practice of the court and the principles adopted in the hearing of cases affecting (1) Samoan matai titles; and (2) land held according to customs and usages of Western Samoa* (Land and Titles Court of Western Sāmoa, Apia, 1958) at 14.

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.⁴⁶ It is a role rooted in duty and stewardship, where the *matai* acts 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.

The *'aiga potopoto* may have several *matai* titles, and so the next hierarchy is that above the *matai*: the *sa'o*.⁴⁷ The *sa'o* possesses the overall governing authority with a multiplicity of functions analogous to legislative, executive and judicial authority over the family estate and members.⁴⁸ 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.⁴⁹ 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*, while the bulk are *matai* of a lesser rank.⁵⁰

2 Village fono

The next identifiable hierarchy is that which occurs within the *nu'u* (village). No two *nu'u* are alike in Sāmoa and the political structure of each derives from its own unique history.⁵¹ 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*.⁵² In the *fono*, every *matai* has *mamalu* and *pule* as the head of the *'aiga*, irrespective of their rank or status. However, the *fono* is ranked by the ascribed status of each of its constituent titles.⁵³ The *fono* could be likened to local government, as it is the decision-maker in relation to 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*.⁵⁴

46 Vaai, above n 26, at 43; Marsack, above n 45, at 14; Guy Powles "The Status of Customary Law in Western Samoa" (LLM Thesis, Victoria University of Wellington, 1973) at 10; and Le Tagaloa, above n 39, at 120.

47 "Fa'amatai system, measina and understanding who we are" *Samoa Observer* (online ed, Sāmoa, 3 February 2020).

48 O'Meara, above n 5, at 78.

49 Vaai, above n 26, at 43.

50 At 50.

51 Meleisea, above n 33, at 11.

52 At 16.

53 See generally 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 ch 4.

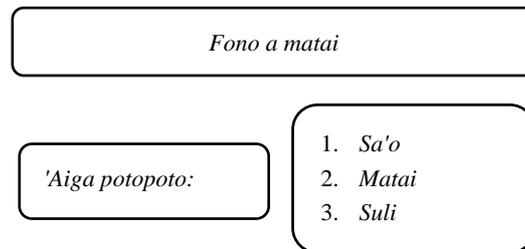
54 Meleisea, above n 33, at 16.

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 Sāmoa and the governance within unique *fono* survived both the German and New Zealand administrations and have continued through Sāmoan independence. Today, *fono* are empowered by the Village Fono Act 1990.

The preface of the Village Fono Act 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".⁵⁵ The Act also confers power on the *fono* to make rules governing the development and use of village land for economic betterment.⁵⁶ 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.⁵⁷

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 Sāmoa prior to colonisation.



The *fa'amatai* is a complex web of hierarchical structures in which every individual is prescribed a specific role for the betterment of the whole. Authority figures such as *matai* are not exempt from the hierarchy and are assigned a role of authority to the extent to which that lineage has earned *pule*. This authority is derived both from custom and from the history of that *'aiga*.⁵⁸ The purpose of articulating these structures is to identify the basis on which customary authority in Sāmoa is asserted.

55 Village Fono Act 1990 (Sāmoa), long title.

56 Section 5(2)(a) and (b).

57 Section 5(3).

58 Vaai, above n 26, at 43.

It provides important context for understanding the way in which Sāmoa 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.⁵⁹ The Commission became the first foreign institution to give Western legal recognition to *fa'amatai* processes concerning *matai* titles and customary land.⁶⁰ Even then, there were discrepancies between Sāmoans who did not want disputes decided by the Commission, and others who saw it as official recognition of *fa'amatai*.⁶¹ Sāmoan custom was generally applied in the Commission, but only to the extent to which the colonial administrators thought it acceptable based on their own Western morality and justice.⁶²

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 1914.⁶³ New Zealand enacted legislation that was more explicit than the German Ordinance and Instructions in its reference to the application of custom in the Commission.⁶⁴ Under this legislation, "customs and usages" remained undefined.⁶⁵ This meant that the LTC had a large say in determining the interpretation of custom, despite having predominantly *palagi* adjudicators.⁶⁶

Through the imposition of Western law, Sāmoa still maintained a dual system during the colonial era where inherited law and the *fa'amatai* operated alongside each other.⁶⁷ *Fa'amatai* was recognised in the colonial systems insofar as it related to land tenure and *matai* title matters through this specialist

59 Marsack, above n 45, at 3; and Land and Titles Commission Ordinance 1903 (Sāmoa).

60 Land and Titles Commission Ordinance, cls 1 and 2.

61 Le Tagaloa, above n 6, at 56; Meleisea, above n 33, at 35–36; and BC Spring "The Land and Titles Court of Western Samoa" (1979) 5(2) Samoan Pacific Law Journal 41 at 43.

