"STEADY AS SHE GOES" – THE CONSTITUTION AND THE COURT OF APPEAL OF SAMOA

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I INTRODUCTION

In 2012, Samoa celebrated 50 years of independence. It was a year of celebration, not just of a Constitution, but of constitutional stability in a challenging and fast-changing world. With political and economic uncertainty affecting many Pacific island nations, Samoa has maintained a pattern of political stability and economic prosperity. That stability is an achievement in respect of which Samoa may take great satisfaction. It is the purpose of this paper to consider the role of the Court of Appeal in some key constitutional cases and to reflect on the extent to which the Court has contributed to that stability. The cases are well-known.[1]

The focus is on cases of Samoa but a limited comparison, in the conclusion, supports the overall thesis that "steady as she goes" is a better judicial approach than one that is less conservative.

II BRIEF OVERVIEW

A Independence

Western Samoa[2] gained its independence on 1 January 1962, after having spent the first part of the 20th century under various forms of foreign rule.[3] Independence

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1 *Attorney-General v Saipa'ia (Olomalu)* [1982] WSCA 3 (*Olomalu*); *Taamale v Attorney-General* [1995] WSCA 12 (*Taamale*); *In re the Constitution, Le Tagaloa Pita v Attorney-General* [1995] WSCA 6 (*Le Tagaloa Pita)*; *In re the Constitution, Mulitalo v Attorney-General* [2001] WCSA 8 (*Mulitalo*); *Samoa Party v Attorney-General* [2010] WSCA 4 (*Samoa Party*). The last in the series, *Samoa Party v Attorney-General*, is dealt with here both because of its significance and because of the appearance in it of the late Helen Aikman QC as counsel for the appellant. She was a strong supporter of Samoa and advocate of its causes and also a daughter of one of the leading figures in the preparation of the Constitution.

2 Upon independence, the newly formed state was called Western Samoa. Following a Constitutional Amendment in 1997, the name was changed to Samoa (and as a result of that amendment, all references made in law to Western Samoa were to be read as references to

brought with it the entry into force of a new constitution.[4] The Constitution of the Independent State of Western Samoa was adopted on 28 October 1960, though it did not come into force until 1 January 1962. The coming into operation of the Samoa Constitution, and the simultaneous independence of the state of Samoa, was notable in that the independence of Samoa and the authority of its constitution were recognised, but not conferred, by an Act of the New Zealand Parliament.[5] Rather, the new Constitution was autochthonous; it derived its legal authority from the Constitutional Conventions and a referendum on independence and adoption of the Constitution.[6]

Samoa, in 1947 and from then on, had gradually been working towards independence. Upon becoming a Trust Territory in 1947, Samoa had sent a petition to the United Nations communicating that their ultimate aim was self-government.[7] As a result, a UN Special Visiting Mission was sent to Samoa. This Mission recommended the first steps towards self-government.[8] Between 1947 and the entry into force of the Constitution in 1962, Samoa was steadily afforded increasing levels of self-government, including the establishment of a Council of State and a Legislative Assembly with limited legislative powers in 1947,[9] an Executive

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Samoa). This article refers to the independent State as Samoa which is not to be confused with its close neighbour American Samoa (which is an unincorporated territory of the United States of America).

3 Western Samoa was annexed by Germany as a result of the Convention between Germany, Great Britain and the United States of America for the adjustment of questions relating to Samoa, Washington, 2 December 1899. In August 1914, as a result of the outbreak of World War I the islands were occupied by New Zealand troops (on behalf of Great Britain) and this military occupation continued until the end of World War I. From 1914 until its independence Samoa was administered by New Zealand, first under a League of Nations mandate, and later under a United Nations Trusteeship.

4 Western Samoa became independent on 1 January 1962, but Independence Day is celebrated on 1 June each year.

5 Western Samoa Act 1961 (NZ).

6 Alison Quentin-Baxter "The independence of Western Samoa – some conceptual issues" (1987) 17 VUWLR 345. This paper will not discuss the development of this Constitution at length, as this exercise has already been undertaken (see also Guy Powles "Constitution Making in Western Samoa" [1962] NZLJ 106-109; 131-134; and C C Aikman "Recent Constitutional Changes in the South-West Pacific" [1968] New Zealand Official Yearbook 1104).

7 Powles, above n 6, at 107.

8 *Report to the Trusteeship Council by United Nations Mission to Western Samoa* (Department of External Affairs, Wellington, Publication No 39, 1947).

9 See Samoa Amendment Act 1947 (NZ).

Council with an advisory function in 1952,[10] a Council of Ministers in 1959, and the appointment of a Prime Minister and Cabinet in 1959.[11]

Two Constitutional Conventions[12] were convened in order to work towards building a constitution for an independent Samoa. The first, in 1954, adopted a series of basic principles upon which the future of the state of Samoa could be founded, such as that it should be a parliamentary system, with a single elected legislature whose Samoan members would be elected on the basis of matai suffrage.[13] The second, in 1960, worked with a draft of a constitution which had been prepared by a 16-member Working Committee on Self-Government, going through it article by article before approving a final version on 28 October 1960.[14]

One thing that the Convention had decided was that it wished to retain a system in which only matai could be electors in the territorial constituencies. The Trusteeship Council of the United Nations, the body responsible for supervising the administration of United Nations Trust Territories, was concerned by this, and placed considerable pressure on the Samoans to opt instead for universal suffrage. Eventually the Trusteeship Council relented, but only because the Samoans agreed that they would hold a plebiscite on the basis of universal suffrage to show that the people were in full accord with their leaders. Two questions were asked of the Samoan population: 1. Do you agree with the Constitution adopted by the Constitutional Convention of 28 October 1960? 2. Do you agree that on 1 January 1962 Western Samoa should become an independent State on the basis of that Constitution? Eighty-six per cent of those eligible to vote in this plebiscite did so; 83 per cent of whom answered yes to the first question, and 79 per cent of whom answered yes to the second question.[15]

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10 Samoa Amendment Act 1952 (NZ).

