

February 12-14, 2018 Pacific Law, Custom & Constitutionalism (PLCC) Conference I



Samoa: Exploring Traditional Leadership, Customary Land Tenure & Religious Rights

Conference Proceedings Publication

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2018 PLCC Conference Committee:

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We were and are honoured for the support you all gave; may God bless you all.

2018 PLCC Conference Committee



Welcome to our Conference Proceedings

Some Introductory Comments...

Tamasailau Suaalii-Sauni & Sonia Pope

On the 12th of February an innovative and exciting three-part conference series – the first of its kind – on Pacific law, custom and constitutionalism (PLCC) kicked off at the University of Auckland, Fale Pasifika. This began the first of the three PLCC conferences, and it focused on Samoan law, customs and constitutionalism. The second conference in the PLCC series will focus on Tonga and is planned for the end of 2019, and the third is planned for 2020 and will focus on the three New Zealand territories of Niue, the Cook Islands and Tokelau.



This conference proceedings booklet records the main speeches delivered at this first conference, as well as some post-conference Samoa newspaper publications written by three of the keynote speakers. These newspaper articles offer evidence of how the conference themes and debates have continued in the public arena since the conference.

The PLCC conference series was the brainchild of a group of enthusiastic Samoan and Tongan women, all of whom currently work in different areas of justice in Aotearoa New Zealand: from the courts to community-based social justice intervention programmes to academia.

They formed what their formidable leader, Judge Ida Malosi, called a 'Brown Swell'. Judge Malosi spoke briefly during the opening formalities on the first day about the formation of this group at the suitably named Te Wahi Ora Women's Retreat site in Piha, Auckland, in August 2017. And, of how they dreamed of a forum where Pasifika peoples – lay and legal experts alike – could participate in, where they would come to listen, learn and dialogue with each other about pressing law, custom, justice and constitutional issues affecting them at this moment in their histories. It was hoped that the dialogue would involve both Aotearoa New Zealand based Pasifika peoples and the wider New Zealand public, as well as a dialogue between Island homeland-based Pasifika peoples and those who have settled in Aotearoa, especially the young. The dream was to allow for a dialogue that was not narrowly technical in its focus or languaging, was bi-lingual, and was more inclusive of a 'community voice' and of ways to build or strengthen 'bridges of understanding' between legal or social justice fraternities and lay peoples. By and large this was achieved with representations and conversations occurring between those from different legal professional, student and community audiences.

The Samoan community seemed a natural first Pasifika group to focus on given not only its population size in Aotearoa New Zealand, but also current public constitution-related debates in Samoa over state religion, over the

relevance of traditional leaders such as Tama-a-aiga in public life, and over Samoan community fears (in Samoa and outside) that the Samoa Land and Titles Registration Act 2008 offered too much opportunity for the constructive alienation of customary land, something seemingly protected against by Article 102 of the Samoa Constitution. The organising committee agreed that these issues – about customary land, religious rights and traditional leadership – would transfer nicely across to the other Pasifika groups highlighted for the PLCC series. The challenge from August to October 2017 was therefore to put together a credible programme on the one hand, and secure basic funding on the other. Once that was achieved the next challenge was to make it all happen in what was by then effectively only two months! Yes, the February 2018 date was a crazy undertaking but one the team considered necessary if we were to capitalise on the momentum surrounding public debates over the constitutional issues mentioned earlier. This conference proceedings booklet evidences the focus and spirit of the conference dialogue that emerged.

It is a well-documented argument in academic literature that most Independent South Pacific countries have, since achieving Independence, not been able to fully and seamlessly integrate their indigenous or custom laws into the fabric of their national or domestic laws, most of which are modelled on Anglo-American systems of law. This applies across the board, from legislation about land tenure to legislation about political elections, crime and so on. The papers in this volume offers readers insight into some of the implicit disconnects between lay or community understanding of legislative intent and the more technical rules of statutory interpretation and legal method. They also imply very different jurisprudential starting points for Samoan custom law on the one hand and imported Anglo-American laws and law-making traditions and principles on the other. For the legal professional they offer insight into the way in which Samoan community advocates and leaders understand and language their current reading of the relationship between law, custom and constitutionalism. And, as well, the way in which the current Samoa Law Reform Commission is framing its messages about custom in law and law reform. All of this provides food for thought about where we, as community members and legal professionals, might focus our exercises of bridge building or bridge strengthening between law and custom.

Fomer Head of State, His Highness Tui Atua Tupua Tamasese Ta'isi Efi raised in his conference Q&A session the significance of not only being in dialogue with each other as Samoans living in and outside of Samoa, but also in dialogue with Maori as tangata whenua of Aotearoa New Zealand and learning from their experiences and their scholarship on integrating custom into law. It is therefore fitting that his keynote address on leadership on Day One in this conference proceedings is followed by Dame Tariana Turia's dinner address on traditional leadership. It is also fitting that the last word in the formal keynote addresses on the second and last day of the conference, notably Ash Wednesday, was given to our tuahine Dr Jenny Te Paa Daniel, who fought to raise social justice awareness among our Pasifika clergy who trained at St John's Theological College during her leadership of the College. Jenny's passionate keynote address puts our Pasifika indigenous issues and values into a broader Pacific social justice context and complements the passion with which the other three Day Two keynoters from Samoa, Sister Vitolia Mo'a, Teleiai Dr. Lalotoa Mulitalo and Fiu Mata'ese Elisara, delivered their addresses.



Although this conference proceedings publication does not record the commentaries by the distinguished members of the three panels, or of the Q&A sessions (especially including those questions raised or commentaries offered by the high school students), edited video excerpts of the panel presentations, Q&A discussions and high school students' commentaries will be made available for viewing on the conference website at: <http://pacificcustomlawconference.blogs.auckland.ac.nz/>. The actual conference programme is available on the website and at the end of this booklet. The conference programme records not only our impressive list of panellists and keynoters, all of whom are experts in their respective fields of work (from law, policing, and corrections, through to mental health, education and social housing) but also a brief biographical profile of them all. All seven keynote addresses (including the opening remarks and dinner address) are published here.

In recognition of the importance of the cultural va between Maori and Pasifika peoples, and between Pasifika peoples and wider New Zealand, the official part of the conference opening began (after the prior performance of an 'ava ceremony and of the mihi whakataua) with opening remarks by New Zealand's former Governor General Sir Anand Satyanand, who fondly disclosed in his opening remarks having close familial ties with the Pacific, including Samoa.

As one participant stated, this was not a usual law conference. For us it was a 'law' conference – and is a 'law conference series' – with a difference. It is a law conference and law conference series that seeks to bring out into the sunshine the 'l-o-r-e' in 'Pacific l-a-w'. We'll let you, the reader of this proceedings and viewer of our website video material, judge just how well that was done. Enjoy!

Pre-conference 'ava ceremony & engagement with students



DAY ONE:

Official Opening &
Theme One: Traditional Leadership



1. Formal Opening Remarks

Good morning, Kia Ora, Kia Orana, Fakalofa Lahi Atu, Taloha Ni, Talofa Lava, Malo e leilei, Ni Sambula, Halo Olgeta, Mi Likum Yu Tumas

I greet everyone, as best as I am able, in Pacific languages from within the Fale Pasifika, a wonderful statement of the strand of the Pacific that has come to characterise this University as well as the city of Auckland, and our country, New Zealand.

I greet everyone who has come here to participate in this Conference and to wish you well in the listening, discussion and conversation that will occupy your time throughout these two days.

My place to stand here, alongside the kind things said by Mr Leauanae, is that I am a New Zealander of the Pacific with my parents having been born and raised in Fiji before migrating to New Zealand.

I also have a part of my family that is Samoan in character with an Uncle who, as a teenager, had a real finauga with his family in 1934, who left his house and his country by boarding a ship and acquiring a menial job on it; a ship which sailed out of Suva and around a number of places before landing in Pago Pago. There, Surendra Pal Tillak changed his name to Tui Chanel and took up residence in American Samoa.

Over the next 40 years he worked, became married and had children. When his first wife died, he married again, and they also had children. I thus came to have two Samoan aunties and a number of Samoan cousins with whom I am in contact today. My Auntie Blanche died and is buried in Satala alongside her husband at Pago Pago, and my Auntie Taufaoa is buried at her village, Saleimoa, on Upolu.

I have three things to say in relation to the Conference. The first relates to the overall theme of Pacific Law, Custom and Constitutionalism. In many legal circles those three things are considered individually. In many Pacific communities, however, there is an intertwining of custom and law, and this Conference provides a great opportunity for those items to be considered together.

Secondly, I want to refer to the programme or agenda and to offer the view that long after the recall of what was said and how and which debates were successful or not has faded, the evidence of this Conference will remain in the printed agenda as an important statement of the issues in the eyes of the Organising Committee. I thus think that the work you have done, Judge Ida Malosi and Helena Kaho and your colleagues, in articulating what is germane for discussion in 2018 is deserving of special mention.

The third thing is people, three of whom (Laulu Mac Leauanae, Judge Ida Malosi and Helena Kaho) I have already referred to. You have managed to gather a cohort of entirely suitable people to speak and teach and challenge. Your Highness Tui Atua, your own willingness to come and participate is a strong vote of support and a compliment to the Conference. People who are Pacific scholars in many disciplines from many New Zealand Universities like Professor Tony Angelo and Dr Jenny Te Paa Daniel provide confidence that this Conference will be followed by others and that people in many different places will benefit.

I want to end with a challenge to say that today is a great waypoint in the life of our country that deserves mention. We have a New Zealand today where there are a number of Maori and Pacific people who have entered the stream of top academicians and practitioners.

Khylee Quince, who is to speak very shortly, introducing Tui Atua, is a recognised top-flight law teacher, Associate Professor Damon Salesa heads the Centre for Pacific Studies at the University of Auckland, and Helena Kaho is the first Pasifika law teacher at the University of Auckland. I stop there because the challenge lies in the nearly 300,000 New Zealanders of Pacific origin in our community. The percentage figure is 7.4 per cent and the number is rising. It went up by over 10 per cent in the time between the last censuses here in 2006 and 2013. It is those people who will benefit from knowing more about who they are, where they came from and how they are part of the very special chemistry that New Zealand is able to offer.

The former Secretary General of the United Nations Kofi Annan paid New Zealand a compliment saying it was “a country that works”. Let me express the hope that these days at this Conference will add lustre to that reputation.

Sir Anand Satyanand

Fale Pasifika, University of Auckland

13 February 2018

2. Taofi Sā: Leadership and Discretion

*His Highness Tui Atua Tupua Tamasese Ta'isi Tupuola Tufuga Efi
Former Head of State of Samoa & Chairman of the Gaualofa Trust*

Introduction

There is a Samoan saying: E sui faiga ae tumau faavae. Essentially this means: Despite change, our foundations will remain the same. “E sui faiga” is a reference to changing forms; to changing physical and economic environments and the impacts of these changes on political, cultural and even theological beliefs. The phrase “Ae tumau faavae” is a reminder that notwithstanding these changes and their impacts there are human verities, such as compassion, truth, fairness and justice, that do and have remained constant and relevant across time. Constitutionalism is about our faavae or foundations, about the verities in our foundations, and about how we protect these from the negative influences of change.

Today I have been asked to offer some thoughts on the constitutionalisation of traditional leadership in the Samoan context. This requires visiting a number of schools of thought. In particular: the faamatai (or Samoan chiefly system), parliamentary democracy and the rule of law. It requires noting how these schools play out within various Samoan contexts and reflecting on how these are recorded and respected by Samoa’s laws and lawmakers. In this paper I focus specifically on the faamatai or traditional Samoan chiefly leadership.

In the situation leading up to Independence, Samoa faced the difficult task of deciding how best to shape her new Malo or new governing regime. Our forefathers knew that in order for Samoa to remain a viable part of the global economy they would need to take on board the political apparatuses of the new European world order. Samoa was familiar with the British and so it made sense to take on the British Westminster system of parliamentary democracy. Our forefathers, being proud Samoans also knew, however, that whatever system of governance they decided upon it had to be a system that would respect the faasamoa – their Samoan heritage and inheritance. The compromise or check and balance they decided on was having a parliamentary democracy that was (and still is) led only by matai, that is, whereby only a matai can be a parliamentarian. And, at the time of Independence, it meant that Samoa would adopt matai-suffrage rather than universal suffrage.

In 1991 the 1963 Electoral Act was amended so that while Samoa’s parliament would still be matai-only, parliamentarians were now being voted into parliament by universal suffrage – by any Samoan citizen over the age of 21 years, titled or untitled. This 1991 legislative amendment set the ball in motion for what seemed the start of a frequent number of successive constitutional amendments to date: from 1991 to the current day there have been at least 11 amendments compared to only six during the 28-year period of between 1962 and 1990.

Faamatai

While a lot of academic work has focused on the faamatai – mostly anthropological and mostly descriptive, not much attention has been given to the deeper logic, theory, histories, sociologies, philosophies and theologies within the faamatai and their universal relevance. This is what is missing from current conversations and scholarship on the faamatai, and it is what is vital to the proper development of a Samoan jurisprudence that takes proper regard of our faasamoa.

Structurally the faamatai can be viewed as a hierarchical, meritocratic and reciprocal leadership system. Access is based on both selfless service (access through tautua) and kinship blood ties (access as suli). The matai system is the creation and prerogative of aiga or families. The aiga is the lifeblood of both the faasamoa and the faamatai. Aiga is both nuclear family units and/or larger extended family clans. Aiga are the bestowers of matai titles. If an aiga does not agree to the bestowal of a title, the title cannot be bestowed. Put it another way, only aiga have the pule or authority to bestow a matai title.

Within the faamatai system there are different levels of matai. There are family matai who deal with the day to day running of family or aiga life in the village, church or other setting. These matai usually include a sa'o or head of the family (which today can be more than one person), and a number of supporting matai – from tulafale matai (or orator chiefs) to matai pitovao¹ and matai vaipou². Matai vaipou would be expected to act as the recorders of knowledge discussed by senior matai in the maota. Although matai pitovao and matai vaipou are sometimes considered lowly in the matai structure, they play an important role in the overall faamatai system. Their service or tautua underline the principles of humility and reciprocity, key principles in the faamatai.

Among senior ranked matai, there are two main types of matai: the alii (understood as being of sacred status and the pre-eminent chief) and the tulafale (or orator chief, understood as having the responsibility of dealing with temporal, executive type matters). There are some families and villages who have combined these two types of matai so that instead of having two separate matai playing the alii and tulafale roles, one matai plays both roles. These are, however, not common.

At the higher levels of the faamatai there exists the layer of traditional leadership that has the most direct impact on Westminster parliamentary democracy and its ideas of leadership and governance. I wish to focus on this layer of traditional Samoan leadership for the remainder of my talk.

This layer of matai leadership has significant inter-village and/or national significance. They involve matai who have sa'o status (i.e. pre-eminence within the family setting) and/or tu'ua status (i.e. sacred wisdom

1 These are serving matai to the sa'o or to other higher ranking family matai; those usually responsible for doing the manual labour work, usually done outside the maota – i.e. the formal village or family meeting house, hence the name 'pitovao', which refers literally to 'end part of the forest'.

2 These are serving matai and they are usually responsible for assisting the higher ranked matai in the maota, for example, they may assist to senior matai of rank who may be hard of hearing at the fono and would generally assist the fono with various chores that need doing.

and elder status). Historically, these matai may also be of ao status³, of tama-a-aiga status⁴, or of pāpā status⁵, and/or of tafaifa or tupu status (i.e. a holder of all four pāpā titles).

Like Westminster parliamentary leadership, this level of traditional Samoan leadership carries huge weights of responsibility. They carry the weight of being arbitrator in aiga, village, district and/or inter-district disputes; of protecting the mana of each of the families and districts to which they belong; and of ensuring that the heritage and inheritance of their people is kept alive from one generation to the next. While these matai roles attract status and deference, they also attract significant burdens and responsibilities. They were and are not roles to be taken lightly. They were and are roles that engage daily with our traditional wisdoms. I wish to turn to these wisdoms – in particular the wisdom of the taofi sā and of the tofā taofiofi.

Taofi sā and Tofā taofiofi

Taofi sā and tofā taofiofi are about the wisdom of discretion and protecting boundaries, and the wisdom of restraint. Taofi sā is shorthand for the phrase: “taofi ona o sa o le mataupu” (i.e. to hold back or show restraint because the issues at hand have far-reaching consequences and carry with them spiritual imperatives). It is a concept and phrase that assumes the idea that e taofi sā ona e le soona fai se tonu: meaning: one is to practice wise discretion or caution because the decisions at hand are heavy, weighty and in need of careful deliberation. This brings to mind the saying: liuliu faalaau mamafa le tofā ma le faautaga (to turn slowly and cautiously like the turning of heavy logs). This saying and the concept of taofi sā connects with the concepts of soalaupule (to share points of view because each person has a legitimate point of view that ought to be shared in order to make wise collective decisions) and the concept of the tofā lauama tootoo. This latter concept is about the wisdom of warning, consulting and advising. It incorporates the notion of fautuaga – another word for careful or cautionary advice. Tootoo is a reference to a chief’s staff and is thus symbolism for support and balance – both implicit in the tofā. The concept derives from the saying: “Aua ne’i lauama, ia lauama tootoo” (Aim not for that which encourages turbulence but for that which engenders calm and peace). Associated with the concept of taofi sā therefore is the idea that one must look carefully (silasila toto’a) at what is at issue and move carefully (lauama tootoo) in one’s decision-making.

Why am I deliberately taking you through each of these concepts? Because these concepts (and many others like them) carry the heart and soul of the tofā and faautaga (the wisdoms) of our forebears. These informed, inspirited, sensitised and flavoured the Samoan aspects of our constitutional foundations. They are what we have to get our heads around in terms of what they meant to our forebears’ and what they mean to us today. Knowing this cultural, philosophical and intellectual genealogy is important to participating meaningfully in Samoan constitutional law reform debates today, both in Samoa and outside.

3 For example, Lilomaiva, Tonumaipē’a, and/or other ao titleholders in Savaii.

4 Namely a tama-a-aiga titleholder, e.g. Malietoa, Mataafa, Tuimalealiifano, or Tupua Tamasese.

5 That is, one of the pāpā titleholders: Tui Atua, Tui Aana, Gatoaitetele or Vaetamasoalii.

In order to protect due process and the authenticity, authority and legitimacy of one's vote or view – of one's pule – our traditional faamatai model saw that there is sometimes a need to impose the process or system I am calling 'taofi sā' on decision-making. In this sense taofi sā also speaks to issues of confidentiality. It is a measure for protecting boundaries, those that for Samoans enable a fair, deliberate and/or culturally appropriate democratic voting process. A process that is respectful of sacred or tapu boundaries. It offered and still offers a check and balance on the powers of a dominant majority. And, in practice it has relevance to the world of Westminster democratic politics and its use of secret ballots.

When Malietoa and my father knew that the constitutional convention was about to deliberate over their involvement as Tama-a-Aiga in the new governing regime as Head of State, sole or joint, they practiced the taofi sā and removed themselves from the debate. The thinking behind this, though perhaps obvious, is worth unpacking. Such unpacking offers transparency, a necessary ingredient for proper, healthy and critical dialogue, the kind necessary to make good laws, laws that can take proper account of our faasamoa and faamatai. As a Tama-a-Aiga and former Head of State I believe there is more to be gained than not by offering my taofi at this point in time. I begin by drawing on the wisdoms of our constitutional forefathers who debated in 1954 and 1960 their views about Tama-a-Aiga as Head of State.

Constitutional debates on Tama-a-Aiga as Head of State

Because of time constraints I will recite only four brief excerpts to underline my point about how our Constitutional forefathers spoke about Tama-a-Aiga as Head of State and the centrality of our Samoan concepts to the wisdom of their thinking. These excerpts evidence the character and quality of their soalaupule and hopefully will inspire someone to do a deeper analysis of the jurisprudential value of the concepts they raised.

I quote verbatim the Samoan language version of the texts, which was the original language used to make their points during the debate. I offer an English translation in my footnotes so non-Samoan speakers can follow, and which people can later compare to the English language translation of the English version of the 1960 Samoa Constitutional Debates volumes. I quote from Orator Chiefs, Pini Falaniko, Tevaga Paletasala, and Tuilagi Pao (see pp.440-442, Samoa Constitutional Convention Debates, Samoan Language Version, 12/09/1960).

Tofā Pini Falaniko states:

“...Ou te tomanatu i le saunoaga a le Afioga a Mataafa i le Fono sa usuia i Lepea faapea foi totonu o le Maota lava leni, a o avea o ia ma Fautua faatasi ai ma le Susuga Malietoa ma le Afioga ia Tupua Tamasese. Sa saunoa faapea i sui o le atunuu na aofia i lena aso, na le manaomia se Malo Tutoatasi, e faafoeina e afioga i alii Fautua, ma sui o le atunuu atoa. Sa ia tautino i sui a le atunuu, e iu lava ina toatolu i latou, e vaai i le toatolu lea o le Tafatolu faamanuiaina aua ua fusia ma tuufaatasia o latou agaga ma mafaufau mo le lelei o tagata uma. O le mea lea ou te vaai i lena saunoaga na faia i lena taimi o se faata e taitaiina ai au i leni mataupu e oo mai i le taimi nei. .../O le a ou afea nisi o faafitauli o leni mataupu faigata, ae ou te lagolagoina ma lou loto atoa, le Faavae Faataitai o lo o i lumamea. **Ou te mautinoa o le mea lava o lo o naunau ai Samoa e faifaimea faatasi po o le fea**

e pasia ma faamaonia ai le Faavae ina ia mafai ai e Samoa ona faifaimea ma isi atunuu o le lalolagi. / Lou afioga o lou taofi lena. Soifua” (p.440).⁶

Tofā Tevaga Paletasala responds:

“Lau Afioga a le Taitaifono ma sui usufono, ou te fia faafetai atu i le avanoa ua tuuina mai e faaalua ai sou manatu i le mataupu ua lumafono o le Ao lea o le Malo. A o lo o talanoaina le mataupu ua i o tatou luma, e fai sina ou popole ona o le mea moni o le fatu ma le lio lenei o le lumanai tutoatasi o lo tatou atunuu. Ou te fia faatepa le mamalu o sui i le saunoaga mai le Nofoa, i se taeao ua tuana'i, ae ou te le i tuu atu ni manatu i le mataupu ua i lumamea. / Ma ou te faapea atu na matua sola ese le popole mai lou mafaufau i le mataupu ou te manatu e tatau e faamuamua ia tatou mafaufauga mo lona iloiloga. E mautinoa lava sa agai uma a tatou talosaga i le Atua ma le faanaunauga maualuga ia maua se mea filemu ma saoloto i lo tatou atunuu. **Ma ou te faamalo i Afioga i Tama-a-Aiga mo le loto mama ma le faatofalaiga i lenei mataupu taua. Ua tatou malamalama uma lava, sa taumafai vaega faaupufai i totonu o Samoa i tausaga ua tea e faavae o lo latou malo i luga o latou Tama-a-Aiga. A o aso nei, o lo o tatou taumafai e faavae le Malo mo tatou tagata e faavae i le Atua. /...Ma ou te mafaufau atonu ina ia faafilemuina ai tatou filifiliga pe le tatau ona faatoai i Tama-a-Aiga fuafuaga mo le lumanai.**” (p.441).⁷

Tofā Tuilagi Pao responds a little further along by saying:

“Lau Afioga i le Taitaifono ma sui usufono o le Fono Faavae, e uiga i mataupu o lo o talanoaina, o se mea e fiafia e pei ona i le Faavae Faataitai, o le avea lea o Afioga ia Tupua Tamasese faapea ma le Susuga Malietoa Tanumafili II, o le Ao Soofaatasi o le Malo, ma a tuumalo se tasi o i laua, e faaauau pea le o lo o soifua o e Ao o le Malo. .../Ma ou te fia faatepa sui o le atunuu, i le maliliu o latou tuua a o taumafai e lagolago a latou Tama-a-Aiga i totonu o faiga Malo i aso ua mavae. Ou te le fefe e tau atu lau Afioga o fevaevaeaiga ma faalavelave na tutupu i taimi ua tea i Samoa. Na mafua mai ia Tama-a-Aiga. A o le a la tatou mea lelei na maua mai ai? Ua tatou mautinoa lelei lava e ui ina sa tutupu faigata i le taimi ua fano, e le i faaitiitia le mamalu o se isi o i latou. Sa masani ona tatou faatoga ma talosagaina le taitaina a le Atua ina ia taitai i tatou i a tatou filifiliga ua le lava lo tatou taimi ina ia 'seu le manu ae tagai i le galu'. O lona uiga e tatau ona tatou taumafai e faapuupuu a tatou felafolafoaiga i le mataupu lenei aua tatou te iloa sa talosaga le sui mai

6 Tofā Pini Falaniko: I remember the words of afioga Mataafa at the meeting held in Lepea and as well in this very house whilst he was Fautua with susuga Malietoa and afioga Tupua Tamasese. He was referring to the Members who opposed Independence led by Fautua and supported by Representatives from throughout the country. He said, “Notwithstanding that there are three of us, but we are one in hope and intention for the common good of our people”. I look on the wisdom of those words as a guide for the issue before us. I shall touch on the problematic issues involved but I want to say at this point I fully support the draft submitted by the working committee. I am certain that it is the wish of our people that we work together to support the draft submitted so that we can proceed towards achieving full independence. With respect that is my opinion.

7 Tofā Tevaga Paletasala: Mr Chairman and members of the Constitutional Convention, I want to thank you for the opportunity to speak on the issue of the Head of State. I do this with special care because this is the core issue of the constitution for our country. I want to touch on some remarks from the Chair before I speak on the principal issue. I want to say that my concern and anxieties have disappeared on the priority issues before us. I believe that we all prayed for the priority which is peace and freedom. **I want to congratulate the Tama a Aiga for their vision and humility. We are aware of the machinations of how foreign countries exploited Tama and Aiga in the past. Now, we are working together to build a malo that is referenced on God. It is my view that in order to secure peace in the future, that we refer this issue for deliberation by Tama a Aiga.**

Leulumoega i le Maota lenei e faapea o lo tatou faamoemoe aupito maualuga o le maua lea o se Malo Tutoatasi o o tatou tagata. **I lou lava lagona, ona pau lava lenei o lo tatou avanoa. A tatou misia, o le a le maua so tatou Malo Tutoatasi. (p.441) / ... Afioga e, o lou lava manatu lena ma ou te matua teena le lafo na faatu ma talosaga atu Samoa, e tuu a tatou Tama-a-Aiga i le tulaga mamalu, ma mafai ai ona tatou maua atoatoa se tulaga fusia faatasi ai ma fealofani o tatou tagata” (p.442).⁸**

Later Tofā Tevaga Paletasala also states:

“E le faafualoaina lau Tautalaga, ae na ona ou faapea atu ou te teena le Teuteuga. Ou te malie atoatoa i le faaupuga o lo o i ai nei o le mataupu e pei ona i ai i le Faavae Faataitai ma ou te fia faamanatu atu foi i sui mamalu ia aua nei i ai ni vaeveaga faapuleaga i le atunuu e ese mai i lo itu o lo o i totonu o le tusi, i le paia o alii ma faipule ma vaega eseese o le atunuu o lo o aofia uma i lenei mataupu. Ou te faapea atu foi e oo lava i Europa ua latou iloa uma Tumua ma Pule o lo o latou pulea le atunuu atoa o Samoa, ma e le tau faaalialia lena itu. / E manatua e sui le isi taeao ina ua tuuina atu e le Nofoa le avanoa ia Pule ma Tumua latou te iloilo ina mai se mataupu ma na tele le taimi na alu ai, ma na ou manatu ua maumau le taimi. O lea ou te talosaga i le ava tele ia Tumua ma Pule, ia tagai foi i Aiga ma Tama ma Aiga o Samoa. **Afai sa masani ona outou fesiligia le fesoasoani mai le Atua ina ia fesoasoani mai ia tatou iloiloga, e tatau ai ona tatou pipii i o tatou talitonuga ae le o le tuu atu o faamatatalaga le sa’o i le Atua. E ao foi ina tatou manatua, o Samoa ua uma ona tofi ma e leai nisi paia e toe faapoopo atu. Ui o lea, ua tatou taumafai i le mea e gata mai ai lo tatou malosia ia fusia i tatou e tasi ina ia tatou maua atoatoa ai faamoemoga aupito maualuga o tatou tagata mo se Malo Tutoatasi ma o lea foi ou te talosaga atu ai i sui mamalu o Salafai, i le motu o Savaii ina ia manatua le fuafuaga a le Tamaitai o Sialei i tagata Savaii, ‘afai tou te mananao e fai so outou lava Malo Tutoatasi, faamolemole manatua le tama o Taeia o lo ua nofo nei i le Itumalo o Atua i Upolu” (p476).⁹**

In bold I highlight points that have potential for further scholarly investigation on their jurisprudential value. Points such as: “Samoa ua uma ona tofi” (Samoa has been divinely designated); “Tuu tatou Tama-a-Aiga i le tulaga mamalu” (Our Tama-a-Aiga are to be afforded dignity and respect); “faatofalaiga” (the wisdom of deliberation); “pe le tatau ona faatoai i Tama-a-Aiga fuafuaga mo le lumanai” (should we not

8 Tofā Tuilagi Pao: Mr Chairman and members of the constitutional convention, I support the draft which stipulates that afioga Tupua Tamasese and susuga Malietoa Tanumafili shall be joint Heads of State and on the death of one, the other will continue as the sole Head of State. I want to refer to the wars between Tama a Aiga in the past, the destruction and havoc caused. Tama a Aiga were responsible. What good derived from this? We know that despite the difficulties we faced in the past, these did not take away the dignity and status of Tama a Aiga. We pray for God’s guidance. It is clearly a benefit of our deliberations that we concentrate on the core issues and ensure that we speak briefly. The representative from Leulumoega spoke that it is their fervent wish that we achieve independence for our people. It is my belief that this is our last chance. If we miss this opportunity, we will not achieve independence. I oppose the motion that has been moved and support the placing of Tama a Aiga in positions of eminence in order to secure peace and unity within our country.

9 Tofā Tevaga Paletasala: I want to speak briefly. I oppose the motion before us. I fully support the draft by the working committee. And I oppose any division of the districts of Samoa which is not consistent with tradition and precedent. The world is aware of Tumua and Pule. I recall earlier when the Chair referred some of these issues to Tumua and Pule and it was a waste of time. I, therefore, with respect, call on Tumua and Pule to take due regard of Aiga and their Tama and Aiga and Samoa. We must bear in mind that we are accountable to God in our deliberations in what we do and say. The heritage and inheritance of Samoa has already been designated and there is no need for change. We must seek to unite as a people in order to achieve independence. And I especially direct my remarks to the divisive speeches of some of the Savaii representatives.

consult with Tama-a-Aiga about matters impacting on our futures); and “ina ia mafai ai e Samoa ona faifaimea ma isi atunuu o le lalolagi” (Samoa must be able to work alongside other nation-states in the global world). A Samoan critique of these sentiments, concepts and statements would ask what is meant by the terms or phrases “faatofalaiga” or “tofi” or “tulaga mamalu a Tama-a-Aiga” or “faatoai i Tama-a-Aiga” or “faifaimea ma isi atunuu” and what might the constitutional relevance of these meanings be? What would they mean in the context of a Tama-a-Aiga as Head of State? Etcetera, etcetera.

When trying to understand the role of a Head of State, their duties and responsibilities in modern Samoa, Samoa’s current legislation and constitutional provisions are, according to constitutional law experts, clear. One expert, Professor Paul Rishworth QC, Former Dean of the University of Auckland Law Faculty, who in 2016 was made a Member of the Order of the British Empire, noted that in relation to the power of a Head of State to refuse assent to a bill they cannot do so “without Prime Ministerial advice” and that this was something more peculiar to Samoa because of her Constitutional provisions (i.e. Article 26 in particular) than something she shared in common with her Westminster patrons, the United Kingdom, Australia or New Zealand.¹⁰

Interestingly, in a 58 page legal opinion Professor Rishworth drew on the opinion (or taofi) of Professor Davidson to support an interpretation of this provision, whereby Professor Davidson is quoted as saying that “only if there was some question as to whether the Bill was in accordance with the Constitution or if it was badly worded that there was doubt about the meaning” might the Head of State refuse his assent.¹¹ When reading through Professor Rishworth’s opinion I was struck by how much it reflects a particular tradition and culture of law-making and legal interpretation. A question for Samoan constitutional lawyers of the future might be: how might we interpret the constitution if read within the framework of an oral law-making culture as opposed to a written law-making culture?

To understand the implications of this and its scholarly, constitutional and jurisprudential significance, legal scholars and jurists alike must take time to develop the skills necessary to learn the nuances of the Samoan reference. This focus on the ‘Samoan’ or the ‘Pacific’ in law and legal discourse, what some might refer to as ‘the indigenous’, is what is missing in the legal training of our Pacific lawyers and judges, and perhaps also in our public and community law reform work. Why? The answer is obviously complex.