62 Le Tagaloa, above n 6, at 56–57, citing the "Instructions" for the Proceedings of the Land and Titles Commission 1903 (translated from German), cl 9.

63 Samoa Native Land and Titles Commission Order 1920; and Marsack, above n 45, at 4.

64 Le Tagaloa, above n 6, at 63; Samoa Constitution Order 1920; Samoa Act 1921; Samoa Native Titles Protection Order 1928; and Samoan Land and Titles Protection Ordinance 1934.

65 Samoa Act 1921, s 278.

66 Le Tagaloa, above n 6, at 64.

67 Mow, above n 44, at 132; and Le Tagaloa, above n 6, at 75.

court.⁶⁸ During the colonial era, there were no formal repugnancy clauses regarding the enforceability of custom.⁶⁹

Although the LTC was conceived with the intention of dealing with customary matters, its scope was limited to land and titles matters. Due to its 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.⁷⁰

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.⁷¹ Yet, in Sāmoa, colonial powers carved out this legal enclave where customary principles continued to apply, and customary land did not become a market commodity.⁷²

B Through Sāmoan Independence

Sāmoa celebrated independence in 1962, and at that date the Constitution of the Independent State of Western Samoa came into effect as supreme law.⁷³ The Land and Titles Court continued as a separated judicial body from the general courts through independence.⁷⁴ The Constitution established Sāmoa as a parliamentary republic with a Westminster system and responsible government.⁷⁵ The Constitution defines the "law of Samoa" as:⁷⁶

... 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.

68 See generally Corrin, above n 9. This is a brief account of the dual court system in Sāmoa which provides an illustration of how these dual systems operate in practice.

69 Meleisea, above n 33, at 40–41.

70 Le Tagaloa, above n 6, at 54, citing Land and Titles Commission Ordinance, cl 1; and Lowell D Holmes "Samoa: Custom versus Productivity" in Ron Crocombe (ed) *Land Tenure in the Pacific* (Oxford University Press, Melbourne, 1971) 91 at 98.

71 Le Tagaloa, above n 6, at 10; and Sally Engle Merry "Law and Colonialism" (1991) 25 L & Soc'y Rev 899 at 891.

72 Merry, above n 71, at 891; and Le Tagaloa, above n 6, at 10.

73 Sāmoan Constitution, arts 1 and 2.

74 Article 103.

75 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.

76 Sāmoan Constitution, art 111.

Part XI of the Constitution provided for the continuation of the LTC.⁷⁷ The LTC was directed to apply custom as defined in the Constitution. The Constitution's definition is vague, which indicates that this was a highly discretionary power. Meleisea described the post-independent LTC as:⁷⁸

[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*.

It was not until 1981 that Sāmoa passed the Land and Titles Act to govern the administration of the LTC. *Palagi* judges were phased out during the period of independence and replaced by Sāmoan judges over time.⁷⁹ Now, judges of the LTC must be *matai* but do not need to be legally qualified.⁸⁰ 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 accordance with the Village Fono Act and the LTA 1981, the LTC can hear appeals from the village *fono*.⁸¹ 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.⁸²



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 that adjudicates on 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 Sāmoa, the LTC sits above these

77 Article 102.

78 Meleisea, above n 33, at 186.

79 Le Tagaloa, above n 6, at 69.

80 Land and Titles Act 1981, s 28(a). Up until 2004 only the President of the Court had to be legally trained, but following an amendment to the Land and Titles Act a non-legally qualified person can now become President.

81 Village Fono Act, s 11; and Land and Titles Act 1981, s 34.

82 Village Fono Act, s 11.

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 Sāmoa's transition to independence give salient insight into the continually evolving and modernising form of *fa'amatai*. The Constitution encapsulates the vision of an independent Sāmoa which melds Sāmoan custom with Christianity and English legal principles.⁸³

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'asāmoa* and that the ability of the culture to accommodate new ideas and practices is a strength in a rapidly modernising world.⁸⁴ It argues that, while Sāmoa has adopted much of her former colonial master's rules, she has done so in a way that reasserts aspects of *fa'asāmoa*.⁸⁵ The latter argues that the vague assertions of custom in the Constitution were made with the mindset that institutions of *fa'asāmoa* would gradually change, so therefore should not be codified.⁸⁶ Traditionalists take the view that continued modernisation degrades *fa'asāmoa* from its former glory and instead assimilates it to the rules of the colonial powers.⁸⁷

The melding of these sources of law is fundamental to understanding the role of the LTC in the broader scheme of the Sāmoan 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.⁸⁸ The laws applied by the general courts are those derived from the Constitution, general statutes of Sāmoa and English common law principles

83 Le Tagaloa, above n 6, at 16; Aiono Fanaafi Le Tagaloa *O le Faasinomaga* (Lolomi e le Lamepa Press, Alafua, 1997) at 31–32; and Sāmoan Constitution, art 1.