11 Samoa Amendment Act 1959 (NZ).

12 The proceedings of these conventions have been published: *1954 Constitutional Convention of Western Samoa: Papers and Proceedings* (Office of the Clerk of the Legislative Assembly, Apia, 1955) vols 1-4; *Official Report of the Proceedings of the Constitutional Convention of Western Samoa* (Legislative Department, Mulinu'u, 1960) vols 1-2.

13 *1954 Constitutional Convention of Western Samoa: Papers and Proceedings* (Office of the Clerk of the Legislative Assembly, Apia, 1955) vol 1, B3. The matai is the leader of the family group.

14 Powles, above n 6, at 108-109. The model for the Bill of Rights in the Constitution was the UDHR.

15 Powles, above n 6, at 109.

The scene was thus set for the final step in the process: Independence. The United Nations General Assembly passed a resolution that the Trusteeship Agreement would terminate as from 1 January 1962.[16] The New Zealand Parliament also passed legislation which provided that New Zealand would, from that date, no longer have jurisdiction over Western Samoa,[17] and that no Acts of New Zealand passed on or after that date would have effect in Western Samoa.[18] The New Zealand Act did not, however, confer independence on Western Samoa.[19]

B Constitutional Reform

The Constitution of Samoa is entrenched. It may be amended in accordance with art 109, which states that any provision of the Constitution may be repealed or amended if it is "supported at its third reading by the votes of not less than two-thirds of the total number of Members of Parliament (including vacancies) and if not fewer than 90 days elapse between the second and third readings of that bill". If the Parliament wishes to amend art 102, which prohibits the alienation of customary land, the Bill must also be submitted to a poll of the electors on the rolls for the territorial constituencies, and it must be supported by two-thirds of the valid votes cast in that poll before the Head of State can assent to it.

The Constitution has been amended on 14 occasions.[20] These amendments have covered a number of matters including the size of the Cabinet,[21] the term of the Legislative Assembly,[22] the number of persons to be elected for territorial constituencies,[23] the conditions of office for the Controller and Chief Auditor,[24] and the retirement age of judges of the Supreme Court.[25] Importantly in 1997 the name of the State was changed from Western Samoa to Samoa.[26]

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16 *The Future of Western Samoa* GA Res 1626, XVI (1961).

17 Western Samoa Act 1961 (NZ), s 3.

18 Western Samoa Act 1961 (NZ), s 4.

19 By way of contrast, Tuvalu's independence was granted to it by the United Kingdom by virtue of the Tuvalu Independence Order 1978 (UK).

20 Constitution Amendment Acts 12 of 1963, 13 of 1963, 25 of 1965, 10 of 1969, 13 of 1975, 28 of 1975, 15 of 1991, 16 of 1991, 17 of 1991, 3 of 1997, 15 of 1997, 12 of 2000, 2 of 2005, 27 of 2008.

21 Constitution Amendment Act 1991.

22 Constitution Amendment Act 1991 (No 3).

23 Constitution Amendment Act 1991 (No 2).

24 Constitution Amendment Act 1997.

25 Constitution Amendment Act 2005.

26 Constitution Amendment Act 1997 (No 2).

C Constitutional Cases

This article focuses on cases decided by the Court of Appeal of Samoa concerning the Constitution. The Constitution of the Independent State of Samoa is the supreme law of Samoa by virtue of art 2 of that Constitution.[27] Any laws that conflict with the Constitution can therefore be declared invalid by the courts. By virtue of art 73, the Supreme Court of Samoa has original jurisdiction to decide questions relating to the interpretation or effect of the Constitution. Article 80 provides that the Court of Appeal has final jurisdiction on such questions.

The cases chosen for comment here are in particular those that relate to human rights matters, the electoral system and which also have attained a more than usual degree of public notice.

III ATTORNEY-GENERAL V SAIPA'IA (OLOMALU)[28]

The first important constitutional case to come before the Court of Appeal was *Attorney-General v Saipa'ia (Olomalu).* This was an appeal from a Supreme Court decision of 1982, which had declared ss 16 and 19 of the Electoral Act void. The Supreme Court had found them to be void because they were inconsistent with art 15 of the Constitution which guarantees equal treatment. Section 16 was declared void because it allowed only matai to vote in territorial constituencies and s 19 because it provided for a special roll for those of non-Samoan origin. The five petitioners had all been prevented from being entered on the electoral roll for reasons relating to these sections.

