

SAMOA: CONSTITUTIONAL GOVERNANCE AND CUSTOMARY LAW

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This article discusses the Samoan constitutional system and its distinctive 'mix' of traditional and modern democracy. On the one hand, the Constitution endorses a series of universal values and the division of power. On the other hand, the chief of the family, called the Matai, is chosen by consensus and s/he still has a distinctive public role within the local council and the parliament. The cooperation and antagonism between modernity and tradition has, over the years, generated a dynamic balance which is perceived by some as hindering the administrative efficiency of the Independent State of Samoa. A process of the constitutional recognition of a national identity might increase the level of complexity of the system of governance but that should not be automatically associated with hindering effects. The article is divided into two main parts. The first part discusses two key aspects of the traditional system of governance called the fa'asamoa and the fa'amatai. The second part evaluates the critiques levelled against the constitutional recognition of traditional identities.

Les réflexions de l'auteur portent sur la singularité du système constitutionnel samoan qui empreinte à la fois aux modèles démocratiques traditionnels et à ceux plus moderne.

On observe tout d'abord que la Constitution des Samoa consacre une série de valeurs universelles tout comme le principe de la séparation des pouvoirs.

Ensuite, on constate que le chef de famille, appelé Matai, choisi par consensus occupe une place et une fonction majeure au sein du Conseil local et du Parlement.

La coopération et les antagonismes entre modernité et tradition ont, au fil des années, certes généré une forme d'équilibre dynamique mais il reste cependant perçu par certains comme une entrave à l'efficacité administrative de l'État indépendant des Samoa.

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Par ailleurs, les modalités de reconnaissance constitutionnelle de l'existence d'une identité nationale pourraient, selon l'auteur apparaître comme un facteur d'aggravation modéré de la complexité du système de gouvernance aux Samoa

L'article est divisé en deux parties principales. La première traite de deux aspects essentiels du système traditionnel de gouvernance appelé fa'asamoa et fa'amatai. La deuxième partie évalue les critiques formulées à l'encontre de la reconnaissance constitutionnelle des identités traditionnelles.

I INTRODUCTION

The Independent State of Samoa¹ ('Samoa') is a parliamentary republic located in a small archipelago in the South Pacific.² The country is one of the smallest in the world and has a population of just over two hundred thousand.³ The majority of the population lives on the two larger islands of Savaii and Upolu.⁴ As with many of the Pacific islands, only small parts of the landmass (less than 15%) are suitable for human residence or agriculture.⁵ The scarcity of resources and awareness of the challenges that are inherent in managing such paucity of resources have been the proxy for a distinctive constitutional system.⁶ The 1960 Constitution provides for an indirect parliamentary democracy that includes, among other elements, a combination of modern deliberative principles inspired by the Westminster system, a set of universal rights and the recognition of customary rules.⁷ There are multiple

- 1 Constitution Amendment Act (No 2) 1997; Central Intelligence Agency "Samoa: The World Factbook" <www.cia.gov/library/publications/the-world-factbook/geos/ws.html>; Samoa Bureau of Statistics "Statistical Abstract 2017" <www.sbs.gov.ws/index.php/new-document-library?view=download&fileId=2258>.
- 2 Constitution of the Independent State of Samoa 1960 42–44.
- 3 Samoa Bureau of Statistics, above n 1, 4, 46.
- 4 Central Intelligence Agency, above n 1.
- 5 Vito Breda *Constitutional Law and Regionalism: A Comparative Analysis of Regionalist Negotiations* (Edward Elgar Publishing, 2018) 148, 168–174, 179; Central Intelligence Agency, above n 1.
- 6 Jennifer Corrin "Resolving Land Disputes in Samoa" *Case Studies* 23, 202; Desmond Uelese Amosa "Local Government and Good Governance: The Case of Samoa" (2010) 0(7) *Commonwealth Journal of Local Governance* <<http://epress.lib.uts.edu.au/journals/index.php/cjlg/article/view/1891>>; Richard Herr "Cultural Adaptation and the Westminster Model: Some Examples from Fiji and Samoa" 11; Elise Huffer and Asofou So'o (eds) *Governance in Samoa Pulega i Samoa* (Asia Pacific Press, 2000).
- 7 Constitution of the Independent State of Samoa 1960 IV, IX; Erika J Techera "Samoa: Law, Custom and Conservation" 19, 366; Corrin, above n 6, 202; Jeffrey B Teichert "Resisting Temptation in the Garden of Paradise: Preserving the Role of Samoan Custom in the Law of American Samoa" (1999) 3 *Gonzaga Journal of International Law* 35.

levels of government,⁸ yet Samoa's system of governance is distinctively structured. It provides a case study for understanding the process of the accommodation of identity-based political and constitutional claims in relatively small states and territories.⁹ Samoa's constitutional arrangements can be compared (within the limits of an analysis that seeks to extract an evaluative narrative from observing unique legal systems) with other Pacific states and other islands such as Guam and US states such as Hawaii.¹⁰

Identity-based constitutional claims are made by a group of individuals who perceive themselves to be the bearers of the values of the premodern community.¹¹ That premodern community has historically acted as the custodian of the land and sea resources that are currently under the modern constitutional system.¹² The types