One possible answer could be the way in which we have privileged the English language and its legal and political traditions and cultures in our Samoan society. There are many examples of this and the consequences are far-reaching. Another answer is the fact that because we are a country that is predominantly Samoan in its population, we take for granted our Samoan-ness and assume that we do not need to spell this out, that by our mere existence our Samoan-ness, our customs and traditions, our aganuu, agaifanua, faasamoa and faamatai is not in any danger of being lost or derailed. As testified to by the number of Land and Titles court cases we have each year, and the very heated and contested debates they have over what is the faasamoa, faamatai, aganuu, and agaifanua, as well as the number of people who feel their lands have been unfairly lost because of unclear guidelines on what customary

10 Legal opinion by Professor Paul Rishworth, 17 August 2011.

11 Ibid. p.11.

land tenure is, perhaps we do need to spell out what we mean by these Samoan concepts more fully.

There is a dire need for leadership in the setting up of such guidelines. The example of the seemingly arbitrary switch from the use of secret balloting and parliamentary consultations with their constituencies to select a Samoa Head of State in 2007 and 2012 to the removal of these protections in 2017 raises questions about how the imperatives of such a switch were arrived at, and to what end our Samoan principles of taofi sã are taken proper account of. Secret balloting makes sense in an environment where there is an imbalance of power, and where voters have the right to vote with their conscience, free from any intimidation or blackmail. Where was the taofi sã, tofã taofiofi and tofã lauama tootoo in these parliamentary debates?

To ensure that the mana of the constitution stays intact, there is a need for all leaders to practice the taofi sã, the tofã taofiofi, the tofã lauama tootoo, and the tofã sa'ili (a constant and unwavering search for wisdom and truth).

Conclusion

Law does not exist in isolation from people. Constitutionalism is about protecting that which is most valuable to us as a people. The constitutionalisation of traditional leadership in Samoa is about protecting our faamatai and all that that entails.

We have had peace in Samoa for all these years since Independence because of the wisdom of those who put our Constitution together. Our Constitution has protected our Samoan values, for the most part, for all this time. It was not because of monies or intelligence, but because of a love and commitment to our faasinomaga, our tu ma aga, our faasamoa. This is what our forebears fought for and is what we must have the courage and commitment to continue to fight for.

I end with the art of allusion commonly employed by my forebears to make my concluding point.

I'm a big fan of Tom Hanks and Meryl Streep. I was delighted when they teamed up for the first time to do the film 'The Post' about the Washington Post and its exposure of government secrets relating to the Vietnam war. I end by reciting some of its script:

T: So can I ask you a hypothetical question?

M: Oh dear, I don't like hypothetical questions.

T: Well I don't think you're going to like the real one either.

M: Do you have the papers?

T: Not yet.

...

T: The way they lied, those days have to be over.

...

T: Let's do our jobs, find those pages.

N: We're talking about exposing years of government secrets.

I: Is that legal?

T: What is it that you think we do here for a living, kid?

...

R: I think I might have something.

A: It must be precious cargo.

R: It's just government secrets.

...

Radio playing: The New York Times was barred from publishing any more classified documents dealing with the Vietnam War.

L: If you publish, we'll be at the Supreme Court next week.

...

M: ...meaning...

T: well we can all go to prison.

...

N: If the government wins the Washington Post will cease to exist.

T: But if we don't hold them accountable, who will?

M: We can't hold them accountable if we don't have a newspaper.

...

G.O: Nixon will muster the full power of the Presidency, and if there is a way to destroy you, by God he will find it.

M: I'm asking your advice Bob, not your permission.

...

T: What will happen if we don't publish? We will lose. The country will lose. What are you going to do, Mrs Graham? ¹²

Soifua.

12 Text was taken verbatim from the youtube 'The Post' video trailer.

3. Traditional Leadership

*Dame Tariana Turia
Dinner Speech, 13 February 2018*

When I was accorded the honour of being invited to speak at this gathering, I was given a title to work from of two words: traditional leadership. The notion of 'traditional' has, of course, a number of interpretations. For some, traditional is slanted as conservative or old-fashioned. I am not one who subscribes to that view. I see traditional as belonging to customs, behaviours, attitudes, ways of being passed down from generation to generation. It is as wide and as diverse as we can all envisage.

I understand that a concept in faasamoa is moe mānatunatu: meaning a dream dialogue with ancestors and family gods; a conscious alertness to connections beyond today. I feel very connected to this system of belief. In te Ao Māori, we follow the view that the future is informed by constant reflection of the past and the present. This, inherently, then becomes the source of leadership – and it is the basis of my korero tonight.

But, before I speak further, let me first make it clear – if you were expecting jokes or light after-dinner comedy, you're at the wrong restaurant. And if you are only here for the entertainment – let me assure you that in next to no time we will have the honour of Te Ura Tabu Dance group here to perform the Mau dance. So, for this moment in time, my measure of success will be to ensure that I finish speaking before you finish listening!

Tonight then, our dinner conversation is the subject of dreams, the basis of beliefs, of the legacy of the leadership we practise at home, and of the opportunities we create for ourselves to live the life we imagined.

This time last week, the eyes of the nation all turned north, as the Prime Minister and her entourage travelled to Waitangi, along with a crowd of over thirty thousand. One might have thought that that was the ultimate form of leadership – for our government representatives to be gathered at the birthplace of the nation. Is this the dream dialogue our ancestors anticipated?

I do believe that the Treaty provided a platform for our nationhood; a foundation for the relationship between tangata whenua – the first peoples of the land – and those who came to this nation by virtue of the Treaty – what we might describe as tangata tiriti. But when I think of leadership – and leadership passed down by generation to generation – our nation-building project is not the only form of leadership that we as indigenous peoples need to uphold. While the world appeared to be at Waitangi; my world was focused in Whānganui – as it is every day, every moment.

Four generations of our whānau spent time together at our sacred river, te awa tupua. We swam, we

shared kai together, we played and spent our day fostering a sense of wellbeing amongst young and old. How can that be leadership you might ask?

The generations that stretch out decades before now passed on to me the inherent belief that our whānau are our greatest asset; our source of strength and sustenance. They are our shade and our shelter; the open arms to come home to, the protection from ill-winds.

But my tupuna also had a view of the world that places our sacred river as the central artery that connects our people from the upper reaches to the lower.

E rere kau mai te awa nui, mai i te Kahui Maunga ki Tangaroa
Ko au te awa, ko te awa ko au.

The Great river flows from the mountains to the sea.
I am the river and the river is me.

Our ancestors lived in such a way as to treasure the intrinsic ties that bind us to our river; to appreciate te awa tupua as an indivisible and living whole from the mountains to the sea. We are inter-connected between land and sea, between people and the environment, in ways which govern the shape of our world. We go to the river to heal, to fish, to wash, to travel, to play, to pray.

Three months ago, Turama Hawira and I were appointed to the role of Te Pou Tupua, which legislation has brought into being, to act as the human face of our sacred river. When Te Awa Tupua (Whānganui River Claims Settlement) Act 2017 came into force, it introduced a notion that Te Awa Tupua is a legal person – recognising the spiritual connection between the iwi and our ancestral river.

Let me be clear, the mana of Te Awa Tupua is not new. Rather, it is the fact that our leadership at home were able to influence the lawmakers of this country to pass an Act which would enable the health and wellbeing of our river to be protected and promoted for ever more. This is leadership based both on the traditional values passed down from those before us, and on honouring the Treaty partnership in action. And, this is not a symbolic move designed to make headlines or foster the popular vote. This is about a mechanism for advocacy; a foundation to protect the interests and mana of the Whānganui River and of the iwi. Te Pou Tupua also has the privilege and responsibility for administering a \$30 million contestable fund, Te Korotete, to grow and support initiatives that will care for our river as we always wanted it to be cared for.

What is so significant about this development is that while it came through the parliament and government of the day, it gives expression to Tupua Te Kawa – the innate values that stem from our whānau, hapu and iwi; values that have been recognised in law for the first time. It is a unique collaboration between traditional leadership, customary land values, and our rights and responsibilities as tangata whenua. I remember a Samoan leader once telling me, the mountains are the sources of blessings and wellbeing. If the leadership is good, the people will live.

Between our mutual peoples, we understand intimately the active obligations we have to share responsibility for the health and wellbeing of our lands, our rivers, and our mountains, if we are to uphold and sustain the health and wellbeing of our communities. In my new role as Pou Tupua I will do everything possible to seek out and engage our awa community – from the source to the river to the sea – to gather their views about how we care for the river – knowing in turn that the river will care for us.

For legislators and policy makers this is a paradigm shift. For our whānau, it is as it should always have been. We have lived with the conflicting value systems that have been the inheritance of Western models of governing introduced during colonial rule. We have known through our own language and our own traditions a different history of distinctive identities of belonging and being that are the lifeblood of indigenous cultures. In our own reference points, as whānau, as āiga, we treasure the social and cultural relationships that have been passed down, connecting us to the past and the present.

This is the form of traditional leadership that I am proud to uphold – the strength of genealogical connections, a vision of wellbeing that leads to strong and vibrant families. We call this Whānau Ora.

When the opportunity came to speak with you, it was the calibre of the traditional leadership within your communities that inspired me to speak. I have the greatest respect for Judge Ida Malosi – a woman of great substance; a leader of immense vision. Her courage and compassion in confronting the violence that is done within the homes of families has earned my highest regard.

I am privileged to count amongst my friends Fuimaono Karl Pulotu-Endermann, and Emeline Afeaki-Mafile’o, who have been key supporters in instigating this New Zealand Pasifika inter-university led conference.

When they asked me to be part of this hui then, I did so both to honour the kaupapa but also in recognition of the difference they – and you – are making in the diverse areas in which you work and yield influence.

Leadership comes from people who are honourable; people who are humble. They lead with their heart, not by orders in a courtroom alone – although the words they deliver will not let you down.

All of us can be leaders, can serve our people and uphold the dream dialogue passed down for us to cherish.

Leaders know that every person matters; that the landscapes we inherit are precious. True leaders fight for us not against us; they know that our strength lies in our people. Our future has been created by the courage of those before us.

I thank you for the honour and the opportunity to contribute tonight. I remain committed to the connection of whanaungatanga – the system of kinship, including our rights and reciprocal obligations to one another as part of a larger collective.

The legacy of nga taonga whakaako – those principles and philosophies passed on to us – reminds us that our sense of belonging, identity and connection is essential to our wellbeing.

Let us awaken our senses to the universe, to unite together, as peoples of the Pacific, to grow, to advance, for the future of all our mokopuna to come. For if there is one message I would leave with you, it is that our mokopuna hold the wisdom of the world; they are our connection both to our tupuna and to our future. Everything they learn, they learn from us. There is no stronger incentive to me than those who will remain long after we have left this world.

E kore e taka te parapara ona tupuna, tukua iho kia a ia. They cannot fail to inherit the talents of our ancestors. No reira, tēnā koutou, tēnā koutou, tēnā koutou katoa.

Conference Official Opening & Dinner



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DAY TWO:

Exploring Conference Themes Two & Three:
Customary Land Tenure &
Religious Rights and Freedoms



4. Law, Custom and Constitutionalism: Customary Land Tenure, Samoa

*Teleiai Dr. Lalotoa Mulitalo Silipa Ropinisone Seumanutafa
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I. Introduction

In this presentation I have two areas for discussion: 1. A brief discussion on 'Law, Custom and Constitutionalism'; and 2. A brief discussion on 'Customary Land Tenure, Samoa'. In the first area I will comment on the limited recognition of custom in laws made by Courts, Executive and Parliament; on the Constitution of Samoa and Acts of the Parliament of Samoa (namely: Acts, Laws, Statutes or Legislation); and offer an analysis of custom in laws made by Parliament over a 11-year period, 2007-2017. In the second area I will comment on the three types of land noted in the Constitution, and on what Article 102 says about non-alienation. I will give an overview of customary land legislation (the legal framework), noting those laws (Acts of Parliament or Statutes) that relate to customary land, and explore the meaning of the Customary Land Advisory Commission Act 2013. I will also explore some case law in relation to the Alienation of Customary Land Act 1965 and then end with the question: Is customary land protected from alienation under the Constitution and the laws of Samoa?

II. Law, Custom and Constitutionalism in Samoa

Law

The Constitution is paramount law in the Independent State of Samoa. Article 111 of the Constitution defines 'law' in Samoa as including the Constitution, any Act of Parliament, any proclamation, regulation, order, by-law or other act of authority made thereunder, the English common law and equity for the time being in so far as they are not excluded by any other law in force in Samoa, and any custom or usage which has acquired the force of law in Samoa or any part thereof under the provisions of any Act or under a judgement of a Court of competent jurisdiction. So, custom is recognised in the law of Samoa but has its limits.

Courts

The courts of Samoa have jurisdiction to apply Samoan customs and usages, but they are bound to apply them according to law and any limitations set by that law. This limited scope is only where such custom or usage has been included as part of an Act of Parliament, or that such custom and usage has been ruled by a court of Samoa to form part of the law of Samoa (by the rule or doctrine of precedent). Customary laws are therefore only recognised if they form part of the law as defined above. Because a lot of custom is not in this legal form they are continually suppressed and struggle to form part of the law.

In Samoa the Supreme Court has original, appellate and revisional jurisdiction and the jurisdiction necessary to administer the laws of Samoa, as may be provided by Act.¹³ The District Court does not have jurisdiction on customary land matters.¹⁴ And the only court with exclusive jurisdiction on customary matters is the Land and Titles Court

13 See Judicature Ordinance 1916, s31 Supreme Court, and s45 Court of Appeal.

14 District Court Act 2016, s24.

(LTC).¹⁵ The LTC has its own Appeal Court, and its decisions, pre-1998, were not reviewable by any other court.¹⁶ In 1998 the Supreme Court decision in the Alomaina case significantly reduced the independence and uniqueness of the LTC. Land and Titles Court decisions may now be reviewed by judicial review in the Supreme Court where there is an allegation of a breach of the fundamental rights of a party to an LTC proceeding. These cases are reviewed not on the merits of a case but on procedural issues only. Although this is a very limited restriction, it is a reduction to the LTC's independence nevertheless.

Executive

It is understood that a conscious consideration of custom must form part of Cabinet's policy making. This is considered necessary to assist the development of laws that recognise that customary values and principles may be more relevant to the people of Samoa as opposed to what are considered more modern values. Here a reference in Tui Atua's keynote address yesterday is relevant:

“...for a society that is predominantly Samoan in its population, we take for granted our Samoan-ness and assume that we do not need to spell this out, that by our mere existence it (our Samoan-ness, our customs and traditions, our aganuu, agaifanua, faasamoa and faamatai) is protected and certain.”

Unless changes are made to our law-making we will continue to develop state laws that continue to undermine customs. A conscious consideration of customs must form part of Cabinet's policymaking.

The executive lawmaking process is guided by the Cabinet Handbook 2011, most recently updated in 2014. However, a perusal and assessment of these handbooks underline the point that the process by which Bills and regulations are developed and endorsed by Cabinet does not require a conscious regard for customs and customary practices. Legal pluralism is not addressed at any level of policy development. State policies are thus not expressly required to be formulated with customary consideration. The effect of a policy on both the State and on customs are not consciously assessed and debated at any step of policy or law formulation. This limitation needs to be addressed.

Parliament

The Constitution and the electoral laws of Samoa provide the criteria for membership which emphasise the importance of customary values and duties. The electoral laws of other jurisdictions show that several common candidacy criteria apply across common law jurisdictions. These include citizenship and age requirements, registration status, and the usual disqualification grounds of having been imprisoned for a period of time and being an undischarged bankrupt, to name a few. For Samoa, in addition to these common criteria, the electoral laws require electoral candidates to be a matai and place emphasis on the candidate's connection to the village. Samoa's electoral laws require that a matai candidate: 1. must not have been banished from the village, and 2. must have resided in the village and served the village through village service requirements for not less than three years prior to the date that candidate's nomination is lodged with the Electoral Commissioner.

A significant challenge for the Parliament of Samoa is the lack of systems in place to assist members elected on strict customary criteria to undertake duties of members of a modern Parliament. A Parliament appointed entirely on customary criteria to take up duties in a modern Parliament needs systems in place to assist them carry out their parliamentary duties effectively. The empirical data shows that there are high expectations that a Parliament solely of traditional matai will allow Samoa to develop laws that support the traditional and customary systems. This has

15 Land and Titles Act (LTA)1981, s34.

16 s71 LTA.

not been and cannot be achieved where Parliament continues to promote individual values contrary to customary ideals. There is a strong desire in Samoa for more laws to be customary oriented, for members to be more involved in customary related debates and to show more certainty and confidence in the laws passed. More interaction is sought between members and their constituencies to explain laws for the benefits of the constituencies.

Custom in Samoa's Acts of Parliament

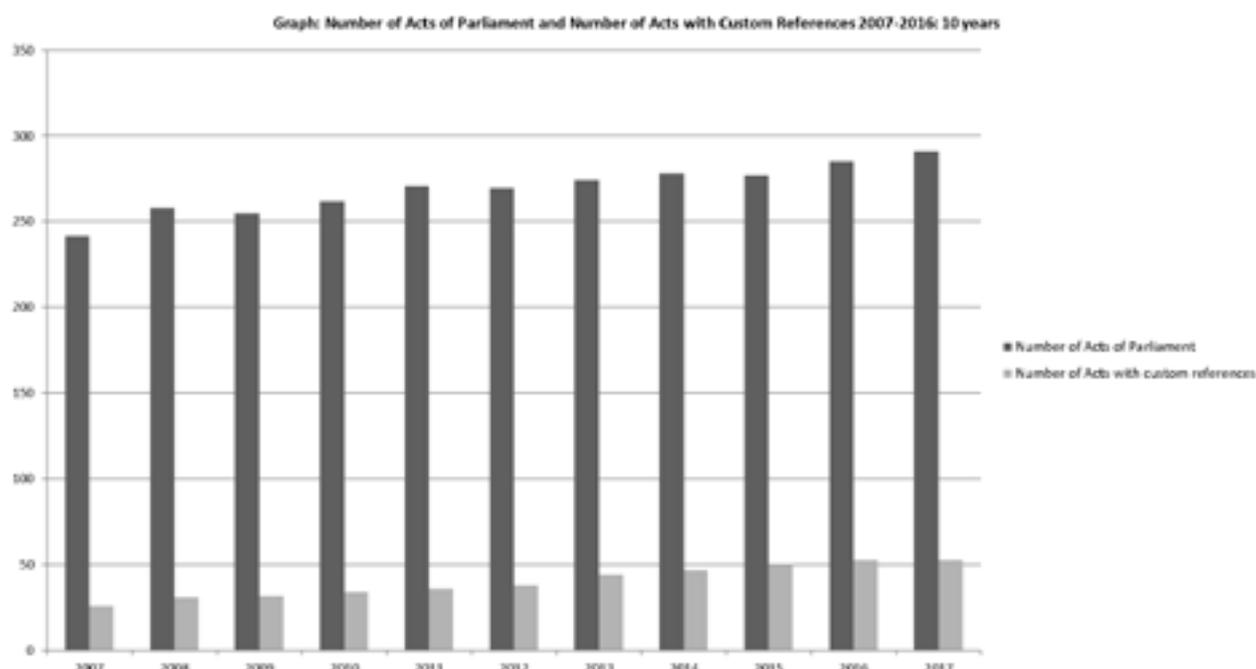
The data below suggests that there is some difficulty for the members to translate some laws of Parliament into the village environment, accounting for the lack of feedback to the villages and the substantial exercise of caution in contributing to parliamentary debates. An important contextual question, relevant to this Conference, is: What is the current status of or emphasis placed on custom references in the laws of the Pacific Islands?

I carried out an analytical exercise of the Acts of the Parliament of Samoa. I counted the total number of Acts passed through Parliament for the analysis period, and then counted those Acts that recognised or acknowledged or made some reference in some way to Samoan customs, to a Samoan context or to a traditional Samoan practice, and then compared those that did make reference with those that did not. Table 1 and Graph 1 below offer counts for Acts passed between 2007 and 2017 (11 years inclusive) and between 2007 and 2016 (10 years inclusive).

Table 1: Total number of Acts and Acts with Custom References, 2007-2017

Acts of Parliament with Custom References in Percentage – 11 years <i>(Law Reform in Plural Societies, Seumanutafa LMR, 2018)</i>		
Year	No of Acts of Parliament	No Acts with express custom references
2007	242	26
2008	258	31
2009	255	32
2010	262	34
2011	271	36
2012	270	38
2013	274	44
2014	278	47
2015	277	50
2016	285	53
2017	291	53

Graph 1: Total number of Acts and Number of Acts with Custom Refs 2007-2016



There is an upward trend across the 10 or 11-year period in these two data sets with increasing references (regardless of how insignificant) to custom in our laws. This is a positive trend. But the numbers are still very low.

And, of that low number of Acts that mention custom, most of these references are made in passing or are insignificant references rather than anything substantive. For example: 1. Acknowledgement that customary land or a customary practice is exempted from the Act;¹⁷ or 2. Making reference to the fact that the ‘purposes’ or ‘objectives’ of the Act is to be in line with customary practises and usages.¹⁸ The only substantive or significant reference to custom in the Acts analysed is found in the Ombudsman (Komesina o Sulufaiga) Act 2013 where the criteria for the position of the Ombudsman is that an appointee must be knowledgeable of Samoan custom. But the Act does not require the Ombudsman to carry out the functions of the office with any specific regard to the customs and traditions of Samoa.

In the 2006 Ministry of Health Act and the 2014 Allied Health Professionals Act there is reference to a custom related term, i.e. that to the ‘traditional birth attendant’. If Samoa and the Pacific Islands are serious about making laws that are suitable and relevant, are compliant with statutory requirements, and meet constitutional aspirations, urgent action must be taken to address this significant discrepancy in the status of custom in the fabric of our laws. We need to get moving.

The results of the above data reveal a reality that is hopeful but concerning. As a young democracy the upward trend is encouraging. This suggests that the Samoan Parliament is becoming conscious of how to reflect a Samoan context

17 In terms of customary land this includes, for example, the Water Authority Act 2003, the Telecommunications Act 2005, and the Broadcasting Act 2010, where customary land is mentioned in relation to government officers seeking access through customary land. In terms of customary practices this includes, for example, references in the Public Trust Act 1975; the Wills Act 1975; the Slaughter and Meat Supply Act 2015.

18 Such as in the Samoa Law Reform Commission Act 2008, the Prisons and Corrections Act 2013, the Lawyers and Legal Practitioners Act 2014, and the Medical Council Act 2015. However, it does not say in the substantive sections of these Acts how exactly these objectives are to be carried out.

in the laws of Samoa. But it is concerning as the number of Acts with any substantive reference to custom is still very low. We have work to do.

III. The Constitution, Customary Land and Land Legislation

The Constitution makes reference to customary land in Part IX, the part that deals specifically with Land and Titles. Article 100 deals with matai titles; Article 101 with Land in Samoa; Article 102 with protection against alienation of customary land; Article 103 with the Land and Titles Court; and Article 104 with Land below the high-water mark.

Article 101 distinguishes between customary land, public land and freehold land and says that all land in Samoa is either customary, public or freehold. It states that “Customary land” is “land held in accordance with Samoan custom and usage and with the law relating to Samoan custom and usage; “Freehold land” is “land held for an estate in fee simple”; and “Public land” is “land vested in Samoa being land that is free from customary title and from any estate in fee simple”. Only four percent (4%) of Samoa’s lands are freehold land, fifteen percent (15%) are public lands, and eighty-one percent (81%) are customary.

Article 102 states that there is to be no alienation of customary land except where an Act of Parliament allows it. There have been two Acts of Parliament which have allowed for it: 1. The Taking of Lands Act 1964; and 2. The Alienation of Customary Lands Act 1965.

Samoa currently has 291 Acts of Parliament as of 2017. Of those, 20 are about Samoa Lands. These are:

1. 1952 Property Law Act (NZ);
2. 1960 Constitution of Samoa;
3. 1964 Taking of Land Act;
4. 1965 Alienation of Customary Land Act;
5. 1966 Land Titles Investigation Act;
6. 1972 Alienation of Freehold Land Act;
7. 1977 Samoa Trust Estates Corporation Act;
8. 1981 Land and Titles Act;
9. 1989 Lands, Survey and Environment Act;
10. 1990 Samoa Trust Estates Corporation Reconstruction Act;
11. 1990 Village Fono Act;
12. 1993 Land for Foreign Purposes Act;
13. 2004 Planning and Urban Management Act;
14. 2007 Land Transport Authority Act;
15. 2008 Land Titles Registration Act;
16. 2009 Unit Titles Act;
17. 2010 Survey Act;
18. 2010 Land Valuation Act;
19. 2010 Spatial Information Agency Act;
20. 2013 Customary Land Advisory Commission.

Of those only five are about Samoan customary land in particular. These are:

1. 1964 Taking of Lands Act;
2. 1965 Alienation of Customary Land Act;
3. 1981 Land and Titles Act;
4. 1990 Village Fono Act;
5. 2013 Customary Land Advisory Commission Act.

Taking of Lands Act 1964

The Taking of Lands Act 1964 is an Act “to provide for the taking of land for public purposes and for the payment of compensation therefore and for stopping roads”. Division 2 of the Act outlines the procedure for taking surveys, plans, notices and objections in respect of freehold land. When customary land is proposed to be taken for a public purpose the Act says that the Minister shall: “(a) ascertain the pule (from the Samoan Land and Titles Court); and (b) cause a survey to be made and a plan to be prepared and certified to be accurate”. It also outlines that the person who is entitled to compensation is: “A person having any estate or interest in any land taken under this Act for any public purpose”. Compensation is ascertained, it says, by the Minister offering “a sum fit as compensation to that person, and that person may agree”. It goes on to say that: “If the compensation payable is not agreed upon between the Minister and that person, it is to be determined by the Court”. A final section of interest is that relating to the limitation of time for claiming compensation: “No claim for compensation for lands taken after 5 years after Proclamation date; and in respect of any damage done, after a period of 12 months after the executive of the purpose out of which the claim has arisen or may arise”.

Alienation of Customary Land Act 1965

This Act provides for the leasing and licensing of customary land. Part 2 has sections that prohibit some leases and licences (s.3), gives power to grant a lease or licence (s.4), outlines the application for a grant of lease or licence process including the form of application, the requirement to survey, to publish application, to dispose of objections and appeal, preparation and completion of lease or licence, payment of rent or other consideration, fees and commission, prepayment of fees, etc., (s5-19).

This Act also stipulates that the Minister may as the Minister grant a lease or licence if this is in accordance with Samoan custom and usage, in the interest of beneficial owners of the land, in the public interest, or as a trustee for an authorised purpose such as a hotel or industrial purpose. The lease or licence would not be longer than 30 years and a renewal of another 30 years is possible. The Act states that: “Nothing in this Act may be construed or implied to permit the alienation of customary land”. This Act also states that “Any Samoan claiming to be a beneficial owner of any customary land” can apply for a lease or licence over customary land by written application to the Chief Executive Officer of the Ministry [of Natural Resources and Environment (MNRE)]”.

Land and Titles Act 1981

This Act gives effect to Article 103 of the Constitution. The Article sets up the legal foundation for the Land and Titles Court (LTC). The Article reads:

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

The jurisdiction of the LTC is stated as: “Exclusive jurisdiction in all claims and disputes between Samoans relating to customary land, and the right of succession to property held in accordance with the customs and usages of the Samoan race”. As stated earlier the LTC has its own Appeal Court.

The Act also provides for a Land Registrar. It defines this person as a “Registrar of the Court”, who under section 11 deals with the “[t]ransmission of judgments, etc., concerned customary land”. The role of the registrar is to “transmit to the Land Registrar every judgment of the Court concerning the title or status of any customary land or interest in such land, and an order or declaration made under sections 8 (Land deemed customary land) and 9 (land declared customary land). Section 12 outlines the duties of the Land Registrar. These are spelt out as:

“12. Duties of Land Registrar – (1) It is the duty of the Land Registrar:

(a) to enter in the record of customary land a judgment, order or declaration received under section 11; and
(b) to enter in the record of customary land details showing that the land or interest to which the judgment, order or declaration relates is customary land or interest subject to this Act.

(2) The Land Registrar shall not accept for registration nor shall he or she register any instrument of title affecting any customary land unless every document affirming the Court’s judgment, order or declaration is annexed or endorsed on the instrument”.

Village Fono Act 1990

This 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 and to confirm or grant certain powers and to provide for incidental matters”. There have been recent amendments to the Act (c.f. Village Fono Amendment Act 2016). This includes a limitation to the jurisdiction of the village fono. That is, the section reads that the Village Fono does not have jurisdiction over a person residing on Government, freehold or leasehold land located within village land where that person is not a matai of that village or is not liable in accordance with the custom and usage of that village to render tautua (service) to a matai of that village.

The Act notes that village decisions and rules may be recorded, and rules may be registered with the Ministry of Justice, but that registration does not mean rules are constitutionally compliant. And that natural justice provisions apply, before the banishment power is exercised. And, that village councils are to be consulted, where a building with a community purpose is constructed in the village.

Customary Land Advisory Commission Act 2013

This is an Act “[t]o establish the Customary Land Advisory Commission to encourage, facilitate and promote greater economic use of customary land to enhance the social, cultural, economic and commercial development of Samoa and for related purposes”. The functions and powers of the Commission are stipulated as:

“Functions and powers –

(a) to recommend to Cabinet suggested measures for the facilitation, encouragement and promotion of the economic use of customary land in Samoa;

(b) in accordance with references made to it by Cabinet, to conduct public consultations on areas of law affecting customary land considered to be in need of reform and report its recommendations for reform to Cabinet;

(c) to consult with and advise the public and any specific sectors of the community about its work;

(d) to review all laws affecting customary land in Samoa and make recommendations to Cabinet for changes to such laws where such are necessary for the facilitation, encouragement and promotion of the economic use of customary land”.

In recognition of the importance of new policies upon customary land, the Samoa Government passed this Act to set up this specialised Commission to assist it to make appropriate decisions affecting customary land use. The Act is to

be read alongside the Law Reform Commission Act 2008, which set up the Law Reform Commission. The Customary Land Advisory Commission functions are the same as that of the Law Reform Commission, except its focus is on research, public consultations and recommendations that are particular to the use of customary land.

Overview of Customary Land Legislation in Samoa

The Samoa Constitution provides for three different categories of land: customary, freehold and state or public land. The Taking of Lands Act regulates customary land to be used for public purposes and states that that taking must be compensated. The Alienation of Customary Land Act regulates the leasing of customary land where the Minister is satisfied that the leases will benefit customary landowners. The Land and Titles Act provides that the LTC has exclusive jurisdiction over customary land and customary titles disputes. The Village Fono Act regulates the village fono and village governance over customary land. And lastly, the Customary Land Advisory Commission establishes the Commission to encourage, facilitate and promote greater economic use of customary land to enhance the social, cultural, economic and commercial development of Samoa. All five Acts speak directly to customary land in Samoa.

Customary land is fiercely protected by Samoans as their God given inheritance, owned by the whole family as the beneficial owners and often entrusted to a few, the matai sa'o, to care for and manage its use. However, for sustainable development, Samoa must find ways to develop our customary lands with our limited resources.

IV. Other Relevant Land Legislation

Land Titles Registration Act 2008 (LTRA)

The only reason the words 'customary land' are in the LTRA is due to the existence and operation of other laws. For example, and in particular, because the Land and Titles Act 1981, and the Alienation of Customary Land Act 2008, are about customary land specifically and because they impact on the operation of LTRA and mention customary land, it is a phrase that is in turn therefore mentioned in the LTRA.

In the LTRA section 5, there is specific mention to what the Registrar must do in relation to customary land. Section 5 (7) states that: "The Registrar must enter in the record of customary land any customary land for which judgment has been made by the Land and Titles Court under the Land and Titles Act 1981". Section 5 (8), however, notes that "[t]he record of customary land is not to be interpreted or construed under this Act as a registration of customary land under this Act". Here, "this Act" refers to the Land and Titles Act.

The LTRA is about the registration of land and any interests on it. With regards to leasehold and licence interests over customary land, section 9(1) (of the Act) states that "Where after the commencement day any land becomes public land, freehold land, or customary land leased or licenced under the provisions of the Alienation of Customary Land Act 1965, the Registrar shall include such public land, freehold land or customary land lease or licence in the [LTRA] Register". Subsection (3) stipulates that "When including land in the Register pursuant to subsection (1), the Registrar may create an ordinary folio of the Register for such land lease or licence. Subsections (4) and (5) then state that:

"[9](4) No provision of this Act may be construed or applied to:

(a) permit or imply the alienation of customary land in a manner prohibited by Article 102 of the Constitution; or

(b) permit or deem ownership in any customary land to vest in a person otherwise than as determined under any law dealing with the determination of title to customary land.