The Court of Appeal reversed the decision of the Supreme Court, and found that the sections were not inconsistent with art 15 of the Constitution. The Court considered that the Supreme Court had read art 15 too widely, and that universal suffrage rights did not fall within its scope. They noted that the drafters of the Constitution had deliberately not included a provision about universal suffrage, despite the fact that there had been recommendations by the United Nations Visiting Mission in 1959 that one should be included. Other constitutions show that universal suffrage is normally treated as a separate right with its own provision; it was therefore not properly dealt with under art 15. The assertion in the Preamble to the Constitution that Samoa is "an Independent State based on Christian principles

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27 Constitution of the Independent State of Samoa, art 2.

28 *Attorney-General v Saipa'ia (Olomalu)* [1982] WSCA 3. Relating to this case, see also: BH Arthur "The significance of twenty years" (1984) 14 VUWLR 295; "A-G v Saipa'ia Olomalu and Others" reported by Campbell McLachlan (1984) 14 VUWLR 275.

and Samoan custom and tradition" lent further weight to the argument that universal suffrage was not included in the Constitution because of customary Samoan practices.

Finally the Court looked at the Constitutional Convention of 1960, and noted that Professor Davidson[29] had made it clear that art 15 was meant to protect the equality of all people with regards to the ordinary laws of the land, but not with regard to political rights. Furthermore, a proposed amendment to the Constitution which had been put to the Convention, and which would have allowed only matai to be elected but on the basis of universal suffrage was rejected by the Convention. The Court noted that its use of the records of the Convention was to confirm their decision, not to found it.

The Court found that the electoral provisions of the Constitution were not to be found in Part II, the Part dealing with rights, but were elsewhere in the Constitution. Those provisions allowed for, but did not prescribe, a system where only matai could vote. Article 15 does not govern parliamentary electoral rights, and therefore the sections of the Electoral Act did not conflict with it.

The Court noted that the decision did not mean that the Court agreed that Western Samoa should continue with the matai system as the basis for its elections into the future. That issue, it said, was not a question of law, but a question of social and political policy, and therefore any changes needed to be made by Parliament and not by the courts.

In 1990 the Plebiscite Act provided for a poll of resident citizens of Western Samoa over 21 years of age, asking if they thought that all Samoan citizens over 21 should be able to vote in elections.[30] By a small majority, those who answered yes to that question won the plebiscite, and as a result the Samoan Parliament, by an ordinary Act,[31] conferred the right to vote on all Samoan citizens over the age of 21 and thus introduced universal suffrage to Samoa.

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29 Professor JW Davidson was sent to Samoa in 1947 by the New Zealand Prime Minister to report on the territory. He was subsequently the Constitutional Advisor to the Samoans from 1959-1961. He is the author of *Samoa Mo Samoa* and was Professor of Pacific History at the Australian National University from 1950 until 1973.

30 It also asked if they agreed that there should be a second Assembly for Parliament comprising members elected in accordance with custom and tradition.

31 Electoral Amendment Act 1990 (Samoa). The right to be a candidate at an election was not extended universally.

IV TAAMALE[32]

The 1995 case of *Taamale v Attorney-General* dealt with the issue of banishment. The Land and Titles Court had ordered that the appellants and their children be banished from their village on the application of the Ali'i and Faipule of that village.[33] It was alleged that the appellants had engaged in insulting conduct, and had failed to comply with village obligations and penalties. The decision was appealed to the Supreme Court on the basis that the practice of banishment was unconstitutional as inconsistent with art 13(1)(d) of the Constitution[34] which protects citizens' rights to move freely, and reside in any part of Samoa. The Supreme Court found that the banishment order was not in breach of the Constitution;[35] that decision was appealed to the Court of Appeal.

The Court of Appeal dismissed the appeal. It focussed on the customary nature of the practice of banishment: The ultimate and most important sanction imposed by a village council by custom. If removed it would significantly weaken a council's authority. The second recital in the Preamble to the Constitution was quoted, as it was in *Olomalu*, to support the proposition that the Constitution must be read in light of the fact that Samoa is a state based on custom and tradition. The Court considered that the practice of banishment formed a part of Samoan law by virtue of art 111(1), which states that law includes "any custom or usage which has acquired the force of law in Samoa, or in any part thereof". Though banishment compromised art 13(1)(d) of the Constitution (freedom of movement), the legal practice of banishment was held to be a reasonable restriction to this right in interest of the maintenance of public order.

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32 *Taamale v Attorney-General* [1995] WSCA 12.

33 The village council.

34 There were also a number of other issues around contempt of court which are not important for the purposes of this discussion.

35 The substantive portions of the judgment are quoted in the Court of Appeal judgment.

The Court emphasised that the legal practice affirmed in its decision could be exercised by the Land and Titles Court but only in accordance with the principles and safeguards which were identified in the decision.[36] Furthermore the Court noted that there might come a time when banishment was no longer acceptable, as the content of constitutional rights may develop over time. The case of *Olomalu* was referred to as proof of the prospect of development because ten years after that decision the Samoan Parliament had introduced universal suffrage.[37]

V LE TAGALOA PITA[38]

Also in 1995, the Court of Appeal heard a second constitutional case, relating again to electoral laws. The case was brought by a group of matai following the enactment of the Electoral Amendment Act 1990.[39] The group contended that that Act was ultra vires the Constitution because the Constitution did not only allow for matai suffrage, as had been found in *Olomalu*, but also served to entrench it. They also sought a declaration that the General Election held in 1991 on the basis of universal suffrage was void.