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- 8 Jennifer Corrin "Breaking the Mould: Constitutional Review in Solomon Islands" (2007) *Comparative Law Journal of the Pacific* 26; Tony Angelo *Constitutional Law in New Zealand* (Kluwer Law International, 2011); "The Constitution of Tokelau" (2009) *Law Publications* 14; Breda *Constitutional Law and Regionalism*, above n 5, 178.
- 9 Article 100, art 103 Constitution of the Independent State of Samoa 1960 Preamble. Guy Powles "Changing Pacific Island Constitutions: Methods and Philosophies Essays and Documents on Human Rights in the Pacific" (1992) 22 *Victoria University of Wellington Law Review* 63; Serge Tcherkezoff "Are the Matai out of Time? Tradition and Democracy: Contemporary Ambiguities and Historical Transformations of the Concept of Chief" in Elise Huffer and Asofou So'o (eds), *Governance in Samoa pulega i Samoa* (Asia Pacific Press, 2000) 113; M Anae et al "Transnational Samoan Chiefs: Views of the Faamatai (Chiefly System)" <<https://unitec.researchbank.ac.nz/handle/10652/3860>>; Techera, above n 7; Corrin, above n 6, 205–209.
- 10 Guy Powles "The Common Law as a Source of Law in the South Pacific: Experiences in Western Polynesia" (1988) 10 *University of Hawaii Law Review* 105; Frank Quimby "Fortress Guåhån: Chamorro Nationalism, Regional Economic Integration and US Defence Interests Shape Guam's Recent History" (2011) 46(3) *The Journal of Pacific History* 357; Joseph E Horey "The Right of Self-Government in the Commonwealth of the Northern Mariana Islands" (2003) 4 *APLPJ* 180; United States. Department of the Interior "From Mauka to Makai the River of Justice Must Flow Freely: Report on the Reconciliation Process between the Federal Government and Native Hawaiians" (Dept of the Interior, 2000); Melody Kapilialoha MacKenzie "Ke Ala Loa. The Long Road: Native Hawaiian Sovereignty and the State of Hawai'i" (2012) 47 *Tulsa Law Review* 621.
- 11 Benedict Anderson *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1983).
- 12 Vito Breda "An Odd Partnership: Identity-Based Constitutional Claims" in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds) *Allegiance and Identity in a Globalised World* (Cambridge University Press, 2014) 52; Vito Breda "Constitutional Identities in a Liquid Society" in Jiri Priban (ed) *Liquid Society and Its Law* (2007); Breda *Constitutional Law and Regionalism*, above n 5.

of interactions (deliberative,¹³ formalistic,¹⁴ or regulatory¹⁵) between the state institutions and those who perceive themselves as representing a premodern culture are normally defined by a series of written and unwritten constitutional conventions.¹⁶ The level of flexibility of the unwritten UK Constitution, for instance, allows for a relatively unbound deliberative process when deciding on the interaction between devolved institutions and the UK parliament.¹⁷ Samoa has adopted its own version of the Westminster system and this has had the effect of imbedding a level of flexibility and uncertainty into the process of the accommodation of identity-based constitutional claims.¹⁸ However, Samoa, with its entrenched written Constitution, provides a basis for understanding the benefits and the drawbacks of having a multi-tier system of governance that recognises the role of premodern identity groups.¹⁹ For instance, only *Matai* can be elected to parliament and attend the village council (*Fono*).²⁰ The *Matai* can be male or female.²¹ There are benefits in merging the

13 Scottish Devolution is considered as a result of a deliberative activity: Breda *Constitutional Law and Regionalism*, above n 5, 25.

14 Michel Seymour "La Nation Québécoise Peut-Elle Se Donner La Constitution de Son Choix?" (2015) (Hors-série juin 2015 Mélanges Jacques-Yvan Morin) *Revue québécoise de droit international* <www.sqdi.org/fr/la-nation-quebecoise-peut-elle-se-donner-la-constitution-de-son-choix/>.

15 Tolerance through law is the system that is adopted in Belgium, Northern Ireland and South Tyrol. Stefan Wolff "The Institutional Structure of Regional Consociations in Brussels, Northern Ireland, and South Tyrol" (2004) 10(3) *Nationalism and Ethnic Politics* 387; Georg Grote *The South Tyrol Question, 1866–2010: From National Rage to Regional State* (Peter Lang, 2012); Giuseppe Avolio "Institutions of Self-Government" in Jens Woelk, Francesco Palermo and Joseph Marko (eds) *Tolerance Through Law: Self Governance and Group Rights in South Tyrol* (Brill, 2007) 4; Breda *Constitutional Law and Regionalism*, above n 5, 73; Patricia Popelier and Koen Lemmens *The Constitution of Belgium: A Contextual Analysis* (Hart Publishing, 2015); T Hadden and K Boyle "Northern Ireland: Conflict and Conflict Resolution" in K Rupesinghe (ed) *Ethic Conflict and Human Right* (United Nations University Press) 53.

16 Breda "An Odd Partnership: Identity-Based Constitutional Claims", above n 12.

17 Note that the official name of the UK Parliament is the Parliament of the United Kingdom of Great Britain and Northern Ireland. For a general analysis of the interaction between the four nations that make up the UK Kingdom see: Robert Hazell "Constitutional Reform in the United Kingdom: Past, Present and Future" in *Reconstituting the Constitution* (Springer, 2011) 83; Breda *Constitutional Law and Regionalism*, above n 5, 2.

18 Elise Huffer and Asofou So'o "Beyond Governance in Sāmoa: Understanding Samoan Political Thought" (2005) 17(2) *The Contemporary Pacific* 311; Anae et al, above n 9; Jack Corbett and Wouter Veenendaal "Westminster in Small States: Comparing the Caribbean and Pacific Experience" (2016) 22(4) *Contemporary Politics* 432; Herr, above n 6, 73.

19 *Constitution of the Independent State of Samoa 1960*.

20 Tcherkezoff, above n 9, 115; Anae et al, above n 9. The convention is manifested in Article 5 Electoral Act 1963 (Consolidated).

21 Tcherkezoff, above n 9, 115; Powles, above n 10, 126.

Westminster model with the process of recognition of identity claims.²² Firstly, constitutional recognition allows identity to be considered, within the limits of reasonableness, as an essential element of a polity and that increases (at least partially) the sense of belonging to a constitutional system.²³ Secondly, the system of governance linked to the Westminster model tends to be dynamically altered to suit the change of identity-based perceptions of what that community ought to be.²⁴ The drawback is an increased level of complexity that might negatively affect the administrative efficacy of the public sector and, indirectly, the economic performance of a country.²⁵

Before I substantiate my claim, a series of issues has to be discussed as part of a preliminary discussion. Firstly, Samoan traditional identity (*fa'asamoa*) is a manifestation of a complex and socially dynamic set of perceived assumptions that are shared among a multitude of groups. According to Iati, "The *fa'asamoa* is essentially a traditional governance system, serving social, economic and political functions."²⁶ In its current form, it might also be a manifestation of both the colonisation and decolonisation processes.²⁷ *Fa'asamoa* is used to describe a multitude of aspects of Samoan life,²⁸ yet this article will only refer to its manifestations that have administrative or constitutional implications. For instance, the *fa'asamoa* system assigns traditional roles with distinctive functions within

22 Breda *Constitutional Law and Regionalism*, above n 5, 25, 178; Vito Breda "Indigenous Australians and the Constitutional Reform: Learning from a Very British Experience" in Jennifer Nielsen, Simon Young and Jeremy Patrick (eds) *Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives* (Federation Press, 2016) 229.

