

DISPUTE RESOLUTION

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Resolving land disputes in Samoa

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A snapshot

Resolving land disputes in Samoa

The importance of the customary system of land tenure has long been recognised by the Samoan people and their leaders. Government resources have been allocated to nurture the customary system, including the provision of forums to resolve customary land disputes outside common law courts. The principle forum for such dispute resolution is the Land and Titles Court, which has a number of advantages over the customary courts established by legislation in other Pacific island countries. Village councils are also recognised by legislation, highlighting their importance and reducing the potential for conflict with common law courts.

The system for resolving land disputes in Samoa provides important lessons on:

- » ways to recognise, support and build on existing local customary systems and institutions
- » issues to consider in the creation and sustainability of a specialist institution to resolve customary land matters
- » the benefits of legally recognising customary institutions and issues that may arise
- » the importance of the legal system being able to adapt to the changing status of institutions for resolving customary land disputes
- » the potential for alternative methods to reduce the time and costs associated with resolving disputes and increase compliance with agreed solutions.

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The setting

Samoa has been relatively successful in maintaining its traditions, and a complex code of social rules exists. The country is divided into 11 traditional districts, each of which is subdivided into villages. There are about 330 villages and each has several extended families (*aiga*). The power an extended family wields in village affairs is proportionate to its size.

The head (*matai*) of each extended family directs its social, economic and political affairs. The matai title is not automatically inherited (although blood relationship is a factor in selection). Rather, the honour is bestowed by the family, taking into account the candidate's record of service to the family and village. The role of the matai is complex and interwoven into the fabric of Samoan culture and history.

Each village has a council (*fono*) made up of the heads of the village families. The council is responsible for governing village affairs. The other strong influence in a village is the church, which is a focus of recreational and social life.

The legal system

THE LAW AND ITS EVOLUTION

In Samoa, originally laws were pronounced orally by the village chiefs (*ali'i*). At independence in 1962 laws introduced during the colonial period were retained. By virtue of its history, the law as it stands today is a complex mixture of formal laws made locally—that is, the Constitution (which is the supreme law) and legislation enacted by the Parliament or made by delegated authority—and common law made by the formal courts of Samoa. In addition, English common law and equity remain in force, so far as they are not excluded by any other law and so far as it applies to Samoa. Customary law is also formally recognised by the Constitution as a source of law. However, there are problems surrounding its application.

THE COURTS

Samoaan courts follow the common three-tier model:

- » lower courts of limited jurisdiction (the District Courts)
- » a superior court of unlimited jurisdiction (the Supreme Court)
- » an appeal court (the Court of Appeal).

The Court of Appeal hears appeals from the Supreme Court. The Supreme Court has the right to conduct the trial of any matter, including matters relating to titles to non-customary land. It can interpret the Constitution and hear cases on breaches of fundamental rights. Its powers are guaranteed by the Constitution. The District Court's jurisdiction is not described here as it is not empowered to hear cases on customary land. Most disputes over alienated land are dealt with by these courts.

The Constitution (Art. 103) provides for a separate body, the Land and Titles Court, to deal with matai titles and customary land. The other forum authorised by legislation to deal with customary land is the village council, a traditional forum.

Procedure in civil cases in the Supreme Court is adversarial in nature. The rules have not been amended since they were introduced in 1980 and they need to be reformed.

Samoa is one of the few countries of the South Pacific region to have its own Evidence Act. This Act incorporates rules that are unsuitable for resolving customary land disputes. From the definition of 'court' in the Act, it appears to apply to all courts established by legislation in Samoa. However, in practice it does not seem to be used by the Land and Titles Court. The Act does not apply to the village council as it is not a court.

Land tenure

The Constitution recognises and defines three types of land tenure: freehold, public and customary. Of the total land area in Samoa, about 81 per cent was estimated in 2002 to be customary land, 4 per cent freehold land and 15 per cent public land (Taule'alo, Fong & Stefano 2003).

Freehold land provides extensive rights to the titleholder, including disposition by sale, gift, mortgage, lease or will. The only restriction on such disposition is that the transfer must be registered in the Lands Registry and sale to a non-citizen requires the consent of the head of state.

Public land is held by the state. Land below the high water mark is public land, thus avoiding the types of dispute that have arisen in other Pacific island countries on the ownership of reefs.

