

IS THERE A BETTER WAY TO SOLVE LAND DISPUTES IN THE PACIFIC? (THE MATAI SYSTEM AND THE COURTS)

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About 80% of the land in Samoa is customary land, which is held in accordance with custom and usage and the law relating to Samoan custom and usage. Disputes relating to customary land in Samoa generally arise in three forms: boundary disputes; ownership disputes; and disputes relating to the exercise of authority by the matai or village council over customary land. Traditionally, such disputes were dealt with by the matai or village council; now, such matters are frequently referred to the Samoan Land and Titles Court or the Registrar of Land and Titles. This paper examines the manner in which contemporary disputes relating to customary title are resolved, and posits suggestions on improving resolution processes in customary land disputes in the Pacific.

Environ 80% de terres de Samoa sont régies par les usages et la coutume. Les litiges fonciers prennent généralement trois formes: les questions de bornage et de limites, la reconnaissance de droits de propriété et les contestations sur les droits reconnus au Matai ou le conseil de village sur les terres coutumières. Traditionnellement ces litiges sont réglés par le Matai ou le conseil de village, mais de plus en plus souvent ils sont aussi soumis à trois juridictions spécialisées: le Samoan Land et le Titles Court ou le Registrar of Land and Titles. Cet article indique quelles sont les modalités pratiques des règlements des litiges fonciers en vigueur aux Samoa et envisage leur possible transposition aux autres systèmes juridiques en vigueur dans le Pacifique anglophone.

I CUSTOMARY LAND

In Samoa, there are three categories of land provided under article 101 of the Constitution. These are customary land, freehold land and public land.

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"Customary land" is defined in the Constitution to mean land held from Samoa in accordance with Samoan custom and usage and the law relating to Samoan custom and usage. Essentially, this means land held under a matai (chiefly) title in a village. All customary lands in a village are collectively held under the protective authority of the Alii and Faipule of the village. This is the village council which is made up of all the matais of the village.

About 80% of the land in Samoa is customary land. The other 20% is made up of freehold land and public land.

II THE THREE TYPES OF DISPUTES RELATING TO SAMOAN CUSTOMARY LAND

There are principally three types of disputes which arise in relation to Samoan customary land. These are boundary disputes, ownership disputes, and disputes relating to the exercise of authority by the matai of a family or a village council over customary land.

Samoan customary lands in general are not surveyed and therefore do not have survey boundaries. This is the source of so many boundary disputes between customary landowners in my country. An effective way to solve such boundary disputes and to avoid or reduce their future re-occurrence is to survey the boundaries of customary lands. This will define the boundaries between customary land owners.

To solve ownership disputes relating to customary land and to avoid or reduce the likelihood of their re-occurrence in the future, it is suggested that a register of customary land should be established. Once the boundaries of a customary land have been legally defined after a proper survey, and the matai title which holds the authority over that customary land has been confirmed, then such land should be registered in the register of customary land with its legal definition and the name of the matai title to whom the land pertains. In the absence of fraud, registration should be conclusive evidence of land ownership.

These may seem to be simple solutions to solve boundary and ownership disputes relating to customary and to avoid or reduce the possibility of their re-occurrence in the future. However, in my country, it is not as simple as it may seem. Customary land and Samoan custom are inextricably intertwined. Customary land is a foundation cornerstone of Samoan society and its way of life.

The Samoan people are generally opposed to their customary lands being surveyed. The notion of a survey is foreign to our traditional concept of customary land. As a consequence, it is difficult to establish a register which will show the

legal definition of the boundaries of a particular customary land and the owner or the matai who holds the authority over that land.

It may be that in the course of time, this traditional mind-set against customary land being surveyed will change so that the boundaries of our customary lands can be surveyed and legally defined and a register of customary land can be established. In this way most of the customary land disputes that end up in Court concerning boundaries and ownership can be avoided or reduced in number.

In relation to customary land disputes which involve the exercise of authority by the matai of a family or a village council over customary land, it is difficult to see an effective alternative to solving such disputes other than Court litigation. The litigations which come within this category of disputes relate not so much to the existence of the authority of the matai or the village council over customary land but to the manner in which such authority is exercised.

Perhaps it should be mentioned at this point that traditionally land disputes between Samoans in a village were dealt with by the matai of a family or the village council. Now, such disputes are often referred to the Samoan Land and Titles Court or the Registrar of Land and Titles.

With the current heavy workloads of the Court and the Registrar, it may be worth considering whether to revive and re-invigorate the traditional dispute resolution function of the village council as a means of alternative dispute resolution to Court litigation. A party, however, may still refer a dispute to the Court if it cannot be resolved before the village council.

III LAND AND TITLES COURT

A Jurisdiction

In Samoa a special Court was established during colonial times with exclusive jurisdiction to determine all matters relating to Samoan matai titles and customary land including all claims and disputes relating to matai titles and customary land. This Court is now continued under the Samoan Land and Titles Act 1981 as the Land and Titles Court.

Since Samoa became an independent State in 1962 with a Constitution of its own, if a claim or dispute relating to customary land involves the violation of a fundamental right provided under Part II of the Constitution, then a party to such dispute may choose to apply to the Supreme Court by appropriate proceedings to enforce his fundamental right that has been violated.

B Structure

The Land and Titles Court is made up of two divisions, the trial division which hears and determines disputes relating to matai titles and customary lands and the appellate division which hears and determines appeals from decisions of the trial division. Leave is required from the President of the Court to appeal against a decision of the trial division.

C Composition

The composition of the Court is made up of the President, Deputy Presidents, Judges and Assessors. Except for the President who used to be an expatriate Judge, all the other members of the Court are holders of matai titles as required under the Land and Titles Act 1981. However, since a Samoan became President of the Court, all members of the Court have been matais.

