

PART II

THE LAW

1 Sources of Law

1.1 The Laws of Samoa

The laws of Samoa comprise:

- Acts of the Samoan Parliament;
- Ordinances:
 - ⇒ made by the New Zealand Administrator, with the assent of the Samoan Legislative Council 1919-1947;
 - ⇒ made by the Samoan Legislative Assembly, with the assent of the New Zealand High Commissioner 1947-1962;
- Acts of the New Zealand Parliament that still apply to Samoa - *s7 Reprint of Statutes Act 1972*:
 - ⇒ Many of these have been abolished or repealed;
- Subsidiary legislation made under any of the above legislation;
- English common law and equity:
 - ⇒ except if inconsistent with the Constitution, legislation, subsidiary legislation or judgment of a Court of competent jurisdiction (see definition of 'law' in Article 111 of the Constitution);
- Custom:
 - ⇒ for the purpose of ascertaining rights to customary land and titles;
 - ⇒ to the extent that they have acquired the force of law under any Act or any judgment of a Court of competent jurisdiction.

Although there are many sources of law for Samoa, all the sources generally fall into one of the following four categories.

1.2 The Constitution

Effective from 1 January 1962, the Constitution is the **supreme law** of Samoa.

Any other pre-existing or subsequent law (including legislation, common law, customary law) which is inconsistent with the Constitution is void.

However, it is Judges who interpret or decide the meaning of certain provisions in the Constitution, so the interpretation of the Constitution may be affected by developments in the common law in some cases.

The Constitution can only be amended by an Act approved by two-thirds of the total number of members of the Legislative Assembly after ninety days have passed between the second and third reading.

Article 102 of the Constitution, which relates to alienation of customary land, cannot be amended without the additional step of a referendum of territorial electors where the amendment receives at least two-thirds of the votes cast.

1.3 Legislation

Legislation is law passed or authorised by Parliament, and in the form of Statutes.

If legislation is inconsistent with the Constitution it can be declared void by the Courts.

Legislation is also interpreted and affected by developments in the common law.

Statutes generally have a similar form:

- Top of page: short title, followed by year and number of the Act;
- Index of the section numbers which summarise the contents of the sections or parts;
- The long title and assent by the Head of State;
- The date that the Statute will commence or start;
- Preamble: this sets out the purpose of the Act, which can be useful for Courts trying to interpret the Act;
- An interpretation or definition section: this gives the meanings of certain words or phrases in the Act;
- Substantive sections of the Act;
- Concluding section to the Statute, which refers to schedules and a list of Acts or sections which existed before but are now replaced by the current Statute;
- A schedule: this contains material that cannot be conveniently included in the body of the Statute.

Statutes in Samoa are made by a majority of the Members of Parliament voting in favour of a Bill. A Bill becomes law after it has passed three readings in the Assembly and been assented to by the Head of State, on the advice of the Prime Minister.

1.4 Common Law

Common law is law which is evolved and developed by Judges.

- Judges can make and develop law where no legislation exists to deal with matters in that case or they make law by interpreting existing legislation.

- The development of the common law does not mean that Judges can make arbitrary decisions. They must follow the Doctrine of Precedent and give reasons for their decision (ratio decidendi).

Doctrine of precedent

This means Judges are bound to follow decisions of higher Courts unless material facts in the case are different.

If the material facts of a case are different from cases which have previously dealt with a similar area of law, legal counsel for either party may ask the Court to distinguish the case at hand from previous cases.

In order for the Doctrine of Precedent to work properly, accurate reports of cases previously heard in the Courts must be made available to Judges. The decisions of the Supreme Court of Samoa are found in the Western Samoa Supreme Court Reports or Western Samoa Law Reports or many of them can now be found online at <http://www.paclii.org> or http://www.vanuatu.usp.ac.fj/paclawmat/Samoa_cases