84 Powles, above n 46, at 12; and MD Olson "Articulating Custom: The Politics and Poetics of Social Transformation in Samoa" (2000) 32(45) J Legal Plur 19 at 19–20.

85 Powles, above n 46, at 12; and Olson, above n 84, at 8.

86 Meleisea, above n 33, at 186; and Marsack, above n 45, at 4.

87 Meleisea, above n 33, at 186.

88 Land, above n 16, at 513. Section 71 of the former Land and Titles Act 1981 states "no decision or order of [the LTC] shall be reviewed or questioned in any other Court".

such as judicial review.⁸⁹ The Constitution enshrines fundamental rights of Sāmoan peoples and the Supreme Court has the primary power to grant remedies for their breach.⁹⁰ The Supreme Court also has the power to judicially review the decisions of "inferior" courts.⁹¹

The question has been whether this power extends to the LTC. Significantly, the LTA 1981 contains a powerfully articulated clause that appears to prohibit the review of LTC decisions by any court.⁹² A significant trail of constitutional litigation has dealt with the issue of whether the Supreme Court could oversee LTC decisions to ensure that they operated in adherence with the Constitution.

The Supreme Court first considered this clause – s 71 – in *Alaelua v Land and Titles Court*, where an LTC decision was challenged on the grounds of natural justice.⁹³ It was argued that s 71 could not apply, as non-compliance with the Constitution rendered the LTC's decision a nullity and thus there was no decision to review.⁹⁴ The Supreme Court refused to exercise judicial review, placing emphasis on the role of the LTC as a unique court with exclusive jurisdiction over Sāmoan titles and customary land.⁹⁵ It emphasised in its decision that Sāmoa has two legal systems, each of which has its own institutions.⁹⁶

Some years later, *Aloimaina Ulisese v Land and Titles Court* came to a different conclusion and overruled the reasoning in *Alaelua*.⁹⁷ In this case, the appellant asserted a breach of the fundamental right to a fair trial⁹⁸ when challenging a banishment order issued by the LTC.⁹⁹ Young J concluded that the LTC, like the New Zealand Māori Land Court and other specialist inferior courts, was subject to judicial review by the Supreme Court on fundamental rights grounds.¹⁰⁰ This decision sought not

89 CG Powles "Fundamental Rights in the Constitution of Western Samoa" (LLM Research Paper, Victoria University of Wellington, 1970) at 7.

90 Sāmoan Constitution, arts 4–15 (Part II "Fundamental Rights").

91 Article 65.

92 Land and Titles Act 1981, s 71.

93 *Alaelua v Land and Titles Court* (1992) 3 WSLR 507 (SC Apia). See Land, above n 16, at 514.

94 Land, above n 16, at 515.

95 At 519.

96 *Alaelua v Land and Titles Court*, above n 93, at 516.

97 *Aloimaina Ulisese v Land and Titles Court*, above n 10. See also *Sefo v Land and Titles Court*, above n 10; and *Penaia II v Land and Titles Court*, above n 10.

98 Sāmoan Constitution, art 9(1).

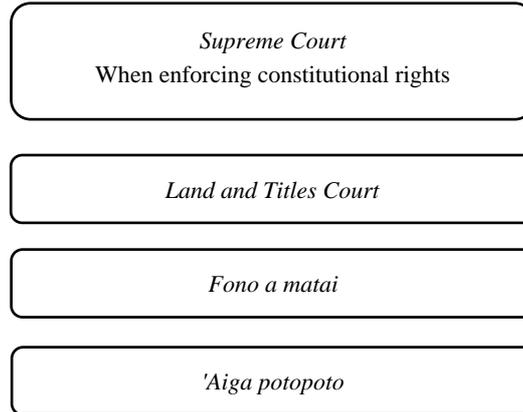
99 *Aloimaina Ulisese v Land and Titles Court*, above n 10, at 8.