Apart from the President who is legally qualified, the other Judges of the Court do not hold legal qualifications. However, all of the Judges have profound knowledge and understanding of Samoan custom and usage and have had extensive working experience in the public or private sector before their appointments to the Court. The Assessors of the Court are also well versed in Samoan custom and usage.

The advantage in members of the Court being holders of matai titles with profound knowledge and extensive experience in Samoan custom and usage is that it provides the necessary status and competence which is required for the work of the Court. It also provides for the legitimacy and acceptance of the Land and Titles Court as an institution which knows how to deal with matters pertaining to Samoan custom and usage.

Traditionally, disputes between Samoans over matai titles or customary had been dealt with by matais of families or the village council which is the body made up of all the matais of a village. So the statutory requirement that the Judges of the Land and Titles Court must be holders of matai titles is in keeping with Samoan tradition. This is accepted by the Samoan people.

D Proceedings

Proceedings before the trial and appellate divisions of the Court are inquisitorial rather than adversarial. Lawyers are not allowed to represent a party before the Court but they may assist a party with the preparation of his Court documents.

Whilst this may not appear acceptable to some people, it is generally accepted by the Samoan people and the Court has worked well without lawyers. One of the principal difficulties in allowing lawyers to have a right of audience in the Land

and Titles Court is their natural tendency to resort to legal arguments but all the members of the Court, except the President, are non-lawyers. Furthermore, all of the Samoan lawyers were trained in foreign law schools which provide no training in Samoan custom and usage or Samoan customary law or the customary methodologies of dispute resolution.

The only disadvantage, as some people may say, of not allowing lawyers to appear in the Land and Titles Court is that it delays the development of principles which will serve as guidelines for the resolution of cases. That may be more a theoretical disadvantage than a realistic one, depending on the calibre of the bar in each country. In my opinion, much will depend on the President of the Court who is a qualified lawyer to develop principles to serve as guidelines for future cases. This, of course, will not be an easy task but an attempt has been made.

E Mediation

About 96% of the disputes in relation to Samoan customary land are lodged with the Registrar of Land and Titles in the form of complaints. With the remaining 4%, a party or parties to a customary land dispute will file a petition or petitions in the Court registry seeking direct referral of the dispute to the Court for determination.

All disputes which are initiated by lodging a complaint with the Registrar are referred by the Registrar to mediation. Within the Ministry of Justice there is a Land and Titles division which has a Mediation section. Nearly all of the complaints lodged with the Registrar are concerned with boundary disputes or disputes over the manner in which the matai of a family has exercised his authority over the customary lands of the family. Family in this context means the extended family.

When a customary land dispute is referred to the Mediation section, the other parties to the dispute will be called in. A deputy Registrar will then conduct a mediation to try and resolve the dispute. About 72% of the customary land disputes lodged with the Registrar are resolved by mediation,.

Most of the customary land disputes in which the parties seek a Court determination by way of petitions, are also referred by the Registrar to mediation. Some of these disputes are resolved during the mediation; in other disputes the parties are determined to have their day in Court. Only a very small number of disputes which are the subject of petitions to the Court are not referred to mediation. These are disputes which appear to the Registrar to have no possible chance whatsoever of being resolved by mediation.

However, with the disputes that end up before the Court, the Judges at times will try to bring about a reconciliation between the parties during the hearing of proceedings if they see there is a chance for reconciliation.

IV IS THERE A BETTER WAY TO SOLVE CUSTOMARY LAND DISPUTES IN THE PACIFIC?

To the question of whether there is a better way to solve customary land disputes in the Pacific, I would suggest, on the basis of the Samoan experience, that in the case of boundary disputes, once the boundaries of a particular customary land have been determined by Court decision or by agreement between the parties to a dispute or between adjoining landowners who are not parties to any dispute, then those boundaries should be surveyed and be legally defined. In that way, there should be no further disputes over those boundaries in the future.

If the notion of a survey is foreign to a country's concept of traditional or customary land, then it is suggested that the government of the country concerned should consider launching a public programme to explain to the people the advantages of surveying the boundaries of their customary lands.

When the boundaries of a particular customary land have been surveyed and its owner has been confirmed, it is suggested that such land should then be registered in a special register to be kept for customary land. Such register should show the name of the owner or the matai title which holds the authority over the land. Registration should also be made conclusive evidence of ownership in the absence of fraud.

In respect of the institutions which have been established by law to determine customary land disputes in each Pacific nation, there may be differences of opinion as to what will best suit each country. We may, of course, learn from one another, but in my respectful view if the institution you have for dealing with land disputes suits your country's needs and is working well then carry on with it. No two countries in the region have exactly the same circumstances in terms of economic capacity, needs, values, customs and usages and so on. Improvements can always be made along the way to our institutions for dispute resolution.

My only suggestion for improvement in this regard, is that those Pacific countries without Court annexed mediation mechanisms may wish to consider Court annexed mediation as a means of alternative dispute resolution. Mediation has resolved a large number of customary land disputes in Samoa which would have taken up much of the time and other resources of our Land and Titles Court.

Mediation has certain advantages. It is less expensive and less time consuming than Court litigation. It is also more prompt than the normal Court process. The

parties to a mediation may also still be able to see eye to eye with one another after the mediation. There is no winner or loser as it so often happens in Court litigation. In other words, mediation can resolve a dispute while at the same time preserve relationships between the parties.

Consideration may also be given to the use of each country's traditional institutions for dealing with dispute resolution whether that is a suitable and appropriate means of alternative dispute resolution. A party should still be able to refer a dispute to the Court if the dispute cannot be resolved through such traditional institutions.