Customary land is held 'in accordance with Samoan custom and usage and with the law relating to Samoa custom and usage'.¹ Consequently, it is not owned individually. Authority over the land is vested in the holder of the matai title to which it is attached or, in the case of uncultivated land, in the chiefs and orators (*faipule*) of the village.

Customary land is fundamental to Samoan society and identity. Its value cannot be assessed in economic terms alone because of its symbolic and cultural value. It is protected from alienation by the Constitution under Article 102—the only article in the Constitution that requires a referendum to be changed. This article states that it is unlawful to alienate or dispose of an interest in customary land. However, there are three ways in which land may, in effect, be taken out of the customary system.

The only direct means of alienation is by compulsory acquisition under the Taking of Lands Act 1964. Another way is by granting a lease or a licence under the Alienation of Customary Land Act 1965. Compulsory acquisition and leasing or licensing are stated by the Constitution to be exceptions to the bar on alienation or disposal.

Another way is through registration of authority over land (*pulefa'amau*). Section 14 of the Land and Titles Act permits a Samoan to register authority over customary land in the name of an individual, whereas traditionally it would lie with the extended family and be attached to the matai title. The court accepts that registration of authority entitles the holder to exclusive rights of occupation and use of the land, which may be inherited by the heirs of the registered titleholder. In other words, it is treated as freehold land. Application for registration of an authority over land often accompanies an application to grant a lease of land.

¹ Land and Titles Act 1981, s. 8. See also Government of Western Samoa (1975, pp. 62–3).

Forums for resolving customary land disputes

Customary land disputes are common in Samoa. Where disputes cannot be resolved privately, the forum to be used depends on Samoan law. The Land and Titles Act 1981 states that the Land and Titles Court has exclusive jurisdiction in customary land matters, but this Act is subject to more specific provisions in other legislation.² The most relevant Acts and the main types of dispute they govern are listed in Table 1.

TABLE 1 » PRIMARY LEGISLATION GOVERNING CUSTOMARY LAND DISPUTES IN SAMOA

Legislation	Disputes governed
Village Fono Act 1990	Disputes relating to uncultivated village land; disputes relating to the use of village land for betterment of the village; disputes over village land where the village's authority is still accepted.
Land and Titles Act 1981	Disputes regarding authority over land and the right to register authority over land.
Land Titles Investigation Act 1966	Disputes about the status of land.
Alienation of Customary Land Act 1965	Disputes over authority to grant leases.
Taking of Lands Act 1964	Disputes regarding title to land and compensation for taking land.

The legislation provides five forums for resolving disputes involving customary land:

- » village council
- » Land and Titles Court
- » Land and Titles Court Appeal Division
- » Supreme Court (with an appeal to the Court of Appeal)
- » Land Investigation Commission.

There are two other ways to resolve disputes, the first arising from custom and usage and the second under the contract law in leases of customary land:

- » determination by matai
- » arbitration.

² It is a rule of statutory interpretation referred to as 'generalia specialibus non derogant' that general provisions in an Act do not derogate from more specific provisions (Bennion 2002, pp. 255–7).

VILLAGE COUNCIL

Unlike most other Pacific island countries, Samoa does not have village-level courts. However, each village has a council with some judicial functions. At present there are about 350 village councils. Some very large villages have more than one council.

The Village Fono Act 1990 recognises the authority of such councils to deal with village affairs in accordance with 'custom and usage'. The jurisdiction of the village council is limited to people usually resident in the village. It does not normally extend to people residing in the village on government, freehold or leasehold land who are not liable in custom to render service (*tautua*) to a matai of that village.

The Village Fono Act also gives the council power to make rules governing the development and use of village land 'for the betterment of the village'. However, while it can make decisions about land use, its jurisdiction to resolve disputes is limited in some areas to uncultivated village land. Decisions on cultivated land are normally made by the matai in consultation with the family.

Where there are disputes between matai on matters such as boundaries these are usually referred to the Land and Titles Court, not the council. However, the council can impose punishments in accordance with the custom and usage of the village. Punishments can be fines of money, mats, animals, food or a combination of any of these. Punishments can also include work on village land.

The Act does not permit appeals to the common law courts. Instead, they are made to the Land and Titles Court, which may allow or dismiss an appeal or refer it back to the council to reconsider. However, the Land and Titles Court cannot substitute its own decision for that of the council or entertain a second appeal after the council has reconsidered the matter.