The Supreme Court, in its decision in *Le Tagaloa Pita*, had held that it was bound by the conclusion in *Olomalu* that matai suffrage was not entrenched in the Constitution. It also said that it agreed with that conclusion, because if it had been intended that matai suffrage be entrenched, it would have been very simple to include that entrenchment in express words in the Constitution.

The appellants before the Court of Appeal agreed that the decision in *Olomalu* was that matai suffrage was not entrenched in the Constitution. However, they asked the Court to reconsider that decision and the Court agreed to consider the issue afresh.[40]

The appellants presented a novel argument about the correct interpretation of art 44 of the Constitution, contending that the English version was an incorrect

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36 These include, for example, that the jurisdiction of the Land and Titles Court to order banishment should only be exercised for truly strong reasons. The Court, having made an order, retains control of that order and may make whatever amending or cancelling order it finds appropriate at any time. Further, a village council minded towards banishment would be well advised to petition the Court to make the order rather than to take an extreme course on their own responsibility – the Court of Appeal in *Taamale* was not prepared to express any opinion on the question of whether a village council has the power

37 Electoral Amendment Act 1990 (Samoa). In general representation remains restricted to matai.

38 *In re the Constitution, Le Tagaloa Pita v Attorney-General* [1995] WSCA 6.

39 Discussed above at Part II.

40 To this end, counsel invited Cooke P and Keith J to recuse themselves on the grounds of their earlier involvement in the *Olomalu* case.

translation of the Samoan version. They said that the terms *fa'a-alalafaga*, *nu'u* and *pitonu'u*, which were translated as constituencies, villages and sub-villages respectively, are Samoan concepts which refer to matai, and that this meaning is lost in the English translation. They argued that an *'a'ai* is a settlement of people without a matai (ie a village), but *fa'a-alalafaga*, *nu'u* and *pitonu'u* cannot exist without matai.

The Court noted that art 112 of the Constitution deals with linguistic differences by stating that the English and Samoan versions of the Constitution are equally authoritative but that the English text prevails in the case of a difference between the two. However, the Court did not find that to be a sufficiently satisfying answer, so it went on to state that one of the terms (for constituencies) was actually invented for the Constitution at the Constitutional Convention. The other terms had been authoritatively translated for many years as village and sub-village, and the Court had no doubt that the words referred to territories and their peoples. The people exercising authority in those territories were associated with the territory and its people, but were not synonymous with it. Furthermore, the Court queried why, if the translation was incorrect, it had not been raised previously, for example in the Constitutional Conventions, or in *Olomalu*.

The Court entered the caveat that even if it had found that the appellants had raised a real doubt about the correctness of the *Olomalu* reasoning, the Court would still have had carefully to consider whether it would be appropriate to depart from the precedent.

The Court therefore came to the same conclusion as in *Olomalu* - that matai suffrage was not entrenched.

They also considered, in greater detail than in *Olomalu*, the issue of the special entrenchment of art 102, which prohibits the alienation of customary land. The normal requirement for amending a constitutional provision is that at the third reading of the Bill the amendment must receive the support of two-thirds of all the members of Parliament. The special requirement for amendment of art 102 requires additionally that the amendment receive the support of two-thirds of all electors of territorial constituencies at a poll. The appellants' contention was that universal suffrage resulted in a diluting of the matai vote at such a poll, and thus the safeguard would be lost. The appellants argued that this was inconsistent with the fundamental role of matai as stewards of customary land. The Court, while accepting that that argument must be given some weight, found that it was

outweighed by other considerations. Even with a diluted matai vote, there were still safeguards in place to protect customary land.

VI MULITALO V ATTORNEY-GENERAL[41]

This case was brought by five matai who objected to the 2000 amendment of the Electoral Act 1963, whereby the residential requirement for eligibility to stand for election was extended from 12 months to 3 years. All five appellants had returned to Samoa more than twelve months previously, in order to be eligible to stand for election in the General Election to be held in March 2001. The amendment to the residential qualification had the result that they became ineligible to stand for election. The five matai felt as a consequence that they had been unfairly treated. They alleged breaches of art 14 (rights regarding property) and art 15 (freedom from discriminatory legislation) of the Constitution.

The Supreme Court found that there had been no breach of the Constitution. In particular it noted the decisions in *Olomalu* and *Le Tagaloa Pita* relating to the right of Parliament to determine electoral qualifications. Even if the amendments were unfair, they were not unconstitutional.

In the Court of Appeal, the correctness of the decision in *Olomalu,* and the application of that decision in *Le Tagaloa Pita,* was once again challenged. Counsel for the appellants suggested that a new paradigm was created by the words in the Preamble of the Constitution declaring Samoa to be a state based on Christian principles and Samoan custom and tradition, and that the Court had to give effect to it. The Court rejected this, stating that words in a Preamble do not allow a Court to extend the meaning of the Constitution beyond the clear and unequivocal words of the Constitution.

The Court also noted that though the Court was open to persuasion as to new interpretations of the Constitution, "the need for certainty and stability are also fundamental tenets in any constitutional interpretation" and therefore the Court would not lightly depart from previous interpretations.

VII SAMOA PARTY V ATTORNEY-GENERAL[42]

The most recent major constitutional case to come before the Court of Appeal again raised issues of rights in relation to elections. In 1995 s 105 of the Electoral Act, which relates to the bringing of election petitions,[43] had been amended to limit

41 *In re the Constitution, Mulitalo v Attorney-General* [2001] WCSA 8.