100 At 13–14. See also Land, above n 16, at 514.

to affect the LTC's primacy on questions of land, chiefly titles and custom.¹⁰¹ Instead, the decision enforced art 2 of the Constitution, which states that it is the supreme law of Sāmoa, and voided any laws (including LTC decisions) inconsistent with its provisions.¹⁰²

Aloimaina was subsequently cited as authority for the Supreme Court's judicial review powers over the LTC.¹⁰³ So, although the LTC is a special court with a distinct jurisdiction over customary matters, it is not exempt from the bounds of the Constitution. Therefore, s 71 within the LTA 1981 did not apply where an LTC decision breached constitutional rights.

So, *Aloimaina* added another level to the hierarchy of authorities which adjudicate on *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'asāmoa*. It is this line of argument that leads us to the Land and Titles Court reforms.

IV LAND AND TITLES COURT REFORMS

A Political Background

In 2020, the precedent set by *Aloimaina* led the then Prime Minister Tuila'epa 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 Sāmoan people".¹⁰⁴ As such, his

101 *Aloimaina Ulisese v Land and Titles Court*, above n 10, at 13.

102 Land, above n 16, at 515; and Sāmoan Constitution, art 2(1) and (2).

103 Land, above n 16, at 515. See for example *Sefo v Land and Titles Court*, above n 10; and *Land and Titles Court v Lautogia* [2018] WSCA 4.

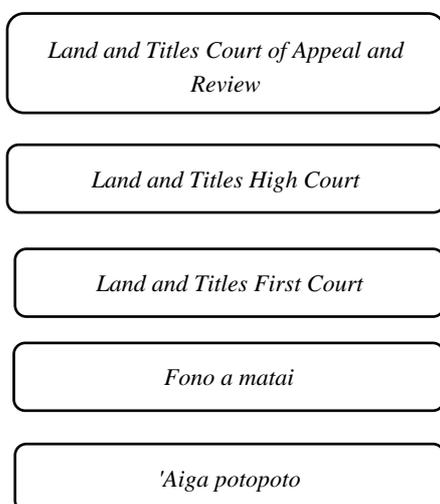
104 Constitution Amendment Bill 2020 (Sāmoa) (explanatory memorandum) at [1.5].

Government ushered in a set of constitutional reforms which sought to establish the LTC as an autonomous court hierarchy with status equivalent to the Supreme Court and Court of Appeal, thus enabling the growth of an independent customary jurisprudence.¹⁰⁵ The 2020 LTC reforms are contained in three Acts passed by the Sāmoan Legislative Assembly on 15 December 2020 and assented to by the Head of State on 5 January 2021: the Constitution Amendment Act 2020; the Judicature Act 2020; and the Land and Titles Act 2020.

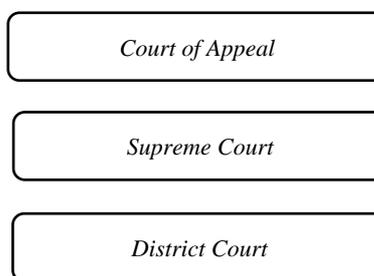
The reforms prompted Fiame Naomi Mata'afa, former deputy leader of the HRPP, to form FAST as a competing political party.¹⁰⁶ FAST campaigned on the repeal of the Acts and won a narrow parliamentary majority in the April 2021 elections, disrupting the HRPP who had been in government for nearly 40 years.¹⁰⁷ 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.¹⁰⁸

The legislation created the following parallel hierarchical structures in Sāmoa:

Dealing with customary matters:



Dealing with civil and criminal matters:



¹⁰⁵ Ey, above n 24, at 28–29.

¹⁰⁶ Land, above n 16, at 510.

¹⁰⁷ See "Extra seat thrown out, FAST wins Samoa election", above n 17.

¹⁰⁸ Sāmoan Constitution, art 109.

B Controversy

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

The Sāmoa 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.¹⁰⁹ According to the president of the Sāmoa Law Society, the Sāmoan Government used the COVID-19 pandemic to covertly make changes to the country's Constitution and its judiciary.¹¹⁰ 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.¹¹¹ Moreover, the Attorney-General and the SLRC, which is where the Bills were likely drafted, are prescribed specific processes within their mandates that include public consultation.¹¹² Leiataualesa Komisi Korā, a partner in Clarke Ey Korā lawyers, stated that when major legislative reform is undertaken such as this, village-wide consultation usually takes place.¹¹³ This was especially important for these reforms, as they directly impacted the LTC, which affects everyone in every village.¹¹⁴

Similarly, Sāmoa'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.¹¹⁵ 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 Sāmoa's ancestors wrote it.¹¹⁶ 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".¹¹⁷ These risks include that it

109 Joyetter Feagaimaali'i "Constitutional amendments worries Law Society" *Samoa Observer* (online ed, Sāmoa, 9 April 2020).