23 Breda *Constitutional Law and Regionalism*, above n 5,

24 Breda "An Odd Partnership: Identity-Based Constitutional Claims", above n 12.

25 Huffer and So'o, above n 6; Amosa, above n 6; Malama Meleisea "Governance, Development and Leadership in Polynesia: A Microstudy from Samoa" in Elise Huffer and Asofou So'o (eds) *Governance in Samoa pulega i Samoa* (Asia Pacific Press, 2000) 189; Don Matheson, Kunhee Park and Taniela Sunia Soakai "Pacific Island Health Inequities Forecast to Grow Unless Profound Changes Are Made to Health Systems in the Region (2017) 41(5) *Australian Health Review* 590; Tuimaleali ifano Morgan "Village Governance and Development in Falelatai" in Elise Huffer and Asofou So'o (eds) *Local Government in Samoa and the Search for Balance* (Asia Pacific Press, 2000) 171, 166; Corrin, above n 6, 217.

26 Iati "The Good Governance Agenda for Civil Society: Implications for the Fa'a Samoa" in Elise Huffer and Asofou So'o (eds) *Governance in Samoa pulega i Samoa* (Asia Pacific Press, 2000) 67, 71. Similar descriptions are also in Malama Meleisea *The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa* (Institute of Pacific Studies of the University of South Pacific, 1987) 16–17; Powles, above n 10, 126.

27 Powles, above n 10, 126.

28 Iati, above n 26, 68, 71; Meleisea, above n 26, 16–17.

parliament and within the village council.²⁹ There is also a tendency to crystallise customary prescriptions into statutory measures.³⁰ The Village Fono Act and its successive amendments, for instance, are perhaps the most evident manifestation of such a tendency of transforming oral narratives that have a prescriptive value into statutory measures with normative function.³¹ The tendency to increase the level of statutory material, Powles noted, was initially resisted, yet the overlap between public roles and traditional titles has been a proxy for increased demands of recognition which, in turn, created a need for a clear regulatory system.³² The role of these title holders is rigidly defined and violations of the code of conduct are enforced by the family and by the *Fono*.³³

Secondly, here the phrase 'identity-based political and constitutional claims' is used to refer to narratives and to community programmes aimed at protecting and promoting the idea of identity.³⁴ It is not the purpose of his article to support the narrative that identity claims are automatically 'worth' constitutional recognition because they are a manifestation of a religious or ideological self-evident truth.³⁵ That is, for instance, Renan's 'blood and belonging' narrative.³⁶ The article, instead, describes some of the effects that an already constitutionally-entrenched recognition of a Samoan identity has on its system of governance.³⁷

Thirdly, the history of Samoan colonisation and decolonisation has multiple effects on current policies.³⁸ Samoa was the first Pacific nation to decolonise, yet the comparatively short period of subordination to an imperial power left a legacy which

29 "Matai (the male or female chief of the family who is also the land title holder), the 'faletua ma tausi (wives of Matai), the 'aumaga (group of untitled men, individually known as taule'ale'a), tama'ita 'i (young women) and tamaiti (children)." Iati, above n 26, 71.

30 Village Fono Act 1990 1990; Village Fono Amendment Act (No 3 of 2017).

31 Corrin, above n 6, 206–207; Village Fono Amendment Act (No 3 of 2017); Village Fono Act 1990 1990.

32 Powles, above n 10, 126.

33 Iati, above n 26, 70.

34 Breda "Constitutional Identities in a Liquid Society", above n 12; Breda "An Odd Partnership: Identity-Based Constitutional Claims", above n 12; Anthony D Smith *The Ethnic Origins of Nations* (Basil Blackwell, 1986); Ernest Gellner *Nations and Nationalism* (Basil Blackwell, 1983); Michael Billig *Banal Nationalism* (Sage, 1995).

35 Breda "An Odd Partnership: Identity-Based Constitutional Claims", above n 12.

36 Ernest Renan *What Is a Nation?* (Presses-Pocket, 1882).

37 Corrin, above n 6, 217.

38 Malama Meleisea and Penelope Schoeffel "Forty-Five Years of Pacific Island Studies: Some Reflections" (2017) 87(3) *Oceania* 337, 340; Corrin, above n 8; Techera, above n 7; Powles, above n 10, 126.

can be described as an attempt at cultural and physical genocide.³⁹ The Dutch were the first to make contact with the Samoans.⁴⁰ Multiple waves of missionaries, even if armed with good intentions, brought diseases and a new layer of religious conventions.⁴¹ Some of these religious prescriptions had the effect of substantially altering the pre-existing Samoan culture in a way that should be associated with an attempt at cultural genocide.⁴² The missionaries were followed by the establishment of the German Trading and Plantation Company. Common Law was introduced during the League of Nations' period.⁴³ During this period, the term *Matai* appeared in the colonial records.⁴⁴ The term did not have its present-day significance but it was construed, perhaps by the colonial powers, in a way that was analogous to the extended-family chieftain.⁴⁵ As mentioned earlier, only the *Matai* are members of the *Fono* and only the *Matai*, as the selected representatives of the family group, can be elected as members of parliament.⁴⁶

The Berlin Treaty of 1889 recognised Samoan independence but *de facto* all the decisions regarding the Samoan archipelago were made by colonial powers and, in 1900, Samoa was divided between Germany and the USA.⁴⁷ There are indications that the German administration, perhaps naïvely, intended to preserve the local culture (or at the very least a 'revised and codified' version of it)⁴⁸ and that was one of the reasons for establishing the land registry and title holders.⁴⁹ Steinmetz reports,

39 Techera, above n 7, 363; Isikeli Mataitoga "Constitution-Making in Fiji: The Search for a Practical Solution" 19 *Melanesian Law Journal* 222.