There are no written rules governing procedure in the village council, but it must exercise its power and authority in accordance with custom and usage. Within the council there are strict rules of rank; the chiefs and orators form the core of the decision-making process. The orators take charge of the proceedings, but the chiefs have the final word, after listening to the deliberations of the lower ranked matai. Practices may differ slightly depending on the location of the village and the personalities of the matai involved.

LAND AND TITLES COURT

The Land and Titles Court has the powers of a court of record. It has jurisdiction to determine four types of dispute, conferred by three different Acts:

- » Land and Titles Act 1981—exclusive jurisdiction to determine all claims and disputes between Samoans relating to customary land and the right of succession to such land, and to deal with claims to a registration of authority over land. Exclusivity is interpreted narrowly and it refers to disputes concerning authority to deal with customary land.
- » Taking of Land Act 1964—jurisdiction to determine which matai has the authority over customary land being compulsorily acquired.
- » Alienation of Customary Land Act 1965—jurisdiction to hear objections to the granting of leases or licences over customary land.

The Land and Titles Court also hears appeals from the village councils.

The law to be applied by the Land and Titles Court is expressly stated to be:

- » custom and usage
- » the law relating to custom and usage
- » the Land and Titles Act and any other enactment expressed to apply to the court.

Otherwise, the court decides matters in accordance with what it considers to be fair and just.

The registry of the Land and Titles Court is in Apia but it has a subregistry in Savaii, where it also hears some cases.

The Act governing the Land and Titles Court provides for it to use the same rules of procedure as the Supreme Court. In practice, however, rules are largely ignored and the Land and Titles Court appears to take an inquisitorial approach.

Hearings are normally attended by the parties and their family members. The proceedings are formal and begin with a prayer and sometimes a brief kava ceremony. Traditional forms of address involving complex customary courtesies are used and the recital of village and district genealogies is undertaken by all parties to set the parameters of the dispute. Samoan judges are entitled to be heard on all questions before the court and can examine any party or witness. Legal practitioners have no right of audience before the Land and Titles Court.

Judgements are made against the land and are therefore binding on all people affected, whether parties to the case or not. Decisions must give reasons, be pronounced in open court and be published.

LAND AND TITLES COURT APPEAL DIVISION

The Appeal Division of the Land and Titles Court hears appeals from original decisions of the court with the leave of the President if there is:

- » new evidence
- » misconduct by a party or a witness
- » misconduct or mistake on the part of the court
- » lack of jurisdiction
- » error of law
- » a decision against the weight of the evidence.

Some of these appeals are also grounds for a judicial review by the Supreme Court.

SUPREME COURT

The Constitution names the Supreme Court as the forum that deals with disputes over compensation for land compulsorily acquired under the Taking of Land Act. The court can also resolve boundary disputes between neighbours arising out of decisions by the Land Investigation Commission. Where the commission has issued a title to land, the court may also deal with a claim by a person who was overseas during the investigation, provided the claim is made within a year.

The Supreme Court can also review decisions of the Land and Titles Court under the common law. The Supreme Court has held that it can review such decisions relating to customary land. Similarly, the Supreme Court can review decisions of the Land Investigation Commission, notwithstanding that these decisions are stated in its governing acts to be 'final and conclusive'.

The modern English law of judicial review applies in Samoa and the principal grounds on which decisions are reviewed include illegality, procedural impropriety and irrationality. Illegality includes cases where decision makers do not understand or give effect to the law.

The Supreme Court also has jurisdiction to review decisions of a village council and the decisions of a matai if they contravene the fundamental rights guaranteed by the Constitution.

LAND INVESTIGATION COMMISSION

The Land Investigation Commission deals with claims over individual landownership. The commission is empowered to determine whether land is customary, freehold or public and whether a claim has been established. Its decisions are by majority. It is important to note that the commission is not empowered to determine ownership of customary land; it must refer such matters to the Land and Titles Court. This avoids the determination of authority by a body other than the Land and Titles Court. The commission rarely sits and its existence is not well known.

RESOLUTION WITHIN THE FAMILY BY THE MATAI

Disputes over customary land, other than uncultivated village land, are determined by the matai with authority over the land, who usually consults other family members before reaching a decision. There is no set procedure for resolving disputes at the family level but consultation is usually relied on. Disputes between different matai—for example, those regarding land boundaries—are commonly referred to the Land and Titles Court rather than being dealt with by the village council.