110 Dominic Godfrey "Samoa Govt pushes major change under cloak of Covid-19 – law society" *RNZ* (online ed, New Zealand, 18 April 2020).

111 The Sāmoan legislative process is largely the same as New Zealand's: see generally Legislative Assembly of Sāmoa *Practice and Procedure Manual* (2012).

112 Godfrey, above n 110.

113 Godfrey, above n 110.

114 Godfrey, above n 110.

115 "Judges warn Samoan govt about judicial reform" *RNZ* (online ed, New Zealand, 13 April 2020); and Nelson, above n 15.

116 "Judges warn Samoan govt about judicial reform", above n 115.

117 "Judges warn Samoan govt about judicial reform", above n 115; and Nelson, above n 15.

compromises the rule of law, as well as undermining the Constitution.¹¹⁸ Sāmoan Ombudsman Maiava Lulai Toma, in his capacity as head of the National Human Rights Institution in Sāmoa, also formally opposed the Bills on the basis that they threatened freedom of religion.¹¹⁹

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 Sāmoan Government stating that new provisions relating to the dismissal of judges would breach international standards on judicial independence.¹²⁰ It would also violate art 14 of the International Covenant on Civil and Political Rights.¹²¹ Amnesty International criticised the Bills on the basis that they compromise the application of fundamental human rights enshrined in the Constitution. The New Zealand Law Society also criticised the Bills in solidarity with the Sāmoa 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.¹²²

The controversy was largely fuelled by Tuila'epa's response to opponents of the reforms. He argued that the Westminster system of law does not and cannot dictate to Sāmoa what micro and macro applied customary practices should be, and criticised opponents of the Bills as "not Sāmoan".¹²³ He also sharply criticised the New Zealand Law Society's statement as an inappropriate lecture and interference with Sāmoan democratic processes.¹²⁴

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

118 See generally Ey, above n 24. See also "Samoa court changes would undermine rule of law – Fiame" *RNZ* (online ed, New Zealand, 14 September 2020). This is because the two different systems would apply different rules and in theory could reach different rulings on the same set of facts.

119 "Samoa's Ombudsman voices opposition to divisive bills" *RNZ* (online ed, New Zealand, 18 May 2020).

120 Letter from Diego García-Sayán (United Nations Special Rapporteur on the independence of judges and lawyers) to Tuila'epa Sa'ilele Malielegaoi regarding the three Land and Titles Bills (26 May 2020).

121 Joyetter Feagaimaali'i "Withdraw constitutional change: UN Human Rights Council" *Samoa Observer* (online ed, Sāmoa, 29 May 2020). See International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 14.

122 Tiana Epati "Serious concerns raised about constitutional law changes in Sāmoa" (2020) 940 *LawTalk* 5.

123 Joyetter Feagaimaali'i "LTC opponents 'not Samoan': PM" *Samoa Observer* (online ed, Sāmoa, 24 September 2020).

124 Epati, above n 122.

C Arguments for Reform

The arguments in support of reform are rooted in traditionalism. It is a line of argument that views the adopted Western legal principles as diminishing of *fa'asāmoa* and *fa'amatai*. It seeks to return authority to the customary bodies and principles that existed prior to colonisation.

Former Prime Minister Tuila'epa and the SLRC argued that the reforms represent an essential incorporation and promotion of Sāmoan custom over Western legal norms.¹²⁵ Telei'ai Lalotoa Mulitalo Ropinisone Silipa Seumanutafa, the Executive Director of the SLRC, suggested that there is an "overwhelming desire" for greater acknowledgement of custom within the Sāmoan legal system.¹²⁶ She argued 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.¹²⁷

Mulitalo's argument was underpinned by the assumption that the Constitution and common law are built upon "different philosophies" to customary law.¹²⁸ This argument is not unique to Sāmoa in terms of identifying the differences between Pacific customary laws and adopted Western laws.¹²⁹ She argued that Sāmoan custom's foundation is communalism, and that it is a strict hierarchy that seeks to preserve peace and harmony in the *nu'u*.¹³⁰ This is argued to directly contradict the individual rights expressed in the Constitution; these rights are therefore inapplicable and have limited relevance for many Sāmoans.¹³¹ Mulitalo evidenced 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.¹³²

125 Mata'afa Keni Lesa "LTC bills: Masked PM slams 'unfounded palagi thinking'" *Samoa Observer* (online ed, Sāmoa, 28 April 2020); Joyetter Feagaimaali'i "LTC's overhaul began in 2016: Law Reform Commission" *Samoa Observer* (online ed, Sāmoa, 2 May 2020); and Land, above n 16, at 509.