[9](5) Nothing in this Act permits the exercise of any power or affects any interest in customary land that could have been applied by law prior to the commencement of this Act".

The Minister has considerable power under the Act over the granting of leasehold interests in customary land. In section 4 (1) it is the Minister that has the power to “grant a lease or licence of any customary land or any interest therein”. The condition or criteria for granting is that the decision be “in accordance with Samoan custom and usage, the desires and interests of the beneficial owners of the land or interest therein and the public interest”. The section cites that the Minister may grant a licence or lease for “an approved” purpose and that this could be for “a hotel or industrial purpose”.

“4. Power to grant lease or licence – (1) Subject to section 3, the Minister, if in his or her opinion the grant of a lease or licence of any customary land or any interest therein is in accordance with Samoan custom and usage, the desires and interests of the beneficial owners of the land or interest therein and the public interest, may grant a lease or licence of that customary land or interest therein as trustee for such owners:

- (a) for an authorised purpose approved by the Minister;
- (b) if the authorised purpose so approved is a hotel or industrial purpose, for a term not exceeding 30 years, with or without a right or rights of renewal for a term or terms not exceeding an additional 30 years in the aggregate, as may be approved by the Minister;
- (c) if the authorised purpose so approved is not a hotel or industrial purpose, for a term not exceeding 20 years with or without a right or rights of renewal for a term or terms not exceeding an additional 20 years in the aggregate, as may be approved by the Minister;
- (d) for such rent or other consideration payable to the Chief Executive Officer, reviewable or not, and if reviewable at such intervals or on such occasions and in such way, as may be approved by the Minister; and
- (e) subject to such other covenants, conditions and stipulations as may be approved by the Minister”.

However, the Act also provides a check and balance on the granting of the licence or lease by the Minister by noting in section 1A that “[d]espite that the lease or licence is approved by the Minister as trustee for beneficial owners...the beneficial owners have... the right to approve or disallow the use of the lease as security...[etc]”. For convenience I provide section 1A in full:

“1A. Despite that the lease or licence is approved by the Minister as trustee for beneficial owners under subsection (1), the beneficial owners have the following rights in relation to such lease or licence granted:

- (a) the right to approve or disallow the use of the lease as security;
- (b) the right to approve or disallow the assignment of the lease or licence whether as a result of a default by mortgagor or not;
- (c) the right to receive payments in accordance with the terms of the lease or licence;
- (d) the right to approve or disallow a sub-lease;
- (e) the right to initiate and enforce a review of rents as provided for by the terms of the lease;
- (f) the right to enforce beneficial covenants under the terms of the lease or licence, including obligations of the lessee or licensee to –
 - (i) provide employment, to assist in business development; or
 - (ii) to provide community services or infrastructure; and
 - (iii) the right to enforce environmental protection obligations applying to the lessee or licensee under the terms of the lease or licence.”

To address the question of mortgaging of the interest of the lessee or licensee the Act is also clear. It states in section 2:

“(2) For the avoidance of doubt, an interest in the lease or licence of customary land that the Minister can grant by subsection (1) includes a mortgage of the interest of the lessee or licensee”.

And section 3 deals with the issue of registration and discharge of mortgages:

“(3) The process of registration and discharge of such mortgages is set out in the Regulations made pursuant to this Act.”

Lastly, section 4, reminds us that the LTRA does not “permit the alienation or disposition of customary land in a manner prohibited by Article 102 of the Constitution”:

“(4) Nothing in this Act may be construed or implied:

- (a) to permit the alienation or disposition of customary land in a manner prohibited by Article 102 of the Constitution; or
- (b) to permit or deem ownership in any customary land to vest in a person otherwise than as determined under any law dealing with the title to customary land”.

Samoa Water Authority Act 2003

The relevance of this legislation is the need to sometimes access customary land in order for Government to discharge properly its duty to supply water to Samoa’s households.

“21. Rights of access to land etc.- (1)(2) Subject to subsection (5), prior to the Authority exercising any right or power, under this Act or any other law to enter customary or freehold or public land, the Authority is required to enter into discussion with all persons having title to such land, with a view to obtaining agreement as to the manner in which the Authority may exercise such rights and powers”.

Forestry Management Act 2011

The relevance of this legislation is the example it provides of how different laws impact on each other. In this case the Alienation of Customary Land Act 1965 and this one. In this Act section 33 notes that there may be customary land whereby the “lawful owners have determined to be used for forestry operations”.

“33. The classes of land for forestry –

- (1) The classes of land upon which forestry operations may be undertaken in accordance with the procedures prescribed in Part 5 are:
 - (a) public land...
 - (b) freehold land...; and
 - (c) customary land which the lawful owners have determined to be used for forestry operations...”.

Forestry licences are needed before use of customary land is granted, and this is granted under the Alienation of Customary Land Act 1965. The relevant section reads:

39. Forestry harvesting licences – (1) A forestry harvesting licence granted under this section is required for the commercial logging or harvesting of native forestry resources on any forest lands, including a customary land under a lease or licence made under the Alienation of Customary Land Act 1965.

Telecommunications Act 2005

Like the above two Acts, this Act also makes reference to customary land in relation to the issue of access. Section 67 of the Act stipulates that:

“67. Access to customary land and facilities – (1) If a service provider:

(a) requires access to customary land or facilities located on customary land to provide telecommunications services, and

(b) cannot, on commercially reasonable terms, reach an agreement with the person responsible for the customary land or facilities, –

the service provider may apply to the Regulator for assistance either in reaching an agreement with the person responsible for the customary land or facilities or for the exercise of other powers to obtain the desired access”.

Broadcasting Act 2010

The final legislation of relevance is the Broadcasting Act. Again, like the others above, the reference to customary land is in relation to the issue of access. In fact, section 58 of this Act is identical to section 67 of the Telecommunications Act save the insertion of “broadcasting” in place of “telecommunications services”. It reads:

“58. Access to customary land and facilities – (1) Where a service provider:

(a) requires access to customary land or facilities located on customary land to provide broadcasting services; and

(b) cannot, on commercially reasonable terms, reach an agreement with the person responsible for the customary land or facilities, the service provider may apply to the Regulator for assistance either in reaching an agreement with the person responsible for the customary land or facilities or for the exercise of other powers to obtain the desired access”.

V. Some Case Law relating to Alienation of Customary Land Act 1965

To date, as far as the records show there is no case law documenting a remedy or questioning of the alienation of customary land under a lease or licence issued under the Alienation of Customary Land Act. That means there has been no case that has reached the Courts of Samoa. The case law available affecting the Alienation of Customary Land Act 1965 are few and somewhat far between. I have only been able to find 7 in total. These are listed in Table 2 below.

Table 2: Case law relating to Alienation of Customary Land Act 1965

Case Law: Alienation of Customary Land Act 1965	
1977	ET Oldehaver & Company Ltd v Attorney-General [1977] SamoaLawRp 1; [1970-1979] WSLR 159 (27 October 1977)
2000	Vaosa v Attorney-General [2000] WSSC 23 (4 August 2000)
2003	Attorney General v Alaiva'a [2003] WSSC 46 (27 January 2003)
2005	Ott v Leuluniu [2005] WSSC 41 (21 January 2005)
2005	Faalavaau Tavita v AG, WSSC, 2005
2010	Liaga v Taleni [2010] WSSC 166; CP 160 of 2009 (13 December 2010)
2017	Kalevini v Tausaga [2017] WSSC 90 (16 June 2017)

VI. A Project Case Study

I wish to promote the economic use of customary land. There are beneficial outcomes from finding ways to do this effectively and legislative reforms are obviously needed to do this. Since 2006 there have been Government attempts to explore how best to promote the economic use of customary land. These efforts have culminated in the enactment of the Customary Land Advisory Commission 2013 legislation and of the Alienation of Customary Land Act 2017.

The law is central to progressing the proper work of the CLA Commission. Together with the Law Reform Commission they are to look at strengthening the legal framework for engaging in authorised alienation of customary land. This 'authorised alienation' includes enabling and facilitating the leasing and licencing of customary land and the mortgaging of leasehold interests of customary land so that the customary land of those families who desire economic development can gain appropriate financing. The law in this case recognises that Samoan families must have the choice and opportunities to do this. These choices and opportunities can, in today's Samoa, only be enabled by legislation.

In 2011 only 41% of the economically active population of Samoa aged 15+ were in the labour force. Of this percentage under half (34%) are involved in subsistence farming and largely for home consumption. Only 8% were self-employed and another 8% considered street vendors.¹⁹ There is considerable need to utilise the large number of unemployed people in Samoa. They are an untapped economic resource.

The legislative reforms that have been put in place for this thus far does not alienate customary land owners from the land. There are checks and balance clauses throughout to protect against this. The reforms provide for clearer procedures for leasing or licencing or mortgaging interests over customary land to ensure there is protection and

¹⁹ Samoa Bureau of Statistics, Population and Housing Census, 2011.

enforcement of the rights of all customary land owners who allow for a leasehold or licence interest over their land to enjoy the rights and benefits usually vested in commercial lessors. The reforms also clarify that a proprietary interest of customary land is NOT affected by the registration of leases or licences in the Customary Land Leases Register.

There is a need to strengthen the status quo, that is, the constitutional prohibition on alienation of customary land. Unless authorised by an Act of Parliament, customary land cannot be alienated. There is a need to strengthen the leasing framework by protecting and prioritising the interests of customary land owners and to provide a legal framework to implementing the mortgaging of leasehold interests over customary land. And there is also a need to facilitate access to financing for development purposes of customary land by making leasehold interests over customary land a valuable and useful security.

Of the 81% of land in Samoa registered as customary land, only 1.5% of this have leasehold interests over it. There are a total number of 308 leases over customary land to date registered in the customary land lease registry. Only 31 are for businesses and hotels. The rest, i.e. 277, have been granted for churches, for educational purposes, for telecommunications (Digicel and Samoa Tel), for Samoa Water Authority and Police.

VII. Conclusion: Can Customary Land Be Alienated Under Current Samoa Land Laws?

There is little of ourselves, our customs, in our laws. Let's do something about it. Given Article 102 of our Constitution (the non-alienation of customary land article) caution must be applied in customary land legislation.

The fact that there are other laws outside of the Constitution such as the Alienation of Customary Land Act that speak to use of customary lands for the benefit of Samoa, and as well to the set-up of a special Customary Land Commission to assist with advising the Government on customary land use, as well as the positive use of the current Customary Land Registry, and judicial support for alienation of customary land for specific purposes as per case law relating to the Alienation of Customary Land Act 1965, it is clear that the legislature and Government have had no intention to deliberately exploit customary land, o le faasinomaga, o eleele ma fanua faaleaganuu, o measina a Samoa (it is our identity, our treasure) using legislation or law. The current legal framework has been cautiously and sufficiently developed to protect Customary Land from alienation. In answer to the question: Can customary land be alienated under current land laws in Samoa? The answer, in my humble opinion, is, No!

5. Customary Land Tenure in Samoa: A Community Advocate's Perspective

Fiu Mata'ese Elisara

Matai of Sili, Savaii & Executive Director of O Le Si'osi'omaga Society Inc. (OLSSI)

Introduction

Ladies and Gentlemen, Talofa lava! As an Indigenous Samoan, let me first pay my respect to the Indigenous Owners of this land and thank their ancestors – past, present and future, for letting me stand before you on these sacred cultural lands!

When Associate Professor Tamasailau Suaalii-Sauni invited me to present this address, I felt immensely honoured, but also very uncomfortable. Honoured, because as a non-academic and simple matai (chief) from the village of Sili Savaii, it is hard to believe that I was considered. But most uncomfortable because as an ordinary citizen I have little knowledge nor legal background to speak on the topic asked of me. Nevertheless, I find solace accepting the invitation knowing that this was your invite! As most of you are legal experts, I trust you will forgive my context as a concerned and worried citizen of Samoa on the imposition of 'globalization' on our customary lands and how related law changes are affecting the constitutional and customary rights of our peoples.

Let me preface my address on this standpoint - The battle to protect customary lands in Samoa, indeed the Pacific, has to be fought and won on two fronts. First, the security front where victory spells freedom from rights violations as a result of the Torrens System through detrimental impacts of the Land Titles Registration Act 2008 (LTRA). Second on the economic and social front where victory means freedom from want, leaving no one behind, engaging development partners with customary land owners to realise durable, full utilisation and economic use of customary lands through enabling legislations that ensures that protection of land rights and customary land ownership remain non-negotiable.

Land Reforms, LTRA and Concerns Raised by Samoa Public

On 29 October 2013, the Samoan Observer ran a story about the 1998 Asian Development Bank (ADB) report authored by Dr. Elora Raymond that was released at the very beginning of Prime Minister Tuilaepa's first term. The report threatened the government stating that ADB would stop lending money to the wider financial sector of Samoa (via Ministry of Finance) unless Samoa agreed to two conditions. First, to privatise state owned enterprises. Second, to pass laws allowing mortgages against customary land. If Samoa agreed, ADB would lend US\$7.5 million to the financial sector, and provide another US\$1.0 million in technical assistance and legal advice. In 2000, ADB lent US\$3.5 million (Project Number 33167) to the Samoa financial sector. In exchange the government agreed to privatise state owned enterprises, create a land registry, and allow mortgages against customary land where the individual chief authority (pule-faa-Sa'o) was an integral part. Neither Parliament nor the Samoan people were consulted about these radical changes to customary land law. Four years later the ADB noted that the "...Samoa government will devise a strategy to improve access to customary land...and use of customary lands as collateral...the strategy... policy and legislative environment is for business development, specifically on legal impediments to economic use

of customary lands, improving debt recovery, and facilitating secured transactions...".²⁰

In March 1999 the World Bank in its Samoa Infrastructure Asset Management Project also prioritised land reform. In 2003 they gave US\$12.80 million to Samoa to support the second phase of the Project. Many community activists suggest that this introduced the Torrens system and the indefeasibility of title to land doctrine to Samoa, that which is now being applied to customary lands under the LTRA. The project document explains that "... the land system would be designed to allow the authority ('pule') over customary lands to be recorded and turn 82% of customary lands into LTRA indefeasibility of title...".²¹

The Australia White Paper in 2006 for Asia and the Pacific acknowledged that the Pacific land mobilisation push under its 'Accelerating Economic Growth' policy²² posed a most serious concern for the Pacific Island Countries with its more than 80% of its lands and resources in customary ownership. The PACIFIC 2020 report at the time clearly noted that "...the challenge for Pacific governments is to steer changes in land tenure arrangements in support of economic growth...through recording land rights, register titles and agreements".²³

Past Samoa Attorney General Aumua Ming Leung Wai at the 2016 Joint Samoa Law Society & Maori Law Society Conference asked: Will the laws passed by Samoa's Parliament within the last eight years result in the alienation of customary lands and therefore be contrary to the Constitution? His answer was: No! But he admitted: "I must concede that the wording of LTRA could have been better to make it clear that the Torrens System does not apply to customary lands and whilst LTRA does mention a 'record of customary land' it did not go far enough to clearly state that whilst customary lands can be recorded, they are not to be registered or treated the same as freehold or public land on the Land Register". He argued that "with the benefit of hindsight, it would have been better if a separate and stand-alone Act had dealt with the registration and recording of customary lands".

Last year current Attorney General, Lemalu Herman Retzlaff²⁴ and President of the Samoa Law Society, Su'a Hellene Wallwork²⁵ both support the view that customary lands are protected under the Constitution and claim that no customary land has been lost as a direct result of LTRA.

In 2009 Ruiping Ye offered a legal analysis of "Torrens and Customary Land Tenure: A Case Study of the LTRA Act 2008 of Samoa" in the Victoria University of Wellington Law Review (VUWLR). She argued that if combined with Samoa government's power to take customary lands for public purposes (as per the Taking of Lands Act 1964): "The operation will be like New Zealand's 'conversion of customary land into freehold land' in the early settlement days, through the Crown's pre-emptive right to purchase lands from Maori, and sell to settlers - the consequences have been devastating in New Zealand, causing a century's grievance to native people and disturbance to the development of the nation".²⁶

In September of 2006 the O le Siosiomaga Society (OLSSI) warned that the government would release a land bill that would introduce and apply the Torrens system to customary lands. Su'a Rimoni, Leader of the Samoa Party, also

20 ADB TA No. 3549 – SAM "Review of Economic Use of Customary Lands – 2013".

21 Infrastructure Asset Management Project IDA Credit Cr. 348. WSO TOR for Component 5.

22 Australia White Paper 2006 for Asia and Pacific on Australian Aid for Pacific Land Mobilization push under Accelerating Economic Growth.

23 Pacific 2020 Australian report, May 2006, on Challenges and Opportunities for Growth.

24 See Samoan Observer, 9 Dec 2017

25 See Samoa Planet, 17 Dec 2017

26 Ye, R. "Torrens and Customary Land Tenure: A Case Study of the Land Titles Registration Act 2008 of Samoa". (2009) VUWLR 40, pp.827-862; p.859.

noted that same year that the HRPP government was secretly planning to register Customary Land under the Torrens Land Registration System and was concerned that the Torrens system would conflict with customary land ownership principles and practice of communal land ownership under the trusteeship of matai.²⁷

In 2008 the Samoa Umbrella for Non-Government Organizations (SUNGO) publicly opposed the LTR Bill and appealed to amend it to conform with 'the Customs and Traditions of Samoa'. They unsuccessfully challenged the Prime Minister and the Attorney General to a public debate on this matter.

Earlier this year, 23 January 2018, Nanai Dr. Iati Iati wrote an article in the Samoan Observer that stated that: "Development policies are being implemented too quickly in Pacific island countries, to the detriment of their people. ...policies are intended to reform customary land tenure systems...yet the good governance agenda means they need to change this land tenure basis to allow for investment to take place...the Samoa government introduced a land leasing system where - in one case, for 120 years - effectively alienates land from customary landowners". This is a concern that Nanai has raised for some time already. In 2006, he wrote a paper titled "Controversial Land Legislation in Samoa: It's Not Just Land" that noted public concerns that government would adopt and apply the Torrens system of land titles registration to customary lands.²⁸

Both Leuluai Tasi Malifa (a Law lecturer in USP for many years) and Nanai Dr Iati have publicly argued against the LTRA. They have argued that section 9(4) of the LTRA was inserted at the last minute to clarify that no provision of the Act was to be interpreted to permit alienation or affect ownership in any customary land, but notwithstanding does not provide protection for customary land ownership rights! Instead, it exposes customary lands to other avenues by which can amount to alienation. The use of certain words like "may" or "in a manner" eliminate certainty with regards to the inalienability of customary land and opens up relevant constitutional provisions concerning customary land to court debate to define their meanings. Ultimately judicial interpretation on these matters will be decided in the Courts, especially the Supreme Court. If the LTRA is, as Professor Guy Powles in an Interview with Nanai Dr. Iati Iati say, "one of the worst pieces of drafting he had ever seen; it has a number of loop holes which could be exploited against the interests of customary land owners...²⁹", then identifying these and getting judicial ruling on them is imperative.

Experiences on Customary Lands in Pacific Countries

In the Samoan Observer on the 04 September 2017, I had warned the Pacific Forum Leaders who attended the recent Apia Forum Leaders Meeting about dissenting voices in their own countries, cautioning them about going down land reform policy pathways that risk privatising ownership and control of customary lands. I pointed out different Pacific examples of indigenous citizens fighting to retain and protect their rights and ownership of customary lands. For example, in Melanesia in 2008 Eddie Tanago is reported to have told Radio New Zealand that he had told the PNG government to stop land grabs disguised as investments. In 2009 Vanuatu established the LAMAP

27 Sunday Samoan Observer, 11 May 2008; see also 2006 Samoa Party Manifesto.

28 Iati, Iati. 2006. "Controversial land legislation in Samoa: It's not just land". Cited by Ye in her article, supra fn. 7. See also another related article by Iati at <https://www.eastwestcenter.org/publications/customary-land-rights-and-pacific-islands-security-stability>.

29 Iati, Iati. 2016. "The Implications of Applying the Torrens System to Samoan Customary Lands: Alienation through the LTRA 2008". Journal of South Pacific Law (JSPL): Special Guy Powles Edition, pp.66-88. Online at: https://www.usp.ac.fj/fileadmin/random_images/home_middle_banners/emalus/JSPL/2016/The_Implications_of_Applying_the_Torrens_System_to_Samoan_Customary_Lands.pdf.

Declaration³⁰ , and seven years later in 2016 the Melanesian Buala Declaration was established representing Bougainville, Fiji, Kanaky, Papua New Guinea, Maluku, Solomon Islands, West Papua, and Vanuatu.

When you read of these Indigenous concerns you will find an urgency to add our voices as Pacific peoples to the cause. There is caution here in dealing with the challenges of state 'land grabbing' through the pressures of economic globalisation and colonization necessarily targeting customary lands and ignoring the human rights of local Indigenous Pacific community people. This creates crises in our peaceful communities. This pathway is expensive in economic, social, ecological, and cultural terms! Sometimes bloody!

Time for action against this 'state land grabbing' is NOW! But the 'now' unfortunately seems to be delayed by manipulations of conflicting agendas at the government level, the so-called 'diplomatic protocols'! We as community cannot afford to sit on the fence and just watch this proceed unchallenged! Time has passed for mere rhetoric! Surely, it is prudent, more humane, to act preventively to meet these threats upstream rather than to have them confront us as crisis downstream!

As Judges and Pacific professionals, we, in the lay community, urge you to infiltrate this vision in your responsibilities. Nip it in the bud!

Deeds System, Constitution, LTRA and Other Legislation

Not having been privy to the process of making legislative reforms in the last two years, I can only make these comments in the context of existing legislations. I understand that the Alienation of Customary Lands Amendment Bill 2017 presented to the Samoa Parliament two weeks ago addresses issues of customary land leases and licenses, as well as mortgaging of these by investors.³¹ I am not able to make substantive comments on the Bill having not seen it. But up to 2009, the Deeds system of title by instruments registered in the Land Register provided security on the person with 'superior instrument' as true owner. In my view, the spirit of the Alienation of Customary Lands Act 1965 (ACLA) and Constitution Article 102 forbidding customary land alienation was secured under the Deeds system of title. Leasing of customary lands under the LTRA, however, is contrary to and violates the spirit of the ACLA 1965 and repugnant to the Constitution!

The government continues to defend the position that customary land is protected under Article 102 of Constitution. Sections 9.4 and 9.5 were added to LTRA in the last minute to try to clarify and secure that in the LTRA. For me, I fail to understand why the Act was given the title Alienation of Customary Land Act 1965 when the Constitution clearly forbade any alienation of customary lands! And, as well, why was the LTRA amended in 2015, seven years later, changing 'recording' to 'registration' of customary lands? Why are customary land leases/licenses registered (not recorded) under LTRA – what is the difference? Registration subjects these leaseholds and licence interests over customary land, and thus customary land, to the indefeasibility doctrine of the Torrens system, the system privileged by the LTRA. It is clearly contradictory for government to state that customary land is excluded from LTRA when customary land leases and licenses, and the decisions of the Land and Titles Court on customary lands are legally required to be registered under LTRA!

Even the authority of the Registrar is extensive with overriding power to register all land dealings by way of instrument

30 See: <http://milda.aidwatch.org.au/resources/documents/lamap-declaration-2009>.

31 Samoa Observer, 05 February 2018.

of registration. But this is the catch: by way of that registration under LTRA an indefeasible and insurmountable title passes. This is the major point of concern and worry. It seems the disastrous intent of sections 32 and 33 that upon registration in the Certificate of Title (CT) folio under Registrar authority, such land whether freehold, customary or otherwise, will become indefeasible, insurmountable and freehold.

Samoans rightly claim customary lands and traditional resources through ancestral ownership - a birthright respected as lawful by custom that brings with it authority and sovereignty. We are stunned by the dangerous implications of the LTRA raised by various notable scholars and lawyers. These concerns are serious for they suggest a real risk, one tantamount to forever losing our customary lands and resources and using a system we never authorised. We, in the community, have not been properly consulted and so have not given up any of our ancestors-given rights of ownership to customary land and to the power to decide what to do with them. Leifi James Faleauto (legal expert) advocates that each Samoan family (Aiga) member has rights to customary land ownership and resources which cannot be taken away without their consent. No government has the right to transfer or extinguish the ancestral rights of any Aiga member without their consent through a National Referendum (Constitution Article 109). In our community perspective, the LTRA is unconstitutional, unfair and unlawful (or at least unethical) because it bundles up the rights of individual family members to land, takes them away, and gives them to a single person (the Sa'o). The matai (or Sa'o) is said to have 'pule' of family land and can lease and register customary lands even if extended family do not approve or were not consulted. If the Sa'o's initiative fails, family customary land is lost forever!

On the Rights of Customary Land Owners when CL are Leased and when Lease is used as Security by way of Mortgage for loan financing, we ask...

The Constitution promises impartial justice for all Samoans, yet the LTRA discriminates against Samoan citizens themselves. Contrary to Articles 14 and 15 of the Constitution on Rights regarding property and on Freedom from discriminatory legislation, the LTRA discriminates and transfers the rights of decision-making over customary lands of many Samoans (suli) without their consent to a few (sa'o). Land alienated to investors, wealthy individuals, corporations, companies because they have been seized by banks or mortgagees because of mortgagor defaults, we are trying to avoid. Also, taxation of customary land needs attention. Section 25 of LTRA also seems to favour Samoans resident in Samoa and thus discriminate against overseas Samoans in breach of Article 15 of the Constitution. This needs attention. Are customary landowners of the leased lands accorded rights not less than those enjoyed by commercial lessors? What of the right of suli (customary heirs to customary land) to approve or disallow the use of the lease as security?

Questions such as the right to receive penalty interest on unpaid rents, and monies payable for benefit of landowners under the lease, have not been properly addressed in community consultations. Also, in the customary land case who has the power to approve or disallow sub-letting, or assignment of lease? The right to receive lease payments? What of the right to enforce environment covenants? The right to initiate rent reviews? The right to access leased lands and premises to determine state of repair, confirm compliance with covenants, and permit traditional rights and observances? What of the right to receive information on security of mortgage, including profitability and other financial details, and the right in respect of capitalization of improvements when the lease ends? Most interesting, why does the Minister have to sign customary land leases and not the land owners themselves? Is there a colonial paternalism that continues here?

Clear answers to all these questions are key. Amending the Alienation of Customary Lands Act 1965, some 52 years later, in the recent Alienation of Customary Lands Amendment Bill 2017 that was tabled in Parliament two weeks ago is a government response to the promise they made to ADB Board on 10 August 2016. If the spirit, intent and letter

of these amended legislations intend to respect the Constitution that forbids alienation of customary lands, then why continue to use the language of alienation in the naming of the Bill?

Four of us matai (chiefs), namely: Leuluai Tasi Malifa, Telei'ai Dr Sapa Saifaleupolu, Dr Lavea Kenneth Lameta, and myself, Fiu Elisara, filed an official complaint to ADB on 29 August 2014. We objected to a series of ADB-backed reforms that could lead to the alienation of customary lands in Samoa. We were gravely concerned that the reforms, to be carried out over more than twelve years without meaningful consultation of Samoan people, could individualise control over customary land throughout the country, and place large tracts of customary land in the hands of banks, mostly overseas banks.³²

The Complaint to ADB³³ , CRP Findings and ADB Board Decisions

Leuluai Tasi Malifa, lawyer and matai of Afega village explains that: "While the Constitution allows customary land to be leased, it prohibits alienation of customary land from rightful owners – including through mortgage. ADB-backed reforms violate the spirit and the letter of this fundamental Constitutional protection." Telei'ai Dr Sapa Saifaleupolu, matai of Saanapu, Fasito'outa and Samatau Upolu, said also in the complaint to ADB that: "Our customary systems of consensus building may be slow and frustrating in the eyes of the financial market, but they safeguard our rights and help ensure the equitable distribution of land and its benefits. It is these systems that have ensured our survival as a people into the 21st century." These sentiments are echoed by myself and Lilomaiava.

On the question of community consultations, Lilomaiava Ken Lameta, matai of Vaimoso and Safotu stated: "Consultations ensure people across the country are aware of the reforms and how they may be affected. People should have an opportunity to provide their opinions, which should be taken into account in decision-making. If ADB and government listened carefully, they will hear plenty of good ideas to enhance customary land productivity in a way that truly benefits local communities." I, Fiu Mata'ese Elisara, matai of Sili Savaii, and Executive Director of Ole Siosiomaga Society Incorporated, point out that: "These reforms are incompatible with the indigenous culture and political institutions of Samoa, and they are inconsistent with the needs and aspirations of the Samoan people. The failure of the ADB to comprehend this has sadly meant a missed opportunity to achieve the laudable goal of promoting economic use of customary land in a culturally, socially and politically appropriate manner, and without meddling with our tenure system."³⁴

Dr. Natalie Bugalski, Legal Director at Inclusive Development International, New York, said "The reforms in Samoa are typical of ADB's approach. ADB has a habit of viewing land solely as a commodity to be integrated into financial markets. ADB needs to respect that some societies have a different relationship with their land and value its enduring social function above its financial value. By failing to hold meaningful consultations and properly assess the social implications of the reforms, ADB has violated its own safeguard policies".³⁵

Given the fundamental and adverse changes being imposed on the faaSamoa, all further land reforms should be halted, and a full and meaningful country-wide consultation be carried out on how best to protect by law our customary land rights. Leasing of customary land to outsiders for long durations under the Torrens system through

32 See: <http://www.inclusivedevelopment.net/asian-development-bank-reforms-threaten-samoan-customary-land/>

33 See: <http://www.inclusivedevelopment.net/wp-content/uploads/2014/08/Samoa-matais-complaint-to-ADB-AM-FINAL.pdf>

34 Ibid.

35 Ibid.

LTRA, a system that does not recognise collective ownership of the extended family, and then mortgaging those leases with banks to secure interests of investors, is tantamount to customary land alienation.

Because of our above concerns we, as matai, requested an independent investigation by the highest level of governance and grievance mechanism of ADB through the Complaints Review Panel (CRP). The gravity of what was at stake was far too powerful to ignore. We put our formal complaint into the ADB and this is what they said:

“ADB Board Supports Complaint of Matais – ADB and staff failed to comply with own policies and procedures on technical assistance to Samoa – Samoa Government given opportunity to implement promised legislation changes to address harms in complaint -

CRP finds prima facie evidence of non-compliance with ADB’s operational policies and procedures...and prima facie evidence that this non-compliance...will likely cause direct and material harm to the complainants and to other affected people. Given the prima facie evidence of non-compliance and the seriousness and widespread nature of the resulting harm, CRP concludes that the non-compliance is serious enough to warrant a full compliance review.

Pursuant to the ADB Accountability Mechanism Policy (AMP), CRP determines the complaint eligible and recommends that ADB Board authorize a compliance review of the Samoa Technical Assistances...”³⁶

The Alienation of Customary Land Amendment Bill 2017 is the government’s response to this. By the ADB’s own admission they and the Samoan government failed to engage communities in meaningful consultations!

Conclusion

Ladies and Gentlemen, time does not allow me to delve into other important aspects pertinent to the topic but suffice for me to briefly raise them for possible discussion in our Q&A session. These are:

- The unethical 120 Year lease on 600 acres of customary land from villages of Sasina, Fagae’e, Letui in Savaii to US citizen Jesse James;
- The unconstitutionality of section 48 of LTRA where registration of mortgage is registration of a ‘conveyance of property rights’;
- The unconstitutionality of the doctrines of privity of contract and privity of estate in customary land leases signed by the Minister;
- Impact of Free Trade Agreements (FTAs, such as the WTO/PACER+/EPAs) on vulnerability of customary land to alienation (i.e. fear of revenue loss; loss of sovereignty and national policy space; imposition of prohibitive subsidies; impact of dumping of cheap goods into the country; loss of jobs, already seen in the closing of YAZAKI, and the manipulation of labour mobility policies);
- Unjust customary land valuations;
- Imposition of Unit Titles legislation (e.g. Unit Titles Act 2009) which facilitate foreign ownership and investor interests;
- Impact of the Customary Land Advisory Commission Act 2013 (in particular section 15.2); and
- Effect of Samoa’s graduation from LDC status in 2014 to middle income country on government policies around customary land use and use of LTRA.

36 CRP Report “Doc R60-16-SAM-Eligibility Report”, 16 Aug.

As an ordinary citizen of Samoa, and as a chief with responsibilities to my village constituencies and families, I thank you for the invitation and for understanding my context in this address. Pending a review by us, community lay advocates of the Alienation of Customary Lands Amendment Bill 2017, I continue to be concerned and worried that the rightful heirs of customary land in Samoa do not have a say in what should happen to our lands. It is incumbent on us to stay the course and win the battle on customary lands to free our peoples from the already emerging disastrous impacts of LTRA, and to free our citizens from unjust economic, cultural, ecological and social want. Government engaging in genuine and durable partnership with customary land owners in a pathway for sustainable development that realises responsible utilisation of ecological resources, wise economic use of customary lands, whilst protecting land rights and ownerships, will ultimately leave no one behind. That is our goal. Both in Samoa and across Pacific countries.