ARBITRATION

The standard form of lease for customary land is prescribed under the Alienation of Customary Land Act. The Act provides for all disputes relating to leases to be referred to arbitration.

Arbitrators' powers and the procedures they must follow are outlined in the Arbitration Act 1976. Arbitrators may subpoena witnesses and take evidence on oath or by affidavit. The Supreme Court may intervene in the case of partiality by an arbitrator.

Tensions and issues relating to customary land dispute resolution

The underlying cause of tension in resolving disputes involving customary land arises from the two legal systems in Samoa—customary and introduced. These systems have different origins and values. Competition between values comes to a head over customary land. A further tension is the growth of the number of heirs to customary land and the increasing role of Samoa's absentee landowners in customary matters. Some of the most obvious conflicts and problems are outlined here.

THE DEFINITION OF CUSTOM

An important issue when a forum is applying custom is determining exactly what is being applied. The term 'custom' or 'customary law' is not defined in the Samoan Constitution, although the Land and Titles Act (Art. 2) defines 'custom and usage' as:

... the customs and usages of Samoa accepted as being in force at the relevant time and [including]:

- (a) The principles of custom usage accepted by the people of Samoa in general.
- (b) The customs and usages accepted as being in force in respect of a particular place or matter.

This definition avoids three problems that have arisen in defining custom in some other Pacific island countries:

- 1 Reference to custom instead of customary law avoids arguments about the often illusory line between the two.
- 2 Reference to customs 'in force at the relevant time' avoids the suggestion that 'custom' must be ancient to qualify.
- 3 Reference to customs 'in force in respect of a particular place' avoids arguments about how widespread a customary rule must be to warrant recognition.

Although custom is defined, its content is not written down. Lawyers from a common law background may see the lack of clear rules as a source of uncertainty. On the other hand, the flexibility of customary law may be an advantage, permitting a holistic approach to resolving disputes. So far, the Land and Titles Court has resisted declaring general rules of custom.

A related issue is the imprecise relationship between custom and other sources of law. While the Constitution and legislation are stated to be superior to other sources of law, the relationship between customary law and common law is not expressly stated, so it is not clear which takes precedence (see Corrin & Paterson 2007, pp. 41–2).³

THE LAND AND TITLES COURT

Procedure

As already mentioned, the Land and Titles Court seems to take an inquisitorial approach. Beyond that, little is known about how it operates although, outside Samoa, Samoans are increasingly adept at bringing and fighting claims before the Lands and Titles Court. One important question that remains undecided is whether custom and usage must be proved as a fact or whether they are a matter of law (see Zorn & Corrin Care 2002). The uncertainty about the practice and procedure of the court has led to it being criticised for lack of transparency. It has also been suggested that the lack of clear procedure contributes to delays because parties are apparently allowed to tell stories at their own pace and to summon as many witnesses as they want to.

³ By way of contrast, legislation in Kiribati and Tuvalu—Laws of Kiribati Act 1989 (Kiribati), s. 6(3)(b) and Laws of Tuvalu Act 1987 (Tuvalu), s. 6(3)(b)—makes it clear that customary law is to prevail over the principles of common law and equity in relation to a specified list of matters.

Legal representation

At present, the Land and Titles Act prohibits legal representation in the court, although there is a specific right to have petitions prepared by a lawyer. There is also nothing to prevent a party from using a lawyer (if they can afford it) to prepare their case. The Law Society believes it is time to change the Act to allow representation by lawyers, who could save time by narrowing issues and preventing irrelevant evidence being put forward. The contrary view is that lawyers would introduce formal and adversarial procedures and, rather than reducing delays in the Land and Titles Court, lawyers would increase the length of hearings and party costs (Anesi & Enari 1988, pp. 107, 110).

Notice

Notice of proceedings in the Land and Titles Court must be published in the government newspaper, *Savali*. Many regard this notice procedure as inadequate because *Savali* has a relatively low circulation—estimated by one interviewee to be about 2000 copies of each edition. Steps have been taken to address this by giving copies to village mayors to circulate in their villages. However, there are still too few copies and some suggest that village mayors do not circulate the paper, to suppress notice of proceedings in which they have an interest.