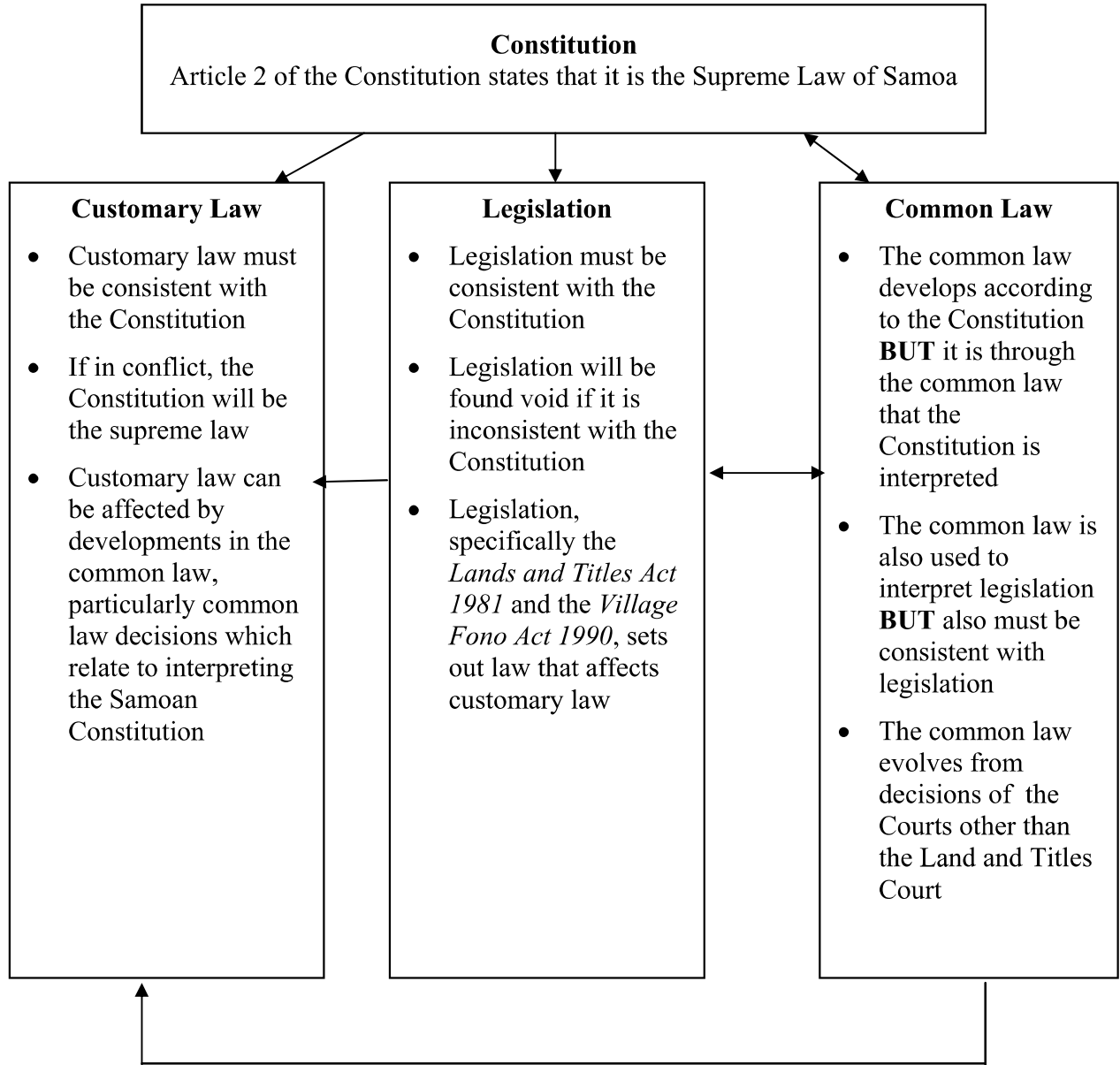
1.5 Customary Law

The Constitution establishes custom and usage as a source of law in two ways:

- Matai titles and customary land are to be held in accordance with Samoan custom and usage;
- Customary law includes any custom or usage which has acquired the force of law in Samoa under the provisions of any Act or under a judgment of a Court of competent jurisdiction.

1.6 Relationship Between Different Sources of Law

Figure 2: Relationship of Law in Samoa



2 Customary Law and Fundamental Human Rights

The Constitution of Samoa provides for the existence of both fundamental rights and for customary law.

2.1 Custom in the Constitution

In the preamble, the Constitution states that the Independent State of Samoa shall be based on “Samoa customs and traditions.”

Part Four: “Lands and Titles” also relates to custom:

- Article 100 states that Matai titles shall be held in accordance with Samoan custom and usage and with law relating to Samoan custom and usage;
- Article 101(2) defines customary land as that land being held in accordance with Samoan custom and usage and with the law relating to Samoan custom and usage.

Article 111 “Interpretation”:

- Law is defined as including any custom or usage which has acquired the force of law in Samoa or any part thereof under the provisions of any Act or under a judgment of a Court of Competent jurisdiction.

2.2 Fundamental Rights in the Constitution

Part Two of the Constitution sets out the fundamental rights of all citizens of Samoa.

- These rights generally follow the United Nations’ Universal Declaration of Human Rights 1948.
- Article 4 of the Constitution states that any person can apply to the Supreme Court to enforce these rights.
- Article 5 of the Constitution states that the Supreme Court shall have the power to make orders necessary to enforce the rights.

The fundamental rights guaranteed in the Constitution

Article 5: The right to life

No person shall be deprived of his or her life intentionally, except in the execution of a sentence of a Court.