I stated a personal standpoint in my introduction on the issue of security over customary lands, as well as over economic and social fronts. The challenge today is to acknowledge that the gap between rhetoric and reality is most painfully evident in the field of human rights. We cannot have a globalised world where people are left behind, and the rich are free to squeeze the social, cultural, ecological and economic life out of the poor.

In the context of our Samoa customary land tenure systems, it is remiss of us if we allow ourselves to be pressured into premature laws and agreements by the momentum of contemporary global corporate land grabbing and land reform processes. Or content ourselves with forced decisions which paper over indigenous non-negotiable realities and fundamental disagreements. Resistance from locally affected peoples and communities is widespread as we increasingly assert our rights to self-determination and to veto forced economic, political and social globalisation, colonisation, exercises of governmental and corporate power. Citizens are demanding accountability of their governments as the condition for their free, prior and informed consent! More fundamentally, we must do all we can to avoid the unfortunate experience of the taking of their customary land ownership and the human rights violations suffered by our Maori, Aborigines, American Indians, Hawaii, First Nations, Inuit brothers and sisters. We must not replicate these on us and our lands in Samoa and other Pacific Island countries.

Faafetai Lava! God bless!

6. Religion, Law, Custom and Constitutionalism in Samoa: 'E Tala Lasi Samoa, E Mau Eseese A'ana' - Samoan Universality, Diversity, and Particularity

Sister Vitolia Mo'a
Missionary Sister, SMSM, St Mary's, Savalalo, Samoa

Introduction

In June 2017, the HRPP-dominated government of Samoa declared Samoa to be a Christian state. In the Explanatory Memorandum that accompanied the Constitution Amendment Bill (No. 2) 2016, it stated, "the object of the Bill is to insert in the Constitution that Samoa is a Christian nation to declare the dominance of Christianity in Samoa."³⁷ On elaborating on the necessity to amend the Constitution the Prime Minister Tuilaepa presented the following arguments: The reference in the preamble of the 1960 constitution which states "...Whereas the Leaders of Samoa have declared that Samoa should be an Independent State based on Christian principles and Samoan custom and tradition.....' is 'inadequate'³⁸. The inadequacy, he said, "lies in terms of how Samoa as a Christian state is not included in the body of the Constitution" and "instead, it is in the cover and preamble of the constitution", therefore showing, that "it is not part of the constitution"³⁹. And, if 'Christian state' is not in the constitution, "it does not stand in court"⁴⁰. There are also security concerns with references to religious wars and religious extremism and the need for legal recourse should such situations arise in the future.

Under the new constitutional amendment, the 'phrase "Samoa is founded on God" will no longer be used. Instead, under the constitution, it will be "*Samoa is a Christian nation founded of God the Father, the Son, and the Holy Spirit.*"⁴¹ I just want to note here that the Trinitarian formula is complex and highly problematic as not every Christian church, denomination, or group in Samoa (and around the world) subscribe to the Trinitarian doctrine of God.

One of the ironic things Prime Minister Tuilaepa said about the framers of the constitution with regards to not having the 'Christian religion' placed in the body of the constitution but instead in the preamble is that they simply "didn't think about it"⁴². I would like to briefly cite a few extracts from the constitutional debates of 1960⁴³ and compare them to relevant parliamentary debates about the constitution in 2016⁴⁴ to underline my concerns about the substance and quality of the constitutional debates we are having today and the process of national participation and general consultation.

37 Constitution Amendment Bill (NO.2) Explanatory Memorandum, see: <http://www.loc.gov/foreign-news/article/samoa-constitutional-amendment-makes-christianity-the-national-religion/>

38 See: www.samoobserver.ws/parliament-backs-Samoa-being-declared-Christian-State, 26 Jan, 2017.

39 ibid

40 ibid

41 ibid

42 ibid

43 Lafolafoaiga o le Fono Faavae 1960, Lipoti Faamaonia (Gagana Samoa), Tusi I, 16 Aukuso 1960- 14 Setema 1960 (Constitutional Debates 1960)

44 See Samoan Observer article at supra footnote 2.

While the 1960 constitutional debates centred round Religious Freedom, Art. 11, and the 2016-2017 debates on the preamble and Christian foundation of Samoa, the quality and measured tone of the debates are significantly different. Extracts from the Official Report of the Proceedings of the Constitutional Convention of Western Samoa 1960 reads on the question of religion and custom:

Mr. Chairman⁴⁵ : “Honourable Members of the Constitutional Convention, I would like to furnish the answer to the question now being put before the Convention. First of all, God made man and man was given freedom. That freedom given to man was given with the understanding that you obey the laws of God or disregard them, and as a consequence you go either go to Heaven or Hell. Religion is not customary to Samoa...” (p. 170).

Mr. Chairman: “...Religion was something that was brought in from outside. Therefore custom should not take charge or should [not] have any responsibility or control towards religion because religion itself does not form any part of the customs. We, in our position as fathers or as parents of our children, if we carry out our responsibilities satisfactorily in setting good examples to our Children, they will follow suit also. The question now is this – if God the Almighty has given man that freedom, who are we? – and who is going to take that freedom off man? The question of our children and their belief in God all depends on the examples and instructions that you and all of us as parents give to our family. If we train them and instruct them according to the Word of God, they will follow that way, if not, then it will be otherwise also. That is the help we would like to give in regard to the matter we have now before us, and therefore we would like to say that it also occurs to our minds this very important question “If God has given that freedom to man, who is going to take that freedom off man?” (p. 171).

In addition to the Chairman’s words, Mr Leleua Peni added:

Mr. Leleua Peni: “...I feel, to such people who like to attend a religion on Sunday and if they go to various churches or several Sundays they may do so without any interference from the law. Furthermore, the question of the matai and members of his family should be left to the conscience of each individual or member of the family if they all choose to go to one religion they may do so, but if each individual would decide to go to another religion they are at liberty to do so and the provision deals only with Government having the right to protect and enforce regulations with regard to different denominations.” (p. 177)

Mr Leota S also stated:

Mr. Leota S: “The individual freedom to practice one’s religion as provided in this Constitution is strongly opposed. I do feel that if this freedom was extended very widely it would surely mean that other relevant troubles within the territory will surely result. As I said this individual freedom to practice one’s religion is very dangerous, it will lead up to several things, one will be that this person would forward to the Alii and Faipule with all sorts of excuses and therefore it is not right to apply this provision...”. (p.178)

We might consider the following excerpts of summaries published by the Samoan Observer of parliamentary debate commentaries on the 2016 Constitutional Amendment Bill (No. 2) 2016:

45 I am uncertain whether this was Afioga Tupua Tamasese or Susuga Malietoa Tanumafili II as no specific name is mentioned. While both chaired the Constitutional Debates forum, sometimes the records named the Chairman specifically, other times not. This time it did not.

“Olo Fiti Vaai:⁴⁶ He showed support for the bill but proposed that the definition of the Holy Trinity be defined even further. Gatoloaifaana Amataga Alesana-Gidlow: Acknowledged the Cabinet for the great initiative in proposing the amendment which will emphasise to the rest of the world that Samoa is truly founded on God. Gatoloaifaana suggested that perhaps the definition of ‘Christianity’ could be expanded to include other Christian doctrines, such as the crucial belief that Jesus Christ was crucified and was later resurrected.

Fonotoe Pierre Lauofo: Noted his support for the bill: ‘But, the proposed bill will not restrict other denominations from their religious practices, nor restrict them from entering the country. In the reality of things, it is difficult for any state to regulate (emphasis added) its people’s religious inclinations given the ability of various denominations to easily reach the public through various technological means and indoctrinate them’.

Aliimalemanu Alofa Tuuau: Supported the bill and noted her concern over the possible influx of religious fanatics: ‘I believe the proposed amendment is insufficient as it apparently lacks real power to limit the spread of potentially fanatical denominations within the country. That’s why we need to either amend the proposed Article or include an additional Article which would restrict the denominations in Samoa to ‘Christian’ denominations only’.

Lealilepule Rimoni Aiafi objected to the proposals to restrict non-Christian beliefs to come into Samoa. ‘I don’t support those proposals. This is an affirmation to tell the world that we are a Christian nation. I don’t think we should restrict other denominations or non-Christian beliefs in Samoa. That will just show we are moving backwards. We are a progressive country. Tell and show the world what we are, and the best way to do it is through what we do. The country [sic]⁴⁷ will know that we are Christian country if we show it to them. And if they come here they will respect that. If also we go to their country, we will also respect their religion and their values...’.⁴⁸

I would also like to include the Attorney General, Lemalu Hermann Retzlaff’s comments made to Members of Parliament on the Constitutional changes, regarding concerns that the constitutional amendment will have on religious freedom. He says:

“The amendment did not amend, alter or change the rights of individuals within Samoa, to exercise their religious beliefs as they deem fit. ...This individual right is outlined in Article 11 of the Constitution, ‘Freedom of Religion’ and it remains untouched. So, while the national religion is now confirmed as Christianity, the individual freedom of religion of all citizens within our nation; remains intact”.⁴⁹

He also said, that the amendment:

“...will enshrine Christianity within the body of the Constitution which effectively provides a legal definition of the State’s religion”.⁵⁰

46 The Samoan parliament has 50 members - 47 HRPP and 3 Opposition members. Olo Fiti Vaai is of the Opposition. Samoa is practically a One-Party State.

47 Author may have meant ‘world’ here.

48 See Samoan Observer, supra footnote 2.

49 Govt. Amends Constitution to Reflect Christian State, Samoa Observer, Dec. 21, 2016.

50 Bal kama, Christianising Samoa’s Constitution and religious Freedom in the Pacific, DEVPOLICY BLOG (April 27, 2017): See: <http://www.devpolicy.org/christianising-samoas-constitution-religious-freedom-pacific-20170427/>.

It would be helpful to quote Article 11, Freedom of Religion. It reads:

“(1) Every person has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in a community with others, and, in public or private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.

(2) Nothing in clause (1) shall affect the operation of any existing law or prevent the State from making any law in so far as that existing law or the law so made imposes reasonable restrictions on the exercise of the right conferred under the provisions of that clause in the interests of national security or public order, health or morals, or for protecting the rights and freedom of others, including their rights and freedom to observe their religion without unsolicited interference of members of other religions.⁵¹

The human, religious, and cultural implications of the 2017 Constitutional changes in making Samoa a Christian nation are complex and far-reaching.⁵² To cover this properly is outside of the scope of this presentation, but I thought it appropriate to context the concerns that I have specifically on the quality of both content and integrity of process in law making and in making constitutional changes.

The other concern is to do with the Samoan government being dominated by one party, namely, the Human Rights Protection Party (HRPP). Since the HRPP took power in 1982, the Samoan Constitution has undergone multiple changes and amendments, and given the HRPP majority in Parliament, the constitutional amendments seem to be pushed through parliament on the strength of party politics rather than an act of probing the wisdom and the spirit of the framers of the Constitution and of the people.

Since the pillars of Samoan society, aside from the rule of law, are the faaSamoa – customs and traditions and the Christian churches, I would like to focus on how we might draw together the Samoan indigenous reference and Christian theology to begin constructing a framework for in-depth talanoa (discussion) about religion, religious freedom, the hazards of religious dominance in a society like Samoa, and the implications of such a talanoa for the constitutionalisation of religion in Samoa.

Religion and Samoa’s indigenous reference

I would like to begin by proposing that our Samoan indigenous reference recognises and affirms nature and existence to be contextually universal, diverse, and unique. The same indigenous reference acknowledges inter-connectivity as basic to existence and to the va tapu, the sacred relational ethical space which is a porous, relationally-negotiable space that facilitates the interplay of what is universally held, what is diverse, and what is unique in ordinary everyday life.

I raise the discussion on theological perspectives from a specifically Catholic theology as an example. It gives some context to what is at stake when there is no proper public discussion on any recommended change to the constitution on matters of religion. Here, I advocate the crucial role of churches in becoming actively engaged in providing content for public dialogue on social issues such as the freedom of religion. In offering this theological discussion, I am hoping that churches, denominations, and religious groups more widely in Samoa can bring their own theologies to

51 See: http://www.wipo.int/wipolex/en/text.jsp?file_id=198467

52 See discussion: V. Mo’a, “God of Christians and God of Samoa”, Samoa Observer, May 27, 2016; and V. Mo’a, “Whose Christian God”, Samoa Observer, Feb 10, 2017.

bear on the issue of Samoa as a Christian State.

The Catholic theological perspectives I draw on are taken specifically from the Ecumenical Council of Vatican II (1963-1965). In particular the documents and decrees on:

- The Church in the Modern World (Gaudium et Spes);
- Ecumenism (Unitatis Redintegratio);
- Relationship of the Church to Non-Christian Religions (Nostra Aetate); and
- Religious Freedom (Dignitatis Humanae).

The Second Vatican Council was a watershed event in the two thousand-year history of the Catholic Church. The fundamental shift here lies in the reawakening and reaffirmation of existential space. That is, the belief: that the Church is located in the world of men and women, of every age, journeying, together with them as a “Church on a pilgrimage towards the fullness of God’s plan for humanity and the universe”;⁵³ and that the Church is human and it “exists in time and is subject to the forces of history”⁵⁴ and “is truly and intimately bonded with humankind and its history”.⁵⁵ Any student of Catholicism would understand the radical significance of these statements – that the Catholic Church is a participative, dialogical, reconciling, and healing pilgrim sojourner with and among members of the human Aiga (Family) and the human condition.

In using both the Samoan indigenous reference and Catholic theology I wish to underline my point about how we might provide content and method to discussions around the recent constitutional changes in Samoa, around the impact of these changes on religious rights, and the challenges arising from them now and in the future.

Samoan Indigenous Reference: E tala lasi Samoa, E mau eseese A’ana

‘E tala lasi Samoa’ means Samoa creates, relates, appropriates, and owns multiple versions and accounts of narratives, beliefs, and perspectives. ‘E mau eseese Aana’ (Aana is a distinct political and geographical district in Upolu) means that Aana holds, owns, and relates a variety of distinctive but related accounts of events, stories, customs, traditions, viewpoints and beliefs. These two Samoan sayings express key articles of cultural creed relating to recognition and acceptance of divergences in beliefs, stories, source of narratives, perspectives, and practices.

‘E tala lasi Samoa’ and ‘E mau eseese Aana’ speak about Samoa’s cultural ability to exercise equilibrium by holding in balance the universal, the different, and the particular in beliefs, sources of narratives, forms, expressions and correlative practices, with each contributing to Samoa’s deposit of beliefs, spiritualities, customs, traditions, practices and perspectives which are at once common, diverse and specific. For the Samoan culture (aganuu and agaifanua), ‘E tala lasi Samoa’ and ‘E mau eseese Aana’ give expression to cultural dynamism and creative inter-relational freedom. On the other hand, what calibrates the porous confluence of the universal, the diverse, and the specific is the va tapu and va tapuia, the sacred space, that provides checks and balances to relational interactions between the distinctive but relational circles of relationality, establishing norms and ethical principles that protect and guarantee relational integrity within an entity or between entities. This means that what is commonly held and what is differently

53 The documents of Vatican II – The Church, p11, Avery Dulles SJ.

54 Ibid

55 Pastoral Concitution on the Church in the Modern World, p.199-200.

expressed should happen within the framework of the ethical principles governing the inter-relatedness of distinctive entities. Hence, from a Samoan standpoint, commonality, diversity, and particularity form integral parts of the ordinary dynamics of cosmic and inter-personal existential reality.

A few actual examples on 'E tala lasi Samoa' and 'E mau eseese Aana' might assist to highlight Samoa's core insights into a Samoan reality that is multi-faceted and porously dynamic. There is a lot of faumalo (upmanship) in the notions of 'tala lasi' and 'mau eseese'. But what is more significant is that the same stories act as relational connections across aiga (families), villages, political districts and the nation.

For example, in the villages of Fasitootai and Fasitoota, Faleasi'u, Satapuata, Samatau and Falelatai, all from the Aana district, all lay claim to the Tui Aana Tamaalelagi and all have competing versions of their own importance and influence on his life and times. Fasitootai's and Fasitoota's narrative is widely accepted as being historically consistent. But, village accounts concerning exploits such as defending Tui Aana Tamaalelagi and/or assisting Liolovave and his nephews Toouta and Tootai in fending off those in pursuit of their stolen child (Tamaalelagi) vary: Samatau relate the decisive role of their own alii (chief) Manoo as important; while Faleasi'u tells of their own man Tooaa, his sister Si'u, and their Fee (octopus) routing Tui Aana Tamaalelagi's enemies in one of the decisive battles at Leulumoega.

These narratives are different and marked with one-upmanship, but they are all inter-related. They are all connected to the person of Tui Aana Tamaalelagi, who is their Alii and a son of Aana. Tui Aana belongs to every Aana. It is reasonable, therefore, that all the villages of Aana district can lay claim to anything related to the Tui Aana Tamaalelagi. And those claims, whether true, half-true, exaggerated, created, embellished, and even hotly contested – are true in the sense that even if each account presents a unique claim to the common story of Aana and history of Tui Aana Tamaalelagi, everyone's claim gets memorialised in the storying of the Aana – Tui Aana Tamaalelagi story. Therefore, Samoans would say, 'E mau eseese Aana, a'o Aana e tasi' (Aana may hold a variety of distinctive claims or accounts but they all form one interconnected Aana fabric, they are all Aana).

An example of a 'tala lasi Samoa' story is that about the origins of the 'ava (kava) in Samoa. When one understands the centrality of the 'ava to Samoa's cultural rituals and ceremonies, one would appreciate the significance of claims embedded in certain villages' narratives about the sacred origins of the 'ava plant. There is no space here to give an account of different 'ava origin stories, suffice to say that the following villages: Falealupo, Safotu, Asau, Vaimauga, and Vailele each lay claim to preeminence of status and place in relation to the origins of the 'ava in Samoa. But, when the 'ava ceremony is performed anywhere in Samoa, and the village honorifics are called, and the 'ava is blessed by the lauga (oratorical speech), and all the matai (chiefs) drink from the one cup, the 'ava is fully owned by every village in Samoa.

What can be drawn from unpacking 'E tala lasi Samoa' and 'E mau eseese Aana' with regards to the religious issue in Samoa is our Samoan indigenous reference, based on perceiving existential reality as being multi-faceted, inter-related, and porously negotiable recognises, acknowledges, and accepts, as a Samoan way of life, commonality, diversity, plurality and reciprocity of unique entities. These sayings and their existential reality are also expressive of something that is expressive of a Samoan spirituality and of an indigenous Samoan way of knowing our existential reality.

Catholic theological perspectives drawn from Vatican II

In bringing theological discussion, albeit through Catholic theological perspectives, to this custom, law and constitutional discussion, and placing it alongside our Samoan indigenous reference, I hope to expand the conversation and canvass the three pillars of today's Samoan society: culture, Christianity, and the rule of law, to inquire into the place of and relationship between culture and Christian values when framing the laws of Samoa, including changes to the Constitution.

Of the Vatican II documents already mentioned I will simply highlight some theological perspectives for consideration for an informed debate on religious freedom and rights in Samoa.

1. From: The Decree on Ecumenism: The relationship between the Catholic Church and other Christian churches and communities.⁵⁶ Some points for consideration:

- The unity of all Christians is not only desired but designed by God;
- The Holy Spirit is at work in churches and communities beyond the visible boundaries of the Catholic Church... and have not been deprived of significance and importance in the mystery of salvation;
- As a pilgrim Church, the movement is towards Christ rather than a movement of return to the Roman Catholic Church;
- Believers in Christ who are baptized are truly reborn and truly our brothers and that God uses their worship to sanctify and save them;
- Unity and ongoing dialogue on beliefs and practices is a task for all Christian communities.

There are several key theological principles and perspectives expressed in this document. First: The acknowledgement that salvation belongs to God alone. Second, and in relation to the first, the Spirit of God cannot be contained in one Christian church or denomination. Third, salvation comes through every Christian church through their own particular worship and belief. And, fourth: Christians are a pilgrim people of God – moving together towards God in unity and in communion on account of what they hold in common and moving towards each other in dialogue and solidarity in recognition of the richness of God's diverse and manifold gifts.

2. From: The Declaration on the Relationship of the Church to Non-Christian Religions.⁵⁷ Some points for consideration:

- It is the Church's task to foster unity and love among peoples and nations, giving primary consideration to what human beings have in common – among Jews, Muslims, Hindus, Buddhists and other non-Christian religions.
- All peoples comprise a single community and have a single origin since God made the whole race of men (women) dwell over the entire face of the earth; one also is their final goal: God.
- God's providence, God's manifestations of goodness, and His saving designs extend to all peoples.
- Diverse peoples and cultures have certain perception of the hidden power which hovers over the course of things and over the events of human life, and that at times give recognition to a Supreme Divinity and a Supreme Father too.
- People look to various religions for answers to the profound mysteries of the human condition. Such perception and recognition instill their lives and cultures with a profound spiritual and religious sense,

56 The Documents of Vatican II; Decree on Ecumenism p. 341 -366.

57 The Documents of Vatican II; The Declaration on the Relationship of the Church to Non-Christian Religions p.660-668.

which are expressed through refined concepts and philosophical inquiry, narratives, rituals, and a highly developed language.

- The Catholic Church rejects nothing which is true and holy in non-Christian religions.
- On the special relationship between Christianity and Judaism, the Catholic Church recognises the spiritual bond that links people of the New Covenant with 'Abraham's stock' and to the spiritual patrimony common to Christians and Jews.
- The Catholic Church repudiates claims of 'deicide' and of Jews being cursed by God.
- The Church exhorts Catholics to promote dialogue and collaboration with the followers of other religions and to give witness of Christian faith and life by acknowledging, preserving, and promoting the spiritual and moral good found among non-Christian people as well as in their cultural values

What we can briefly gather from this Declaration are: First: A recognition and emphasis on the divine origin of all peoples as the universal principle of humanity's source of unity and communion. Second: That God's manifestation of goodness and saving designs are freely given in diverse ways to all peoples. Third: That diverse peoples and cultures have their own perception of the divine and spiritualities. Fourth: That there is acknowledgement and acceptance of what is good and moral, true and holy in all religions, and respect for their cultural values. Fifth: That there is acknowledgement of the special bond and relationship between Christianity and Judaism, and a repudiation of claims made on Jews as 'deicide' and cursed by God. And, lastly: That there is an exhortation on Catholics and on all religious groups to promote dialogue and collaboration for life and to build up human societies together.

3. From: The Declaration on Religious Freedom.⁵⁸ Because the issues of religious freedom are many and complex, I highlight only those I believe capture the spirit and orientations of the document. These are:

- Freedom is a gift from God.
- The right of religious freedom has its foundation in the very dignity of the human person and is a right of the human person to be recognised in the constitutional law that governs society.
- The dignity of the human person lies in his/her responsible use of freedom.
- The demand for freedom in human society regards the quest for the values proper to the human spirit, hence, the free exercise of religion in society.
- The right to religious freedom is a civil and moral claim.
- All are to be immune from coercion on the part of individuals and/or of social groups and/or of any human power in matters religious.
- All are to be immune from being forced to act in a manner contrary to his/her personal beliefs or to be forcibly restrained from acting in accordance with his/her beliefs.
- There must be Constitutional limits on the powers of government in order to keep check on encroachment on rightful freedoms of the person and of associations.
- The case of religious freedom does not begin with politics but with religion; it derives, both historically and theologically from an understanding of the nature of faith.
- The highest norm of human life is divine law, which is eternal, objective and universal (in the philosophical sense, where certain things are held to be true independently from perceptions and perspectives, e.g. from the Christian standpoint 'God' is an objective truth, so too is the dignity of the human person, both underlie moral law).
- In all activity the human person is bound to follow his/her conscience faithfully and cannot be forced to act in a manner contrary to his/her conscience or to be restrained from acting accordingly, especially in matters of religion.

58 The Documents of Vatican II; Religious Freedom, p.675-696

- Religious bodies also have the right not to be hindered by legal measures or by administrative action on the part of government regarding any aspect of what is properly the function and right of religious bodies.
- In the use of all freedoms, the moral principle of personal and social responsibility is to be observed.
- In the exercise of their rights, individuals and social groups are bound by moral law to have respect both for the rights of others and for their own duties toward others and for the common welfare.
- Society has the right to defend itself against possible abuses committed on the pretext of freedom and religion. It is the special duty of government to provide this protection, but it cannot act in an arbitrary fashion or in an unfair spirit of partisanship.

I am sure some constitutional lawyers would find certain theological thoughts raised here interesting, even challenging. But, I believe this Document provides solid basis and arguments for religious freedom. That is:

- (1) That freedom is a God-given gift;
- (2) That religious freedom has its foundation in the very dignity of the human person;
- (3) That the dignity of the human person lies in the informed and responsible use of freedom;
- (4) That the right to religious freedom is both a civil and moral claim;
- (5) That the case of religious freedom does not begin with politics but with religion;
- (6) That the highest norm of human life is the divine law which is eternal, objective, and universal;
- (7) That the most profound orientation and expression of religious freedom is towards God and towards the common good, and as such, coercion, restraint, and encroachment on the rights of people to exercise this freedom cannot be done by government or groups unless there are serious abuses and breaches against the freedom and security of others; and
- (8) That the government has a special duty to provide protection regarding abuses, but it cannot act in any arbitrary fashion or in an unfair spirit of partisanship.

The focal point of this paper, as stated before, is the content and quality of constitutional debates. It is concerned about the process of participation and consultation regarding constitutional changes, specifically, in relation to religion and to Samoa becoming a Christian nation. In bringing together two sources, the faaSamoa or Samoan indigenous reference and the faaKerisiano or Christian theological perspectives, I wanted to highlight certain points. First: culture and religion (state religion or otherwise) are and must be dialogue partners. Second: culture and religion are not diametrically opposed; there is and can be convergence in cultural and religious (Christian) perspectives. Third: according to the preamble of the Constitution of Samoa, Christian principles and the faaSamoa, customs and traditions form the basis of Samoa as a nation. I would therefore say that a country that recognises both Christian principles and cultural values as foundational to its way of life and identity must do justice to both when dealing with matters of national and religious interests. It is for this reason I am proposing use of both Samoa's indigenous references and its Christian theological references as its enquiry framework for probing both content and ways towards a participative process for conversations on constitutional matters in Samoa.

Conclusion

We have a Samoan saying born out of our ancestors' adaptive wisdom and resilience in traversing seas and oceans in their voyaging explorations: A ele le matagi, sisi le la-fala; a lukaluka le aso, sisi le la-afa / In calm winds, raise the pandanus sail; in turbulent weather, hoist the sennit sail. In a lot of ways Samoa is traversing very rough and stormy seas today. Our groping efforts to sail against the prevailing winds of a uniforming and conforming globalised culture have generated equally worrying trends: the espousal of western/foreign-oriented development ideologies, cultural

relativism, religious fundamentalism, and political disengagement as well as disenchantment.

So, we are looking, searching for tautai – wisdom guides and voyage mentors. We look to the tofā sa'ili (discerning leadership wisdom) of the council of chiefs in the villages; the faautaga poto (wisdom-counsel) of women everywhere; and the tofā fesili (inquiring wisdom) of the youth. We look to re-awaken the collective participation and engagement of stewards and custodians of our faasinomaga, our cultural identity. And, we look for the tofā faale-Atua (God-inspired wisdom) from the churches and, from the government the tofā fetala'i (dialogical wisdom). Together we can start preparing and weaving the la-afa through raising community awareness, promoting transformative conversations, engaging in dialogue between culture and the Christian religion (and religion in general), and exercising social and political participation.

Samoans are a resilient people, but we need to hone our skills of reading tides and signs of the times to know that, unless prepared, it is perilous for us to sail into turbulent seas on the la-fala.

7. Reflections on Pacific Church Leadership and Pacific Law, Custom and Constitutionalism from the perspective of a Teacher of Theology

Dr Jenny Te Paa Daniel
Former Principal of St John's Theological College, Ash Wednesday

E oku tino rangatira, e toku whanau, toku aiga i roto i te maara waina o te Atua o te aroha me te whakapono, tena tatou katoa.

I greet the esteemed elders of this gathering with deep respect. As this New Year dawns rich with promise and possibilities, I thank God for the precious blessings of family and of friendship that I am privileged to enjoy with so many of you. I look forward to treasuring the wonderful new friendships made here in this hui. This is an important gathering; indeed, it is a beautiful gathering – how could it not be when it was so lovingly shaped and formed by such extraordinarily visionary, beautiful and talented women. I offer my very special aroha, my deepest gratitude to you all for still imagining I could have something useful to say.

In fact, let me tell you what happened just after my beloved sister Sailau contacted me a few weeks ago to ask if I was available to contribute into this superb gathering. My first and unerring instinct was just to say yes, not at all because of the subject matter, which my mind barely if at all registered, but because my heart was stirred by the prospect of reconnecting, of being blessed by being once again in the presence of so many of you for whom I hold immense aroha and the deepest respect.

I allowed myself to bask in that prospect for a few more days and then eventually I looked at the kaupapa, the purpose and programme for this gathering! Well, the only other time in my life I have felt so similarly overwhelmingly consumed with raging 'onset self-doubt', was maybe 25 or so years ago when I stood in the grounds of the University of California in Berkeley, California gazing upward at the Graduate Theological Union - these were the twin schools I had chosen to undertake my doctoral studies within. At that time, as with my experience of a few weeks ago, my mouth went dry, my eyes did the opposite and my heart just sank as I thought to myself – you are completely out of your depth! This is not your field! Who do you think you are – upstart Maori girl from Ahipara!

But the thing about upstarts is we usually just keep going irrespective of our perceived limitations and we do so because to the largest extent we recognize that ultimately, we are formed and driven by forces beyond ourselves. Of course, when selectively appropriated, this particular belief system also very conveniently provides the perfect pretext for blaming others when things go awry! And don't worry I have all my attributions neatly lined up just in case!

But seriously though, is it not the case that we as Maori and Pacific peoples are to the largest extent incredibly staunch 'believers' in that institution which is all-pervasive in our communities and which is largely uncritically taken for granted. I am referring to our unquestioning acceptance and understanding of that which we experience in our day to day lives as religion or faith (toku Hahi or toku whakapono), spirituality (toku taha wairua), tradition (te korero o nga tupuna mai ra ano), custom (tikanga or ritenga) or just simply to Church (toku Hahi) – same concepts just different words in our respective languages and contexts.

There is indisputably so much which is indeed profoundly life-giving and life sustaining, comforting, inspirational, revelatory, merciful, tender, fulfilling, reassuring, enfolded within each and every aspect of our religious/spiritual/Church based lives (especially when, as His Highness Tui Atua Tupua Tamasese referred to yesterday, they are enfolded within the deepest elements of the best of our culturally grounded theological understandings). Many of these things we experience as exquisitely inexplicably mysterious, profoundly moving, and deeply, deeply inspirational.

There is, however, also much within the institutionally sanctioned power structures associated with our religious/church/spiritual lives which human hands and hearts, at the behest of age-old patriarchy, have rendered and continue to render as life-denying, hypocritical, abusive attitudes and behavior. And, this surely ought to distress us immensely? But somehow it seems not yet to do so. Such is the historically embedded, completely erroneous hegemony of infallibility.

I believe that it is either our collective inability or our determined refusal to interrogate and/or critique this hegemony that enables so many of the utterly oppressive, religiously affective aspects of our lives to continue unchallenged. It is this unwillingness and/or inability to challenge that sees too many of our already vulnerable and/or marginalised continue to suffer needlessly, and worse, to suffer so often in silence.

I am speaking here of the too many women and girls who are subjected daily to the evil of domestic and/or sexual violence. I am speaking here of young people at grave risk of suicide. I am speaking here of gay and lesbian sisters and brothers yearning to be recognised as fully and equally worthy, and deserving, human beings. I am speaking of the unknown poor, the unknown lonely, the abandoned elders, especially the widows. I am speaking of those in prison, of those being unjustly discriminated against for any reason.

As has been impressively articulated during this gathering, all in our Pacific Island nation states, and certainly all here in Aotearoa, have legal rights, human rights, indeed Constitutional rights, but there are also too many for whom existing laws and provisions, those which enshrine supposedly universal civil rights, are either failing or are inadequately culturally inclusive. And yet, the Gospel's mandated unconditional advocacy of the Church for those on the margins is so often missing. In addition – and here is where I become extremely animated – there are a number of contemporary civil rights which many Churches are actively inhibiting such as in the case of gay marriage and women's reproductive rights. When not actively inhibiting the rights of those already vulnerable the alternative stance is often that of impassivity or remaining **either institutionally oblivious or indifferent to the plight of the people whose lives are being delimited, indeed diminished, by unjust or culturally insufficient laws**. There is a huge social justice imperative here crying out for theological endorsement.