There are also concerns about the content of notices when they describe land by reference to parcel numbers since this is not always recognised by those concerned. One complaint arising from the government's current attempt to acquire land for a hydroelectric project in Sili village is confusion over what land is affected. Another complaint is that the environmental impact statement cannot be understood because it is in English (*Samoa Observer*, 16 April 2007, pp. 1, 3). Most people interviewed for this case study agreed that an illustrated plan or picture showing the location of land would be more effective.

Another issue relates to the notice of decisions. As already noted, the Land and Titles Act requires decisions to be made in open court and be published. It requires the Registrar of the Land and Titles Court to publish decisions in *Savali*, and decisions are deemed complete on publication. However, since an amendment to the Act requires reasons to be given, decisions are no longer published because it is considered to be too expensive to publish a document that is likely to be 10–15 pages.

Failure to publish could be an issue when a party is trying to enforce a decision or when a decision is needed on whether the time for appealing has expired. It could be argued that a decision is not complete or enforceable until after publication. It could also be argued that the time limit relating to appeals does not begin until after publication. However, since the Act requires only 'particulars' of decisions to be published one option is to publish them without reasons and to supply full details directly to the parties concerned and members of the public for a fee.

Registration of judgements relating to customary land

An issue related to notice of proceedings and decisions is the requirement of the Land and Titles Act for the Registrar of the court to send every Land and Titles Court judgement on title or status of customary land to the Land Registrar for registration. Unfortunately this is not happening. There appears to be two related reasons for this. The first is the lack of resources to cope with the backlog of judgements and the second is that decisions do not translate well into registrable details. Customary land is often unsurveyed and described in narrative terms, referring to landmarks such as trees and rivers and undulations in the land. This problem is being addressed by surveying land in dispute and there are plans to devote extra resources to registering land.

Access to legal representation

There is no civil legal aid or public solicitor's office in Samoa, although there is a constitutional right to legal assistance in criminal cases where the interests of justice so require. The absence of legal representation may result in unequal bargaining power in negotiations of compensation for land acquisition and villagers are increasingly seeking legal advice at their cost. It may also lead to inequities in dispute resolution proceedings.

Delay

The Constitution of Samoa guarantees the right to 'a fair and public hearing within a reasonable time'. In the past there have been considerable delays in hearing matters, particularly in the Land and Titles Court. This issue is being addressed and cases are now listed within six months of a claim being lodged.

Binding effect of decisions

Because decisions of the Land and Titles Court are judgements in rem—against a thing rather than against a person—they are binding on all people affected, whether parties to the case or not. This has the advantage of instilling a sense of finality into court decisions. However, it may be contrary to the Constitution, which guarantees the right to a fair and public hearing in determining civil rights and the rights of people deprived of property to access the Supreme Court. This question has not been resolved by the courts.

THE MATAI SYSTEM

Issues also arise from the fact that customary land is ‘attached’ to matai title and that the titleholder has authority over that land. In recent years the number of titles has grown to extremes, even though there has been no corresponding change in population (O’Meara 1995, p. 138). In 1975 a government review of the matai system documented growing concern about the dramatic increase in titles caused by matai creating new titles and splitting existing ones, mainly for electoral purposes (Government of Western Samoa 1975, p. 2). This has arguably resulted in a move towards recognising individual rights and succession by heirs or children of matai to customary land. However, this move may be restricted to small tracts of land attached to newly created matai titles. Such a movement has the potential to give rise to conflict with community interests and to increased disputes about authority over land.

A related but more specific problem arising is the registration of authority over land. It has been suggested that this is being used as a device to individualise landholdings, which may affect the traditional basis of society (O’Meara 1995, p. 150). Cabinet approval has apparently been given for the development of legislation to abolish the registration of authority over land.

THE VILLAGE COUNCIL

Statutory recognition

The Village Fono Act highlights the importance of the village council at village and national government levels. This Act reduces the potential for conflict between the two court systems because village council punishments are taken into account in mitigation in common law courts. However, it has been argued that the Act may have limited the power of the council rather than enhanced it. By setting out available penalties it has been held to prohibit the imposition of other sanctions. It has also been argued that the legislation entrenches the patriarchal and status-based norms of customary law, and that these powers have sometimes been abused by traditional leaders (Meleisea 2000).

Conflict with fundamental rights

The village council has come into conflict with the Supreme Court over issuing banishment orders. For example, in a recent case the court held that the village council had breached the applicant’s right to freedom of movement when they banished him and his family from Lotofaga village because of his son’s bad behaviour towards the village pastor. The court concluded that the council was no longer empowered to make such orders (see Corrin Care 2006a).