40 Techera, above n 7, 364.

41 Ibid; Tcherkezoff, above n 9, 121–124.

42 Techera, above n 7, 364.

43 Ibid 363.

44 Tcherkezoff, above n 9, 122; Malama Meleisea and Penelope Schoeffel "The Work of the Dead in Samoa: Rank, Status and Property" (2016) 125(2) *Journal of the Polynesian Society* 149, 154.

45 Tcherkezoff, above n 9.

46 Constitution of the Independent State of Samoa 1960 100.

47 Powles, above n 10, 128; Other International Agreements of the United States of America 1776–1949 (Bevans) Treaties "Neutrality and Autonomous Government in Samoa (General Act of Berlin)" 13, 1; Techera, above n 7; George Steinmetz *The Devil's Handwriting: Precoloniality and the German Colonial State in Qingdao, Samoa, and Southwest Africa* (University of Chicago Press, 2007) 317 <<http://ebookcentral.proquest.com/lib/usq/detail.action?docID=408510>>. "A Declaration respecting the independence and neutrality of the Islands of Samoa, and assuring to the respective citizens and subjects of the Signatory Powers equality of rights in said Islands; and providing for the immediate restoration of peace and order therein."

48 Steinmetz, above n 49, 319.

49 Tcherkezoff, above n 9, 122.

for instance, a statement made by Erich Schultz, one of the governors called in which there are the first seeds of a distinctive blend of modernity and tradition in Samoan public institutions: 'I have often told natives that the German government wishes them to be ruled, not according to white mans ideas [sic], but according to the Faa Samoa [Samoan custom]. ... For this reason I do not wish to interfere in your Samoan titles and such things.'⁵⁰ The recognition of the role of cultural values was the harbinger of a distinctively Samoan practice of blending tradition with modernity.⁵¹ As a result of the First World War, Germany lost control of Samoa.⁵² New Zealand administered Samoa first with a League of Nations' mandate and then as a United Nation's Trust Territory till 1961.⁵³ The New Zealand administration was sympathetic to the local culture but the interwar period was marked by the establishment of Samoan nationalism and the cultural independent movement called *Mau a Pule*.⁵⁴ Post-World War II, Governor Powles's administration prepared the conditions for Samoan self-government.⁵⁵ The New Zealand administration of Samoa, under pressure from the *Mau* movement, ended on 1 January 1962 when Samoa became an independent and sovereign nation.⁵⁶

The fourth preliminary point is that Samoa cannot easily be compared with American Samoa. American Samoa is, according to the United Nation's General Assembly and the Special Committee on Decolonization, an autonomous, non-self-governing US territory.⁵⁷ The political structures and the sizes of the two communities are different. American Samoa recognises traditional families and the role of the *Matai*.⁵⁸ American Samoa also has a common land-management system analogous to that in Samoa.⁵⁹ These arrangements are subject to US Congress

50 Steinmetz, above n 49, 319.

51 Ibid.

52 Alison Quentin-Baxter "The Independence of Western Samoa: Some Conceptual Issues" (1987) 17 Victoria University of Wellington Law Review 345, 346.

53 Morgan, above n 25, 154.

54 Nicholas Hoare "Anticolonialism and the Politics of Friendship in New Zealand's Pacific" (2018) 15(3) History Australia 540, 542; Quentin-Baxter, above n 55, 348.

55 Quentin-Baxter, above n 55, 352.

56 Quentin-Baxter, above n 55.

57 General Assembly United Nations "What the UN Can Do to Assist Non-Self Governing Territories?" 5.

58 Breda *Constitutional Law and Regionalism*, above n 5, 169–172.

59 United Nations General Assembly "American Samoa (A/AC.109/2017/i). The Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples" (n 184) 7 Ibid.

legislation.⁶⁰ The role of customary law has been squarely considered in *Tuaua v United States*,⁶¹ where the DC Circuit Court accepted that customs were part of American Samoa insofar as they were a manifestation of the democratically elected Legislative Assembly's will. So, customary law and traditions have, so to speak, an interstitial role within the American Samoan legal system.⁶² The normative implications of Samoan traditions are explicitly and implicitly recognised.⁶³

II FA'ASAMOA AND FA'AMATAI: CONSTITUTIONAL ACCOMMODATION OF TRADITIONAL IDENTITIES

The blended structure of Samoa's current constitutional system has been affected by the process of colonisation and subsequent decolonisation. There are multiple manifestations in the text of the Constitution of the perception that traditional customs are essential to the Samoan way of life (*fa'asamoa*) and it is outside the scope of this essay to provide a comprehensive analysis of the interplay between the *fa'asamoa* and the Constitution.⁶⁴ The focus instead is on the complexity that distinguishes the current Samoan system.⁶⁵ There are, for instance, multiple levels of governance. One of these levels is composed by the government of Samoa, the forty-seven *Matais* who are elected to represent their respective constituencies, two MPs who represent individual voters of non-Samoan descendants and the people of Samoa in general.⁶⁶ The *mālō* and *fa'amatai*, instead, include the government, the *Matai* and the people. The *mālō* is the only tier of governance that is recognised as having national representation.⁶⁷ The *fa'amatai* is, however, composed of parliamentarians and it is assumed that it should exercise its power at the local level. In particular, the *fa'amatai* should foster the economic and social wealth of the community.⁶⁸

60 Exec Order No 10,264, 3 CFR 447 (Supp 195 1), Act of Dec 8, 1983, Pub L No 98-213, § 12, 97 Stat.

61 *Tuaua v United States* 788 F 3 d (DC Cir 2015). Constitutional Convention of American Samoa, The Constitution of American Samoa, Article 1 (3). 48 USC § 1662a.

62 Arnold H Leibowitz "American Samoa: Decline of a Culture" (1980) 10 California Western International Law Journal 220.

63 Tcherkezoff, above n 9, 115; Constitution of the Independent State of Samoa 1960 100, Preamble (2).

64 Constitution of American Samoa 1967 Preamble.

65 Tcherkezoff, above n 9, 125.

66 Note that in 2016, an extra member of parliament was added to meet the 10% quota for women. Constitution of American Samoa 1967, 44–46.