42 *Samoa Party v Attorney-General* [2010] WSCA 4.

43 An election petition is the procedure of challenging the result of an election.

their availability. Following the amendment, apart from the right of the Electoral Commission to bring a petition, only winning candidates and candidates who gained at least 50 per cent of the vote that the winning candidate in the electorate had obtained could bring a petition.[44] The Samoa Party challenged the constitutionality of the amendment on the grounds that: (1) it was inconsistent with the Constitution of Samoa and therefore void pursuant to art 2 of the Constitution; (2) it breached the doctrine of separation of powers; and (3) it breached the constitutional guarantee of a system of representative and constitutional government.[45] The Supreme Court found against them on all three grounds.

In the Court of Appeal the three main grounds of appeal were: That the limitation in s 105 violated the right to fair trial in art 9 of the Constitution, that the limitation violated the right to be free from discrimination in art 15 of the Constitution, and that the limitation violated two rights which are not expressed in the Constitution but which are implicit in it. These two implicit rights were said to be the right of voters to participate in elections which are free and fair, and the right of voters to bring petitions by way of election petitions to enforce free and fair elections. The appeal was dismissed.

In reaching its decision, the Court of Appeal briefly considered the Constitution as a whole before dealing with each of the three grounds of appeal.[46]

The head of appeal relating to the right to a fair trial failed because the Court, following the reasoning in *Olomalu*, held that the right to vote in Samoa was a statutory, and not a constitutional right. The appellants' argument had been based on the assertion that the right to vote was a civil right, and that inherent in that right was the right to challenge elections which were not free and fair. They argued that under art 9 they were entitled to some sort of public hearing in this respect.[47] The Court disagreed, stating that it was necessary to have regard to the particularities of

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44 The right to challenge an election by means of a private prosecution brought pursuant to s 11 of the Criminal Procedure Act 1972 against a Member of Parliament alleging electoral corrupt practice also remains intact. Such a prosecution, if successful, would disqualify the Member of Parliament from holding their parliamentary seat under s 10(e) of the Electoral Act 1963.

45 *Samoa Party v Attorney-General* [2009] WSSC 23 at [1].

46 The question of the separation of powers in the Constitution of Samoa was discussed extensively in the decision of the Supreme Court but not pursued in the Court of Appeal. The Supreme Court accepted the general principle of separation of powers and its presence in the Constitution of Samoa but noted that the doctrine is an abstract one and that apart from providing against a monopoly of government power, the operation of the doctrine is a Constitution-specific matter.

47 At [16].

the Constitution.[48] The Constitution of Samoa contains no right to vote. Therefore the argument that there is a constitutional right to challenge an election result which corresponded to a constitutional right to vote must necessarily fail.[49]

The second head of appeal, relating to freedom from discrimination, failed for a similar reason: No constitutional right was breached. Article 15 protects against discrimination on the basis of personal characteristics, but does not protect from discrimination on the basis of the number of votes a person receives in an election.[50]

The third head of appeal, relating to alleged implicit rights, received more attention from the Court than did the first two. The Court used largely Australian authorities to decide whether it was necessary to imply rights into the Constitution. It was acknowledged that sometimes it will be necessary to look behind the text of the Constitution,[51] but that because the Constitution of Samoa was a 'modern' document, the Court should be slow to depart from the text too much by engaging in judicial interpretation.[52]

VIII COMMONALITIES

This part considers what the Court of Appeal decisions have in common, with a view to demonstrating the steady and careful approach of the Court to constitutional matters.[53]

A Unanimity of Decisions

The immediately apparent commonality is that the findings were all unanimous. This can be interpreted as part of the Court's appreciation of the need for certainty and stability in matters of constitutional development.

B Role of Precedent

A further expression of this appreciation is the Court's reluctance to depart from its own precedents in constitutional cases. In *Le Tagaloa Pita* the Court was asked to depart from the *Olomalu* interpretation of the Constitution relating to suffrage.

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48 At [19].

49 At [22].

50 At [28].

51 At [32].

52 At [37]. The role of precedent was an important factor in this discussion.

53 Not all commentators take the same view as the author, with some arguing that the Court of Appeal should be more activist in its approach, see for example BH Arthur, above n 28, where it was argued that the courts have an obligation to the people to intervene in cases such as *Olomalu*.

The Court said that no real doubt was raised as to the correctness of the *Olomalu* decision, but noted nevertheless that they would have been reluctant to consider reversing it even if there had been some merit in the argument because "[a] Constitution is a living and evolving thing. The course of its development by judicial interpretation should not be dramatically reversed on no more than finely balanced arguments." This notion was affirmed in *Mulitalo* when the Court noted that "the need for certainty and stability are also fundamental tenets in any constitutional interpretation. The Court will not lightly embark on a new approach unless there are compelling reasons for doing so."