One reason for the court’s decision was that the council’s procedure did not ensure that notice of proceedings was given to those involved or ensure their right to be heard. The court said that this conflicted with the constitutional guarantee of the right to a fair trial.

There are counterarguments to this, including the fact that proceedings in the village council are not a trial, nor do they purport to be. While there is no written or posted notice, those who offend against custom are informed by word of mouth. The council acts along 'fairly predictable lines and is capable of reaching clear decisions in matters of everyday concern to Samoans' (Gilson 1970, p. 48). Further, there is normally a hearing, and untitled men are usually entitled to make representations through their matai.⁴ The council can also act quickly, unhampered by the adversarial system and complex rules of procedure that restrict the formal courts (Gilson, p. 22). Customary procedure is also much more flexible, and this often works to the offender's advantage, although it could be argued that this flexibility allows for the arbitrary exercise of discretionary powers (see Corrin Care 2006a).

Gender discrimination is also an issue in dispute resolution. The number of females who are heads of extended families (matai) is gradually increasing, with most estimates being between 5 and 10 per cent. Females are involved in decision making at the family level and those who hold matai titles sit in the village council. However, they do not form part of the decision-making elite. This may change gradually as more matai titles are bestowed on women. The conflicts between constitutionally enshrined rights and the composition and actions of the village council raise complex questions about how to balance traditional values with those reflected in human rights (Corrin Care 2006b).

NEGOTIATION AND MEDIATION

Disputes arise in relation to customary land, as well as freehold land, over compensation for land acquisition. Although negotiators are experienced, the negotiation process is not clearly defined in theory or practice. If negotiation is unsuccessful the only avenue is to refer the matter to the Supreme Court, which will decide the matter in an adversarial setting. Once a dispute has been referred to the court, settlement is unlikely. Planned amendments to the Land and Titles Act will give statutory recognition to the informal mediation role currently played by court officers. Recent amendments to superior court rules in other countries, such as Vanuatu, have introduced compulsory mediation as part of the court process (see Corrin Care 2005).

4 See *Mose v Mosame* [1930–49] WSLR 140, where the village council's decision was set aside on the grounds that it had been imposed in the absence of any representation on behalf of the offender. The reference to 'men' in this sentence is deliberate as the responsible parties and 'advocates' in customary societies are much more likely to be male. Only a small percentage of women are heads of extended families, and the majority of these hold lesser matai titles bestowed solely for the purpose of standing for election to parliament (Aiono 1986, p. 102).

Innovations

In several ways Samoa's approach to resolving customary land disputes is unique in the Pacific. For example, it builds on the strength of tradition and attempts to balance continuity and change. Some of the most striking innovations are now discussed.

RESOURCES, LEADERSHIP AND CULTURAL UNDERPINNINGS

The cohesive force of custom and tradition has long been recognised by the central government. It contributes to preserving peace and harmony and has led the government to invest in nurturing the customary system by, for example, providing forums for resolving customary land disputes.

As with all justice systems, there is tension between the desire to give access to justice and the desire to have a sustainable 'user pays' system for resolving disputes. In Samoa there are court and registration fees. While these are manageable for the user they are insufficient to sustain the system. However, there is another source of revenue from customary land—the 5 per cent rent the government is entitled to under the Alienation of Customary Land Act.

Samoa has forthright, authoritative leaders at national and village levels. Both leaders and citizens are proud of their culture. The desire to retain the strengths of custom and usage, while allowing Samoa to adapt to the changing needs of 'modern' society, is evident in several leadership initiatives. An example is the 1975 review of the matai system, mentioned earlier. The resulting report, based on extensive consultation and analysis, addressed how to retain the best elements of the matai system while dealing with problems resulting from it.

A related and important initiative is the program linking the village council and central government through village mayors and government women's representatives. Village mayors are matai, although women's representatives may not be. Members of both groups are nominated by their villages to represent the villages at a weekly meeting at the Ministry of Women, Community and Social Development. They are paid a stipend by government and pass on information to each side about their plans and concerns. They also distribute the *Savali* in their village.

Having highlighted the strength of tradition, this case study acknowledges that the matai system—and custom more generally—faces challenges from the gradual breakdown of traditional patterns.

