

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".

PART III

THE LAND AND TITLES COURT

1 Introduction

The Land and Titles Court:

- is a Court of record;
- is established under Article 103 of the Constitution and the *Land and Titles Act 1981* substituting the repealed *Samoan Land Protection Ordinance 1934*.

2 The Relevant Law

2.1 Governing Legislation

- Constitution Part IX.
- Land and Titles Act 1981, with amendments, i.e.
 - *Land and Titles Amendments Act 1988*;
 - *Land and Titles Amendment Act 1992/1993*.

2.2 Other Operational Legislation

- *Village Fono Act 1990*.

2.3 Custom and Usage

The Declaration of Independence in the preamble of the Constitution states, among other things:

“Samoa should be an Independent State based on Christian principles and Samoan Customs and tradition”.

Article 111 of the Constitution itself defines “law” as meaning, among other things, “any custom and 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”.

The *Land and Titles Act 1981* with amendments, defines custom and usage as “the customs and usages of Samoa accepted as being in force at the relevant time and includes:

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

The *Village Fono Act 1990*:

- validates and empowers the past and future exercise of power and authority by every Village Fono with respect to the affairs of its village, **in accordance with the custom and usage of that village**;
- requires every Village Fono to exercise any of its powers or authority, in accordance with custom and usage of that Village. Note the exceptions in *s5*.

3 Composition of the Court

3.1 Samoan Judges

Criteria for appointment

- Holder of a matai title.
- Considered qualified by reasons of:
 - ≡ character;
 - ≡ ability;
 - ≡ standing;
 - ≡ reputation; and
 - ≡ has not attained age of 65 years.

Appointment

- Appointed by the Head of State, acting on the advice of the Judicial Service Commission.
- Holds office up to age of 65 years.

- Extension of term of office after reaching age of 65 years may be considered where:
 - ⇒ application is made either prior to or upon reaching age of 65 years;
 - ⇒ application made before or upon completion of the period of the current extension; and
 - ⇒ each application is accompanied by a satisfactory Medical Certificate signed by a Senior Medical Officer designated by the Secretary for Justice.
- Each extension and or successive extensions of term of Office for a Samoan Judge who has reached the age of 65 years is limited to a period of 12 months for every extension.
See s29(1)

3.2 Assessors

Not less than 10 persons are appointed as Assessors by the Head of State, who acts on the advice of the Judicial Service Commission.

The Registrar keeps the list of Assessors and administers their appointments.

The President or Deputy President selects from the list of Assessors not more than 2 Assessors for each sitting of the Court.

See s31

3.3 Deputy Presidents

The Head of State, acting on the advice of the Judicial Service Commission from time to time, appoints Samoan Judges to be Deputy Presidents.

A Deputy President presides over sittings of the Court, and exercises such other functions of the President in respect of a particular case or matter, as directed from time to time by the President.

When not presiding as Deputy President, every Deputy President sits as a Samoan Judge.

See ss27 and 36(2)

3.4 President

The President is the Chief Justice or a Judge of the Supreme Court.

The President directs the Land and Titles Court.

3.5 Removal from Office

The Head of State, acting on the advice of the Judicial Service Commission, may at any time, by Order, remove a Samoan Judge from office for inability or misbehaviour.

3.6 Resignation

A Samoan Judge may resign his/her office by notice under his/her hand addressed to the Head of State.

See s29(5)

4 Judicial Oath and Ethical Principles

Judges and Assessors of the Land and Titles Court swear the following oath on appointment:

“I swear by Almighty God that I will well and truly serve the Independent State of Samoa in the office of in accordance with the Constitution and the law; and I will do right to all manner of people, without fear or favour, affection or ill will. So help me God.”

This Oath is administered by:

- the President in the case of a Samoan Judge;
- the President or Deputy President in the case of an Assessor.

See ss31 and 31A

The Oath can be divided into parts to illustrate a number of well-established ethical principles of judicial conduct.

4.1 “Well and Truly Serve”

Diligence

Judges should be diligent in the performance of their judicial duties.

- Judges should devote their professional activity to their judicial duties broadly defined, which include not only presiding and sitting in Court and making decisions, but other judicial tasks essential to the Court’s operation.
- Judges should take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for judicial office.
- Judges should endeavour to perform all judicial duties, including the delivery of judgments, with reasonable promptness.
- Judges should not engage in conduct incompatible with the diligent discharge of judicial duties or condone such conduct in colleagues.

4.2 “In Accordance with the Constitution and the Law”

Lawfulness

Judges should act within the authority of the law.

- The exercise of judicial discretion should only be influenced by legally relevant considerations, and Judges should not take into account irrelevant considerations in the course of their duties.
- Judges should not abdicate their discretionary powers to another person.
- Judges should defend the constitutionally guaranteed rights of the Samoan People.

Judicial Independence is also related to this portion of the oath. See “Without Fear or Favour” below.

4.3 “Do Right”

Integrity

Judges should strive to conduct themselves with integrity so as to sustain and enhance public confidence in the Judiciary.

- Judges should make every effort to ensure that their conduct is above reproach in the view of reasonable fair minded and informed persons.
- Judges, in addition to observing this high standard personally, should encourage and support its observance by their judicial colleagues.

4.4 “All Manner of People”

Equality

Judges should conduct themselves and proceedings before them so as to ensure equality according to the law.