This right is not infringed when it is the result of the use of force that has been prescribed by law or is reasonably justifiable because it was done:

- in defence of any person from violence;

- in the course of an arrest or to prevent the escape of a person detained by police or is believed on reasonable grounds to be in possession of a firearm;
- for the purpose of suppressing a riot, insurrection or mutiny.

Article 6: Right to personal liberty

No person shall be deprived of their personal liberty except in accordance with the law.

- A complaint can be made to the Supreme Court that a person is being unlawfully detained. In this case, the Supreme Court shall inquire into the complaint and then release the person if not satisfied that the detention is lawful.
- Every person who is arrested shall be informed promptly of the grounds of their arrest, the charge against them and be allowed to consult legal counsel.
- Every person who is arrested or otherwise detained shall be taken before a Judge of the Supreme Court, some other judicial officer, the Registrar of the Supreme Court or any subordinate Court who has approval from the Registrar of the Supreme Court (all referred to as “remanding officers”) within 24 hours of being detained.
- A person cannot be detained beyond the 24 hours without the authority of a remanding officer.

Article 7: Freedom from inhuman treatment

No person shall be subjected to torture or inhuman or degrading treatment or punishment.

Article 8: Freedom from forced labour

No person shall be required to perform forced or compulsory labour.

The term “forced or compulsory labour” shall not include:

- work done as a consequence of a sentence of a Court;
- any military service;
- any service needed in case of an emergency which is life-threatening to the well-being of the community;
- any work or service required by Samoan custom or which forms part of normal civic obligation.

Article 9: Right to a fair trial

In determining the civil rights and obligations or any charge against an individual for an offence, every person is entitled to a fair and public hearing in a reasonable time by an independent and impartial tribunal established under law.

Every person charged with an offence is presumed innocent until proven guilty.

There are a number of minimum rights given to every person charged with an offence. These are:

- the right to be informed properly, in a language they understand, of the nature and cause of the accusation against them;
- the right to have adequate time and facilities for preparation of their defence;
- the right to defend themselves in person or to have legal assistance;
- the right to examine or have examined witnesses against them and provide their own witnesses to be examined in the same manner;
- the right to free assistance of an interpreter in the Court if required;
- no person accused of an offence shall be compelled to be a witness against himself.

Article 10: Rights concerning criminal law

No person shall be convicted of an offence unless it is defined by law.

No person can be held guilty of an offence based on an act or omission to act if that act or omission was not an offence at the time when it was committed.

A penalty cannot be imposed that is heavier than at the time the offence was committed.

No person who has been tried for any offence, after conviction or acquittal, can be tried again for the same offence unless:

- a retrial is ordered or conducted by a Court exercising superior jurisdiction than the Court where the case was first heard; or

- an application for retrial has been granted by a Judge of Supreme Court to rehear the case in the Supreme Court.

Article 11: Freedom of religion

Every person has the right to freedom of thought, conscience and religion. This includes freedom to change their religion or belief and freedom, either alone or in a community with others, in public or private, to manifest or propagate their religion or belief in worship, teaching, practice or observance.

Nothing in the clause above can affect the operation of any existing law or prevent the State from making any law which imposes reasonable restrictions on the exercise of the right conferred if it is in the interests of:

- national security or public order;
- health or morals;
- protecting the rights and freedoms of others, including their own right to observe and practice their religion without unsolicited interference with members of other religions.

Article 12: Rights concerning religious instruction

No person attending any educational institution shall be required to receive religious instruction or take part in any religious ceremony or attend worship if it relates to a religion other than their own.

Every religious community has the right to establish and maintain educational institutions of its choice.

The right to establish a school does not prevent the State from making any law regarding the inspection of the educational facility or for maintenance standards which are in line with the general educational level in Samoa.

Article 13: Rights regarding freedom of speech, assembly, association, movement, residence

All citizens of Samoa shall have the right to:

Freedom of speech

Existing law can operate and the State can still make any law which imposes reasonable restrictions on this right if it is done in the interests of:

- national security;
- friendly relations with other states;
- public order or morals;
- protecting privileges of the Legislative Assembly;
- preventing the disclosure of confidential information.

Assemble peaceably and without arms

Existing law can operate and the State can still make any law which imposes reasonable restrictions on this right if it is done in the interests of:

- national security or public order;
- health or morals.

To form associations or unions

Existing law can operate and the State can still make any law which imposes reasonable restrictions on this right if it is done in the interests of:

- national security or public order;
- health or morals.

To move freely throughout Samoa and reside in any part of it

Existing law can operate and the State can still make any law which imposes reasonable restrictions on this right if it is done in the interests of:

- national security;
- the economic well-being of Samoa;
- public order;
- health or morals;

- detaining persons of unsound mind;
- preventing any offence;
- the arrest and trial of persons charged with offences or for punishing offenders.