C Role of the Court

The Court of Appeal has over the years also stressed the fact that its role is to interpret law, and not to initiate policy development. While occasionally making statements which suggest that it is not satisfied with some of the findings the law requires of it, the Court has nonetheless acknowledged that it is bound to interpret the law as it stands: It is for the legislature to take steps towards constitutional development where it sees fit. In *Olomalu* the Court, in a postscript-like fashion, stated that "the present judgment does not imply any view on the part of the Court about whether or not continuing to use the matai system as the main basis for elections to the Legislative Assembly is in the long-term interests of Western Samoa." The Court went on to note that the question of suffrage, on its interpretation of the Constitution, was a question "not of law, but of social policy… to be decided by Parliament, not by the Courts."

After *Olomalu* the Legislative Assembly did introduce universal suffrage, and the constitutionality of this was challenged in *Le Tagaloa Pita*. The Court noted there that this shows that "the new generation, thinking hard and long about the matter and drawing on the wisdom and experience of earlier generations, has taken a fresh stick."[54] This also happened in *Taamale* where the Court stated:

> … we by no means exclude the prospect that as Western Samoan society continues to develop the time may come when banishment will no longer be justifiable. As envisaged as possible in … *Olomalu's* case, the practical content of a constitutional right may evolve over the years. The introduction of universal suffrage in Western

54 The terminology 'fresh stick' came from a Samoan saying which one of the matai had introduced in argument in *Le Tagaloa Pita*: "Just as a green stick cannot be broken, Samoan custom is too vigorous to be disregarded in this generation. But the next generation will probably do something different just as every season a fresh stick is used to knock down the breadfruit, and it will be up to that generation to reshape the electoral system to suit themselves."

> Samoa within a decade of that case is a striking illustration of how progress may be achieved if not unduly rushed.

In *Samoa Party* it was similarly clear that the Court was not entirely comfortable with the state of the law, but that it was convinced its decision was the right one in law: [55]

> Certainly to restore to voters or even to runners-up, the right to bring an election petition would provide still greater protection of the public interest in free and fair elections. But Parliamentarians, faced with the harsh reality of securing revenue, are not answerable to the Court but to the community as to how they allocate it. For a court to rule otherwise would place it, not Parliament, in breach of the Constitution…

It can be concluded that the Court has a preference for the status quo while indicating, where appropriate, a path for possible future developments. The Court is unwilling to interfere in matters which are not strictly legal, and it takes very seriously the limits on its power under the Constitution.

D The Customary Context

In *Taamale* (the only case considered here which did not relate to electoral law) the Court approached the issue of banishment very cautiously. On the one hand, the Court recognised the importance of the customary punishment of banishment. They accepted that it had attained the force of law and that removing it would significantly weaken the authority of the village councils. On the other hand, the Court was careful to restrict its judgment - rejection of the argument that banishment is unconstitutional - to cases coming before the Land and Titles Court. The Court noted that it was not expressing any opinion on whether village councils have the authority to order banishment. It also noted that banishment orders should only be made where it was truly essential, and should be made in accordance with the principles and safeguards identified in the decision.

The Court in *Taamale* emphasised the importance of applying the Constitution "with due regard to its Samoan setting". The Constitution itself, in the second recital in the Preamble, emphasises the importance of custom and tradition, which place the Constitution within the context of "an Independent state based on Christian principles and Samoan customs and traditions." *Samoa Party* directs that the Constitution is to be interpreted in light of the Preamble, [56] and that it is necessary to examine with care the particular characteristics of the Samoa

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55 At [55].

56 At [8].

Constitution, which may differ markedly from others.[57] *Mulitalo* warns, however, that the words of the Preamble cannot be used to extend the meanings of words in the Constitution beyond their clear meaning, rather it just sets the scene. In undertaking its interpretation exercise in *Le Tagaloa Pita* the Court stated that it would "consider the words of the provisions principally in issue, the constitutional and legal context in which they appear, and the wider social and historical context in which they are to be understood."

Discussion in *Le Tagaloa Pita*, in *Olomalu*, and in the *Samoa Party* case, looked specifically back to the Constitutional Conventions for the purpose of confirming the Court's interpretation.

Certainly there would be little point in the Court of Appeal making decisions which paid scant regard to the Samoan context. Were the Court to dismiss custom or traditional practices as irrelevant, or pay only lip service to them, it is unlikely the decisions would gain respect in Samoa and might not be widely followed or enforced. It is important to note that in all the cases considered here, the appellate judges were past or present members of the New Zealand or Australian judiciary. In the case of *Taamale*, where custom was at issue, these non-Samoan judges found it appropriate to give weight to the decision of the indigenous Samoan Chief Justice, and essentially quoted his judgment verbatim in the appeal judgment.[58]

IX THE APPROACH OF THE TUVALU COURT OF APPEAL IN TEONEA[59]

The approach to constitutional interpretation pursued by the Samoa Court of Appeal can be contrasted with the different approach taken by the Tuvalu Court of Appeal in the case of *Teonea*, where more emphasis is placed on universalist notions of human rights than on culture and tradition. As is clear from some of the effects of that decision, it is an approach which neither promotes stability, nor helps promote the rule of law.

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57 At [19].

58 The Land and Titles Court Judge in *Taamale* was Sapolu CJ, who was Samoan. The Court of Appeal Judges on that case were Cooke P and Casey and Bisson JJ. By way of contrast, the Supreme Court Judge in *Olomalu* was St John CJ, who was Australian. The Court of Appeal Judges in *Olomalu* were Cooke P and Mills and Keith JJ.

59 *Teonea v Pule o Kaupule o Nanumaga* [2009] TVCA 2.