Then, of course there are the very different but equally urgent questions to do with economic justice, environmental justice, land rights – all of which are written about and referred to repeatedly in the Bible and the Torah and the Koran. Yet there is scant evidence of hearing sermons being preached consistently and passionately in the Pacific on either climate change, economic injustice, the plight of migrants on Manus Island, the genocidal behavior of the Indonesian government toward West Papua, unrestrained land loss, or our utterly shameful statistics which show how a number of Pacific Islands, including Samoa, have some of the highest rates of spousal abuse in the OECD!

Let me reiterate that I believe it is either our collective inability or our determined refusal to interrogate and or critique the hegemony that all is perfectly well in the Church which enables so many of the utterly oppressive religiously affective aspects of our lives to continue unchallenged. Again I say it is this unwillingness and or inability to challenge which in turn will continue to render us ever vulnerable, and in this instance, to the relentless external

onslaughts we face upon our lands, our resources, our people, our environments, our way of life, our way of being fully human, which at its God given best, is generously inclusive, unconditionally hospitable, profoundly egalitarian, and intellectually and spiritually expansive.

Let me tell you where I think one of our Churches' biggest problems lies and where I believe the most radical and enduring solutions could be developed and implemented.

I was a teacher for almost 25 years of those preparing either for ordination or for lay ministry. Therefore, I was a teacher of those who, to the largest extent (or so I naively thought!), were so selflessly offering themselves (and at times their families) into the service of the Church and to the fulfillment of God's mission purposes. These were good and decent faith-filled men and women. They told me that they understood their baptismal promises and later their ordination vows, which obligated them to seek for the lost and lonely, to feed the hungry, to comfort the sick, to shelter the homeless, to visit those in prison, to stand against injustice, to advocate for the oppressed, to be unafraid of challenging unjust laws, to be fearlessly prophetic in the public square, to be gentle and merciful beacons of God's unending love. I believed them. And, I believed in them.

As a lay woman I have always been in awe of those who, as they are ordained, publicly profess before the people and before God that they will undertake to do all these things; that they will live lives of exemplary moral righteousness, that they are utterly committed to serving the needs of those who are the least among us. I am in awe of anyone who can stand presumably in all humility before the altar and vow to do this. Why am I in awe? Because I know, without a shadow of doubt, that I certainly could not! I am too impetuous, too undisciplined and probably too prone to mischief-making as opposed to peacemaking! But I have immense respect for those who do publicly commit to a life of sanctified service to others and not to self. As a result of that respect, I have always been driven to provide the very best theological educational experience for my students, in order to help them fulfill their ordination promises to God and to God's people. As those of you who are teachers will know, however, not all students want our help! And not all institutions actually believe that Faculty even need to be involved in curriculum development – Faculty are after all to teach at the behest of the needs of the institution!

I am so sad that I was not a teacher of Pope Francis, but I am completely utterly and unequivocally indebted to him for assuaging what eventually became burgeoning professional self-doubt. Pope Francis singlehandedly fulfilled my teacher yearnings in terms of student profile – indeed he was and is literally the answer to my prayers. For his is the persona, the gentle, deeply compassionate, exceptionally articulate, utterly fearless holy person of God who exemplifies the men and women students I always had in mind and in my fervent prayers. But who, even after nearly 25 years, I only very rarely found in my classes!

Every year I yearned for students who shared my theological assumptions, who shared my passion for a fearless Gospel-driven activism. And every year I was largely disappointed. Apart from the international students I was able to handpick as the result of my work as head of the global Anglican Peace and Justice network, and apart from the handful of either Maori or Pacific students who were courageous enough to speak out and risked being silenced, disciplined or having their scholarships cancelled, I can honestly say that too many of those sent to my seminary for theological education and ministry formation by the Church were never ever destined to be like my Pope Francis. Every year I fretted about this, I wrote about it, I spoke about it, I raged a little bit about it. Year after year I often found myself despairing about the calibre of those destined for church leadership, not only here in Aotearoa but beyond in the Pacific region.

It was because of this existential disconnect between the rhetoric of the theological academy and the relatively unattended to contextual reality of human suffering, of poverty, homelessness, violence, serious mental health issues, domestic abuse and so on, that I began to think and to pray even more fervently about what needed to change. How could students become like Pope Francis if they were not being intellectually and spiritually fed as he so clearly had been? I did not blame the students. It was more something radically wrong with the seminary diet! And so began an uphill and ultimately stunningly unsuccessful struggle to encourage my Church to take seriously what I was urging upon them. That is, in terms of the theological curriculum, pedagogy, assessment, and environment. I felt if the Church is indeed serious about its mandated responsibility to raise up similarly exemplary Christ-like leaders, taking all this seriously was and still is imperative: To raise up men and women of deep spiritual wisdom, indeed of holiness; men and women of expansive brooding intelligence intimately acquainted with the historic and contemporary ways of the world, unafraid of oppressive powers, unreservedly compassionate, selfless yet full of mercy, grounded in the God-given gifts of their culture; men and women who are imaginative and ordinary.

My Church, the Anglican Church in Aotearoa New Zealand and Polynesia was not, indeed is not, the slightest bit interested in transforming its dominant theological education paradigm. And sadly neither, from my experience of much of the Pacific, are any of our Churches. Instead most Pacific seminaries are still primarily raising little princelings, those who yearn only to be Kings, to be served but not to serve, to be feted like Emperors at the top table, and to have all women, especially their wives, know unquestioningly their (falsely alleged) Biblically mandated subservient place. What I find so deeply disturbing is that there seems to be increasingly little apprehension among church leaders, Maori and Pacific, of the fact that there is an indisputably direct correlation between Gospel truth and political activism. They have after all only to look to the lived and to the dying example of Jesus to be convinced of that factual reality. There is instead, however, either a completely uncritical preference for the egregious Pacific wide 'propaganda' masquerading as theology, being peddled daily, hourly, by obscenely wealthy white tele-evangelists, or else our leaders speak as those schooled into passive acceptance of conservative unyielding theology – that which is espoused by too many of those men still holding the academic reins of power within our seminaries.

I have on my desk a copy of a poster first produced in 1917 in New York. It was popularly used at that time by the Workers' Rights Movement; in other words, by those seeking for justice and seeing in Jesus an example, an ally and advocate. Here are the original words of the poster. Here also, is the Jesus of my heart.

Reward for information leading to the apprehension of Jesus Christ – Wanted for Sedition, Criminal Anarchy, Vagrancy, and Conspiring to Overthrow the Established Government. Dresses poorly, said to be a carpenter by trade, ill-nourished, has visionary ideas, associates with common working people, the unemployed and the poor. Alien – believed to be a Jew. Alias: 'Prince of Peace, Son of Man' – 'Light of the World' etc, etc. Professional Agitator, Red beard, marks on hands and feet the result of injuries inflicted by an angry mob led by respectable citizens and legal authorities.⁵⁹

As I used to say to my students, what is it about this image of and narrative about Jesus that is not true? Some ultra conservative students insisted angrily that it was all untrue. Most said they found it unhelpful because they had never thought of Jesus in this way because no-one had ever taught them to see Jesus as the radical activist. And, my loveliest and most honest students said my poster was all true, but they personally found it hard, if not impossible, to see themselves in the same way. It is here, in their recognition of an inability to empathise with the real Jesus of the Bible, that I have found something that has always remained one of my biggest remedial clues.

59 Art Young, 1866 – 1943. Political cartoonist and left-wing activist.

Once again, I think Pope Francis is key, because for our times, some 2000 years after Jesus was indisputably confronting the oppressive forces of the Roman Empire, Pope Francis similarly exemplifies the same fundamental Christ-like characteristics of fearlessness; of unending, boundless, sacrificial compassion; and of deep abiding, uncomplicated, faith in God. It has been the age-old, patriarchally driven, sanitizing, domesticating, and emasculating of the radical Jesus, at the hands of those who traditionally wield unfettered power in the Church, and certainly in the academy, that has led us, as Pacific people, to a point of theological passivity, tameness, tentativeness, submissiveness, uncertainty, compliance and adherence to dominant theological narratives – all of which are utterly bereft of any semblance of our cultural nuance, our theological epistemology, our poetry, art, dance, and music.

This is why, instead of engaging confidently and competently in public debates on incredibly important and ultimately life and death contemporary moral issues such as abortion, euthanasia, gay marriage, and participating in war, our church leaders instead hide behind their false piety and their theologically questionable slogans. This is why there is so little apprehension of the complexities inherent in what we are discussing here in this hui; the complexities, for example, of **what ought to be the relationship between religion and the law, religion and constitutionalism?**

I believe we have so much to contribute from our own wells of indigenous knowledge, theological insight, understanding and experience. Not only into the reforms of the remnant, completely outdated, colonially inspired laws, but into the development of new laws, which are ever needed to regulate the fast changing political, social, economic and moral landscape of our beloved Pacific region.

I want religious leaders who are articulate and visionary thinkers. I want those who know about and care about constitutionalism, who understand its ramifications for all of the Pacific, including Aotearoa. I want religious leaders who would hold the Bible, the Koran or the Torah in one hand and simultaneously look to enduring secular treasures, such as the United Nations Declaration on Human Rights, to benchmark every aspect of any new or revised Constitution. This ought not to be an impossible goal. In my own denominational stable, for example, there is a fundamental truth which sees 'authority' never being based solely on the subjective opinions of the individual but rather on the claims of "scripture, tradition and reason" acting in concert. But it seems to me fairly self-evident that in order to get to 'reason', well, you need to have some basic understanding of and experience in political and moral philosophy, and possibly a dabble of legal theory. I defy any one of you to show me where these subjects are listed in any seminary curriculum anywhere in the Pacific or here in Aotearoa.

We have instead allowed the very antithesis of Locke's teachings to prevail. And, so it is that we see a preponderance of religious leaders arrogantly and determinedly asserting that the 'authority' of their religion or of their religious beliefs (the two of which are not necessarily always in accord!) is to be preeminent. When it comes to engaging in reasoned, compassionate, morally judicious debates in the public square about gay marriage, euthanasia, suicide, abortion, women's rights generally, there is no credible evidence that the vast majority of our religious leaders are prepared for this responsibility, even though they are often elevated to the official platforms of decision making, policy formation and law making, and are thereby by default so often responsible for obstructing pathways to justice for those directly affected by discrimination. Unlike predominantly secular societies, which have to a great extent disentangled moral questions from the often overtly and very unhelpfully judgmental clutches of male church leaders, we, Pacific societies, have yet to free ourselves from these limitations.

Leadership within our religious/church institutions needs to change. Our lives as women now depends upon it. The lives of gay and lesbian people depend upon it. The aspirations and opportunities for all young people to flourish freely and to know the sweet taste of success in their lives depends upon it. Indeed, the future credibility and the very survival of our beloved religious institutions depends upon it. And so, I firmly believe, that as Maori and Pacific

people inextricably and lovingly bound to our faith communities, to the churches of our forefathers and mothers, we can, will and must commit afresh to the project of transforming our religious academies. For those destined for the precious work of church leadership, our sacred places of teaching and of learning, our seminaries, must become places of great culturally enriched academic freedom. They must become places where men and women of God flourish in mutuality and interdependence; where theological imagination and profound human empathy is irresistibly stirred by necessary proximity and deep engagement with human suffering; where compassion for those who suffer is guided by respect and not pity; where an expansive and substantive curriculum reaches out beyond itself to the secular academy, to moral and political philosophy, to legal theory, to sociology, to law and human rights, and becomes normative not aberrant.

It occurs to me that here present in this hui are the experts, the culturally competent teachers we have need of to engage the necessary disciplines and their resultant dialogues crying out for attention. We have therefore the Faculty needed to fulfill the vision – so might we have a shared plan? Imagine what a beautiful, life-giving, redemptive intellectual coup this could be!

To quote Genesis (in case you are wondering!)⁶⁰ I can just about imagine God looking on at what might be created and saying, 'Behold, this is not just good but indeed it is very good, for my precious Maori and Pacific peoples'!!

Faafetai lava ma ia manuia.

60 Genesis 1:31.



Photo credit: Yvonne Ualesi



Photo credit: Faanati Mamea (Mamea Media Ltd)



Photo credit: Yvonne Ualesi

Continuing the Public Dialogue Post-Conference



8. O fea le alofa? Where is love?

Tui Atua Tupua Tamasese Ta'isi Tupuola Tufuga Efi
Former Head of State of Samoa
Chair of Gaualofa Trust, Samoa
20 April 2018

As evidence of the topicality, centrality and impact of the conference on public discussion, especially on current debates over the relationship between land law, land customs, and constitutionalism in Samoa, we have included in this conference's proceedings' publication, this post-conference newspaper article by His Highness Tui Atua, published in the Samoan Observer on 22 April 2018. We are grateful to His Highness for his permission to do this. His Highness was spurred both by the debates held during the Conference and following the Conference in Samoa on customary land alienation to write this article. He credits the focus of this article to a conversation he had with Professor Tony Angelo during the conference, and its impetus to a public plea made by Faapale Taumua, who on the 10th of April wrote a letter to the Samoan Observer editor asking His Highness to speak specifically to the issue. For reading convenience we attach as an appendix Faapale's letter to the editor. His Highness' paper was orally delivered in a press conference on the 20th April, 2018, it was published two days later complete with video access to the actual press conference reading (see: http://www.samoaoobserver.ws/en/22_04_2018/local/32434/Customary-lands-O-fea-le-alofa-Where-is-love.htm).

On Tuesday, 10th of April, 2018, the Samoan Observer published an open letter addressed to me by Faapale Taumua. His letter moved me deeply and this is my response.

On returning to Samoa from the University of Auckland Pacific Law, Custom and Constitutionalism (PLCC) conference held February 12th to 14th, I have been reading with great interest our current public debates on Samoan customary land and land laws.

Faapale is right. Samoa is now at a significant cross-road in her governing history. Not just in terms of trying to figure out how best to protect our customary land from foreign or alien interests, but also how to protect ourselves from ourselves. I will explain what I mean further on. Suffice to say for now that this is the most dangerous issue facing us since our fight for the return of our Independence.

Since Samoa regained Independence we have taken our faasamoa for granted. We as leaders have assumed that so long as we have governing control over ourselves, Samoa mo Samoa, we will never lose it. But the loss of culture and core values can happen slowly, subtly and stealthily, and on our own watch.

Today it has become clear that we can no longer escape the reality that as leaders we must take a public stand against allowing the ambiguity of Article 102 of our Constitution to persist. We must admit that in light of the accumulating evidence (some of which I will speak to shortly) this ambiguity has been exploited in ways that now seriously undermines the integrity and purpose of Article 102, i.e. to protect customary lands from alienation. Today

I make a plea that as a nation whose faasinomaga (identity) and tofi (inheritance) are inextricably connected to our customary lands that we stand together and demand that this ambiguity be properly attended to, and that following this the Article be accordingly amended. This is our right; it is our right as sulii (heirs) of all customary lands in Samoa, whether you live in Samoa or not.

The preamble of our Constitution talks unashamedly about love. It says that God is an “ever-loving” God; that his love or alofa is ever-lasting. In drafting our Constitution, the supreme law of our land, our forebears recognised that they must preserve what makes us unique as a people. They wrote that Samoa is a country founded on God; a country where only God has absolute sovereignty over everything; and a country where we as a people have authority (pule) over our Samoan heritage, our tu ma aganuu Samoa, and that this heritage is a sacred heritage, a tofi pa’ia tuufaasolo, a heritage that is to be passed on from one generation to the next, forever.

Our tu ma aganuu Samoa tells us that we are of the land and the land is of us. The ritual burying of a child’s pute⁶¹ and a mother’s fanua⁶² in the land is because we believe that we are of the land and the land is of us. Our faasinomaga is nothing without land. Our matai titles have little meaning without land. To be landless in our faasamoa is therefore to belong to nowhere; to live without identity; to have no roots or home.

The title of my address is: O fea le alofa? Meaning: Where is love? Where has the principle of alofa gone? Professor Tony Angelo, a well-respected New Zealand constitutional law specialist, in the Pacific Law, Custom and Constitutionalism conference mentioned earlier, asked in the midst of a heated interchange of views: where is love? Following this there were giggles and muffled laughter from the audience. For me, however, this question had a profound and lingering impact.

I asked someone what the learned professor might have meant by his question and it was suggested to me that perhaps more than anything else it had to do with the fact that the language of love is no longer a part of the language of law. Sadly, even Samoan custom law. Therefore, in asking: o fea le alofa? where has the principle of alofa gone? I am deliberately drawing our attention to the fact that the language and spirit of our laws today have taken us so far away from their original source of inspiration, the tu ma aganuu Samoa wherein love is a given, that we are now in the position of having to re-educate and restore its logic, mana and integrity in our laws. And, we do this not because we have the pulu or authority as Samoans to do so, but because we have a deep and everlasting love or alofa as Samoans for our nation, our villages, our families, our individual selves, and our faasamoa. This is where the principle of alofa resides and finds meaning.

Let us turn to the ambiguity at issue here in Article 102 of the Constitution. The ambiguity lies in how best to read the relationship between the wording of the main body of the Article and the wording of its two subsections or sub-clauses, particularly the first. Let me cite the Article.

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

Provided that an Act of Parliament may authorise –

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

61 Pute is the Samoan word for umbilical cord

62 Fanua is the Samoan word for land, earth and placenta

The purpose of Article 102 is clearly expressed by its title: **“No alienation of customary lands”**. The rest of the Article is however less clear, i.e. there is ambiguity within. In layman’s terms the Article says that it is illegal to alienate customary lands **unless** an Act of Parliament allows for 1. a lease or licence to be granted over customary land, or 2. customary land is to be taken for public purposes. I do not have any problems with the taking of customary land for public purposes, assuming of course that such public purposes are indeed valid public purposes. What I have a problem with is the ambiguity that arises as a result of reading the sub-clause that states that an Act of Parliament may authorise “the granting of a lease or licence of any customary land or of any interest therein” alongside the wording of the main text of the Article which says no alienation of customary land “...whether by way of sale, mortgage or otherwise howsoever”. This sub-clause (a) also makes no specific mention of mortgaging a leasehold interest. To read this within the words “or of any interest therein” would seem to run against the plain meaning of the words of the main body of the Article which explicitly prohibits against mortgages. Therein lies our ambiguity.

Our Constitutional forebears put their faith in us to make just decisions moving forward in relation to protecting our customary lands. Decisions that would progress us as a nation whereby we would not only stand proud alongside other nations in our ability to be economically viable in terms of our needs, but also in the knowledge that we did not sell our souls, our sacred heritage, our tofi pa’ia tuufaasolo, in the process. The provisions of the Land Titles Registration Act 2008 (“LTRA”) have raised significant doubt and controversy over Article 102’s ability to meet its constitutional promise of protecting customary land against alienation. So too has the reasoning offered by government for the Alienation of Customary Land Amendment Bill 2017 (“ACLAB”). I make reference here to section 25 of the LTRA in particular as evidence of how law is being used to erode our rights as sulis on the one hand, and to subsection 1.1.2 of the explanatory memorandum of the ACLAB as evidence of how the ambiguity of Article 102 is being negatively exploited to pass legislation that would legalise the mortgaging of customary land (even if it is only in terms of the mortgaging of a leasehold interest on it), on the other.

The subsection of Section 25 of the LTRA that I want to highlight is subsection (4). It relates to the provision of what it calls a “certificate of correctness”. I am told that this certificate is only relevant to the registration of freehold land, and that there is another process for the registration of a leasehold or licence interest over customary land. This other process is that by law, the owners of customary land must file an “Application to Grant a Lease of Customary Land” with the Ministry of Natural Resources and Environment (MNRE) for approval. If approved the MNRE would then draw up the lease or licence, and then the Minister signs the lease as trustee for the customary landowners. Here the landowners I am told is not meant to actually sign the lease or licence. However, there is evidence to the contrary. Leaving aside the issue of multiple owners and the proposed pule faasa’o for the moment (as the problematics of this has been well argued in public debates to date), section 25 is of interest to me insofar as it raises two pertinent questions: why have we vested such power in one person, even if he is the Minister, over our customary lands? And, why is there not a similarly transparent ‘standard of correctness’ required of registration of interests over customary land as seems the case for freehold land? The imperative to finding answers to these questions lies in the need of sulis to gain trust in these laws and the protection mechanisms they purport to give to ensuring that our customary lands are not unlawfully alienated.

In Samoan custom law (both aganuu and agaifanua) the only person that has any rights over customary land is a suli. Sulis retain their suli rights forever. Once a suli always a suli; it does not matter whether they reside in or outside of Samoa. In other words, a suli does not lose his or her suli status if they decide to live outside Samoa. In the custom law of our faasamoa, this is a given; it is fundamental to being a suli. Any impositions by the state, however well-meaning, on our rights as sulis is a breach of our tu ma aganuu protected by the Constitution.

In terms of the legalisation of mortgaging of leasehold interests over customary land, as is promoted by subsection

1.1.2 of the explanatory memorandum to the ACLAB, this is both negatively exploitative and dangerous. It negatively exploits the ambiguity discussed already in Article 102 and creates a dangerous platform by which the effective alienation of customary land can be enabled. This in itself also runs contrary to the primary purpose of Article 102, i.e. no alienation of customary land.

The Sasina Village Council's recent decision to lease customary lands to foreign investors for 100 years for a sum of \$250,000.00 SAT⁶³ per year, for example, means that they could unwittingly open the doors to their customary lands being subjected to mortgagor interests should their tenants decide to mortgage their leasehold interests as per the ACLAB. This potential for mortgaging of leasehold interests opens the door further to other potential foreigners imposing their interests on Sasina land for at least 100 years, thus potentially putting access to Sasina land out of the reach of at least three generations of current and future suli of Sasina should they want to access it. The question arises, who has a right to take this access away from suli of the Sasina lands at issue and for such a period? One hundred years is a long time. With the speed at which fundamental changes to Samoa have occurred over the last 30 years, it is not hard to imagine what could happen in a hundred years if we were to continue on this type of law-making path. The seriously negative implications that these scenarios have presented have given rise to Faapale and others' call for serious national leadership attention and action. I hear your call.

In 2008 as Head of State I was assured by the Attorney General that the provisions of the LTR Bill would not impact in any way on the customary land rights of suli. The Attorney General and his or her office is tasked with a sacred duty to provide the Head of State with the best legal advice possible. Parliament is tasked with a similar sacred duty to consider the full implications of all the bills that come before it. The Prime Minister is also tasked with the same sacred duty. He must ensure that by the Third Reading and before the Bill is passed officially into law, i.e. when he advises the Head of State to give his assent so that the bill can become law, that he has properly considered the full implications of the said bill on the people. Our Constitution states that where all this has properly occurred, and the Prime Minister does in fact advise the Head of State to give his assent, the Head of State must give his assent. That is the process and protocol for law-making set down for us by our Constitutional forebears. It is, as Faapale writes, a process and protocol that assumes that our leaders are capable of fulfilling their sacred duties, that they have the skills and support to do so, and that they do so with the alofa demanded of them by our forebears. The checks and balances on the power and proper work of the state if not operating well then needs to be fixed. Today we have no choice but to admit that there is something not operating well here and that we, collectively, have an obligation to identify and fix it.

Today we have the responsibility of admitting that there is a problem with Article 102; that the ambiguity within is serious enough to warrant the attention of our best minds in order to make Article 102 unambiguous. These minds, however, must be able to locate the principle of alofa in their custom law and statutory law assessments and have it sing in harmony alongside their assessments of pule, and of legal certainty and transparency. These minds must come up with ways to fix the ambiguity whereby the process for fixing it is as much about strengthening people and culture as it is about strengthening the law. And, these minds will have to advise the country on how best to frame the amendment so that when the proposed amendment is put to a public referendum as per Article 109 of the Constitution, that the country will be well equipped to make the right decision in accordance with their conscience.

We as a nation have a sacred duty to find these minds and to support them by putting our personal and political biases aside so that we can work together as one people to achieve the balance and protection desired by our

63 See Samoan Observer article, 7 April 2018, titled "\$250,000.00 for Sasina village" by Joyetter Feagaimaalii-Luamanu at: [http://www.samoobserver.ws/en/07_04_2018/local/31940/\\$250000-for-Sasina-Village.htm](http://www.samoobserver.ws/en/07_04_2018/local/31940/$250000-for-Sasina-Village.htm)

Constitutional forebears in Article 102 – the balance between gaining economic environmental sustainability for all families and villages and retaining the cultural integrity of our tu ma aganuu Samoa, and the protection of our customary lands against undue alienation.

In the last 30 years there has been a paradigm shift. We have moved from a faasamoa where pule and alofa co-existed in relative harmony, to one where pule now seems to rule alone. In this new paradigm we see the introduction of laws where instead of the pule of a sa'o being dependent on the love and support of the auaiga (supporting family and/or village members), the sa'o is capable of existing and exercising pule quite independently from them. In the faasamoa this is wrong. It is repugnant to everything that the faasamoa stands for. The faamatai exists and draws meaning and value from the reciprocal love and respect between matai and auaiga (family members). Even for tama-a-aiga this is true.

When Samoa was fighting for the return of our Independence during the Mau, the leadership of tama-a-aiga would not have amounted to anything had it not been for the reciprocal love, respect and support they shared with all those in their auaiga who rallied behind and alongside them. During that fateful Black Saturday when he heard gunfire and was told where it was coming from and of the wounded, Tupua Tamasese Lealofi III did not hesitate to make his stance against colonial administrative tyranny. Knowing full well that he may get shot if he walked towards the gunfire, he went, along with fellow leaders, anyway. Theirs was an act of leadership, of ultimate service and sacrifice. It was an act of love and protection – protection of land, family, and the dignity of Samoa.

This reciprocity of love is what fuels us to go beyond the call of duty to sacrifice our comforts for the greater good. This kind of reciprocal love is what motivates parents to care for their children notwithstanding. It is what motivates children to care for their parents no matter what. It is what motivates families and villages to care for their members. And it is what makes members of our nation proud to be a part of this nation. There is a saying in Leulumoega: O le matua o Leulumoega e le se matua e fafaga i fale, o le matua e gasese: meaning, the leaders of Leulumoega (i.e. Tumua) are not leaders by virtue of status, they are leaders by virtue of the love and self-less service they give to their people and receive in return. To emphasise pule without alofa is to strip pule of what will ensure its longevity. In other words, if matai exercise his or her pule without alofa their pule will be short-lived.

Let me return to my question: o fea le alofa – where is love? where has the principle of alofa gone? In this new paradigm we ourselves have stripped ourselves of the power of this most fundamental principle to protect us against our own arrogance and greed. When we stand by and watch the passing of legislative enactments that undermine or make alofa irrelevant in law we are complicit in that act of colonial disempowerment. Here the colonial, nay neo-colonial, master is not an outsider forcing us to do something against our will, he is right within us, moving among us, preying on our vulnerabilities, luring us to believe that there is no other option for economic development but the alienation of customary lands. Our forebears knew this would happen. That's why they made Articles 102 and 109 such a significant part of our Constitution. We know from current private sector agricultural practices that this is not the only option. We know that with the right state support it is possible for local businesses to set up profitable partnerships with villages and families to develop their customary lands to produce goods and services for both internal and external markets. In knowing this, our Constitutional forebears are challenging us to rise to the occasion to do all we can to protect ourselves from ourselves, to protect ourselves – and the lands they fought so hard to protect – from unnecessarily alienating them, actual or constructive. To do this we must remember and revive in our custom law, our tu ma aganuu, and our languaging and practices, the importance of alofa, **of their alofa**.

I end with the story from Sataua. It is the story about the origins of the saying 'ua segia le maui' (the maui or soul has been stolen). The saying is one of the few Samoan sayings that remains today that uses the term 'maui' for soul.

The story is about a couple, Fine and Sau, and their son Mataulufotu.⁶⁴ Mataulufotu, was not only able to take away souls and thus cause death, but he was also able to restore them and so restore life. The story begins that Fine and Sau had several sons and each time a son was born they gave him to the sea eel for food. One day the father, not wanting to give any more of his children to the sea eel, asked his wife to run away inland with him to hide from the sea eel. After a time, the mother gave birth to another son. They named him Mataulufotu. When the father went looking for food, mother and son remained behind.

One day, the mother, a cannibal, then decided to kill her son, bury his head under the breadfruit tree and eat his body. When the father returned he asked after his son. The mother denied knowing where he was. The father climbed the breadfruit tree and when he got to the top heard the head of his son shouting to him to look down to where he was lying. The father saw his son and climbed down ready to beat his wife. The son, who still cared for his mother, asked his father not to beat her to death but to instead weave a basket of pandanus leaves to carry his head in, for they should leave. The basket with his head was to be carried by his mother on her back. The head and his parents came to the village Sataua. The village were hosting a great malaga or travelling party. The old man and his wife entered the chief's house by first lifting up the shutters at the front of the house. People inside the house told them off, asking them not to lift the shutters in case moisture entered the house but to instead enter via the back of the house. The travelling party ate and then slept. They did not offer any food to the old man, his wife or the head. When the cock crowed to signal the coming of dawn the following day the head told his mother to wake his father for it was time to leave. When they left all the people sleeping in the house were dead. The head had taken their souls.

As the head travelled on with his parents they came across a ship that had come to Savaii from Fiji in search of a doctor who could restore the life of Sina, the daughter of their liege lord, Tui Fiti. The ship was about to return to Fiji when the head called out to his father to tell the crew that they will return with them to Fiji. The father did so but the crew did not listen and continued to move their ship away from the shore. The head froze the ship long enough so that he and his parents could jump in. When their ship came close to Fiji they came across a reef channel that the crew wanted to avoid because Anaeoso, a fish belonging to Sina, were there and were considered dangerous. The head told his father to tell the crew to proceed through the channel, not to be afraid for everything will be okay. The Fijian crew proceeded cautiously but made sure that the old man, woman and head knew that if the ship sunk they would kill them. The head gave the crew a song to sing to help guide the ship safely through the channel. The ship reached the shore safely. On the shore the Tui Fiti's daughter's body was covered with a fine mat. The head spoke to his parents. He told them to go ashore, not to avoid the fine mat or the body but to sit right next to it. The Tui Fiti welcomed the old man and woman. He told them that his people had gone to Samoa in search of a doctor to revive his daughter but were unable to find one. The head told his father to tell the Tui Fiti that he was to continue trying to bring his daughter back to life. Meanwhile the head would go to the heavens to also try to restore Sina's life.

The head went into the nine heavens to see Fuluulaalematoto, who was a woman who devoured human beings. When he got there Fuluulaalematoto was not there, but her son was. Along the ridge pole of their house in the heavens the head saw little baskets hanging. In the midst of them was a basket that seemed new. The head asked the boy what was in the new basket. The boy replied: "that is the soul of the Tui Fiti's daughter that my mother brought". Mataulufotu reached up and brought down Sina's soul. When he returned it to Sina, she came back to life.

The Tui Fiti was overjoyed, but he was conscious that he did not have a suitable gift for the head and his parents. He

64 Kramer, A. (1995). *The Samoa Islands* (translation by Theodore Verhaaren). Volume 1. Auckland: Polynesian Press. p.154-155.

decided to give them Sina's jumping fish, Anaeoso, which they gratefully took back with them to Samoa. When this fish appears in Savaii people are reminded of this story and say: o le alugaloa na i Sataua; o le Malaga na ave e Mataulufotu o latou agaga – literally meaning, “the long bamboo pillows at Sataua; the travelling party whose souls Mataulufotu took”.

The heavens, as the residences of God, are where souls can be retrieved and restored. In going to the heavens to find Sina's soul, Mataulufotu figuratively announces that good souls, like Sina's, can be restored. Selfish souls, like those of the travelling party at Sataua, will remain dead. In searching for what should be restored and what should not the moral imperative is that we ought to always aim for the heavens in our search. The message that love and respect is what keeps our souls alive is implicit. If it is stolen or taken away, ua segia, it is only through love that it will be returned and restored.

The land law issue we are embroiled in now has the potential to strip us of our soul. There is a divisiveness here that we must avoid at all costs. But to avoid this we must re-locate, re-inscribe and re-inspire in the heart and mind of our laws the wisdom of our tu ma aganuu Samoa and our tofi pa'ia tuufaasolo. This we cannot do without finding and reviving the principle of alofa in law.

We have faced many challenges as a nation since regaining Independence, but this is the most serious. To overcome this challenge, we must first recognise that the challenge now comes not from outside but from within. We must recognise that, like Joshua and the Israelites, the only way to cross the river as a nation with our souls intact is to find understanding in the wisdom of our forebears and their trust in God.