67 Tcherkezoff, above n 9, 125.

68 Iati, above n 26, 72.

These are just some examples of an articulated system of governance in which transaction-intensive services are provided with the help of (and sometimes against) customary practices.⁶⁹ The level of overlap between the institutions and the community commitment to traditional practices that are complied with, by way of comparison with a European unitary state such as France, increases the level of complexity of the Samoan public law system and, in particular, its system of governance. However, according to Unasa, this complexity is not perceived as an impediment for most Samoans.⁷⁰ Nor are the effects of such a blending of administrative practices perceived as hindering an effective distribution of, for instance, public resources. This perception is, however, problematic from an external perspective.⁷¹ The increased level of regulatory transparency and scrutiny demanded, for instance, by international organisations providing financial aid to Samoa, is perceived as unfitting to the *fa'asamoa* spirit.⁷² For instance, the village *Fono* is composed of the *Matai*.⁷³ The *Fono* has a series of administrative competences similar to a regional council.⁷⁴ The *Fono* also manages the allocation of common land and, in general, it is expected to act as the administrative institution in charge of the village and of monitoring the conduct of the *Matai*.⁷⁵ Managing the common land – and albeit indirectly, fishing practice – is derived from customary law.⁷⁶ It is relatively clear, according to Techera, that tradition in Samoa is a proxy for a series of transaction-intensive resource-management practices that Samoan *Fonos* and *Matai* have probably developed over several centuries. Similar narratives are seen in Corrin's report on land disputes.⁷⁷ The increasing population and the increasing stress on the fragile ecosystem (some of which is due to external factors)

69 Tcherkezoff, above n 9, 120, 125; Iati, above n 26; Stephanie Lawson *Tradition Versus Democracy in the South Pacific: Fiji, Tonga and Western Samoa* (Cambridge University Press, 1996) 118; Lant Pritchett and Michael Woolcock "Solutions When the Solution Is the Problem: Arraying the Disarray in Development" (10, Center for Global Development, 2002) 1, 8.

70 Unasa Va'a "Local Government in Samoa and the Search for Balance" in Elise Huffer and Asofou So'o (eds) *Local Government in Samoa and the Search for Balance* (Asia Pacific Press, 2000) 151.

71 Pritchett and Woolcock, above n 72, 6.

72 Va'a, above n 74.

73 Village Fono Act 1990 1990; Village Fono Amendment Act (No 3 of 2017); Iati "Civil Society and Political Accountability in Samoa" <<https://ir.canterbury.ac.nz/handle/10092/13645>>.

74 Morgan, above n 25, 161.

75 Morgan, above n 25.

76 Techera, above n 7, 365; Louise M Illes "Ecosystems and Villages: Using Transformational Metaphors to Build Community in Higher Education Institutions" (1999) 21(1) *Journal of Higher Education Policy and Management* 57, 12; Corrin, above n 6, 203.

77 Corrin, above n 6.

are also perceived by Samoans as requiring attention.⁷⁸ One recent example involves Samoan policies aimed at protecting the shark population from depletion, an issue that was almost certainly not related to Samoan overfishing.⁷⁹

The advantages of a system of governance that refers to the *fa'asamoa* are relatively easy to appreciate.⁸⁰ The side effects of the *fa'asamoa* include highly regulated complexity and a reliance on distinctively slow-forming Samoan deliberative consensus.⁸¹ For instance, debates dealing with controversial topics within the *Fono* tend to take multiple deliberations.⁸² This is internally perceived as a manifestation of the *fa'asamoa*.⁸³ Samoan identity is expressed via a multitude of formal and informal practices and the Constitution allows these practices to be part of the Samoan legal system. I do not argue that tradition has an absolute normative value that should trump both economic and social development.⁸⁴

Samoa is, it is reasonable to suggest, a consociative democracy⁸⁵ in which villages that might have had difficult interactions in the past refer to the *mālō* and

78 Techera, above n 7, 368.

79 Marine Wildlife Protection Regulations 2009 reg 11(2); Erika J Techera "Shark Sanctuaries As Vehicles For Transplanting Conservation Tools In Disparate Legal Jurisdictions" in Vito Breda (ed) *Legal Transplants in East Asia and Oceania* (Cambridge Univ Press, 2019).

80 The *fa'asamoa* provide an internal point of view of the rules that can be shared between administrators. HLA Hart, Penelope A Bulloch and Joseph Raz *The Concept of Law* (3 ed, Oxford Univ Press, 2012) 89–102.

81 Powles, above n 9.

82 Va'a, above n 74.

83 Anae et al, above n 9.

84 Commonwealth Secretariat "Ocean Governance: Our Sea of Islands" 163.

85 Wolff, above n 15.

There are examples of these types of consociative democracies in Europe. For instance, the alpine communities of the South Tyrol are divided by a landscape which locks valleys in a subarctic environment for several months every year and by the use of different languages. Clusters of villages in the same valley tend – like Samoan villages do – to develop a strong sense of identity and make claims that are identity-based. These local divisions do not prevent the implementation of transaction-intensive service policies in areas such education, healthcare or those aimed at protecting the environment in a way which is comparable to, and often better than, any other European region. The way in which such coordination takes place has, in the past decades, been taken over by regulatory bodies, yet it has been part of a tradition that preceded modern institutions. The modern manifestation of that alpine transcultural cooperation is again an example of delivering transaction-intensive services in communities with a strong sense of tradition. Some of these traditions have been manifested in laws that echo traditional assumptions. Breda *Constitutional Law and Regionalism*, above n 5, 79; Emma Lantschner "History of the South Tyrol Conflict and its Settlement" in Jens Woelk, Francesco Palermo and Joseph Marko (eds) *Tolerance Through Law: Self Governance and Group Rights in South Tyrol* (Brill, 2007) 4. Jens Woelk "What It Means to Be Special in Relations with the Central State: Institutions and Procedures" in Jens Woelk, Francesco Palermo and Joseph Marko (eds) *Tolerance Through Law: Self Governance and Group*

fa'amatai to coordinate the delivery of transaction-intensive services.⁸⁶ The argument here is, however, that local consociative institutions perceiving themselves as representing an identity group tend to be, by way of comparison to institutions that exclusively deliver transaction-intensive services, more articulated. They have to be perceived as a manifestation, or at the very least, show awareness of a specific cultural environment. International institutions might find that managing that level of complexity requires extra effort, but it is the prerogative of a community to set the level of perceived efficiency of its institutions.⁸⁷