- Judges should carry out their duties with appropriate consideration for all persons (for example, parties, witnesses, Court personnel and judicial colleagues) without discrimination.
- Judges should strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnical background, etc.
- Judges should avoid membership in any organisation that they know currently practices any form of discrimination that contravenes the law.
- In the course of proceedings before them, Judges should disassociate themselves from and disapprove of clearly irrelevant comments or conduct by Court staff or any other person subject to the Judge’s direction. Improper conduct can include sexist, racist, or discriminatory language or actions which are prohibited by law.

4.5 “Without Fear or Favour”

Judicial Independence

An independent Judiciary is indispensable to impartial justice under the law. Judges should therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

- Judges must exercise their judicial functions independently and free of extraneous influence.
- Judges must firmly reject any attempt to influence their decisions in any matter before the Court outside the proper process of the Court.
- Judges should encourage and uphold arrangements and safeguards to maintain and enhance the institutional and operational independence of the Judiciary.
- Judges should exhibit and promote high standards of judicial conduct so as to reinforce public confidence which is the cornerstone of judicial independence.

4.6 “Without ... Affection or Ill Will”

Impartiality

Judges must be and should appear to be impartial with respect to their decisions and decision making.

- Judges should strive to ensure that their conduct, both in and out of Court, maintains and enhances confidence in their impartiality and that of the Judiciary.
- Judges should as much as reasonably possible conduct their personal and business affairs so as to minimise the occasions on which it will be necessary to be disqualified from hearing cases.
- The appearance of impartiality is to be assessed from the perspective of a reasonable, fair-minded and informed person.

Judicial Demeanour

While acting decisively, maintaining firm control of the process and ensuring expedition, Judges should treat everyone before the Court with appropriate courtesy.

Civic and Charitable Activity

Judges are free to participate in civic, charitable and religious activities subject to the following considerations:

- Judges should avoid any activity or association that could reflect adversely on their impartiality or interfere with the performance of judicial duties.
- Judges should not solicit funds (except from judicial colleagues or for appropriate purposes) or lend the prestige of judicial office to such solicitations.

- Judges should avoid involvement in causes and organisations that are likely to be engaged in litigation.
- Judges should not give legal or investment advice.

Political Activity

Judges should refrain from conduct which, in the mind of a reasonable, fair minded and informed person, would undermine confidence in a Judge's impartiality with respect to issues that could come before the Courts.

All partisan political activity must cease upon appointment. Judges should refrain from conduct that, in the mind of a reasonable, fair minded and informed person, could give rise to the appearance that the Judge is engaged in political activity.

Judges should refrain from:

- membership in political parties and political fundraising;
- attendance at political gatherings and political fundraising events;
- contributing to political parties or campaigns;
- taking part publicly in controversial political discussions except in respect of matters directly affecting the operation of the Courts, the independence of the Judiciary or fundamental aspects of the administration of justice;
- signing petitions to influence a political decision.

Members of a Judge's family have every right to be politically active. Sometimes this may adversely affect the public perception of a Judge's impartiality. In any case before the Court where there could reasonably be such a perception, the Judge should not sit.

Conflict of interest

Judges should disqualify themselves in any case in which they believe they will be unable to judge impartially.

Judges should disqualify themselves in any case in which they believe that a reasonable, fair minded and informed person would have a personal suspicion of conflict between a Judge's personal interest (or that of a Judge's immediate family or close friends or associates) and a Judge's duty.

Disqualification is not appropriate if:

- the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification; or
- no other Judges are available to constitute a Court to deal with the case or, because of urgent circumstances, failure to act could lead to a miscarriage of justice.

5 Powers

The Land and Titles Court has all the powers inherent in a Court of record and exclusive jurisdiction in all matters and issues, in terms of the tradition, custom and usage of the Samoan people or race. See Part IV: Jurisdiction, for a detailed discussion of the powers of the Court.

6 Inquisitorial Nature

The role of the Judge in the Land and Titles Court is different than the role of the Judge in the other branch of Courts in Samoa.

This difference in role arises because each branch of Court is modelled after a different legal system.

- The Land and Titles Court reflects a type of inquisitorial system.
- The other branch of Courts in Samoa reflects the adversarial system.

Figure 3 shows the differences between an adversarial system and an inquisitorial system.

Figure 3 **Differences Between an Adversarial System and Inquisitorial System**

<h2 style="text-align: center;">Adversarial System</h2>	<h2 style="text-align: center;">Inquisitorial System</h2>
<ol style="list-style-type: none">1. Parties define the issues to be dealt with.2. Parties are in control of what evidence to call.3. Parties, usually represented by a lawyer, present the evidence.4. Parties, or their lawyers, test the other side's evidence.5. The Judge is passive in that he/she does not test either party's evidence nor questions witnesses.6. The Judge ensures strict compliance with procedure and rules of evidence, "leaving" the parties or their lawyers to present their cases.7. Proceedings can often reflect a competitive struggle to win.	<ol style="list-style-type: none">1. The Judge who hears and decides the case is also the person who investigates the case.2. Witnesses are called and examined by the Judge.3. Both sides will reply to the Court once the Court has finished examining the case for either side.4. There is no distinct pre-trial phase where parties' lawyers conduct discovery of witnesses.5. Purpose of the Court is to ascertain the truth rather than "referee" a contest conducted by the parties and their lawyers.6. Less formal rules of evidence.
<p>In Samoa, the District Court, Supreme Court and Court of Appeal are based on the adversarial system</p>	<p>In Samoa, the Land and Titles Court is based on the inquisitorial system. In this way it is unique.</p>