In Joshua 4: 2-7, the Lord said to Joshua: “Choose twelve men from among the people, one from each tribe, and tell them to take up twelve stones from the middle of the Jordan, from right where the priests are standing, and carry them over with you and put them down at the place where you stay tonight. So, Joshua called together the twelve men he had appointed from the Israelites, one from each tribe, and said to them, “Go over before the ark of the Lord your God in the middle of the Jordan. Each of you is to take up a stone on his shoulder, according to the number of the tribes of the Israelites, to serve as a sign among you. In the future, when your children ask you, ‘What do these stones mean?’ Tell them that the flow of the Jordan was cut off before the ark of the covenant of the Lord. When it crossed the Jordan, the waters of the Jordan were cut off. These stones are to be a memorial to the people of Israel forever” (NIV).

Our stand against the unconstitutionality of any Act of Parliament that seeks to undermine Article 102 and for the need to make our Constitution unambiguous and free from negative exploitation are our memorial stones in the river crossing exercise we are now facing. Despite the heavy weight of these stones we must carry and place them firmly in the river so that they will stand the test of time and the force of changing currents so that when future suli ask: o fea le alofa, where is love, where is the principle of love in what we did, we can proudly say, there it is.

Soifua.

Appendix

Former Head of State to break his silence

*By Joyetter Feagaimaali'i-Luamanu, 19 April 2018, Samoan Observer
(http://www.samoobserver.ws/en/20_04_2018/local/32360/Former-Head-of-State-to-break-his-silence.htm)*

The former Head of State, His Highness Tui Atua Tupua Tamasese Efi, will break his long-held silence over fears about the alienation of customary lands today.

He will do this during a press conference at his Tuaeфу residence where he will deliver a paper on the issue.

The press conference was confirmed in a letter from his Office earlier this week.

"As announced in the Samoa Observer on Wednesday the 11th April 2018, Le Afioga a le Tama-a-aiga, His Highness Tui Atua Tupua Tamasese Ta'isi Tupuola Tufuga Efi invites media personnel to attend a media event at the Ta'isi residence where he will be speaking to the customary land issue," the invitation reads.

"His speech will be followed by a question and answer session."

The reference to the announcement on the Samoa Observer was in relation to a letter to the editor the former Head of State had written. It was in response to a call from one "Faapale Taumua" who challenged the former Head of State and called for his voice on the issue of customary land.

"First and foremost, I humbly and respectfully apologize for my presumption to approach your Highness without invitation," Taumua wrote.

"I am confident though that the former Prime Minister that I remember as a youth, a humble man full of wisdom, will welcome any and all contributions to the conversation on all subject matters irrespective of rank or title, involving welfare of nation.

"The subject matter addressed here, the circumstances and the long-term detrimental impact of L.T.R.A. of 2008 to community, warrants temporary suspension of decorum so as to enable community to voice opinions on matters that will directly affect us all.

"I pray that if this call reaches you, that the subject matter be your foremost concern and not the source. And I again apologize for my presumption and any inconvenience I may cause for calling on you for assistance." (the letter in full is reprinted below)

But the letter touched His Highness Tui Atua quite deeply.

"Talofa Faapale Taumua," he wrote in response.

"I write in response to your open letter in the Observer 10 April 2018 which moved me to tears and prayer: Dear God, make me worthy of this man's trust.

"I will speak on the customary land issue not this week out of deference to the Deputy Head of State's funeral but next week. I will let you know through the paper when and where."

That place is Tui Atua's residence at Tuaefu today at 10.30am.

The following is the open letter from Faapale Taumua:

An open letter to His Highness Tui Atua

First and foremost, I humbly and respectfully apologize for my presumption to approach your Highness without invitation.

I am confident though that the former Prime Minister that I remember as a youth, a humble man full of wisdom, will welcome any and all contributions to the conversation on all subject matters irrespective of rank or title, involving welfare of nation.

The subject matter addressed here, the circumstances and the long-term detrimental impact of L.T.R.A. of 2008 to community, warrants temporary suspension of decorum so as to enable community to voice opinions on matters that will directly affect us all. I pray that if this call reaches you, that the subject matter be your foremost concern and not the source. And I again apologize for my presumption and any inconvenience I may cause for calling on you for assistance.

I have the urge to present this point to check if it crossed your mind. It had been discussed and voiced in the past, but we are now on that cross road demanding direction from our leaders. Being that you are the Tui Atua, you are the Father and Leader of the nation based on the Aganuu, the Faa-Samoa. Therefore, on behalf of all those concerned with the long-term impact of the L.T.R.A. 2008, I hereby seek your opinion regarding questions raised below.

The opposing voices about L.T.R.A 2008, focus more about the risk the Prime Minister is exposing our lands to. I have reviewed due process procedures only under Part 2, drafted up for the protections of families and their lands, and what I find are word-playing tricks drafted by lawyers that I prefer to believe, the Prime Minister himself understands. Our elders may not be so educated in these kinds of governing processes with laws written out in complicated technical jargons and their meanings, but that does not excuse anyone to treat them as fools. The tricks written into this Part 2 alone reveals how the government views our community as a whole. Being simple in matters of the outside world does not mean they're idiots.

It is my general understanding that you signed off on this law. This is perhaps why you are so far reluctant to come out publicly to join the protests.

I don't blame you. This is because one of the strengths of our culture, is the unquestioning trust we place on family and community leaders that they will do their utmost to protect us from harm.

But in the hands of irresponsible individuals and leaders, this unquestioning trust can turn into a double-edged sword. You did the same here. You trusted that the Prime Minister will not intentionally harm the community and signed off without reading it thoroughly.

But if you regret it now, then you also regret the Faa-Samoa that raised you and made you the man that you are today.

You trusted a leader like you were supposed to. It is an automated reaction as the culture demands of us all even today. All of us would have done the same.

But as Abraham Lincoln once said, "I walk slowly, but I never walk backward". Walking slowly in this case, works out for the best. This is because this law, presents a scenario that had been avoided but must be dealt with eventually. If you hadn't signed it, we would not have had the chance to deal with this issue to its final conclusion. But as least for now, we have you, the best of all of us to deal with it.

I have a separate concern besides the danger the L.T.R.A. of 2008 poses on our customary lands. My concern is about maintaining the rule of law as established by the Aganuu Faa-Samoa for thousands of years.

We generally view the Faa-Samoa as a culture, but what we overlook is the fact that the Faa-Samoa also had the authority to make rules, established traditions that became accepted practices, which became laws that regulated our social lives.

This authority to make rules and regulations means that the Aganuu Faa-Samoa, falls under the category of government consistent with its modern definition. It was the Faa-Samoa that established a regulation and rule of how a family land shall be owned.

There had been other rules and regulations as well that we continue to apply today that are critical in maintaining and strengthening our culture, identity, and continue to promote harmony amongst community members.

Another example of this is that families are left to choose their Matai on their own without government interference.

The rankings of Matai Titles also are left to standards set by our ancestors undisturbed as another example. These were rules and regulations and as they were established by the Aganuu Faa-Samoa, we must consider the Faa-Samoa as a governing body equal to all forms of modern governments as defined, because of its authority to make rules and regulations for community to live by.

Because of how ancient our regulation is regarding land ownership, some Judicial Systems like the American's, will definitely view this regulation as a law that granted all citizens a fundamental right or fundamental liberty, to be a part owner of family land, equal to all members of family. In America, there are not that many rights or liberties considered fundamental.

I believe you understand this point very clearly. These fundamental rights include the right to worship any god of your choosing, the right to associate with anyone, the right to raise your child as a parent, and the right to choose your spouse.

These fall under the umbrella of natural rights of man to Life, Liberty and Pursuit of Happiness. This is because these rights were practiced by humans individually all over the world, before men began organizing communities to form modern governing bodies to govern their lives. Some were added onto this list by the American Constitution however. The American Courts have guarded these rights zealously and will carefully review any government interests seeking to interfere with or deny the exercise of these fundamental rights and liberties. This generally means that to interfere or deny these rights, government must prove that there are no other alternatives left to them in pursuit of their goals, but to interfere and deny the exercise of these rights and liberties outright.

Because of how ancient our rules and regulations are as to land ownership, we can claim following the American

system, that each of our family members has a fundamental right or liberty to land ownership equal to all other members. In that case, under American law, the question the Court asks in a challenge against a government policy that seeks to interfere with, or deny exercise of right is: how compelling is the government interest that now seeks to eliminate this right completely, a right so ancient that it might have been the very first right established by our ancestors? The government interest that justified the LTRA of 2008 is to make money. How compelling is this interest when there are plenty of other alternatives available that will accomplish same goal, but leave this ancient right undisturbed?

My opinion is that the authority that must deal with this question and other related ones is the office responsible for maintaining and prolonging the Aganuu Faa-Samoa. This office is the office of the Tui Atua. This is because the fundamental right interfered with and deleted by the LTRA, was a fundamental right granted to us all by a governing body that is still operating today, the Aganuu Faa-Samoa.

My first question is: does the government have authority to overrule any rule or regulation set in place by the Aganuu Faa-Samoa? Out of respect for our elders, your peers and subjects of the Tui Atua, I believe this question needs to be presented for their overall opinions. They all have a right in deciding this question. I kind of remember a question of this kind, that of separation of the powers between the Aganuu Faa-Samoa and government floating around during your term as a Member of Parliament in the 70s, but not of the circumstances that brought it up. I remember it not only because my father (who looked up to you (he wished he was as educated as you)) had an opinion of it, but also because it was unique.

But here it is again confronting us except that this time, the government is now seeking to pull out the corner stone of the foundation that the Aganuu Faa-Samoa is based on. This is a huge structural change to our way of life.

This rule had been set in place so far back that the memory of its beginning is lost to us all. It must have been very important to our ancestors to set this up in place. Whatever their purposes were, it brought harmony to the community and implanted on all of us a sense of belonging. This is the psychological element that the Prime Minister does not see. The land came first before man and therefore acted as the cornerstone which began the roots of the culture that came to be known as the Faa-Samoa.

The next question is this: If someone is to pull out this cornerstone, is that someone a Tuilaepa, or under the authority of other Titles he represents? And if it is, then why is he worthy of a monumental structural change that will forever change the core of the Aganuu Faa-Samoa?

In other words, what had any of these Matai titles he represents done to deserve this honor? My answer is no[thing]. This is not to demean the honor of these families, but it is because I believe that nobody alive has earned that right. Can you imagine a vision so far ahead of its time in [terms of] both [its] social and psychological impact, [the vision] that went into shaping this rule for our community? I don't believe schools or universities were invented yet then?

And yet, our ancestors devised this scheme so beautiful that it seems like it was passed directly from God. And yet, minds framed by so called advanced education fail to see the advantages that such wisdom contributed to our identity. So, who is worthy then?

The L.T.R.A. of 2008 has brought this confrontation head on. To support what the government is seeking here, is a vote granting the government authority from this point forward of regulating all areas pertaining to our social lives that were once regulated by the Aganuu Faa-Samoa. The government may seek to tell you who the Matai of your family

shall be and as precedent is already set here, you may have to accept that too. As of now, there is no one speaking up to represent the Aganuu Faa-Samoa and its interests. The only worthy representative is one with the Tui Atua honor. So this issue falls on your lap unfortunately. But as difficult as may be, you are worthy of the task. But that is speaking from a biased point of view.

I was a boy of around ten years old when my father and I began sitting around our little radio mesmerized by your voice, wisdom and delivery as a Member of Parliament. It was the only time that I noticed my father had stopped working. But I believe it was the same with most of our country at that time. Everything kind of stopped when Tupuola Efi spoke. That kind of mana had not been seen since. I then discovered a speech you gave the United Nations sometime in the late 70s or early eighties rejecting South Africa's apartheid policy. I had goose bumps and tears as I remembered those early days with my father as I was reading this. But even more so was the knowledge that my father wished for while listening to you that was spelled out in detail in this speech. Like the ancestors who drew up this plan for the distribution of our lands, you were ahead of the times. These so-called advanced societies with education degrees to prove their worth, had no idea of what freedom to individual liberty was, but our Tupuola Efi did. I was so proud.

I am calling for that hero today who understood and defended individual freedom to liberty. We need the Tui Atua's wisdom in deciding whether a government formed by ideas of outsiders, has the authority to change rules and regulations set up by our ancestors under the Aganuu Faa-Samoa?

There is nobody worthy amongst us to lead the discussion. It may seem like this law only deals with land ownership, but it [does] not. There are unforeseen consequences of this change that has opened up the nation to another form of foreign invaders.

You will leave behind a broken foundation that will never be repaired. This is the beginning of the end of the Aganuu Faa-Samoa as we know it as this structural change will slowly divide the nation into classes of landowners and serfs.

A knowledgeable man like yourself fully understands how this kind of system worked out for minorities all over the world! The Faa-Samoa is the only thing that separates us from other cultures and [is] responsible for our national identity. If we let the government delete one fundamental right and liberty for such minimal justification as to make money, where will it end?

Can you envision a Chinese Tupua Tamasese when future government decides to fix budget shortfalls by selling our Matai names to the highest bidder?

I trust in your leadership as if anyone understands the nature of fundamental rights and liberties and what they pertain, it is you my Tui Atua. This is your watch.

With the Utmost Respect,

Fa'apale Taumua.

9. Why the 'Land Titles Registration Act 2008' (LTRA) is Incapable of Alienating Customary Land

Teleiai Lagipoiva Dr Lalotoa Mulitalo Seumanutafa

*Response to Public Discussion in Samoa on Conference Themes after the Conference
Published in Samoan Observer, 24 February 2018*

As evidence of the topicality, centrality and impact of the conference on current Samoan debates over the relationship between law and custom, especially in the area of customary land, we have included in this proceedings publication Dr Lalotoa's 24 February 2018 Samoan Observer article as it elaborates upon what she presented at the Conference proper. Only those sections pertinent to the conference themes have been republished here. For access to the full article see: http://sobserver.ws/en/25_02_2018/local/30430/Why-the-Land-Titles-Registration-Act-2008--is-incapable-of-alienating-customary-land.htm. There is some repetition of text and points in this Samoan Observer version as it draws from her conference power-point slides presentation (which was turned into her edited paper in this conference proceedings publication: we decided to keep the two 'papers' more or less as they were offered for they both provide us with a record not only of the different points of emphases she engages, but more importantly they highlight the rich data (case law, legislative documents, registry documents, etc.) that she has generously made available for future scholars and readers to reflect on and use.

"...At the Conference, given the overall theme, Dr Mulitalo's topic was entitled: Law, Custom, and Constitutionalism: Customary Land Tenure, Samoa.

For the first part, her presentation focused on the fabric of the laws in Samoa, how much custom is evident in that fabric of Samoa's laws and the Constitutionalism of those laws.

The second part was on 'Customary Land Tenure in Samoa', and the Laws pertaining to those, Parliament laws and the Constitutionalism in those Parliament laws, relating to customary land in Samoa.

This is the part where much interest was evident at the Conference. It is now put together and more appropriately entitled: "**Why The 'Land Titles Registration Act 2008' is Incapable of Alienating Customary Land**". Given the significant interest on this topic, it is now released for the public's information:

1. What the Constitution of Samoa says about customary land – 3 Types of Land

Article 101 of the Constitution of the independent State of Samoa says there are three (3) types of land in Samoa, **Customary land** which is land held in accordance with Samoan custom and usage and with the law relating to Samoan custom and usage; **Freehold land** which is land held for an estate in fee simple; and **Public land**, which is land vested in Samoa being land that is free from customary title and from any estate in fee simple. In essence, as it is commonly appreciated, customary land accounts for 81% of the land in Samoa; public land accounts for 15% and freehold 4%.

Article 102 of the Constitution then prohibits the alienation of customary land; except where an Act of Parliament authorizes such which is only in two modes: (a) the granting of a lease or licence of any customary land or of any interest therein; and (b) the taking of any customary land or any interest therein for public purposes. The two Acts of Parliament these have resulted in are (a) **The Alienation of Customary Land Act 1965** (53 years old now); and the **Taking of Land Act 1964** (54 years old now). While the former law allows customary land to be leased for the benefit of customary landowners as is statutorily required, the latter allows the government to build public hospitals, schools, roads, bridges for public use.

The Current Fabric of Laws of Samoa and Laws Relating to Customary Land

According to the Consolidation of Samoa's Laws Project carried out annually by the Office of the Attorney General, as of December 2017, Samoa's law count (Acts of Parliament) totalled 291 laws. From this 291, inclusive of the Constitution, some 20 laws relate to land (the 3 types in the Constitution). In the order of the year they were enacted, these are as follows:

- (1) 1960 Constitution of Samoa;
- (2) 1952 Property Law Act (NZ);
- (3) 1964 Taking of Land Act;
- (4) 1965 Alienation of Customary Land Act;
- (5) 1966 Land Titles Investigation Act;
- (6) 1972 Alienation of Freehold Land Act;
- (7) 1977 Samoa Trust Estates Corporation Act;
- (8) 1981 Land and Titles Act;
- (9) 1989 Lands, Survey and Environment Act;
- (10) 1990 Samoa Trust Estates Corporation Reconstruction Act;
- (11) 1990 Village Fono Act;
- (12) 1993 Land for Foreign Purposes Act;
- (13) 2004 Planning and Urban Management Act;
- (14) 2007 Land Transport Authority Act;
- (15) 2008 Land Titles Registration Act;
- (16) 2009 Unit Titles Act;
- (17) 2010 Survey Act;
- (18) 2010 Land Valuation Act;
- (19) 2010 Spatial Information Agency Act;
- (20) 2013 Customary Land Advisory Commission.

There are other laws which have some (lesser) relation to customary land as discussed further below but from the above 20 laws, 5 impact directly on customary land. Again, in the order of years they were enacted, these are as follows:

- (1) 1964 Taking of Lands Act;
- (2) 1965 Alienation of Customary Land Act;
- (3) 1981 Land and Titles Act;
- (4) 1990 Village Fono Act;
- (5) 2013 Customary Land Advisory Commission Act.

As the reader will note, in the analysis of laws relating to land (x 20) and the laws directly impacting on customary land (x5), the 'Land Titles Registration Act 2008' is listed in the 20 above but not in the 5 below, the 5 that directly impact on customary land. And this brings us to the question of why this law, the Land Titles Registration Act 2008, is indeed incapable of alienating customary land. In summary, the 5 reasons **in statutory interpretation and in case law analysis** that support this position are as follows: (1) Nothing in the Act allows the alienation of customary land; (2) The Act expressly says 'alienation of customary land is prohibited'; (3) the very limited reason the term 'customary land' is used in this Act is that it is only due to the operation of other existing laws; (4) other related laws that allow customary leases for public purposes have more influence on customary land than this Act; (5) since enactment in 2008, no court proceedings has ever challenged the provisions of the LTR Act on any allegation of customary land being alienated.

2. Some Background to the LTR Act 2008

Before the Land Titles Registration Act was enacted by the Parliament of Samoa in 2008, in its place was the Land Registration Act 1992/1993. As its Long Titles stated, this 1991/1993 Act was an Act to regulate the law relating to the registration of deeds affecting land. The Land Titles Registration Act 2008, at section 94 repealed the Land Registration Act 1992/1993. The Land Registration Act 1992/1993 was a deed system of registration, and the Land Titles Registration Act 2008 introduced the Torrens system of land registration in Samoa.

Prior to 2008, a series of consultations were undertaken on the Land Titles Registration Bill 2006, 2007 until 2008 and enactment. These were carried out with the Samoa Law Society, the Judiciary, the relevant Government Ministries, the private sector and the public. A Fugalei matter which eventuated in the 2002 and for which proceedings reached the courts in 2005 (Civil claim against the Ministry responsible for Lands/Government, and 2012 Judicial Review against the Ministry responsible for Lands/Government) made the Torrens system of land registration more preferential at the time.

In this Fugalei matter, the applicant lost some \$480,000 for the "purported" purchase of a piece of land at Fugalei near Apia containing an area of about four acres in 2002. This resulted in a court case, a civil claim against the government claiming loss. Although the price of \$480,000 was paid by the plaintiff purchaser, the Registrar cancelled the registration of the deed of conveyance because prior to the registration of the deed, parcel 627 shown in the legal description was not recorded on the land register and in particular was not recorded on the land register as owned by Ms McCarthy. **There was therefore no such parcel of land known as parcel 627 which Ms McCarthy could have conveyed to the applicant.** (Chang Tung v Attorney General [2005] WSSC 24 (31 October 2005)) The applicant also lost any hope for any remedy from the government or any party in the judicial review proceedings. **Chan Tung v Attorney General** [2012] WSSC 42 (12 October 2012)

In those proceedings, the material differences between the Deed's system of registration and the Torrens system of registration as referred to by His Honour Chief Justice Sapolu is taken from Land Law in New Zealand (2003) by Hinde McMorland & Sim vol 1, para 8.009:

"(1) The Deeds system is nothing more than a method of registering instruments which affect the title to land. Under the Torrens system it is the title itself that is required by registration".

"(2) Under the Deeds system, the legal estate in the land passes on the execution and delivery of the deed. Under the Torrens system, the registered estate (which for many purposes may be regarded as equivalent to the legal estate) does not pass until the instrument is registered. Under the Deeds system, the legal estate passes by an act of the parties; under the Torrens system, it passes by an act of the State".

“(3) Except in so far as registration under the Deeds system affected priorities, a deed did not acquire any additional effectiveness or validity when it was registered”.

The title to the land depended upon the deeds themselves, not upon registration. Thus, the registration of a void deed had no effect on the title. Under the New Zealand Torrens statute (the Land Transfer Act 1952), however, the registration without fraud of a void instrument is effective to vest and to divest title and to protect the registered proprietor against adverse claims.”

The adoption of the Torrens system of registration of land was a modern step for Samoa and brought about great faith and hope for the registration of freehold land and public land, for government to be liable for any further mishaps to the bona fide purchaser of freehold land, and was not intended to affect or alienate Samoa’s customary land.

At this point, we return to the responses to why the ‘Land Titles Registration act 2008’ is incapable of alienating customary land.

3. Why the ‘Land Titles Registration Act 2008’ is Incapable of Alienating Customary Land

Reason 1 - Nothing in the Act allows alienation

In interpreting laws, the first point of reference for the courts and any user of any law, is the law itself. What does it say, or not say (silent) on the issue? The issue is – is there a likelihood customary land law would be alienated by the provisions of the LTR Act? An analysis of the provisions of the Act shows no provision of this Act allows this. In fact, the provisions of the Act prohibit this.

Reason 2 - The Act itself expressly prohibits the alienation of customary land

Again, the first point of reference for the interpretation of any law is the law itself. Section 9(4) is very clear on this. The provisions says that **“No provision of this Act** may be construed or applied to: (a) permit or imply the alienation of customary land in a manner prohibited by Article 102 of the Constitution; or (b) permit or deem ownership in any customary land to vest in a person otherwise than as determined under any law dealing with the determination of title to customary land.

Where in any Act, there is such a provision, it means exactly that. **“No provision”** allows the alienation of customary land. So, for the Land Titles Act 2008, it has 98 sections, this means none of its 98 sections permit or is implied to permit the alienation of customary land. In addition, the definitions of certain words in section 2 (Interpretation) clearly further prohibit the alienation of customary land under this Act. For example the words - **“land”** includes all estates and interests, whether freehold or chattel, in real property... but does not include customary land for the purpose of registration of land under this Act (other than registration of licences or leases of customary land); **“record of customary land”** means a record of customary land maintained under section 5(1)(l) but does not include registration of licences or leases of customary land; **“Register”** means the Land Register required to be maintained under section 8 but does not include a record of customary land; **“registration”** means the administrative process which, under this Act, affects, confers, confirms or terminates interests by means of entries in the Register but does not include record of customary land. Section 2(3) states further that reference to any folio under this Act does not include record of customary land as part of the folio. It is evident from these additional prohibitory provisions that

the Act is made incapable of alienating customary land. The drafting may be accused of being repetitious, but in some laws in commonwealth countries, these are accepted to ensure there is no room to permit, expressly or impliedly, the prohibition.

Reason 3 - The very limited purpose the term 'customary land' is used in the Act i.e. due to the operation of other existing laws

Some law drafters may argue this is the strongest ground on the position that the LTR Act does not alienate customary land. The question is - If we are saying "customary land" is not alienated nor negatively affected under this Act which registers land in Samoa, why are the words "customary land" in this Act?

It is crucial to note that this Act only registers freehold land and customary land, and also registers customary land leases, but **not** customary land. It is the lease of the customary land that is registered and not the customary land. The only reason the words 'customary land' are in the LTR Act 2008 is due to **the operation of other existing laws**, i.e. the Land and Titles Act 1981, and the Alienation of Customary Land Act 1965.

The **Land and Titles Act 1981**, sections 11 and 12 requires the Register (CEO) of Courts to transmit judgments of the Land and Titles Court to the Land Registrar (MNRE), and the Land Registrar is to enter in the record of customary land such judgment, order or declaration. The Land Registrar is the Land Registrar defined in section 2 of the Land Titles Registration Act.

The Alienation of Customary Land Act 1965, under section 10(1)(c) requires an applicant for a customary land lease or licence (customary landowners) to register that lease or licence with the Registrar of Lands. This is the Registrar of Lands in the Ministry responsible for lands i.e. the CEO of MNRE.

This is how laws are drafted and interpreted. At the time of drafting, they are not drafted in a vacuum. A drafter surveys the laws existing at that time and drafts accordingly.

The drafter must take account and make references to existing laws. Thus, when the Act is enacted and later used and interpreted, a provision is not to be interpreted on its own lest its true meaning is misinterpreted and taken out of context.

A law provision (section) must be read with the sections before and after that section, and other existing laws, in order to achieve the correct interpretation of a single provision. These are the basic principles of statutory interpretation. A section must be interpreted in context, lest it is misinterpreted and defeats its purpose in the legal framework an Act purports to put forward.

It must also be noted that these provisions of the Land and Titles Act 1981 (sections 11 & 12) and the Alienation of Customary Land Act 1965 (section 10(1)(c)) are brought forward from the Land Registration Act 1992/1993 (referred to above) which was repealed by the Land Titles Act 2008. Thus, this is a continuation of provisions that existed since 1992/1993 to give effect to a 1965 and a 1981 law, and are not brand new provisions instigated by the Land Titles Registration Act 2008.

These positions immediately above are further supported by the following: **the restrictive use of the term 'customary land' in the LTR Act 2008**. The Land Titles Registration Act is made up of **98 sections, 16 Parts, 4 Schedules**. From the beginning to the end of the Act, out of 98 sections, the reference to 'customary land' is in 3

sections only, 2, 5, 9. These are the Interpretation section (s2); the section on the powers of the Registrar (s5) and the section on the inclusion of land (s9). The Revision Notes to the Act mentions 'customary land' 4 times but is not counted as revisions notes do not form the substance of the Act. Thus clearly, the sparse and few sections (x3) with the term 'customary land' shows the use of the term 'customary land' is only for a very limited purpose, i.e. to permit the operation of other existing laws in Samoa.

Reason 4 - Related laws to customary leases

While we are on the laws relating to customary land - it is worthwhile to note other laws that are not solely about customary land but make reference to customary land. For example, the laws that require certain persons and authorities to take account of the lawful use or access of customary land. These are for example, laws regulating the work of authorities servicing public utilities. Such laws are the Samoa Water Authority Act 2003; Forestry Management Act 2011; Broadcasting Act 2010; and the Telecommunications Act 2005. Under these Acts, if entrance or access to the customary land is required, the Authority/authorised persons are required to enter into discussion with all persons having title to such land, with a view to obtaining agreement as to the manner in which the Authority may exercise such rights and powers.

In certain cases, customary land need to be leased under the Alienation of Customary Land Act 1965. The process of leasing customary land under that Act must be adhered to.

A look at the Customary Land Lease Registry shows this. Out of the 81 % of the customary land of Samoa, some **1.5%** only are under customary land lease. It is therefore a very small portion of customary land that is currently being leased, under the provisions of a 53-year-old Act i.e. the Alienation of Customary Land Act 1965. This means some 79.5% of customary land of Samoa is untouched by any customary lease. On this 1.5% of customary land under customary land lease, a total of 308 customary land leases are registered. Of this number, some 31 are hotels and businesses whereas some 277 are other leases e.g. customary land leased for the LDS Church, Education, Digicel, Samoa Tel, SWA, Police, Other churches. The operation of the above-mentioned laws/Acts come into play. Relevant authorities must comply with relevant laws for the purposes of servicing the public through public utilities- at the same time ensure compliance with the rule on the non-alienation of customary land.

The customary landowners are enjoying the benefits from the customary land lease payments made under these leases, without the fear of customary land being alienated. They cannot be alienated as this is fiercely protected not only by the Land Titles Registration Act; the Alienation of Customary Land Act, but also by the supreme law, the Constitution in Article 102. Where any Act breaches the Constitution, it is subject to being declared by the courts as unconstitutional and void ab inito i.e. void from the beginning. This brings us to an analysis of the relevant court judgments to date.

Reason 5 - Case Law /Court Decisions: The Land Titles Registration Act 2008 and Alienation of Customary Land Act in the Courts of Samoa

The Land Titles Registration Act 2008

Although the databases immediately available for research may be inconclusive on the number of cases recorded (paclii.org; samlii.org), an analysis of the available case law in those databases are still useful to draw from. In the courts of Samoa (Court of Appeal and Supreme Court), some 11 cases are found to have discussed the Land and Titles Registration Act 2008. These are namely Betham v Skelton [2017] WSSC 117 (18 July 2017); Fesolai v Boon [2016] WSSC 206 (22 December 2016); Pune v Drake [2015] WSSC 33 (4 February 2015); Faataualofa v Faataualofa

[2012] WSSC 37 (14 June 2012); Chan Tung v Attorney General [2012] WSSC 42 (12 October 2012); AG v Namulauulu [2013] WSSC 72 (12 September 2013); Seabee Ah Yeung v Moe Jay To [2010] WSSC 49 (26 May 2010); Pune v Drake [2016] WSCA 8 (14 March 2016); Boon v Registrar of Lands (MNRE) [2017] WSSC 149 (14 December 2017); Police v Toluono [2012] WSSC 12 (22 March 2012); Carter v Ioane [2010] WSSC 14 (12 April 2010). In none of these 11 court decisions have any allegation on the alienation or attempts to alienate customary land been brought to court. All these 11 cases are mainly on disputes and claims made on freehold land and public land, 2 of the 3 types of land in Article 101 of the Constitution.

Alienation of Customary Land Act 1965

On a further search, some 7 court decisions to date discuss some provisions of the Alienation of Customary Land Act 1965. These are: ET Oldehaver & Company Ltd v Attorney-General [1977] SamoaLawRp 1; [1970-1979] WSLR 159 (27 October 1977); Vaosa v Attorney-General [2000] WSSC 23 (4 August 2000); Attorney General v Alaiva'a [2003] WSSC 46 (27 January 2003); Ott v Leuluniu [2005] WSSC 41 (21 January 2005); Faalavaau Tavita v AG, WSSC, 2003; Liaga v Taleni [2010] WSSC 166; CP 160 of 2009 (13 December 2010); Kalevini v Tausaga [2017] WSSC 90 (16 June 2017). An analysis of these 7 court decisions show that none of these contain or claim or allege the attempted taking of customary land unlawfully under the provisions of the Alienation of Customary Land Act 1965.

These proceedings relate mostly to the preliminaries and the circumstances to the development or continuation of a customary land lease agreement e.g. the renewal clause; the validity of a lease agreement; claims against the government for not carrying out administrative and statutory duties under the Act.

Conclusion

Given the discussions above, the Land Titles Registration Act 2008 is incapable of alienating customary land.

It is important to note that whether a law is initiated or instigated by government or by the public sector, where such a law contravenes the Constitution, it is subject to being declared unconstitutional and void, notwithstanding its origins.

Governments seek the best way forward for the development of their own countries. Samoa has taken a leap of faith through the leasing and mortgaging of customary land leases. Samoa has done so with the utmost respect and ultimate caution to its existing laws and the supreme law, the Constitution of the Independent State of Samoa.

As 'customary land' is a measina Samoa; such a move requires boldness in leadership, governance with a clear vision, and faith in the populations that one day, the populations will see to it that "All laws are made for the benefit of the people they are to regulate".

This is a basic principle of law making and a rule of thumb for legislative drafters. So when courts interpret legislation, it is towards the positive; and the most favourable interpretation is such that will make a law work.

Ultimately, it is presumed that it (a law) has been made on such basis- for the benefit of the people it is to regulate.

Faamanuia tele le Atua ia Samoa!"