III IDENTITY, TRADITIONAL GOVERNANCE AND THE ROAD TO DENMARK

Samoa's constitutional system provides a regulatory framework for a complex system of governance that fosters Samoan traditional values. In Part II, I explained that multiple local and national organisations appear to have overlapping competences that are not clearly defined by regulatory bodies.⁸⁸ The idea of *fa'asamoa* appears to be, from an external observer's point of view, a cognitive device that institutions and researchers deploy to justify every aspect of Samoa's institutional activities that cannot otherwise be justified in a way that fits the assumptions of a modern liberal democracy.⁸⁹ That might be the case, yet there are stronger indications that it is a term used to simplify the result of a complex historical interaction between multiple communities.⁹⁰ In this Part, I will discuss a series of side effects arising from that complexity. In particular, the focus is on the critique that considers the perceived ineffectiveness of Samoan institutions in managing external aid and in implementing externally-fostered policies which are aimed at increasing development and economic growth.⁹¹

In describing development strategies, Lant Pritchett and Michael Woolcock defined eight cognitive assumptions that development agencies and state institutions

Rights in South Tyrol (Brill, 2007) 121; Wolff, above n 15. Grote, above n 15. Va'a, above n 74; Tcherkezoff, above n 9; Corrin, above n 8; Resina Katafono (ed) *A Sustainable Future for Small States: Pacific 2050* (The Commonwealth, 2017).

86 Va'a, above n 74, 152.

87 Wolff, above n 15.

88 Village Fono Amendment Act (No 3 of 2017); Village Fono Act 1990 1990.

89 Teichert, above n 7; Norman Meller "Ethnic and Racial Cleavages in Pacific Island Constitutions" (1997) 32(2) *The Journal of Pacific History* 203; Iati, above n 26.

90 Corrin, above n 6.

91 Matheson, Park and Soakai, above n 25.

might adopt to grasp common development issues.⁹² Fukuyama, in his analysis of Pritchett and Woolcock's article, 'Solutions When the Solution Is the Problem: Arraying the Disarray in Development', uses the term 'Getting to Denmark' to define the cognitive assumption that, according to Pritchett and Woolcock, might facilitate the deployment of efficient policies (and that historically made the European state the template of many modern nations).⁹³ Here Fukuyama's term to encapsulate Pritchett and Woolcock's contentions. The 'Road to Denmark' suggests, at least in Fukuyama's interpretation, a relation of causation between administrative effectiveness, the adoption of the rule of law and indirect representative democracy.⁹⁴ It is important to note that Fukuyama's analysis (as that of Pritchett and Woolcock) shows a highly articulate awareness of the contextual problems related to development strategies. For instance, it is relatively clear from the literature reviewed by these three authors that administrative efficiency can seldom be achieved by transplanting legal institutions.⁹⁵ They also acknowledge that the processes of colonisation and decolonisation tend to have a cumulative negative effect on the development of poorer nations,⁹⁶ and Samoa could reasonably be argued to have been affected by these two processes.

It could also be suggested that Samoan governance might experience the effects of failed or partially failing development strategies. For instance, Samoa, according to several authors, shares many of the issues mentioned by Pritchett and Woolcock.⁹⁷ A comprehensive analysis of Samoan development strategies is not presented here.⁹⁸

92 Pritchett and Woolcock, above n 72, 24. In a complex institutional environment, it is expected that traditional practices, which might have long-term hindering effects, are still adopted because the new policies are ineffective or misunderstood.

93 Francis Fukuyama *The Origins of Political Order: From Prehuman Times to the French Revolution* (Profile Books, 2012) 14.

94 Ibid III, IV.

95 Pritchett and Woolcock, above n 72, 32; Fukuyama, above n 101, 51; Pierre Legrand "The Impossibility of 'Legal Transplants'" (1997) 4(2) *Maastricht Journal of European and Comparative Law* 111.

96 Pritchett and Woolcock, above n 72, 32; David Kinley "Bendable Rules: The Development Implications of Human Rights Pluralism" in Brian Z Tamanaha, Caroline Sage and Michael Woolcock (eds) *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press, 2012) 50, 56; Brian Z Tamanaha "The Rule of Law and Legal Pluralism in Development" in Brian Z Tamanaha, Caroline Sage and Michael Woolcock (eds) *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press, 2012) 34, 24–5, 45.

97 Matheson, Park and Soakai, above n 25; Iati, above n 77; Michael Goldsmith "Codes of Governance in the Pacific" in Elise Huffer and Asofou So'o (eds) *Governance in Samoa pulega i Samoa* (Asia Pacific Press, 2000) 9; Meleisea, above n 25, 191; Amosa, above n 6.

98 Amosa, above n 6. For a general analysis, see: Matheson, Park and Soakai, above n 25. For a comparison between the Pacific and Caribbean, see: Corbett and Veenendaal, above n 18. A

However, the level of complexity distinctive of a blended constitutional system that recognises a traditional identity should be dissociated from the systemic difficulties encountered by a developing nation.⁹⁹ An increase in the population that inhabits slums, the stringent interconnection between small polities and large economic trends and the corruption of national politicians might be correlated to Samoan society but there is little evidence of a causative link between these contextual aspects of Samoan society and the recognition of identity-based constitutional claims.¹⁰⁰

For instance, the Hawaiian Constitution recognises native Hawaiians' identity and, in relation to the management of the common land, there is a multilayered territorial organisation that has the aim of protecting and helping native Hawaiians.¹⁰¹ The issue of who should be entitled to administer the common land was questioned in the US Supreme Court in 2000.¹⁰² However, there is little in the literature that suggests a correlation between the constitutional recognition of the Hawaiian native identity and the common weal of the native population.¹⁰³ In fact, the recognition was directly intended to foster the economic development of a depressed community.¹⁰⁴ In *Rice v Cayetano*,¹⁰⁵ the limits of identity-based claims within the US constitutional system were analysed but the issues were mainly to do

comparison between Caribbean and Pacific archipelagos is also in: Breda *Constitutional Law and Regionalism*, above n 5, 158–165.