126 Telei'ai Lalotoa Mulitalo Ropinisone Silipa Seumanutafa *Law Reform in Plural Societies* (Springer, Cham, 2018) at 58–59; and Sāmoa Law Reform Commission *Fetuunai Muniao: Lipoti o Suesuega* (Research Report 1, 2019) at 4–8.

127 Seumanutafa, above 126, at 62–65.

128 At 50; and Land, above n 16, at 516.

129 Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP17, 2006) at 75–78.

130 Seumanutafa, above n 126, at 50; and Elise Huffer and Asofou So'o "Consensus versus dissent: Democracy, pluralism and governance in Samoa" (2003) 44 *Asia Pacific Viewpoint* 281 at 291.

131 Seumanutafa, above n 126, at 53–55.

132 At 55.

D Arguments against Reform

Opponents of reform suggest that reformists significantly understate the already existing role of Sāmoan customary law. The Sāmoan judiciary rejected the proposition that the general courts "control and interfere" with the LTC in a submission made advising against the reforms.¹³³ The judiciary then discussed the mechanisms that mitigate the diminishment of custom as Tuila'epa and Mulitalo suggest. The submission highlighted the Supreme Court's conservative use of its judicial review powers and emphasised the Court's inability to review the merits of LTC decisions as two mechanisms upholding customary law.¹³⁴ 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.¹³⁵

Moreover, if a judicial review succeeded, the Supreme Court usually sent matters back to the LTC for reconsideration on the customary merits.¹³⁶ This mechanism retained and respected the LTC's specific expertise on Sāmoan custom. Furthermore, when the Court has dealt with matters concerning customary land, such as cases challenging historical land confiscations, it has relied on evidence of *matai* and historians to draw conclusions on customary issues.¹³⁷

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 SĀMOA

In this Part I seek to identify what the recent LTC reforms and subsequent constitutional crisis tell us about *fa'amatai* and *fa'asāmoa* in contemporary Sāmoa. In doing so, I will address the fundamental differences between traditionalists and modernists. I will also identify what the 2020 Sāmoan election indicates about Sāmoa's perception of *fa'amatai* today.

133 Joyetter Feagaimaali'i "Judges caution Govt about judicial overhaul" *Samoa Observer* (online ed, Sāmoa, 12 April 2020) at [26].

134 Feagaimaali'i, above n 133, at [27]–[29].

135 *Penaia II v Land and Titles Court*, above n 10, at [17].

136 Land, above n 16, at 517; and Feagaimaali'i, above n 133, at [28]. See for example *Esekia v Land and Titles Court* [2017] WSSC 145 at [44].

137 *Alii and Faipule of Lauili v Trustees of the Estate of Jacob Helg* [2011] WSSC 48 at [31]–[32].

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

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

Prior to colonisation, Sāmoan society was predominantly rural and for this reason there was likely to have been a far stronger consensus around *fa'asāmoa*.¹⁴⁰ Once Sāmoa was unified under colonial rule, it was inevitable that new hierarchies that worked broadly across the islands would develop, and the 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 Sāmoa were determined by the *fa'amatai*.¹⁴¹ The LTC now fulfils this function and has been accepted to fulfil this function for decades.¹⁴² 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.

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

The two camps of traditionalism and modernism are then focused, 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

138 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, Suva, 1988) 107 at 107–108.

139 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.

140 Meleisea, above n 33, at 188.

141 Vaai, above n 26, at 29. See generally AF Le Tagaloa "Samoan Village Society" (1986) 99 *The Courier* 1; Le Tagaloa, above n 6, at 76; and Malama Meleisea and Penelope Schoeffel (eds) *Lagaga* (University of the South Pacific, Suva, 1987) at 24–38.

142 Le Tagaloa, above n 6, at 76.

lived their entire lives in the *nu'u*.¹⁴³ 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 not accepted state oversight since colonisation began.¹⁴⁴ Where family and village interests clash with national interests, many Sāmoans put their *'aiga* and *nu'u* first.¹⁴⁵ This is evidenced by the rejection of some LTC findings, as discussed above.¹⁴⁶ 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 Sāmoans. On this view, these roots which their ancestors planted have not moved, and therefore neither have their perceptions of *fa'amatai*.