10. Community Consultations – Farce and/or Fiction: The ADB, EPC, Alaoa Multi-Purpose Dam Project and Customary Land

Fiu Mata'ese Elisara

Matai of Sili, Savaii & Executive Director of O le Siosiomaga Society Inc. (OLSSI)

As evidence of the topicality, centrality and impact of the conference on public discussion, especially on current debates over the relationship between land law, land customs, and constitutionalism in Samoa, we have included in this conference's proceedings' publication the newspaper excerpts below by le Fetalaiga ia Fiu Mataese Elisara. One is a letter he wrote to the Asia Development Bank (ADB) that was published in the Samoan Observer on 18 September 2018 (see: www.samoaoobserver.ws/en/18_09.../Fiu-writes-to-Asian-Development-Bank.htm) and, second, is his article titled "EPC Must be more Transparent on the Proposed Alaoa Multi Purpose Dam Project" (see: http://www.samoaoobserver.ws/en/24_09_2018/columns/37054/EPC-must-be-more-transparent-on-the-proposed-Alaoa-Multi-Purpose-Dam-Project.htm). This additional paper is titled "Community Consultations – Farce and/or Fiction" because of the strong argument Fiu makes about community consultations or lack thereof in the exercise of gaining the necessary mandate for constitutional and legislative reforms, especially where custom is concerned. These public commentary excerpts expand on his conference paper themes. They give us further evidence of a community feeling and voice on these issues. Getting adequate community or public buy-in to projects that affect public welfare and the public purse requires appropriate community consultation processes and recognition, without which government decision-making and law-making becomes arbitrary at best and dictatorship at worst. We are grateful to Fiu for his permission to republish these pieces. The article about EPC and the Alaoa multi-purpose dam is reported first, followed by the letter to the ADB. This letter to ADB makes mention of the formal complaint described in Fiu's conference paper proper. In this September 2018 letter, he makes specific mention of our PLCC conference and conference debates.

EPC Must Be More Transparent on the Proposed Alaoa Multi-Purpose Dam Project (Fiu Mataese Elisara, Samoan Observer, 24 September 2018)

"Together with six other non-government organizations (NGOs), Ole Siosiomaga Society (OLSSI) was invited on 25 July 2018 by the Manager of the proposed EPC Alaoa Multi-Purpose Dam Project to a related meeting with representatives of a few government Ministries and institutions, project consultants, ADB officials, and EPC staff. Unfortunately, only OLSSI turned up perhaps due to the late one-day advice and lack of supporting documents shared in the invitation to assist us prepare well and better align to the proposed project discussions.

Whilst OLSSI registered its objection on timing and lack of information we nevertheless tried to make the most of the opportunity, quickly reading through the 'overview summary' and 73 pages of final inception report sent later on request the morning of the same day of the afternoon meeting.

I was genuinely interested to attend and rescheduled prior engagements. After all, this was the first time I knew there was such a government and EPC Alaoa Multi-Purpose Dam Project. Every time I see the word 'hydro dam' something runs up my spine and I feel uncomfortable! Scared in fact! Especially for the people living around the proposed site area. So, despite the process and timing problems with the invitation, I went because I was interested from a stakeholder civil society and local community perspective.

A dam proposed to be sited inland from some eight village communities downstream the Vaisigano River with close proximity to the urban Apia metropolitan business center and commercial focus of Samoa, makes it even more concerning to say the least. So, I needed to know and wanted to contribute.

The EPC invitation stated that EPC is undergoing Environmental Impact Assessment (EIA) Study for building this multipurpose dam in Alaoa for 3 purposes.

1. to stop or minimize impacts of major floods like the 2012 flood during Cyclone Evan that caused a lot of damage in Vaisigano River;
2. provide all season storage for water supply to Apia; and
3. for power generation from a new hydro to be built in Alaoa.

As part of its stakeholder engagement responsibilities, EPC invited NGOs to meet and discuss with the consultants and ADB the carrying out of the EIA study and safeguard issues related to the project. On request for more information, the Program Manager later added that "...we all witnessed damages of the flood during Evans in 2012... which caused 500 million tala of damages as well as fatalities and major damages to EPC hydro plants and other infrastructure...we realized the only solution is to construct a large dam in Alaoa to contain major flooding of Vasigano river...total EPC losses alone is in order of 50-70mi tala...that is why we submitted a request to ADB for establishing of this project for a flood control dam with hope to get some of climate change funding through GCF (Global Climate Fund)...that is how whole project started in 2016...GCF approved it in principle but required a full feasibility study... our Govt accepted to have ADB as the leading agency to spearhead the coordination of this project...ADB/Govt selected ENTURA consultant from Australia for feasibility study...technical and EIA...we have completed technical feasibility study, dam site selection, geotechnical drilling, and now is EIA.....results of all these studies will include in our Govt submission to GCF and other donor partners...for funding. If all goes well and funding is secured...we are looking into start construction in 2020... and it will take 2 to 3 years to build it... this dam is 4 mi (million) cubic meters capacity... compared to Afulilo dam (10mi cubic meter capacity) ... 4 mi is allocated as follows...0.5mi for silt retention at bottom, 0.5m for water supply and 3 mi for flood control...".

For me, this was very useful information. It was clear from the Manager's email that the three stated purposes for the project were to minimize floods like that caused by Tropical Cyclone Evans in 2012, to provide water storage, and secure additional power generation through the proposed hydro dam at Alaoa. It was also clear that the proposed hydro dam was close to half the size of the Afulilo hydro power dam in terms of volume. Whilst all three stated purposes are laudable, they confirm my sense of fear over the possible impacts of such a hydro dam built close to villages and Apia.

More stated facts are quite worrisome:

- a. EPC proposes to construct a large 4 million cubic meters dam at Alaoa” – close to half the 10million cubic meters in the Afulilo hydro dam! So, this Alaoa project is a relatively large undertaking, sited close to the eight villages downstream along the Vaisigano River, and proximity to the Apia Town area and its hinterlands. By comparison, the area under the Afulilo hydro dam is around 600 acres. This Alaoa initiative is a relatively massive undertaking with the proposed hydro dam constructed in a much lesser area, more confined space, and with immense water pressure that need to be safely contained in a dam structure. At least the 600 acres of land area taken up by the Afulilo hydro project is expansive enough for water to be distributed rather safely throughout. The Alaoa proposal on the other hand will be fraught with many design, safety, engineering and structural challenges in respect of site geography, lesser area, rugged topography, geology uncertainties, and how to safely manage the immense pressure of damming 4 million cubic meters of water in a dam with such constraints will undoubtedly be a human nightmare for EPC but especially a daily safety concern for those residing close to it in the likelihood of failure.
- b. “Feasibility study for the project activities started in 2016” – this means the concept design and stated activities have been ongoing for the last 2 years. It was however evident that ADB, the consultants, EPC, and government ignored obligations to engage in stakeholder consultation on the project and this failure could render rejection of the project proposal should we pursue this to higher governance level of ADB and GCF as targeted donor. We were advised that the EPC only had their first meeting with the eight village communities affected by the project the same morning of the day we had our NGO meeting in the afternoon.
- c. “Government had accepted ADB as leading agency to spearhead coordination” - That is fine but ADB has clear policy and regulation to trigger and comply with in terms of indigenous peoples and local communities, on resettlement issues clearly relevant in any hydro-dam project, requirement for due diligence process, assessment of compensation to those affected by the project, etc. Both ADB and ENTURA as selected consultant seem to have ignored those clear compliance issues and EPC failed to ensure putting in place an independent mechanism to check these compliance requirements are met. The serious and broader impact the Alaoa project poses on safety to lives and properties should failure occur cannot be overstated enough.
- d. “ADB and Government selected ENTURA consultant from Australia for feasibility studies” – That is fine too. But ENTURA also have human rights, social justice, and safeguard issues they obviously ignored, and EPC again had no independent accountability checks done to ensure they complied with those important responsibilities. It was a concern that EPC missed an opportunity for a local capacity building component in the project to enable our local contractors to learn from ENTURA in this kind of macro-level work and we hope engagement of our locals especially in engineering and construction work are being considered in the project.
- e. “The technical feasibility study, dam site selection, geotechnical drilling are completed” – These are all very well and useful for EPC in its attempt to meet its project goals quickly. However, we hope that the accelerated attempt to meet deadlines for GCF submission does not compromise key safety concerns. Again, the missed opportunity to engage locals in the work completed was an unfortunate missed opportunity.
- f. “NGOs are now invited to input into the EIA” – Whilst EIA is a useful tool to assist in development consent and project approval, in large projects, such as this, we find that focusing on just EIA fails to delve into equally important issues of social impacts, cultural impacts, and a full cost benefit analysis that takes a comprehensive assessment as a basis for decision on feasibility especially in large projects such as this [where] safety issues

become paramount. I pray the local EIA experts recruited to assist ENTURA in this consultancy as well as MNRE/PUMA go beyond the EIA and engage in a more comprehensive impact assessment and analysis of both benefits and risks and be bold enough to recommend the project not proceed when the risks far outweighs the benefits.

g. "GCF has approved the proposal in principle but require a full feasibility study" – I hope the notion of a feasibility study will not fail the test on integrity, and the high standard integrity needed in making recommendations that fit the assessment. Far too many feasibility studies have been subjected to questions when money become enmeshed in the focus of consultants to align with the goals rather than the goals and decisions being ultimately guided by integrity and independence of the findings.

h. "EPC, subject to GCF approval, plans to start construction in 2020 and will take 2 to 3 years to complete" – This proves the urgency of the need and the option of it not going through is not part of EPC radar. I pray all the integrity checks and balances are sincerely vetted and assessed within that timeframe. For me, this is a highly risky project in terms of safety concerns in the event of design and construction failures be they short or long term. Safety is a key consideration that must dictate a decision for the project to proceed and must not be compromised on issues of costs considerations.

The following email documents what I said in the meeting sent to the Program Manager the next day 26 July 2018, copied others.

"26 July 2018

Talofa lava Fonoti/all,

Thanks for the opportunity to have myself meet with your project team this afternoon. Pity the others invited from our CSO community were not able to attend but I hope my comments will have been helpful as your team progresses in the planned activities.

Whilst we recognize the laudable value of the proposed Alaoa multi-purpose dam project in terms of its three focus on flood protection, assist in seasonal water supply service for Apia, and additional hydro-power generation, it is still incumbent on us all to address not only the benefits but more importantly the risks and challenges. I reiterate what I said during the discussion that my comments be taken in the spirit of cooperation and collaboration to ensure the high quality of the final outcome.

Given that this ADB/ENTURA partnership together with government and EPC as part of the Global Climate Fund (GCF) supporting ADB as Implementing Agency in the wider Pacific Island Countries Program for seven countries that include Samoa in their attempt to transition to Renewable Energy, it will be interesting to see how this integrates with the activities of other PICs. More importantly, I asked as how this GCF initiative takes in the activities of the Vaisigano GCF programme that was approved during the GCF Board meeting hosted by Samoa government a couple of years or so ago. The specific treatment by that program of upland forest as a key consideration in relation to root causes of flooding and collateral damage is a benefit that I saw important for this GCF initiative.

I also shared my genuine concern with issues of dams and after watching TV last night on the devastating disasters in the country of Laos caused by failed dams during construction time with much loss of life, immense

destruction of properties, failed dam concrete structures, etc. I could not emphasize enough the real concerns that I have on this kind of project and pray the team take this into account at all levels of this project given that some of the team also saw the same TV program and acknowledge the real drastic dangers of failures.

I wanted to take this opportunity to try and capture the other comments I made during our discussions this afternoon.

1. I regret the Alaoa Multi-Purpose Inception report was only sent this morning pending our afternoon meeting. Whilst I was therefore unable to read through it to get better understanding and alignment, I found the quick read of the report useful. Together with the brief introduction by Fonoti Perelini, the explanations from the ENTURA consultants, the comments from social safeguard expert Mavaega Tim O'Meara, the brief interventions from the EIA expert Toesulusulu Cedric Schuster, and the sporadic interventions from the others during the discussions these helped me respond and made comments in the short meeting.
2. Whilst Tim stated that all the land targeted in the project was government land, I registered my concern about the accuracy of this statement and asked that MNRE submit a true and genuine status of land ownership that the three components of the project propose to take. I suspect that there is a substantive percentage of land under customary land ownership and it was clear that villages have been and continue to work much of the land in question under agricultural and related development.
3. I impressed during the discussion that land 'demarcation' using remote Lidar aerial surveys without actual boundary marks on the ground are in many cases immensely problematic for the village communities and suggested that boundary demarcation be carried out on the ground to ensure there is no question about abutting uses, land ownership and occupation. It also helps to build trust with the villages involved and ensure long terms sustainability of the project.
4. I sought assurance to ensure that ADB and indeed ENTURA comply with due diligence process on the ground at project level and this include important stakeholder engagement at all levels of the project, compliance with ADB regulations and policies that deal with re-settlement and relocation, Indigenous and Local Communities triggers, appropriate compensation pay-out, meaningful consultations with the communities affected, etc. I was concerned that the technical assessment of dam site selection, geo-technical drilling investigation, etc. has completed but there have been no community consultations held. The Inception report only refer to consultations with those ENTURA intended to be recruited as part of its consultancy team.
5. The consultation with the eight or so villages affected by the project allegedly took place this morning is necessary, but it should have been part of the inception activities as the project clearly states that stakeholders such as village communities should be engaged at all levels of the project. It is my understanding that the meeting with the villages this morning was well documented and will be interested in an account of what they said in the consultation. From this, we will be also interested in how EPC and government accountably respond to all the village concerns as it was reported that the issue of there being no consultation during the Inception Phase was raised by the villages. We also trust that this first village meeting this morning will continue as ESS and project activities progress.

6. I was encouraged by the Inception report stating that some 68% of the area targeted for the project have dense and predominant rainforest cover and asked that this key feature of the landscape be enhanced as TC Evans caused USD\$200million collateral damage much of which was caused by lack of proper land utilization management of upland forest.

7. On the related issue of biodiversity, noting that there will be immense heavy machinery, voluminous concrete imported into the area, huge earthworks involved, etc. I asked the EIA expert to ensure projection, conservation, and enhancement of biodiversity is secured nevertheless. Enhancement of rainforest cover is a key factor to assist on this.

8. I shared a concern from the Inception report when it stated that the option of using 'concrete gravity dams' were eliminated due to high quantity of cement needed and therefore accept 'FSHD' (faced symmetrical hardfill dam) in the light of lesser cost estimation. Again, I linked this to the issue of safety, human lives, security of villages downstream, Apia town area, infrastructures, and again security not being compromised because of cost factors. I also alluded to the report stating the '...huge risk of dams was in relation to leakages...' is a concern and drilling as well as water pressure packers testing may give some solution as well as information on how to address this, but any alternative will not be a high standard security or full proof.

9. One point I missed was the lack of local capacity for drilling and having to outsource to outside consultancy in Australia/NZ - this could be part of a capacity building opportunity through this project for local contractors.

10. Finally, I cautioned about the current status of GCF not having the high level of expected funding and already having trouble meeting many of the submissions and hope that our Ambassador Aliioaiga Feturi who sits on the GCF Board will better advised on this given the Samoa government expectation that by the end of next year the project proposal will be submitted to GCF and start by year 2020."

On 07 September 2018 I sent this follow-up email to Program Manager and EPC team, the relevant content of which is:

"It is over a month since we met, and I submitted my related comments below and wonder as a matter of accountability to our stakeholder consultation if there has been some response to points I raised as they are important from our side. I look forward to hearing from you on this to help us obtain a better alignment and understanding as to how your team and EPC are responding and integrating our comments into both the project design and implementation. Kindly refer to my comments in my email below of 26 July 2018 for your response please".

The Program Manager replied same day to say:

"We have discussed points that you brought up as we are working on some of them as we progress with EIA study etc. I will put together a response to send you as well as record of meeting we had with 8 [sic] villages. Maybe you should join us to work on this and other similar projects. Will keep in touch".

I was naturally excited to receive the formal response from the Program Manager and especially anxious to read up on the record of meetings EPC had with the 8 villages. From a civil society, NGO, and community perspective, we have

accountability issues on meaningful consultations with affected communities, due diligence obligations to be met by ADB and consultants, compliance issues, triggering policies in ADB projects, risks concerns and safety fears in relation to dams constructions, complementarity with other donor funded projects, actual customary lands affected and demarcation of same, maintaining of existing rainforest cover, enhancement of biodiversity in site area, concerns about compromising safety to save costs, missed opportunity for local capacity building, etc. I was anxious to check.

Unfortunately, two more follow up emails this month on 13 and 18 September have been ignored. Promised response and record of meetings with villages have not been shared.

I am therefore disappointed and unable to further contribute and am concerned that EPC may have used the NGOs to tick their program delivery boxes. I implore the Program Manager and EPC that it is imperative for all concerned that they be more transparent on the Alaoa Multi- Purpose Project as it is indeed a risky undertaking where the safety concerns on people's lives and property are fundamental. The outreach of the impacts is far broader than they can ever anticipate and is incumbent on all of us to ensure those impacted are better informed."

"Fiu Writes to ADB"
(Samoa Observer, 18 September 2018)

"Dear Warren Evans,

It has taken us more than a week to consider whether or not to reply to your email dated 4 September 2018, which attached what you stated as OSPF's final Report on our complaint of 9 September 2014.

For us complainants, when we successfully transferred our complaint to the higher level of ADB grievance mechanism through the Complaints Review Panel (CRP) in April 2016 it was an admission and acceptance by ADB that OSPF failed its problem-solving mandate for reasons we submitted, and eligibility for CRP to take over our complaint ended OSPF involvement in our view. We fail to understand how OSPF justified to continue its problem-solving role through its monitoring implementation of consultation process and related actions to its TA Completion Report this year on 16 August 2018, when we as complainants with the 'problem' were no longer part of its OSPF process. When OSPF states it issued its problem-solving completion report on 5 May 2016 and its Monitoring Report 9 February 2017 we are confused as OSPF failed and in our view should have exited as of April 2016 when CRP took over.

Hence, we are surprised with your email, and to be advised that OSPF was submitting a letter to us with its final report. On viewing the letter and said final report, we found its condescending spirit and content brevity irritating given OSPF failed us, and it was done and buried as of April 2008.

Notwithstanding these concerns, we have nevertheless decided to accord OSPF the following response and take liberty in the courtesy of copying those included in this reply:

1. We have kept records of relevant communications and documents that are part of the rather complex ADB grievance mechanism process we had to go through as complainants since 2014. This continues today whilst monitoring the actions of our Government to amend legislations they promised ADB/CRP and its Board in August 2016 they will undertake to address the harms detailed in our complaint. OSPF is aware that the draft Alienation of Customary Lands Amendment Bill 2017 currently in the process of the Samoa Parliamentary third and final reading is one we are currently analysing and watching closely its outcome. Based on this, and the signs so far are unsatisfactory to ourselves as complainants, we intend to re-trigger the CRP recommendation

in August 2016 to the ADB Board to carry out an investigation of our complaint.

2. As you are aware, the report of CRP investigation of our complaint detailed a series of justified and legitimate reasons through a number of stated prima facie evidences they found to then advise ADB Board to proceed with the investigation. However, a stay of execution in the decision of the ADB Board in August 2016 was to give the Government of Samoa an opportunity to amend legislation to remove the harms stated in our complaint. As complainants we have the opportunity to re-trigger that CRP recommendation to the ADB Board to proceed with the investigation should we find the outcome of the Government actions unsatisfactory.

3. As stated in 1 above, we wanted to await the outcome of government legislative actions such as the Alienation of Customary Lands Amendment Bill 2017 currently before Parliament for its 3rd and final reading before we invoke the CRP recommended Investigation of our complaint. This will likely be our next step as we find the Government of Samoa ongoing efforts as piecemeal and unacceptable.

4. Our complaint has catalysed a huge number of peoples, mainly Samoans living outside Samoa, supporting our complaint and have broaden their own concerns into establishing the Samoa Solidarity International Group (SSIG) which is a global movement in USA, New Zealand, Australia and indeed Samoa engaging in a number of protest marches in the countries they reside and in Samoa pushing for a repeal of the Lands Titles Registration Act 2008 (LTRA) that introduced the Torrens system of land titles registration in Samoa. The global SSIG has engaged in securing financial support for activities that SSIG Samoa utilises in its village awareness programs and has now taken the Government to court on their efforts to repeal LTRA based on their view that it is unconstitutional. SSIG has further established a Political Party "Samoa First" to run in the next General Election with the sole purpose of repealing LTRA and to secure the inherent protection of Samoa customary lands as dictated by the Samoa Constitution.

5. As complainants, we have supported and took part in the SSIG protest marches in Samoa because of our fundamental belief in the cause on customary lands discourse detailed in our complaint. However, we have not formally joined SSIG for reasons that their broader mandate outside our customary land complaint could dilute our case.

6. We have written widely in local and regional newspapers, interviewed and talked on regional radio and other programs (NZ and Australia) as well as in Samoa, presented in Universities (Samoa and Auckland) on their requests, and have accepted invitations from Samoan diaspora in the USA and NZ to speak about our customary land complaint. These efforts are well documented in formal avenues of institutions, local newspapers, social media, and other information avenues.

7. On the invitation of the Parliamentary Committee that is reviewing the Alienation of Customary Lands Amendment Bill 2017, we had prepared and presented to them a comprehensive close to 70 pages assessment and felt that the Committee received our comments well.

8. OSPF states that our complaint of 9 September 2014 was focused on four (4) elements being lack of consultations; use of customary lands; inadequate environment and social due diligence; and disclosure of documents. We have on record our communications to ADB (OSPF and CRP), to Government through CLAC, MNRE and Attorney General Office, etc. detailing our clear concerns on Government and ADB failure on all of these four focus areas. We also raised a number of times, without any response to date from Government and ADB/OSPF, on the conflict of interest in the OSPF recruited communication specialist when we discovered (now

able to prove) that she is 'married' to the current Government Consular in American Samoa and was Head of the Prime Minister's Ministry during the time of the TAs in question. A conflict that was not disclosed during the time of interview. To date, OSPF and ADB have failed to give us the courtesy of a response on this legitimate and recorded complaint.

9. OSPF was also copied on of a number of correspondences we sent Government and ADB/OSPF/CRP about the unilateral decision of OSPF to terminate the Project Manager and give these responsibilities to the recruited communication specialist, and related recorded concerns from the Government CLAC legal team to say that the specialist failed in her communication responsibilities to the village communities because she could not speak Samoan well enough to clearly convey the so-called consultation messages. They ended up implementing these important tasks. Again, we received no response from OSPF, GoS [Government of Samoa] and ADB to this day.

10. We also referred to a November 2017 implementation report by the Program manager to state our concerns about the failure of CLAC, the communication specialist, Government and ADB to comply with the clear requirement for meaningful consultations and further failure to comply with the requirement of Article 109 of the Samoa Constitution in respect of the Referendum requirement on matters related to customary lands.

11. The OSPF Final Report clearly states that it is the 'leasehold interest' of customary land leases that would be mortgaged, yet all the proposed legislative work and current Amendment Bill states that it is the 'customary land leases' themselves that are being registered under the LTRA2008 (Torrens System) and targeted to be mortgaged. This deliberate confusion continues to cause much problems and concerns. Samoa Observer published one of our writeups (one of many) submitted on the insincerity of the Government on this concern and brings in many other concerns that deals with treatment of adjudicated decisions of Lands and Titles Court on customary lands now required by LTRA2008 to be registered in same.

12. The comments in the Final Report document that talks about "...Aside from a number of recommendations made for Project..." listing establishing CLAC as secretariat with skilled staff and budget for it to function well; form a legal working group to draft legislative reforms; pilot test reforms; and Agribusiness support project to organize awareness raising events with business communities, banks, and Chamber of Commerce to help alleviate fears and provide design options for businesses to consider; and also saying that four Banks now provide finances to nine businesses..." these are all false reports in our view subject to confirmation. For example, CLAC continues to have a few staff members without the skills required nor budget to implement its so-called "One-Stop Shop" intent of Government for customary lands issues under its CLAC Act 2013. We have never been privy to any reports from Legal Working Group despite our many requests for same. We are not aware of any pilot testing of reforms taken. The agribusiness component grant was one of our concerns in complaint but the reply from OSPF refuted our allegations that the agribusiness was an avenue for Government and ADB to increase the leasing framework of customary lands. ADB/OSPF informed us that this was not part of the overall intent of the TAs. Now it is! - as stated in the report.

13. Part III (2) of the Final Report refer to 'Consultations' - It is clear from this that OSPF and Government failed to comply with meaningful consultation and our previous communications on this support this. We have been asking for Minutes of all consultations, summary of issues discussed, response prepared, records of participants feedback, response by Government on same; assessment on quality of consultations, etc. etc. but nothing has been submitted to our requests despite promises to share these with us when available.

14. Part III (3) of the Final Report refers to Legislative Framework alluding to Government introducing amendments to confirm in law precepts that guide reform etc. Our submission to the Parliamentary Committee on the Alienation of Customary Land Amendment Bill 2017 demonstrated our concerns about the insincerity of Government in this proposed legislation and how inadequate and piecemeal this attempt is when many related dangerous legislations are not even contemplated to be addressed.

15. The Final Report under Part IV states that CRP Committee Report 18 August 2016 recommend a compliance review not proceed. This is incorrect as it is our understanding that ADB Board was giving Government the opportunity to attend to legislation reviews and amendments to address the harms in our complaint. The ADB Board member representing the United States of America walked out of the ADB Board decision because he disagreed with the stay of execution option and he wanted the investigation to proceed as recommended by CRP.

16. The former Head of State who signed the LTRA has gone public in his total reverse views on this through video interviews, local newspapers, keynote addresses he has been asked to present on this issue, etc. He exposes ADB, Government, the Prime Minister, the Attorney General under their clear policy and legal responsibilities enshrined under Article 109 of the Constitution requiring them not to submit any Bill that affect customary lands for the assent of the Head of State unless and until the requirement for Referendum has been first met.⁶⁵

17. OSPF will agree that this complaint has been challenging for us as complainants especially when it failed its mandate on problem-solving for us. The challenge continues for us under the auspices of CRP. There are a lot more bridges to cross. Whilst there are efforts within ADB system that we are aware of attempting to use their process and time limitations to deny us justice in the outcome of this, we continue to stay strong in moving forward to secure it.

18. Evidence of success is through the strong and powerful global movement of SSIG and related national actions in establishment of Samoa First Political Party, the court case already filed against the government, the financial and moral support from Samoans around the world, an ongoing active social media that is fuelling extreme sharing of opinions and feelings on this issue, etc. will help ensure our ultimate goal to destroy the ADB TAs and Government intent to alienate customary lands.

Finally, we hope you will publish this response in your ADB website and look forward to viewing it there when we next check.”

65 His Highness Tui Atua speaks to this issue in his conference paper and the post-conference paper ‘O fea le alofa’ both published in this conference proceedings. I am aware that His Highness is adamant that he did not and has not “reversed” his position from that he took in 2008 that led him to sign the LTRA. In conversations with him, His Highness pointed out that he accepts and stands by his decision to sign the LTRA because he was assured that it would not affect the rights of suli over their customary lands. His reasons are outlined in his conference paper and in his ‘O fea le alofa’ paper. I am leaving my paragraph above as is because that is what I had published in the Samoan Observer.



Conclusions, Reflections and Recommendations & Appendices



11. Conclusions, Reflections and Recommendations

*Tamasailau Suaalii-Sauni, Julia Ioane and Sonia Pope
on behalf of the 2018 PLCC Conference Committee*

Conclusions and Reflections

We started this journey because we wanted to create a forum for a focused discussion on Pacific law, custom and constitutionalism between legal and social justice professionals and scholars, and the Pasifika lay community. We wanted to start a Pasifika law and justice conversation that was embracing of bilingualism and community advocates. We also wanted to offer participants from outside of Samoa (especially those living in Aotearoa New Zealand, but also Australia and elsewhere) the opportunity to hear first-hand from experts from the Pacific homeland, in this case from some of Samoa's prominent cultural, legal, spiritual and community activist leaders. So that they could assess for themselves the current state of the debate in Samoa on traditional leadership, customary land tenure and religious rights and freedoms.

The kind of debate and/or conversations we had hoped for were those that would improve basic community knowledge (including illuminating what basic knowledge was missing or considered at odds with each other for different participating audiences). In order for professionals and community activists to work together effectively they/we need to understand each other's reference points, they/we need to know how the other thinks, and what information gaps are present, and why. Such knowledge would improve their/our ability to work together towards a common purpose – say of positively mobilising a shared constitutional cause, for example.

The question asked by one of the New Zealand Law Foundation funded Samoan high school students on Day Two of the conference was, at the moment it was asked, profoundly poignant. In the midst of a heated discussion between community activists and the Samoa Law Reform Commission Executive Director, about customary land tenure and the Torrens system, the young man asked: 'Please, I'm sorry if this is a basic question: but what is the Torrens system?' His question began to diffuse what was escalating into a highly emotionally charged 'talking-past-each-other' exercise. His question and the fact that he – a high school student and member of the next generation of potential leaders – had asked this question de-escalated the raised voices and calmed the by-then animated audience. He reminded them (and us, the organisers of this dialogue) of who this dialogue was ultimately for. He reminded all of us in the audience of the need to check at the outset what knowledge base we were assuming people brought with them to these conference forums, and what basic information we ought to distribute or have made known to conference participants at the beginning to ensure basic levels of knowledge about core concepts. The young man's question, indeed the presence and participation of all the high school students, kept our dialogue grounded. His question taught us 'adults' a lesson about what it means to organise and to actually be in conversation – a conversation that is focused on developing true understanding rather than winning an argument.

The ability to communicate effectively is a critical skill for professionals and community advocates alike, but one that requires, among other things, access to the expression of genuine viewpoints. We wanted this conference to offer a forum for such expression. We believe by and large that this was achieved. We also believe that such a forum could raise discussion on some of the connections (and disconnections) between the theory and the practice of traditional leadership, customary land tenure, and religious/spiritual/sacred beliefs as assumed by Samoan laws (including the

Constitution) and Samoan customary practices/traditions/usages/lore, as interpreted by the Courts and the Samoan people in the contemporary moment. There is certainly enough in this conference proceedings for readers to gain a beginning awareness of these. Including of the complexities, nuances, and sometimes cross-cutting layers of meaning and practice present in articulations of l-o-r-e on the one hand, and l-a-w on the other, and their social justice implications.

Trying to find what canon lawyer Father Etuale Lealofi, in his analysis of the potential for a Samoan jurisprudence describes as a 'middle point' between 'what is thine and what is mine'⁶⁶ – i.e. the jus or justice in l-o-r-e and l-a-w, was and is a primary objective for this conference. To put it another way, to find ways to bring custom into law in more tangibly balanced and practically applicable ways (as hoped for by all the Samoa keynoters, including Teleiai Dr. Lalotoa Mulitalo, and by Samoa's Constitutional drafters) is something we hoped would be inspired by this conference and by this conference proceedings publication.

Most of the approximately 150 participants of the conference were New Zealanders; mainly Samoan New Zealanders, but also New Zealanders from other ethnic groups with an interest in Pacific or Samoan society and peoples generally. Many of the Samoan New Zealanders present were deeply interested in the historical and contemporary links between custom and law raised by the conference speakers, and they considered these topics and links important to them personally and professionally. The inclusion of high school students in the conference was praised by most of whom attended. Approximately 90 students, a third of which were high school and the rest tertiary students, attended the conference. Eighty of these 90 students were funded to attend the Conference by the New Zealand Law Foundation. Most were Auckland based, but there were a number that came from outside of Auckland, including from the South Island. The rest of the audience across the two-days of the Conference were made up of professionals and community lay people. A good number of these participants also attended the Conference dinner at the end of Day One, where conversations continued, and new networks were established.

Conference Evaluation Findings

Conference evaluation forms were distributed on Day Two of the conference and of those (n=39) who completed one most were high school students (14/39). There was, however, among the evaluation participants a wide range of ages, i.e. all the age range groups were represented, but most were in the 36-65-year-old age group (22/39). There were also evaluations from the full range of occupation groups, from Academics, Students, Legal and Other Professionals, Ministers of Religion and Retirees (with a small number who did not specify an occupation – 4/39).

From these evaluation findings the participants stated that what they liked best about the conference was 'learning about Samoa, its law[s], constitution, and traditional concepts'. This was the most prominent feedback theme highlighted by evaluation participants. Also, the breadth and depth of speakers were highly valued, particularly the number and calibre of female speakers. Many acknowledged also the value of networking amongst peers, family and friends; while some valued the presence of students to the conference and the welcoming nature of the organisers. Actual comments received on these points and what they considered good about the conference included:

- "friendly greeting at the door";
- "good themes";

66 See Etuale, L. 2018. "Samoan Jurisprudence: A Commentary". In Su'esu'e Manogi: In search of fragrance: Tui Atua Tupua Tamasese Ta'isi Efi and the Samoan Indigenous Reference. Suaalii-Sauni, T.M. et al (Eds). Reprint. Wellington: Huia Publishers, pp. 447-455, p.449.

- “the presence of such knowledgeable academics from New Zealand and Samoa”;
- “speakers were great”;
- “networking with other Pasifika professionals”;
- “learning about my Samoan culture and beginning to understand current issues in Samoa; also learning more about Samoan laws, customs and the Constitution”.