THE DUAL COURT SYSTEM

The Land and Titles Court

Although the court system provides a familiar common law environment for introduced law, the adversarial approach it embraces arguably makes it an inappropriate venue for deciding matters involving custom. Further, the adversarial approach is out of synch with the values of consensus and community decision making prevailing in Samoa.

These factors have led most Pacific island countries to seek alternative ways of resolving customary disputes, particularly over land. This usually involves establishing, through legislation, separate 'customary' courts that exist alongside western-style courts. This is the rationale behind Samoa establishing the Land and Titles Court. However, this court is unique in many ways and its differences allow it to avoid some of the pitfalls of 'customary' courts. One significant difference is that, apart from the Supreme Court, the Land and Titles Court has been accorded superior status as a court of record.

Another significant difference lies with the avenue of appeal. In Samoa, appeal lies only to the Appellate Division of the Land and Titles Court, whose decision is final. Together with the Land and Titles Court's status as a court of record, this helps to avoid the suggestion that it is inferior to the courts administering common law. In other countries appeal often lies from the 'customary' court to the superior court within the formal structure. Even where such appeal is restricted to questions of law, questions of fact are often 'dressed up' so as to gain re-entry to a system ill-equipped to deal with questions that should be decided in accordance with customary law.

As already noted, the Land and Titles Court has also avoided getting bogged down with common law procedure and rules of evidence by adopting an inquisitorial approach and does not permit lawyers in court, which helps to prevent an adversarial approach. Samoan judges are appointed on their knowledge of custom and usage and their standing in the community, not on their expertise in the common law system.

Customary resolution

Many issues are resolved at the family level in the customary way without interference. Further, Samoa is one of only two countries in the region that have attempted to integrate traditional dispute resolution with the formal court system (the other being Solomon Islands). The Village Fono Act recognises the village council's authority to resolve minor disputes in a customary way. Resolving matters in accordance with custom and usage without written record by the village council is endorsed by the Act. This is a far cry from the customary courts established by legislation that are burdened with written rules of procedures and western practices (see, for example, Island Court (Civil Procedure) Rules 1984 (Vanuatu), now repealed).

Robust judiciary

Samoa has a robust and well-qualified judiciary served by able administrators. The sensitive approach of the judiciary to custom has led it to find ways to reconcile conflicts with human rights so progress can be made without denigrating customary values. The introduction of universal suffrage in Samoa within a decade of a Supreme Court decision refusing to interfere with such practice has been referred to by the Samoan Court of Appeal as a ‘striking illustration of how progress may be achieved if not unduly rushed’.

AVENUES FOR DEVELOPING CUSTOMARY LAND

Innovative ways to use customary land commercially also deserve mention. In some other Pacific island countries, such as Solomon Islands, the only way land can be used commercially is through alienation. However, Samoa has developed a system of using land for development without taking it permanently out of the customary system by leasing, licensing or, more controversially, registering authority over land.

Lessons

BUILD ON TRADITION

LESSON 1

As a general principle an effective system to deal with disputes involving customary land will seek to recognise, support and build on existing local customary systems and institutions, rather than trying to introduce foreign ideas and institutions that do not resonate with society.

Customary land is fundamental to Samoan society and identity and this has long been understood by Samoan people and their leaders. Generally, government policy has been to build on the strength of tradition and to try to balance continuity and change. Resources have been devoted to nurturing the customary system, including establishing forums outside common law courts for resolving customary land disputes. An important initiative that might be valuably employed elsewhere in the Pacific is that of the village mayors and government women’s representatives. This line of communication links the state to traditional society and avoids the disconnection apparent in some other parts of the region.

CREATE SPECIALIST INSTITUTIONS

LESSON 2

One way of improving the resolution of customary land disputes is to create a specialist institution that is able to develop expertise in customary land matters and is not restricted by the normal rules of evidence.

In Samoa the principal forum for resolving customary land disputes is the Land and Titles Court. This court has an advantage over 'customary' courts established elsewhere in the Pacific in that it has been accorded superior status and the only appeal is to its own Appellate Division. The court's inquisitorial approach is suited to dealing with customary land disputes as it avoids a competitive battle between parties and unfair litigation tactics. Further, the court is not bound by technical rules of evidence, which make it very difficult for parties to prove their case in customary matters.