A Facts

The case of *Teonea* dealt with the sensitive issue of religious freedom. The Falekaupule of the island of Nanumaga in Tuvalu had decided in 2001 that, in order to preserve peace and order on the island, the four religions already present on the island were enough.[60] They resolved that any new religion to come to the island would not be allowed to spread its belief. After members of the Assembly of God had sought permission to preach on Nanumaga the Falekaupule passed another resolution in early 2003 stating that no new religion or church was allowed to establish itself on the island.

In July 2003 Teonea came to Nanumaga to preach on behalf of the Brethren Church, which had arrived on Funafuti[61] in 2001 and which was a registered religious body.[62] This upset some people on Nanumaga and a third resolution was passed which stated that new religions, meaning those not already on the island, were restricted. The Tuvalu Brethren Church members on Nanumaga decided to continue meeting in spite of the resolution. Some young men threw stones at one of their meetings, damaging the building in which it was being held and causing minor injuries. As a result of that, after discussion with the police and the elders of Nanumaga, Teonea and other Brethren Church leaders left the island.

Teonea instituted proceedings claiming that the prohibition on his practising of his religion on Nanumaga was a violation of his rights under ss 23(1),[63] 24(1),[64] 25(1)[65] and 27(1)[66] of the Constitution of Tuvalu. Essentially the argument was that the three resolutions of the Falekaupule in relation to religious practice on Nanumaga were unconstitutional.

B Relevant Constitutional Provisions

The current autochthonous Tuvaluan Constitution came into operation in 1986. It replaced the 1978 independence Constitution of Tuvalu, which was drafted in London.

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60 Those four religions were the Seventh-Day Adventist Church, the Jehovah's Witnesses, the Baha'i faith and the Christian Church of Tuvalu (Te Ekalesia Kelisiano Tuvalu).

61 The main island of Tuvalu.

62 Having registered under the Religious Bodies Registration Act on 2 September 2002.

63 Freedom of thought, religion and belief.

64 Freedom of expression.

65 Freedom of assembly and association.

66 Freedom from discrimination.

The Preamble to the 1986 Constitution guides the implementation of the Constitution by setting out the Principles of the Constitution. These include such things as the belief that Tuvalu must take its rightful place amongst the community of nations, while maintaining stability by retaining Tuvaluan values, culture and tradition.[67] One of these values is identified as being traditional forms of community.[68] The life and laws of Tuvalu should be based on both respect for human dignity and on acceptance of Tuvaluan values and culture.[69] The final principle acknowledges the reality that values and culture will inevitability change, and that their development should not be unnecessarily hampered.[70]

These principles are all preambular. As such, they would not on generally accepted common law principles form a substantive part of the Constitution. They can be used to guide interpretation, but not to change the meaning of clear words in the Constitution.[71] To avoid doubt about the role of the Preamble in the Tuvaluan Constitution, these principles were reinforced substantively by specific references to them in several articles of the Constitution, a number of which were relevant to *Teonea*.

Section 13 of the Constitution states that the principles in the Preamble "are adopted as part of the basic law of Tuvalu, from which human rights and freedoms derive and on which they are based."

The sections on which Teonea was challenging the constitutionality of the resolutions, apart from s 27,[72] are subject to s 29, which states, inter alia, that:

> (3) Within Tuvalu, the freedoms of the individual can only be exercised having regard to the rights or feelings of other people, and to the effect on society.

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67 Constitution of Tuvalu, Principles of the Constitution (3).

68 Ibid, at (4).

69 Ibid, at (6).

70 Ibid, at (7).

71 This is the common law position on the use of preambles in interpretation. For a discussion of the use of preambles in constitutional interpretation in the Solomon Islands context, see *The Minister for Provincial Government v Guadalcanal Provincial Assembly* (11 July 1997) unreported, Court of Appeal, Solomon Islands, Civ App 3/1997. For a discussion of that case see: Kenneth Brown and Jennifer Corrin Care *More on Democratic Fundamentals in Solomon Islands: Minister for Provincial Government v Guadalcanal Provincial Assembly* (2001) 32 VUWLR 653.

72 Constitution of Tuvalu, ss 23, 24 and 25.

(4) It may therefore be necessary in certain circumstances to regulate or place some restrictions on the exercise of those rights, if their exercise-

(a) may be divisive, unsettling or offensive to people; or

(b) may directly threaten Tuvaluan values or culture.

C The Result

The courts in this case thus found themselves negotiating the difficult tension which is often encountered in the Pacific between individualistic universal human rights standards on one hand and communitarian local customs and values on the other.[73]

The decision of the High Court of Tuvalu fell on the side of custom and found, using the language of s 29 of the Constitution, that the appellant's actions were divisive, unsettling and a direct threat to the culture and values of Nanumaga. The decision focussed on the fact that ss 23-25 are subject to s 29. The Chief Justice, Gordon Ward, stated that "our Constitution… is firmly founded on the desire of the legislature, as an expression of the wish of the people, to hold to their traditions even if to do so means that some individual rights may be curtailed or restricted."[74] The Court did not rule on the merits of the Falekaupule's decision, but simply said the Falekaupule was entitled to make the decision.