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

It is important not to minimise the importance and relevance of the views of Sāmoans who do adhere to the traditional understanding of *fa'amatai*. As Tuila'epa correctly cited, in some *nu'u* today,

143 Taua'a, above n 32, at 62.

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

145 Unasa LF Vaa "Samoan Custom and Human Rights: An Indigeneous View" (2009) 40 VUWLR 237 at 241; and RP Gilson *Samoa 1830 to 1900: The Politics of a Multi-Cultural Community* (Oxford University Press, London, 1970).

146 Seumanutafa, above n 126, at 55.

147 Vaai, above n 26, at 62; and Vaa, above n 145, at 247.

148 Ey, above n 24.

the likes of fundamental constitutional rights are not discussed on the *fono*.¹⁴⁹ 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 for elders and those who have lived in the *nu'u* their entire lives, tradition is the world that revolves around them.¹⁵⁰ To adapt and to change those traditions, and to 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 sit 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* that 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.¹⁵¹ Western principles have guided much of the discussion about the reforms and therefore about the role of custom in Sāmoa. In removing the Supreme Court's supervisory jurisdiction, the changes have abolished the application of fundamental human rights over village *fono* decisions in the pursuit of uplifting "communal rights" instead.¹⁵² The intention of the reform is fundamentally flawed as it unjustifiably simplifies the distinction between custom that 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 Sāmoans.¹⁵³ Professor Malama Meleisea has criticised the false dichotomy between individual and traditional communal rights, explaining that, when individual rights are protected, the community is protected.¹⁵⁴ Sāmoan Ombudsman Maiava Iulai Toma reported that human rights are not foreign ideals, but in fact have their roots in Sāmoan cultural values, and that the two taken together make a more harmonious society.¹⁵⁵

149 Constitution Amendment Bill 2020 (Sāmoa) (explanatory memorandum) at [1.5]; and Tiffany, above n 139, at 36.

150 Tiffany, above n 139, at 36.

151 Matai'a Lanuola Tusani T-Ah Tong "UN criticism of LTC changes endorsed by Law Society" *Samoa Observer* (online ed, Sāmoa, 6 June 2020); Matai'a Lanuola Tusani T-Ah Tong "LTC Committee's 'misleading' handouts: Law Society" *Samoa Observer* (online ed, Sāmoa, 24 July 2020); and Matai'a Lanuola Tusani T-Ah Tong "Delayed decisions and what could happen if LTC bills passed" *Samoa Observer* (online ed, Sāmoa, 30 August 2020).

152 See generally Constitution Amendment Bill 2020 (Sāmoa) (explanatory memorandum).

153 Ey, above n 24.

154 Meleisea, above n 33, at 17.

155 "Samoa's Ombudsman voices opposition to divisive bills", above n 119.

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 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'asāmoa* herself, is rooted in a network of values inherited by Sāmoans from our ancestors.¹⁵⁶ It is these values of *alofa*, *tautua*, *fa'aaloalo* and *usita'i* that provide the 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'asāmoa*, 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 Sāmoans accept authority.

The 2021 Sāmoan election provides insight into what authority Sāmoan people accept today. The HRPP had governed Sāmoa for nearly 40 years, and these reforms that adversely affected constitutional human rights were the catalyst for their electoral demise.¹⁵⁷ Prime Minister Fiaame stated that, when she formed FAST to campaign against the reforms, she did not think that FAST was going to win the election.¹⁵⁸ However, FAST did win and in doing so disclosed the public discomfort with Tuila'epa's plans to undermine the Constitution and the rights that it affords Sāmoan 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'asāmoa*. Fiona Ey strongly refutes any suggestion that Sāmoan lawyers and judges who resisted the reforms, many of whom hold *matai* titles, are not "sufficiently Sāmoan".¹⁵⁹

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

It is through the Sāmoan public's, as well as the diaspora's, discomfort with compromises to the Constitution that these human rights can be understood as a part of the *fa'asāmoa* 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 as a source of customary governance by the people of Sāmoa. Moreover, seeing as these human rights are not in conflict with *fa'asāmoa*, but instead are in harmony, individual human rights are arguably inherent in *fa'asāmoa* as they protect the collective. Either way, the 2021 election has demonstrated that constitutional rights are an

156 Meleisea, above n 33, at 17.

157 Land, above n 16, at 508; and "Extra seat thrown out, FAST wins Samoa election", above n 17.

158 Hollingsworth, above n 20.

159 Ey, above n 24.

authority which Sāmoans accept and, as a result, may be said to form a part of the *fa'amatai* in contemporary Sāmoa.