ADDRESS ISSUES ARISING FROM A SPECIALIST INSTITUTION

LESSON 3

Establishing and maintaining a specialist institution involves choosing from a complicated and sensitive set of options regarding jurisdiction, rules of evidence, handing down decisions and enforcing and supervising decisions.

Establishing and maintaining a specialist institution to deal with land disputes is not a simple exercise. The failure of the Samoa Land and Titles Court to give notice in ways that can be understood, to distribute decisions publicly and to register judgements has led to dissatisfaction and a sense of unfairness. More generally, the extent of the court's independence from the Supreme Court is unclear. A process is under way to determine the parameters of the Supreme Court's supervisory jurisdiction.

There are uncertainties about the practice and procedure of the Land and Titles Court and whether the rules of custom and usage are to be proved and whether they are subject to the common law. Delays are also a source of criticism. Queries also arise from the fact that judgements are made against the land and are binding on people who were not parties to the case. The lack of access to legal advice is also an issue, not only with representation in court but also in negotiating compulsory acquisitions or leases to third parties.

RECOGNISE CUSTOMARY INSTITUTIONS

LESSON 4

Legal recognition of customary institutions makes dispute resolution more accessible to society, but it needs to be done carefully to avoid conflicts with other sources of law.

Samoa is one of only two countries in the Pacific region that have attempted to integrate traditional dispute resolution within the formal court system. Recognising the importance of the village council through the Village Fono Act reduces the potential for conflict with the common law courts. The Act expressly recognises that the council acts in accordance with custom and usage. However, it may have unwittingly limited the powers of the council. There are also conflicts between constitutionally enshrined rights and the composition and actions of the village council.

RECOGNISE THE CHALLENGES TO TRADITION

LESSON 5

The level of recognition that a legal system gives to customary institutions should reflect the level of importance society gives to customary authority but needs to be able to adapt to new circumstances and changing social expectations.

Customary land is attached to chiefly title, and the titleholder has authority over that land. Outside formal avenues for resolving disputes in Samoa, the matai and the extended family are left to deal with customary land in a customary way, and many disputes are resolved at the family level. This appears to have worked well in Samoa, where customary authority is still well respected. However, the growth in the number of titles and the (mis)use of registration of authority are among the factors that pose a challenge to the traditional basis on which Samoan society operates.

PROVIDE ALTERNATIVES FOR RESOLVING LAND DISPUTES

LESSON 6

Creating alternative methods for resolving land disputes, particularly disputes about land acquisitions, may reduce the time and costs of disputes and increase compliance with agreed solutions.

The negotiation process during land acquisitions is not well defined. Further, if negotiation is unsuccessful the only avenue available for resolving a dispute is to refer the matter to the Supreme Court. Once this occurs, avenues for settlement outside court are limited. Because not all disputes can be resolved through mediation, further options for settlement might be valuable in Samoa and in other parts of the Pacific.

Appendix: People consulted

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- » Seve Keilani L Soloi, Soloi Survey Services
- » Afoa Arasi Tiotio, Chief Executive Officer, Samoa Land Corporation
- » Le'aula Tavita Amosa, Assistant Chief Executive Officer, Community Affairs, Ministry of Women, Community and Social Development
- » Le Taua Paul Philips, Assistant Chief Executive Officer, Ministry of Works, Transport and Infrastructure
- » Ming Leung Wai, Attorney General, Office of Attorney General
- » Patrick Fepuleai, barrister and solicitor
- » Masinalupe Tusipa Masinalupe, Chief Executive Officer, Ministry of Justice
- » Klaus Stunzer, President, Samoa Chamber of Commerce
- » Peleiupu Fuata'i, Principal Officer, Drafting Division, Ministry of Natural Resources, Environment and Meteorology
- » Hon. Fiame Naomi II, President, National Council of Women
- » Salota and Atalina, Government Women representatives, Ministry of Women, Community and Social Development
- » Pupualii Senio, representative of village mayors
- » Hon. Tagaloa Tuala DC Kerslake, President, Land and Titles Court
- » Roina Vavatau, Chief Executive Officer, SUNGO, and board members
- » Tu'u'u Dr Ieti Taulealo, Chief Executive Officer, Ministry of Natural Resources, Environment and Meteorology
- » Toleafoa Solomona To'ailoa, representative, Samoa Law Society
- » So'oialo Lalau David Fong, Assistant Chief Executive Officer, Land Management, Ministry of Natural Resources, Environment and Meteorology

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