99 Meleisea, above n 25, 190.

100 Goldsmith, above n 105, 9; Meleisea, above n 25, 190–191; Breda *Constitutional Law and Regionalism*, above n 5, 58, 134, 141; Breda "An Odd Partnership: Identity-Based Constitutional Claims", above n 12; Beatrice Tabangcora "Ua Se Va'a Tu Matagi: The Revival of Criminal Libel in Samoa" (2018) *Comparative Law Journal of the Pacific* 14.

101 Hawaii Constitution, Section 4. The lands granted to the State of Hawaii by s 5(b) of the Admission Act and pursuant to art XVI, s 7, of the State Constitution, excluding then from lands defined as 'available lands' by s 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public [Add Const Con 1978 and election Nov 7, 1978]. Breda *Constitutional Law and Regionalism*, above n 5, 148; MacKenzie, above n 10.

102 *Rice v Cayetano* 528 US 495 (2000), *Hawaii v Office of Hawaiian Affairs* 556 US 163 (2009); Kimberly A Costello "Rice v Cayetano: Trouble in Paradise for Native Hawaiians Claiming Special Relationship Status Notes" (2000) 79 *North Carolina Law Review* 812; Kathryn Nalani Setsuko Hong "Understanding Native Hawaiian Rights: Mistakes and Consequences of *Rice v Cayetano*" (2008) 15 *Asian American Law Journal* 9.

103 Hawaiian Homes Commission Act (Act of July 9, 1921, c 42, 42 Stat 108); Pub L 56-339: An Act to provide a government for the Territory of Hawaii (1900) 599.

104 Pub L 56-339: An Act to provide a government for the Territory of Hawaii (1900) 599. Jon M Van Dyke "The Political Status of the Native Hawaiian People" (1998) 17(1) *Yale Law & Policy Review* 95.

105 *Rice v Cayetano* 528 US 495 (2000).

with a violation of egalitarian principles and not with whether an identity group could manage administrative policies effectively.¹⁰⁶ A similar lack of causation (between identity and economic development) can be found in the analysis of the development of other Pacific islands such as Guam.¹⁰⁷ Guam, like American Samoa, is part of the US territories but its demographic allows for a closer comparison with Samoa.¹⁰⁸ Also in the Pacific, its size and paucity of resources are closely related and so are the debates over the effects (and the risks) of managing those resources.¹⁰⁹

There are indications that, in Samoa, there is a lack of external oversight of political institutions, individual rights are systematically violated¹¹⁰ and an independent, à la Weber, civil sector might not be 'quite there yet.'¹¹¹ Cluny Macpherson and La'avasa Macpherson suggest that increased transparency and more regulations (which are part of the strategies of Fukuyama's 'Getting to Denmark') might help to increase the efficiency of the Samoan public sector.¹¹² The quasi-kingship loyalty of the *mālō* and *fa'amatai* system, according to the two authors, unavoidably and negatively (from an external agency point of view) affects the allocation of resources.¹¹³ However, the authors recognised that part of the population considered the connection as a vessel for a fairer (in the text they report the use of the term 'Christian') allocation of public resources.¹¹⁴ Corrin's analysis of the land-management system is analogous to the one proposed by Cluny Macpherson and La'avasa Macpherson.¹¹⁵ The use of informal channels for political representation (once the official ones are perceived as being unreasonable in terms of their effectiveness) is also reported in Pritchett and Woolcock as one of the

106 Costello, above n 110; Hong, above n 110. Note that the Supreme Court, in the case of *Rice v Gaetano*, decide that voting rights cannot be derogated.

107 Quimby, above n 10; Horey, above n 10.

108 Quimby, above n 10.

109 Goldsmith, above n 105; Samoa Bureau of Statistics, above n 1.

110 Ramona Boodoosingh and Penelope Schoeffel "Community Law-Making and the Codification of Customary Laws: Social and Gender Issues in Samoa" (2018) *Department of Pacific Affairs in brief series: 2018/19* <<https://openresearch-repository.anu.edu.au/handle/1885/148714>>.

111 Cluny Macpherson and La'avasa Macpherson "Where Theory Meets Practice: The Limits of the Good Governance Program" in Elise Huffer and Asofou So'o (eds) *Governance in Samoa pulega i Samoa* (Asia Pacific Press, 2000) 17, 20, 22.

112 Cluny Macpherson *The Warm Winds of Change: Globalisation in Contemporary Sāmoa* (Auckland University Press, 2009) 36. For a general analysis of a potential future for Samoa, see: Katafono, above n 94, 127.

113 Macpherson and Macpherson, above n 119, 30.

114 Ibid 27.

115 Corrin, above n 6, 218.

potential failures in a state's development.¹¹⁶ Once more, these elements are not related in a causal manner to the process of the recognition of traditions, religion, or the existence of a dominant national identity in Samoa. Fukuyama notes that patrimonialism is a feature of many modern states.¹¹⁷

More pertinent is the argument that suggests a reactionary, perhaps despotic, use of tradition.¹¹⁸ This is the claim made by Iati, who compares Samoan traditions to 'a social cage.' The cage inhibits changes and imposes draconian sanctions.¹¹⁹ The *Matai* controls individual members of the family (yet, the family can dismiss him). The *Matai* is, instead, made accountable by the village *Fono*.¹²⁰ The internal structure of the *Fono*, which places the *Matai* in a hierarchy, is manifested in ceremonial practices and it is rigidly enforced: 'Rites and rituals may become very complex and extend to areas not normally associated with such phenomena.'¹²¹ Social pressure and, if needed, enforcement, ensure social control.¹²²

It is relatively clear that outsiders (even those whose intentions are to benefit Samoan society) find navigating unwritten Samoan customs frustrating and sometime hazardous.¹²³ This is true for aid agencies, foreign-born residents and Samoans.¹²⁴ "Alliances must be continually negotiated, formed, tested and dismantled and the process has to start all over again. No party wishes to be dominated by another."¹²⁵ The jostling process based on a rigid system of unwritten rules is not exclusive to the Samoan tradition.¹²⁶ It is worth mentioning that an ideal

116 Pritchett and Woolcock, above n 72.

117 Francis Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalisation of Democracy* (Profile Books, 2014) 4, 7. He includes Italy and Greece in the group of neopatrimonialist states.