The Court of Appeal overturned the decision of the High Court by a 2:1 majority. Fisher JA, in the majority, while acknowledging that "[t]he Constitution of Tuvalu goes to unusual lengths to preserve a set of values which could be broadly described as unity, stability and the preservation of Tuvaluan values and culture…",[75] found nonetheless that the Constitution did not intend to place more weight on Tuvaluan culture and stability than on the protection of fundamental freedoms.[76] He therefore went on to balance the competing values, concluding:[77]

I can well understand the view that the threat to Nanumaga stability, culture and unity is a high price to pay for permitting the introduction of another religion on the

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73 For more discussion on this point see Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP17, 2006). From the Pacific perspective, and particularly Samoa's, it is interesting to note that this research was led by the late Helen Aikman QC: see above n 1.

74 *Teonea* [2005] TVHC 2.

75 At [107].

76 At [128].

77 At [158].

> island. However in the end I have concluded that the time has come to allow the people of Nanumaga their constitutional freedoms.

Paterson JA, also in the majority, also undertook a balancing act. The starting point for him was the international obligations of Tuvalu to protect fundamental freedoms.[78] He found that the resolutions were not reasonably justifiable in a democratic society.[79] He also placed emphasis on the need to weigh traditional values against the need to develop and gradually change in recognition of the principle in the Preamble that "Tuvalu must take its rightful place amongst the community of nations."[80]

Tompkins JA, in the minority judgment, noted the "very strong emphasis the Constitution places on Tuvaluan society and culture, unity and respect for Tuvaluan values."[81] His decision was ultimately based on the finding that the resolutions were not laws,[82] obviating the need to go into the balancing exercise that would otherwise be necessary. However, he did go on to state that if he had found the resolutions to be laws he would not have found them unconstitutional because "in the circumstances here, the protection of Tuvaluan values and culture should be the dominant consideration."[83]

D The Aftermath of Teonea

First and foremost, following the *Teonea* decision the Parliament of Tuvalu amended the Constitution. This amendment has the effect of preventing a decision similar to *Teonea*, where individual rights considerations override traditional values, being made again. The Constitution (Recognition of Traditional Standards, Values and Practices) Amendment Act 2010 lists three purposes, as follows:[84]

> (a) To protect the island communities of Tuvalu from the spread of religious beliefs which threaten the cohesiveness of island communities.

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78 At [211].

79 At [212].

80 Constitution of Tuvalu, Principles of the Constitution (7).

81 At [21].

82 At [63].

83 At [35].

84 Section 4.

(b) To provide the powers necessary to make laws to restrict the exercise of certain constitutional freedoms, where the exercise of those freedoms is inconsistent with a law, or an act done under law, which accords with the traditional standards, values and practices of the island communities of Tuvalu.

(c) To provide legal recognition for the traditional practices of island communities to limit the establishment of religions on their islands.

The Act goes on to amend the Constitution in a number of sections in order to make clear the high level of emphasis that should be placed on traditional standards, values and practices.

Though the Court of Appeal held that the resolutions were unconstitutional, there was still significant fall-out from the case. This is clear from the fact that the police on Nanumaga could not or would not enforce the law, and from the fact that people lost their jobs and were not reinstated.[85] This is evidence of the destabilising effect that ignoring traditions, customs and values can have on a small traditional society. The legislature of Tuvalu acted quickly to obviate future such results.

X CONCLUSION

It may be presumed that had the case of *Teonea* been heard by the Samoan Court of Appeal the outcome would have been somewhat different. To begin with, in constitutional cases the Samoan Court of Appeal has recognised the need for stability and responded to this requirement, in part, by releasing only unanimous decisions. This can be contrasted with the 2:1 majority approach taken by the Tuvalu Court of Appeal.

The Samoan Court of Appeal has also been reluctant to impose constitutional change upon Samoa and has preferred instead to maintain the status quo, and to signal in obiter where there seems to be room for development. In *Teonea* the Tuvalu Court of Appeal took the opposite approach, with Fisher JA declaring that he felt it was time to give Tuvaluan people their constitutional freedoms and made his decision on that basis, rather than allowing the development to occur

85 Following the decision, four cases were brought before the High Court of Tuvalu which had been filed on 29 July 2008. They all had to do with the establishment of the Brethren Church on Nanumaga and the Court of Appeal's decision, and were related to unlawful termination of employment. They were all tried together (*Konelio v Kaupule o Nanumaga* [2010] TVHC 9). Three of the claims were dismissed. A fourth claim, against the Attorney-General in respect of the Ministry of Home Affairs, was successful. That claim was brought by a woman who had lost her job. The High Court found that that claimant had been wrongfully dismissed from her job at the Ministry of Home Affairs on the basis of a ruling of the Falekaupule. She was awarded two years' salary ($11,676.00) plus exemplary damages of $5,884.00.

organically at the instigation of the people of Tuvalu and their elected representatives.

As evidenced above, the Tuvaluan people had specifically written a Constitution for themselves which placed a strong emphasis on values and culture. And in order to protect itself from a Court of Appeal which did not respect that, the legislature had to amend the Constitution to make that emphasis even clearer.

At its milestone 50th year of independence, Samoa can celebrate not only 50 years of its Constitution as an independent state, but also 50 years of constitutional stability in a world where turmoil and instability have plagued many post-colonial societies. As the cases discussed in this article demonstrate, the cautious, consistent, contextual approach the Samoan Court of Appeal has taken to constitutional cases has made a significant contribution to the maintenance of that stability.