D Customary Authority and Governance Today

The issue of where customary authority and governance presides in contemporary Sāmoa is an extremely vexed question which would likely receive different answers from *'aiga* to *'aiga*, in the same way that *fa'amatai* varies from *nu'u* to *nu'u*. At its roots *fa'asāmoa* governs the behaviour of Sāmoan people and *fa'amatai* is the administrative skeleton that dictates the authority afforded to each individual, family and village in pursuit of collective peace and success. But Sāmoa 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.¹⁶⁰ Instead, Sāmoa has hundreds of protocols that govern the behaviour of Sāmoan people, whether they live in traditional villages governed by *fono* or elsewhere.¹⁶¹

Although these protocols, which have been practised for centuries, place little value on individualism, I argue that the contemporary statements from the likes of Tuila'epa regarding customary governance create an illusory competition between individual and collective interests.

Sāmoan 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" form being reserved for formal or polite speech) and many other aspects of life.¹⁶² I have discussed at length the extent to which customary protocols dictate resource allocation and land distribution matters. *Fa'asāmoa* 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 (in which the constitutional rights find their origin) governs how the individual behaves to achieve a betterment of self.

So, despite Western and Sāmoan 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. It would be false to articulate these frameworks as being void of similarity. Since 1921 Sāmoans have lived under a legal system that more or less successfully mixes Sāmoan custom with modern laws that grew from the historic bedrock of British common law and the United Nations Universal Declaration of

160 Malama Meleisea and Penelope Schoeffel "Sāmoan Custom, Individual Rights, and the Three 2020 Acts: Reorganizing the Land and Titles Court" (2022) 57 *Journal of Pacific History* 439 at 449.

161 At 449.

162 At 449.

Human Rights.¹⁶³ Most Sāmoans are satisfied with this system¹⁶⁴ 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'asāmoa* for the betterment of their *'aiga potopoto*. So, individual rights in the Constitution do not exist at the expense of customary authority. Instead, they behave 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 Sāmoans accept customary governance today.

We have yet to see how the new LTC legislation will operate in practice or if it will be overturned. The legislation gives the LTC powers to make decisions without reference to the provisions of the Constitution. This has disturbing implications for these fundamental rights that are nowadays accepted by most Sāmoans as their due.¹⁶⁵

VI CONCLUSION

Fa'amatai has always been a very complex web of relationships, all balanced with the values of *fa'asāmoa* 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, and then the Constitution when enforcing fundamental rights. The purpose of this article 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 Sāmoan thinking has shifted in relation to customary governance and changed since its conception. *Fa'asāmoa* and *fa'amatai* evolved to survive and incorporate Christianity, and Christianity continues to live at the heart of Sāmoan culture today. Similarly, *fa'asāmoa* 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 in customary Sāmoan practices.

In the aftermath of independence, *fa'amatai* and *fa'asāmoa* remained intact, both in practice and in theory. However, what had changed was the different legal mechanisms colonial rule had left behind to adjudicate on custom. In relation to customary law, the LTC existed as a protective institution to ensure that Sāmoa 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

163 At 450.

164 At 450.

165 At 450.

practice regarding customary land and *matai* titles. Prior to colonisation, each *nu'u* understood that its *fono* reserved the final decision in disputes that concerned the *nu'u* and its constituents.

But, over the course of the last century, the LTC has been an important institution by which decisions at the *fono* can be appealed. It is an accepted institution, respected for its expertise in customary matters. In fact, throughout the debates regarding the reforms, both those in support and those against argued 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'asāmoa* 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 that is relevant for *fa'amatai* and *fa'asāmoa* 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 interconnectedness. This article 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 Sāmoan conscience that 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 Sāmoan identity. This is because when every individual has rights, the collective is uplifted as a result.¹⁶⁶ This must then be aligned with *fa'asāmoa*, 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 and adopted law. It is not that simple. Understanding what *fa'amatai* looks like today to many Sāmoans requires attention to *both* customary and adopted principles, because colonisation has left an indelible mark on Sāmoa and her people. This debate has generated such a large conversation because the reforms and subsequent election have gone to the heart of the question of what it really is to be Sāmoan. And the answer is that the Sāmoan identity – always rooted in *fa'asāmoa* – is ever-changing and adapting to survive in the world around it.

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

¹⁶⁶ Meleisea, above n 33, at 17.

<i>Fa'amatai</i>	Indigenous Sāmoan political system
<i>Fa'asāmoa</i>	Sāmoan 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