One participant wrote a comment that was echoed informally by many in the audience throughout the Conference and already raised above. The participant stated:

“I enjoyed the youth presence and voice. It’s imperative if we are to move forward in all areas of law, custom and constitutionalism that we enjoy and connect with our future practitioners and researchers. They are more relevant than we are to this discussion. Great start to critical dialogue”.

This was echoed in an email by Natalie Baird, a senior lecturer in law at the University of Canterbury, and participant in the conference’s panel on ‘Implications for Legal Practice, Legislative Drafting and Constitutional Law Reform’, to the organisers. She stated that:

“I thought one of the best features of the Conference was having the high school students there – hopefully it will have inspired many of them to think about some of the issues from a different perspective, and no doubt it will inspire them for further tertiary studies”.

In order to allow students, especially high school students, the opportunity to engage in the Q&A sessions during the Conference, we found it necessary to allocate specific time to them to have their say. This proved a successful tactic and one that ought to be deliberately applied in the next conference. Also, although impromptu, the high school students’ formal song performance and feedback speeches highlighted not only their capacity and willingness to participate, but also evidenced the significant and positive impact the Conference had on them. This positive impact was testified to by their high school teachers in their informal feedback reports to the organising committee.

Of those who participated in the formal evaluation, almost all (97%) gave the conference a rating of “Good” to “Excellent” where “Good” was 18%; “Very Good” was 33%; and “Excellent” was 46%. And of the total respondents 92% would recommend this conference to others. When asked about what we could improve on, some wanted more time for Q&A, some suggested better timekeeping in particular areas, some noted getting better audio-visual equipment, and one most usefully noted the need for access to specific thematic information on key conference themes prior to the conference, as also mentioned above. This last feedback was from a high school student who stated:

“An explanation prior to the conference for us students about constitutionalism, laws etc., in Samoa, and a brief on the general issues that are going to be talked about...this will make it increasingly easier for us, as [we] can [then] follow the conversation easier”.

This point is well made and appreciated. The conclusion is that the conference was worthwhile doing despite the severe time limitations we imposed on ourselves to put it together. And, that a ‘basic facts and definitions’ pamphlet for all participant conference packs is a must for future reference.

Reflecting on Conference Themes

The conference discussion on the three themes of traditional leadership, customary land tenure, and religious rights and freedoms raised several issues worth reflecting more deeply on in our efforts to move this discussion on Samoan law, custom and constitutionalism forward. **First is an issue of pedagogy:** what might the papers published in this proceedings' publication teach us about how Samoans learn, use and translate cultural and legal concepts and terminology across English, Samoan, academic, professional, popular, homeland and diasporic spaces? The use of the term 'alienation' in legislation was, for example, seen as confusing for some and thus a possible case in point to trace in this pedagogical way. **Second, is an issue of methodology:** how might we break the polarisation of views expressed at this conference so that 'a middle point' could be arrived at regarding how the public can gain proper information on 1. what constitutes Samoan customary law or a Samoan indigenous jurisprudence that can work alongside a larger Samoan jurisprudential agenda, and 2. what ought to be the standard for government, professional and/or academic consultations with the (Samoan) lay community, and how should a breach of those standards be addressed? **Third, is an issue of responsibility:** whose responsibility is it or ought it to be to set proper community or public consultation standards around law reform and constitutional amendments, and to ensure that they are adhered to? Or whose responsibility is it to establish a body of custom law and jurisprudence that can properly guide legislative drafting and judicial decision-making on the question of the role of the faamatai, or of customary land tenure, or of spiritual and religious plurality in Samoa's present and future laws? Or whose responsibility is it to design and deliver appropriate training curricula for lawyers, judges and/or the general public on the role and relevance of traditional leadership models, customary land tenure, and religious traditions and institutions in the legal system of modern Samoa? **And, fourth, is an issue of legacy:** what role does legacy play in determining the place of custom in the future of Samoa, of Samoan culture or faaSamoa, of Samoa's chiefly system or faamatai, and/or in the future of Samoan laws?

His Highness Tui Atua and Dame Tariana Turia spoke on traditional leadership. His Highness taught us about the different layers of matai (chiefs) within the faamatai (chiefly system). He spoke in particular about the role of Tama-a-aiga. As Samoa's longest serving Tama-a-aiga and the only pāpā title holder, he is in a unique position to talk about the faamatai, and in particular the workings of and theory behind the higher echelons of the faamatai in the contemporary present. He advocates for looking more deeply into the faamatai and its relationship with the Westminster political system of governance and cautions against rushing into constitutional amendments that would undermine the legacy and significance of the faamatai to Samoan culture and identity. Dame Tariana taught us about the connections between traditional Samoan and Maori concepts of leadership and the nation-building project that Indigenous peoples must uphold. Both reminded us that our families – our aiga or whānau – are our greatest assets as Indigenous Maori and Samoan peoples who believe in the sacredness and legacy of our Indigenous institutions of leadership. They reminded us that advocacy for protecting in law that legacy and sacredness begins at home. Their eminent presence and words at the Conference carried the mana of our traditional leadership models, the kind of mana and leadership that can still be passed on to future generations.

Samoa's government has just proposed another amendment to the Head of State provisions in the Constitution, and Prime Minister Tuilaepa is quoted in the Samoan Observer as saying that this new change is because he wants to make the Head of State office "more professional".⁶⁷ What might the implications of becoming 'more professional' mean in the light of our Conference conversations around traditional leadership and its place in the future of traditional Samoan leadership in and outside of Samoa? And whose responsibility is it to create real public dialogue

67 See: http://www.samoobserver.ws/en/06_10_2018/local/37360/PM-stands-by-Head-of--State-Amendment-Bill.htm

on these matters? The same could be asked of future dialogues on customary land tenure and religious rights and freedoms, and their place in Samoan or Pacific laws.

As with the traditional leadership theme, the issues of pedagogy, methodology, responsibility and legacy apply equally to our reflections on what was talked about in the customary land tenure and religious rights and freedoms sections of the Conference. It is not realistic for anyone to expect everyone in society to be well versed in the technicalities of the law, with its many labyrinths of clauses, subclauses, qualifications and sub-qualifications. However, from the Conference presentations and conversations on both customary land tenure and religious rights and freedoms, it became obvious quite quickly that there is a lot of work to be done to bridge some of the knowledge gaps and communication barriers present between different audiences. There is, it seems, a dire need to address these gaps and barriers in order to have constructive conversations as a society and region about how best to understand the current theory and practice of laws affecting customary lands and religious rights and freedoms in Samoa and more widely. The question, therefore, is not so much whose responsibility is it to address these, as surely it is a shared responsibility for Government, Churches, Community Leaders, Family Leaders, and Training Institutes (i.e. Law Schools, Institutes of Professional Legal Studies, and related University Faculties as well as Consultants who specialise in judicial training), but who will have the courage to take it up and the patience to work with others for the long term, notwithstanding differing political, cultural, theological and/or philosophical perspectives?

Those are some reflections on what we see to be some of the key issues arising from our Conference conversations thus far. We look forward to seeing how these conversations progress in both the near and distant future. And, we look forward to seeing what unfolds in the conversations to be had in the next Conference of this series. Meanwhile, we offer some recommendations for consideration for ways to move the aims of this Conference forward.

Recommendations

We make the following six recommendations:

1. We recommend that the Conference series retains the inclusion of high school and tertiary level students and prepares a 'basic facts and concepts' sheet/pamphlet for inclusion in background reading material for participants, to be made available to registered participants before the conference proper starts.
2. We recommend that for the next Conference an opportunity to hold context setting psycho-educational talanoa (conversational workshops) with students prior to and during the Conference is planned for and delivered on. The purpose for this talanoa is to not only gain an understanding of student expectations and interests to help speakers in the preparation of their addresses, but also to help students be better prepared to engage meaningfully in Conference discussions.
3. We recommend that students are given specific time in the programmes of the next two Conferences to engage in the Q&A sessions and to give formal feedback to the Conference audience on what they have gained from participating in the Conference, including giving a creative group performance if desired. This would require a person specifically dedicated to looking after students', especially high school students', needs.
4. We conclude that the evaluation findings are of value for future planning and recommend that they inform the organisation of the next two Conferences in the series.

5. We recommend that proper time is invested in securing funding and in the promotion of the next two Conferences, drawing on the experience of this first Conference, and on the goodwill of those who have supported it.
6. We recommend that the legal profession, including the judiciary (especially those with an interest in Pasifika communities), develop and/or strengthen information resources and community consultation strategies and/or models alongside Pasifika community leaders and academics, based on what is relevant from within this Conference proceedings publication to help bridge knowledge gaps and address communication barriers between them.

Faafetai ma ia manuia!



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Appendix One: PLCC Conference I, Programme

Pacific Law, Custom and Constitutionalism: A Three-Part Series:

Part I: Aotearoa NZ and Samoa in Dialogue: A Critical Analysis of Law Reforms in Traditional Leadership, Customary Land Tenure, and Religious Rights

Faculty of Law, University of Auckland, 12-14 February 2018

12 Feb: ***Welcome 'Ava ceremony & Pre-Conference Session for Samoan Auckland High School & NZ Undergraduate Tertiary level students & Overseas Speakers Faafaletui/Talanoa (Discussion) Session***

1.00pm Lotu & 'Ava o le feiloaiga ceremony
2.30pm Afternoon tea
3.00pm Talanoa/Faafaletui Session with Auckland High School & NZ Tertiary Students
4.30pm Talanoa/Faafaletui Closes
5.00pm UniBound (UoA) Session
5.15pm Faafetai

13 Feb: ***Day One of Conference***

7.30am Registration
8.30am Participants to be seated & Opening Lotu: MC: Salevao Faauuga Manase & Pastor Maafala Koko
8.45am Welcome on behalf of University of Auckland: Professor Robert Greenberg, Dean of the Faculty of Arts
8.55am Welcome on behalf of Conference Organisers & Setting the Conference Scene: Judge Ida Malosi
9.10am Official Opening Remarks: Sir Anand Satyanand (To be introduced by Laulu Mac Leauanae – Chief Executive, Ministry for Pacific Peoples)

Keynote Address Panel 1: Law, Custom and Constitutionalism: Traditional Leadership

9.30am Introduction of Keynote Address: Khylee Quince, AUT – School of Law
9.35am Keynote address: His Highness Le Afioga a le Tui Atua Tupua Tamasese Ta'isi Efi
10.10am Morning Tea
10.40am Q&A
12.00noon Lunch

Sector Panel 1: Implications for Legal Practice, Legislative Drafting & Constitutional Law Reform

- 1.00pm Introduction of Panel 1: Helena Kaho (University of Auckland – Law)
- 1.10pm Panel 1: Prof Angelo (VUW), Natalie Baird (Canterbury University), Aliimuamua Sandra Alofiavae (KAM Solicitors & Barristers)
- 1.55pm Q&A
- 2.30pm Afternoon tea

Sector Panel 2: Implications for State Policing, State Courts & State Corrections

- 3.00pm Introduction of Panel 2: Dr Julia Ioane (AUT)
- 3.05pm Panel 2: Auckland-based State sector reps: Inspector Peter Stokes (Police), Judge Ida Malosi (Courts), Mr Sosefo Bourke (Corrections)
- 3.50pm Q&A
- 4.30pm End of Day Summary Wrap-up (Laulu Mac Leauanae, MPP)
- 4.45pm Closing Prayer (Pastor)
- 7.00pm Conference Dinner (Fale Pasifika)**
- 7.10pm MC Welcome (Fuimaono Karl Pulotu-Endemann)
- 7.15pm Lotu (Pastor Maafala Koko)
- 7.20pm Dinner Speech (Dame Tariana Turia)
- 7.35pm Launch of Gaulofa Trust Website (Te Ura Tabu Dance Group perform the Mau Dance; His Highness Tui Atua to speak to the Gaulofa Trust and its vision)
- 7.55pm Blessing & Toast to the Trust & Grace for Dinner (Pastor)
- 8.00pm Dinner & Entertainment
- 9.30pm Closing thanks & prayer

14 Feb: Day Two of Conference

- 8.30am Welcome to Day 2 & Lotu (MC & Pastor)

Keynote address Panel 2: Law, Custom and Constitutionalism: Customary Land Tenure

- 8.45am Intro to Keynote Panel: Facilitator: Fonoti Seti Talamaivao (Northern Regional Manager, Ministry for Pacific Peoples)
- 8.55am Keynote panel address 1: Fiu Mata'ese Elisara-La'ulu
- 9.30am Keynote panel address 2: Teleiai Dr. Lalotoa Mulitalo
- 10.00am Morning tea
- 10.30am Q&A
- 12.00noon Lunch

Keynote address Panel 3: Law, Custom and Constitutionalism: Religious Rights

- 12.40pm Intro to Keynote Panel: Dr Laumua Tunufa'i (AUT, Criminology)
12.50pm Keynote address: Sister Vitolia Mo'a
1.20pm Keynote address: Dr. Jenny Te Paa Daniel
1.50pm Q&A
2.15pm Afternoon tea

Sector Panel 3: Implications for Education, Health, Housing

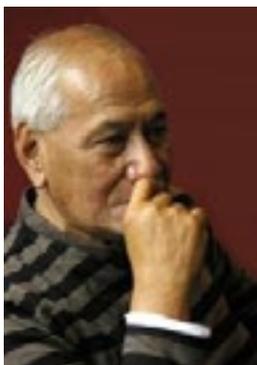
- 2.45pm Intro to Panel 3: Assoc-Prof Tamasailau Suaalii (UoA, Criminology)
2.50pm Panel 3: Prof Peggy Fairbairn-Dunlop (Education), Faumui Lope Ginnen (Social Housing),
Fuimaono Karl Pulotu-Endemann (Health)
3.45pm Q&A

Formal Close

- 4.30pm Final Words of Thanks/Faafetai: Professor Andrew Stockley (University of Auckland – Dean of
Faculty of Law) and Judge Ida Malosi
4.45pm Close & Final Prayer (MC & Pastor)

Appendix Two: Brief Biographies of Conference Speakers & Conference Organising Committee

Keynote & Distinguished Speakers:



His Highness Tui Atua Tupua Tamasese Ta'isi Tupuola Tufuga Efi

Le Afioga a le Tama-a-aiga, His Highness Tui Atua Tupua Tamasese Ta'isi Tupuola Tufuga Efi is Samoa's former Head of State and held this position from 2007 to 2017. He was a former Prime Minister of Samoa as the leader of the Samoa Democratic United Party and a Member of the Parliament of Samoa from 1966-2004. He holds nationally recognised traditional chiefly titles and is seen across Samoa to be one of her leading cultural custodians. He is recognised internationally for his work on what he describes as Samoa's indigenous reference. He has published articles in scholarly journals and books in the English and Samoan languages (Sue'su'e Manogi: In Search of Fragrance, Huia Publishers, 2nd print, 2018; Whispers and Vanities: Samoan indigenous knowledge and religion, Huia Publishers, 2014; Ia Faagaganaina oe e le Atua Fetalai, Pacific Printers & Publishers, 1989). His Highness is chairperson of the 'E leai se gaumata'u na o le gaualofa' Charitable Trust based in Samoa, which seeks to promote and develop Samoan indigenous knowledge resources.



Sir Anand Sataynand

Sir Anand is New Zealand's 19th Governor-General. He served a five-year term from 2006. He is New Zealand's first Governor-General of Indian and Pacific ancestry. He has had a lengthy career as a lawyer, judge and ombudsman as well as contributing to many community, professional and sporting groups. In 1982 he was appointed a District Court Judge with a warrant for civil and criminal cases, specialising in criminal jury trials. In 1995 he was appointed a Parliamentary Ombudsman, serving two five-year terms. In his role as Governor-General he chaired the Confidential Forum for Former In-Patients of Psychiatric Hospitals, reviewed the Banking Ombudsman scheme, and installed the Pecuniary Interests Register and Scheme for Members of Parliament. He has also contributed to the community in a number of fields, for example, as an elected member of the Auckland District Law Society Council and as a member of the Freeman's Bay Community Committee. Sir Anand served on the governance boards of the Asia New Zealand Foundation and the New Zealand Institute of International Affairs and Transparency International. On being appointed Governor-General he was made a Principal Companion of the New Zealand Order of Merit in 2006 and a Companion of the Queen's Service Order in 2007. In 2006, his alma mater, the University of Auckland, awarded him an honorary Doctor of Laws degree.



Dame Tariana Turia

Dame Tariana Turia is affiliated with all the Whanganui region's main tribes. In her eighteen years as an MP, she advanced thinking in the disability area, advocated for tobacco reform and spoke out about sexual abuse, violence and racism. She also led the Whānau Ora initiative. In 2004, she crossed the floor, leading to the birth of the Māori Party. In a world-first in March 2016, as part of a Te Tiriti o Waitangi settlement, the Whanganui River gained its own legal identity, giving it the same rights as a person. Dame Tariana Turia now acts as one of two human voices of the river to ensure its rights are protected. She has recently come out of retirement to support the Maori Party in regrouping and realigning its values.



Sister Vitolia Mo'a

Sister Vitolia Mo'a is a Missionary Sister of the Society of Mary (SMSM). She is based in Samoa at St Mary's, Savalalo. She worked for the National University of Samoa, for the Ecumenical Centre for Research, Education and Advocacy (ECEA) in Fiji, and as a missionary in the United States, South America and Fiji. She practices contextual theology and promotes dialogue between the Gospel and indigenous cultures, including her own Samoan indigenous culture. She is co-editor of *Whispers and Vanities: Samoan indigenous knowledge and religion* (Huia Publishers, 2014), and author of the text *Reflecting on social justice: process for change* (ECEA, 2008).



Dr. Jenny Te Paa Daniel

Dr Jenny Te Paa Daniel (PhD. Graduate Theological Union) is Co-Director of New Zealand based Ohaki Consultancy specialising in Higher Education and in Public Theology. Formerly Te Ahorangi of Te Rau Kahikatea, St Johns College in Auckland, Aotearoa New Zealand she was the first lay indigenous woman to hold the Principalship of an Anglican seminary, nationally and internationally. During her 23-year leadership tenure she was called to serve on many global Anglican Communion and wider Church committees, including Chair of the World Council of Churches Commission on Ecumenical Theological Education. Globally she is widely recognized for her outstanding commitment to peace and justice activism and to mentoring younger women especially those from third world or indigenous communities into higher education and into leadership. Her numerous publications include *Anglican Woman on Church and Mission* (co-editor with Judith Berling and Kwok Pui-lan; Canterbury Press/Morehouse, 2012).



Teleiai Dr. Lalotoa Mulitalo

Teleiai Dr. Lalotoa Mulitalo is the current Executive Director/CEO of the Samoa Law Reform Commission; and a part-time lecturer for the Faculty of Law, University of the South Pacific. She has taught (LLB Programme) in the areas of law reform in the Pacific Islands, legislative drafting, legal ethics and family law. More recently (Feb-Dec 2017) Dr Mulitalo taught the Certificate in Law (Civil) Programme for Samoan Parliamentarians. In 2013, she received her PhD in Law from the University of Queensland's TC Beirne School of Law, and was the recipient of the 2013 Deans Award for Higher Research Degree Excellence. As a recipient of the 2017 Greg Urwin Awards, she wrote and launched the first ever Guide to 'Legislative Drafting in the Pacific Context' at the University of Queensland in 2017. Dr Mulitalo has served the Parliament of Samoa for many years in the course of her 10 years (5 years as Parliamentary Counsel) at the Office of the Attorney General. She was also Parliamentary Legal Counsel with the Parliament of Samoa under a one (1) year UNDP Service Contract. Dr Mulitalo has published in scholarly journals and most recently published a book entitled Law Reform in Plural Societies (Springer, 2017).



Fiu Mata'ese Elisara

Fiu Mata'ese Elisara-La'ulu is the Director of O le Siosiomaga Society Incorporated (OLSSI), a NGO that promotes the care and conservation of Samoa's natural environment. Prior to OLSSI, Mr Elisara-La'ulu worked with United Nations Development Programme (UNDP) in Samoa from 1993 to 2001. He was responsible for the Global Environment Facility and was closely involved with the South Pacific Regional Environment Programme. He is actively involved in advocating on the global stage for the protection of the rights of indigenous peoples, protection of customary lands, and the promotion of sustainable environmental development. He is an internationally well-known and well-respected NGO advocate on environmental issues in the Pacific.

Distinguished Panellists & Facilitators:



Aliimuamua Sandra Alofivae

Aliimuamua Sandra Alofivae graduated with a law degree from Auckland University in 1989 and has practiced as a lawyer in the Auckland region representing children, young persons and their families. She is a partner in KAM Legal Chambers, as well as a member of a number of Boards. Her positions includes being the Independent Chair of the South Auckland Social Investment Board, being the independent director of the Housing New Zealand Corporation Board as well as a member of the Counties Manukau District Health Board (2010-2016) and the Fonua Ola Board (a Pacific Social Service provider network). She did a six-year term as a Commissioner with the NZ Families Commission. Aliimuamua was appointed a Member of the New Zealand Order of Merit for services to the Pacific community and youth in 2016. As a New Zealand Samoan matai (chief) and lawyer she engages in both Samoan and New Zealand leadership spaces.



Professor Tony Angelo

Professor Tony Angelo is currently Professor of Law at Victoria University of Wellington, in Wellington. Professor Angelo holds a BA and LL.M from Victoria University and an Ordre des Palmes Académiques (Chevalier). He is a member of the Swiss International Law School (SiLS) Advisory Board. Professor Angelo's research focus is on comparative law and private international law. He has a long-standing special interest in the laws of small states and has published extensively on the legal systems of Mauritius, Seychelles and the Pacific nations. Professor Angelo was appointed to the rank of Queen's Counsel mid 2017. His major current research involves Private International Law monographs for the South Pacific and articles on aspects of constitutional development and decolonisation in the South Pacific.



Natalie Baird

Natalie Baird is a senior lecturer in law at Canterbury University. Natalie's research interests include international human rights, refugee law and Pacific legal studies. In the Pacific context, Natalie is interested in the role and impact of international human rights monitoring mechanisms in small Pacific Island states. Recent work has included consideration of the impact of the UN's Universal Periodic Review mechanism in the Pacific, and the (sometimes distorting) role of international NGOs. Natalie was one of the lead researchers for the 2006 New Zealand Law Commission study on custom and human rights in the Pacific, and retains an interest in the relationship between custom law and state law. Natalie is coordinating the 2018 Pacific Law and Culture conference at the University of Canterbury.



Inspector Peter Stokes

Inspector Peter Stokes is the National Pacific Strategic Advisor for NZ Police. He is originally from Fiji and moved to New Zealand as a young adult. He has been in his current role for the past four years and before that has had an extensive career in both the uniform and criminal investigation branches. Mr Stokes has been involved in completing a National Pacific Action Plan for the New Zealand Police which is currently under review and will be launched within the next three months. He has also been actively involved in programmes within the Police force, such as “ethnic awareness” programmes, to help overcome cultural biases within the NZ Police. He is a strong advocate for promotion of Pasifika, Maori and other non-European Police recruits, bringing diversity into the NZ Police.



Sosefo Bourke

Mr Sosefo Bourke is the National Pacific Advisor for the Department of Corrections. Mr Bourke has worked in Corrections for over 30 years. He started his career as a corrections officer, and moved into leadership roles within the prison services. Since 2006, he’s been the Regional Advisor Pacific for Central Region. Mr Bourke has worked with others to design and deliver training for staff in the Corrections Services Pacific Engagement Model, *Fauina o le Fale*; and the Pasifika Identity programme in the prisons. Together with Lucy King (clinical psychologist), Mr Bourke has recently published a research paper reviewing the *Saili Matagi* Programme for Pasifika prisoners. *Saili Matagi* is a medium intensity rehabilitative programme offered by the NZ Corrections to Pasifika prisoners who are serving sentences for serious offences.



Tagaloatele Professor Peggy Fairbairn-Dunlop

Tagaloatele Professor Peggy Fairbairn-Dunlop, AUT’s inaugural Foundation Professor of Pacific Studies, has been teaching, researching and publishing on Pacific development issues, from national sustainable development through to family security, gender and youth equity, for over 30 years. Her teaching experience ranges from early childhood through to primary and tertiary level in the Pacific and New Zealand education sectors. Tagaloatele taught at the School of Agriculture, University of the South Pacific, Alafua campus (Samoa), for over 15 years and then held posts with UNDP, UNIFEM and UNESCO. She was Director of Victoria University of Wellington’s *Vaaomanū Pasifika* Unit in Wellington before moving to Auckland to join AUT’s Institute of Public Policy in 2009. She is a commissioner in Samoa’s first human rights enquiry currently in progress. Tagaloatele has received a CNZM.



Fuimaono Karl Pulotu-Endemann

Fuimaono Karl Pulotu-Endemann came from Samoa to live in New Zealand as a young child and later trained as a Psychiatric, General and Obstetric nurse. He went on to become an independent consultant on Pacific health issues and developed the Fonofale model of Pacific mental health, which is widely accepted both by the Mental Health Commission of New Zealand and across the Pacific mental health sector of New Zealand as the standard framework for Pacific mental health awareness and service delivery. As an educator, Pulotu-Endemann rose to be associate-head of Manawatu Polytechnic's Nursing and Health Studies and is a current member of the ANIVA Pacific health nursing programme leadership team. In the 2001 New Year Honours, Pulotu-Endemann was made a Member of the New Zealand Order of Merit for services to Public Health. Fuimaono is one of New Zealand's best-known and most honoured fa'afafine.



Faumui Penelope Ginnen

Faumui Penelope Ginnen is a family law barrister, specialising in child advocacy, care and protection issues and corporate governance. She is actively involved with corporate governance work, primarily for organisations that have the well-being of people as the primary focus. She is a trustee of the Brainwave Trust Aotearoa, and a trustee of Emerge Aotearoa. Since 2016 she has been the chairperson of Ngāti Whātua Ōrākei Whai Maia Limited, the tribal development entity of the hapū, tasked with investment in employment and education, health and well-being, tourism, arts and culture and environmental management. Lope is an independent director of Vaka Tautua, a nationwide "by Pacific for Pacific" health support service provider.



Khylee Quince

Khylee is of Ngapuhi, Ngati Porou, Ngati Kahungunu descent. She is the Associate Head of School, and the Director of Maori and Pacific Advancement at the AUT School of Law. She teaches and researches in the areas of criminal law and justice, youth justice, dispute resolution and women and the law. In 2014 Khylee was awarded a National Tertiary Teaching Excellence Award for Sustained Excellence. She graduated BA/LLB (Hons) from the University of Auckland in 1997. Khylee practised law for three years before joining the Faculty of Law at the University of Auckland part-time in 1998, then full-time in 2000. She was also Tumuaki Associate Dean Maori at UoA Faculty of Law for nine years. Khylee has extensive governance experience, and currently serves as a trustee on primary and secondary school Boards, the New Zealand Drug Foundation, the Sursum Foundation and Ako Aotearoa Academy for Tertiary Teaching Excellence.



Dr. Laumua Tunufa'i

Laumua is currently a lecturer at AUT, teaching criminology, social science and public policy. He came to New Zealand from the small village of Afega in Samoa in 1994. Originally studying a Bachelor of Arts in Theology and Philosophy, Dr Tunufa'i worked as a theologian for many years up until 2001 when he resumed studies at AUT. He graduated with a Master of Arts (Social Sciences) in 2005 and a Doctor of Philosophy in Criminology in 2013. Laumua's doctoral thesis examines the overrepresentation of Samoans in violent crimes, and the attitudes of his participants towards the New Zealand criminal justice system. Laumua has worked extensively with youth around the Pacific. He was a youth worker in Samoa, Papua New Guinea, New Zealand and American Samoa.



Laulu Mac Leuanae

Laulu is of Samoan descent. He holds the chiefly title, Laulu from Faala. He is from the villages of Faala, Iva and Saasnaapu. He is currently the Chief Executive Officer of the Ministry of Pacific Peoples in New Zealand. Prior to this role he held the post of Chief Executive of the Pacific Cooperation Foundation, which has the primary goal of delivering economically sustainable initiatives in the Pacific. Prior to working at PCF Laulu was the General Manager of Pure Pasifika Ltd, a company that exported horticultural products from the South Pacific into primarily Asian markets. Before his involvement in the business sector, Laulu worked in the primary healthcare field for ProCare Health Ltd. He was the Pacific Health Manager and then moved into Senior Management roles. Earlier in his career he worked in Pacific community and business development, including with the Pacific Business Trust. Laulu started his career as a practising lawyer before moving into the field of business management. He holds a MBA from Henley Management College in the UK. His dissertation focused on community participation in governance.



Fonoti Seti Talamaivao

Fonoti graduated with a law degree from the University of Auckland. He is currently the Northern Regional Manager of the Regional Partnership Directorate for the Ministry of Pacific Peoples in Auckland. Prior to working for MPP, Fonoti worked as a senior solicitor for the Ministry of Social Development for twelve years.

Conference Organising Committee:



Judge Ida Malosi

Judge Ida Malosi is a District, Family and Youth Court Judge based at Manukau in South Auckland. After graduating from Victoria University of Wellington she established an all Māori and Pasifika women legal practice in South Auckland – King Alofivae Malosi – which received the Auckland District Law Society’s EEO ‘Most Innovative’ award in 2000. In 2002, she became New Zealand’s first female Pasifika Judge when she was appointed to the Family Court. Since then, she has sought to implement alternative, culturally appropriate responses to youth offending in her community, working with her Māori Youth Court colleagues on establishing Rangatahi Courts and using this as a model for Pasifika Youth Courts. Judge Malosi’s judicial achievements extend beyond New Zealand to Samoa, where she served as the first Samoan female Supreme Court Judge between May 2013 and July 2014.



Associate Professor Tamasailau Suaalii-Sauni

Tamasailau is of Samoan descent. She also has ancestral links to Niuatoputapu, Tonga. She currently teaches in the Criminology Programme, School of Social Sciences at the University of Auckland. She has held lecturing, research fellow, deputy director, and programme directorship positions at the University of Auckland, Victoria University of Wellington and the University of Otago. She has worked closely on research projects with colleagues from the National University of Samoa while based in Samoa from end of 2008 to 2011. She has published in a wide range of fields from Samoan custom and law, Pasifika research methodologies and Pacific models of care to Samoan gender and sexuality. She works closely with various Pacific community groups in New Zealand and Samoa, especially in the fields of mental health and Indigenous knowledge. Her current research interests focus on Indigenous jurisprudence, Indigenous criminology and Pasifika research methodologies.



Helena Kaho

Helena holds a Master of Laws (LLM) and a conjoint Bachelor of Laws (with Honours) and Arts. She is of Tongan and New Zealand European descent. She is the first Pacific Islander to become a law school academic. She taught Law 121G (Law and Society), Law 428 (South Pacific Legal Studies) and Law 446 (Pacific People in Aotearoa: Legal Peripheries) at the Faculty of Law at University of Auckland before moving to take up a legal position with the Ministry of Business, Innovation and Entrepreneurship in 2018. Whilst at the UoA Faculty of Law, Helena was the Associate Dean Pasifika.



Dr. Julia Ioane

Dr Julia Ioane is a first-generation NZ born Samoan, bilingual and with strong connections to Fasitootua and Leauvaa in Samoa. Julia is trained as a clinical psychologist and specialises in the area of care and protection and youth justice, child and youth mental health, childhood trauma, youth forensic and violence, child and youth development from a Pacific perspective. Julia is a trained clinical psychologist, having completed a Doctor of Clinical Psychology at the University of Auckland in 2011. She works mainly with youth, especially Pacific youth. She has an extensive career including working with the Ministry of Education, Safe Network, Regional Forensic Youth Service and Youth Horizons, as well as managing her own private practice. She joined the School of Public Health & Psychosocial Studies at AUT in 2015 at the South campus. She also provides formal student support and guidance for the School. She teaches in areas of: Pacific and psychology; Childhood trauma; Child and Youth offending behaviour, risk and interventions; and Child and Youth Mental Health and Interventions. Her research areas include Child and Youth Mental Health; Child and Youth Risk and Resiliency factors; Youth development; and Youth offending.

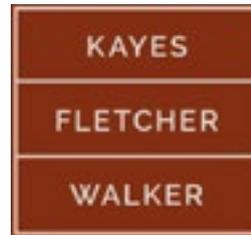


Sonia Teuila Pope

Sonia is of Tongan descent. She recently completed a Master of Arts in Psychology in 2017 at the University of Auckland. Her thesis explored intergenerational views of wellbeing among Tongan women in New Zealand. She is currently a programme coordinator for The Tuākana programme in the School of Psychology, which includes assisting with the coordination of the Māori and Pacific Psychology Research Group (MPPRG). Sonia was the primary research assistant for the 2018 PLCC conference.

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