Article 14: Rights regarding property

No property shall be taken possession of compulsorily and no right over or interest in any property shall be acquired compulsorily, except under the law which:

- requires the payment within a reasonable time as adequate compensation;
- gives to any person claiming that compensation right of access for the determination of their interest in the property;
- gives to any party the ability to carry out proceedings in the Supreme Court in relation to a claim, and the same rights of appeal as given generally to parties of civil proceedings.

Nothing in this section affects general laws relating to such things as enforcement of tax or duty on property, imposition of penalties and forfeitures for breach of law, leases, tenancies, mortgages, etc, and other general laws as stated in Article 14 of the Constitution.

Article 15: Freedom from discriminatory legislation

All persons are equal before the law and entitled to equal protection under the law.

- Except where expressly authorised under the provisions of this Constitution, no law and no executive or administrative action of the State shall subject any person(s) to any disability or restriction or confer on any person(s) any privilege based on descent, sex, language, religion, political or other opinion, social original, place of birth, family status or any of them.
- This section does not prevent the establishment of qualifications for service of Samoa if they are established under the law or for making provisions for the protection of women, children or any socially or educationally retarded class of persons.

2.3 Incompatibility between Custom and Fundamental Rights

In several cases, there has been some suggestion that Samoan custom and tradition and fundamental rights can be incompatible or in conflict. The fundamental rights in the Constitution which have been, or may in the future, be seen as incompatible are:

Freedom of movement and residence

In the case *In re the Constitution, Taamale v Attorney-General* [1995] WSCA 1 (18 August 1995); C.A. 2/95B, the appellants, the Taamale family, were appealing a decision of the Supreme Court. The Supreme Court upheld an order of banishment made by the Alii and Faipule of Sapunaoa, Falealili, which had also been upheld by the Land and Titles Court. The appellants argued that this order violated their right to freedom of movement and freedom of residence.

The Court of Appeal found that the Land and Titles Court can make an order of banishment and that banishment does not violate the right to residence or movement as outlined in the Constitution because banishment is a reasonable restriction imposed by existing law in the interests of public order.

In *Taipu v Sila and Others* [1983-1993] WSLR 19, the Supreme Court held that the banishment order made against the plaintiff, because he refused to attend church, violated the plaintiffs' right to freedom of religion. Therefore, the banishment order was found to be unlawful. It is important to note that this case is distinguished from *Taamale* because it was argued on the basis of freedom of religion and not freedom of movement or residence.

Freedom of religion or religious instruction

In *Sefo v The Attorney-General* [2000] WSSC 18 (12 July 2000), the plaintiffs appealed a decision of the Land and Titles Court to the Supreme Court. The Land and Titles Court had upheld the decision of Alii and Faipule of Saipipi to limit the number of churches in their village and to prohibit the plaintiffs from conducting bible classes or church services in Saipipi.

The plaintiffs argued that this decision violated their right to freedom of religion and their rights concerning religious instruction, and that the Land and Titles Court and the Alii and Faipule of Saipipi did not have the power or authority to restrict freedom of worship and religious instruction.

The Supreme Court found that the Land and Titles Court and the Alii and Faipule did not have the authority to make an order restricting religious worship in the village and that the plaintiffs' fundamental right to freedom of religion had been violated in making this decision. They also found that these rights would be infringed if the Village Council was allowed to restrict the number of churches in a village or if villagers had to seek permission to start a church.

The Court also rejected the argument made by the Attorney General that the restriction of freedom of worship in this case should be allowed based on the exception of "public order" found in *Village Fono Act 1990* and *The Land and Titles Act 1982*.

Freedom from discrimination

In *re the Constitution Attorney-General v Olomalu* [1982] WSCA 1 (26 August 1982), the Attorney General appealed a decision of the Supreme Court, which had found that the matai voting system for electing members of Parliament was discriminatory. The Court of Appeal overturned this decision and found that the fundamental rights section of the Constitution did not apply to the section in the Constitution dealing with Parliamentary election, and therefore the matai system did not violate the right to freedom from discriminatory legislation.

This decision has since been upheld in *In re the Constitution, Mulitalo v the Attorney-General of Samoa* [2001] WSCA 8 (20 December 2001).

What can Judges in the Land and Titles Court do in the face of possible incompatibility between fundamental rights and Samoan customs and tradition?

Village Fono do not necessarily take fundamental freedoms into account when making their decisions, so it is up to the Land and Titles Court to take fundamental freedoms into account where there is an appeal from a Village Fono decision.

Understanding, prudence and care are essential requisites when interpreting concepts such as "rights" or "customs".