118 Iati, above n 26, 70.

119 Ibid 70, 74.

120 Ibid 71.

121 Ibid 75.

122 Ibid 76.

123 Morgan, above n 25.

124 Tabangcora, above n 108, 46. The frustration is vented in blogs such as the O Le Palemia and that was a catalyst for an institutional reaction which tried to criminalise anonymous internet conduct. *OLP OLE Palemia* <www.facebook.com/olppalemia/?tn-str=k*F>.

125 Morgan, above n 25, 167.

126 Tabangcora, above n 108. Sonia Morano Foadi "Key Issues and Causes of the Italian Brain Drain" (2006) 19(2) *Innovation: The European Journal of Social Science Research* 209. Pritchett and Woolcock, above n 72. The neopatrimonialism system that dominates some Italian public institutions is also based on tradition and is rigidly enforced. Sonia Morano Foadi "Key Issues and

Weberian system is also expected to have rigid rules that are enforced. The point is, once more, that Samoa's constitutional recognition of the manifestation of the *fa'asamoa* is unrelated to the efficiency of the community enforcing what is perceived externally as customary rules.

The last objection to the recognition of the *fa'asamoa* is perhaps the weakest. The restriction of the passive constituency (ie who can be elected) is in violation of the basic principles that all egalitarian societies should have.¹²⁷ The dilemma here is whether culture should provide a narrative that reduces political freedoms.¹²⁸ The Samoan Constitution does not include a lexical equivalent of the Fourteenth and Fifteenth Amendments of the US Constitution, but the dilemma is based on the assumption that active and passive electoral prerogatives are unbounded.

Modern democracy, as Tully pointed out, depends on rules.¹²⁹ It is up to a community to set up the rules that define what a constituency is composed of (Should it include sixteen-year-olds? Should it exclude all convicted criminals? And if so, for how long?) and who can be elected. In the case of the *fa'amatai* system, the rule¹³⁰ is derived from an unwritten constitutional convention which delegates the process of selection to consensus. The family has the prerogative to decide who will best represent the interests of the individuals who compose the family group and the permanent support of the family is a condition of public office for an elected member.¹³¹ There are, according to the 2011 census, over fifteen thousand registered *Matai* who can represent their constituencies in the *Fono* and who can potentially be elected to the Assembly.¹³² Perhaps it can be argued that modern democracy should aspire to be as open as possible and that families might be strategic (rather than meritocratic) when selecting their representatives yet, in practice, very few modern Western-style democracies allow open access to political representation and there is

Causes of the Italian Brain Drain" (2006) 19(2) Innovation: The European Journal of Social Science Research 209.

127 Tcherkezoff, above n 9; Electoral Act 1963 (Consolidated) Article 5.

128 Costello, above n 110; J Kehaulani Kauanui "The Politics of Blood and Sovereignty in *Rice v Cayetano*" (2002) 25(1) Political and Legal Anthropology Review 110.

129 James Tully "The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy" (2002) 65(2) Modern Law Review 204.

130 "5. Who may be candidates for election as Members: (1) Subject to the provisions of the Constitution and of this Act, any person who is registered as an elector of any constituency and is the holder of a matai title is qualified to be a candidate and to be elected as a Member of Parliament". Electoral Act 1963 (Consolidated).

131 Lawson and Lawson, above n 72, 118; Tcherkezoff, above n 9.

132 Samoa Bureau of Statistics, above n 1, 3; Lawson and Lawson, above n 72, 118; Tcherkezoff, above n 9; *ibid* 200.

little evidence that a party's strategies are deliberative.¹³³ Given the rigidity and often the obliquity of party systems, the Samoan tradition of electing political family representatives in the public sphere might provide inspiration for an alternative model of deliberative democracy.¹³⁴

IV CONCLUSION

The constitutional system of Samoa adopts a blend of traditional values and universal prescriptions. Aspects of Samoan identity, such as the *fa'asamoa* and *fa'amatai*, are explicitly and implicitly recognised by the Samoan constitutional system. The focus of this article has been on whether the current constitutional arrangement is unhelpful for a fair and meritocratic allocation of resources, and whether the complexity of the Samoan system of governance is a factor hindering the development of Samoa.

The conclusion is that there is little comparative evidence of a connection between administrative inefficiency and the recognition of identity-based constitutional claims. There are sufficient examples of constitutionally-recognised identities that are managing a paucity of resources and at the same time are able to foster an efficient system of governance. Even in relation to Samoa, identity-based assumptions might foster the implementation of policies in a way comparable to other Pacific nations. Whether or not constitutional recognition of a traditional culture helps or damages the administrative efficiency of the state, analysis shows that having a process in place that allows for the constitutional recognition of tradition is, within the limits of reasonableness, unrelated to the ability of that system to perform the basic functions of a modern deliberative democracy.

133 James W Ceaser "The 2016 US Election: The Nomination Game" (2017) 28(2) *Journal of Democracy* 45; Micah Uetricht "The World Turned Upside Down: 'Our Revolution,' Trump Triumphant, and the Remaking of the Democratic Party" (2017) 26(2) *New Labor Forum* 20; Jürgen Habermas *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (The MIT Press, 1991).

134 Cronin Ciaran, 'On the Possibility of a Democratic Constitutional Founding: Habermas and Michelman in Dialogue' (2006) 19(3) *Ration Juris*; Vito Breda "Constitutional Patriotism" in *Handbook of Patriotism* (Springer, Cham, 2017) 1 <https://link.springer.com/referenceworkentry/10.1007/978-3-319-30534-9_5-1>.