

Land and Titles Court Bench Book

Produced by the Pacific Judicial Education Programme, in collaboration with the Samoan National Judicial Education Committee, and with generous assistance from the governments of Australia, New Zealand and Canada.



Introduction

I am pleased to introduce the first Land and Titles Court Bench Book. It is intended both as a guide to newly appointed Judges and as a useful source of reference to more experienced Judges of the Land and Titles Court.

The constitutional role of the Judiciary, of which Judges of the Land and Titles Court form part, is to administer justice fairly, honestly and impartially on the law and the evidence before it, without external pressure or influence and without fear or interference from anyone. An independent Judiciary is the right of every Samoan.

Judges of the Land and Titles Court, then, have a duty to uphold and defend judicial independence, not as a privilege of judicial office, but as the constitutionally guaranteed right of everyone to have their disputes heard and decided by impartial Judges according to the law.

The Land and Titles Court, which is often referred to as the People's Court, is not without difficulties confronting it in the conduct of its role. Obviously, the Court cannot satisfy everyone. There will be criticisms and complaints from dissatisfied parties, as is noticeable in the increasing number of appeal applications.

With these in view, I advise Land and Titles Court Judges to find time to broaden their awareness, innovation, flexibility and aspirations in enhancing their professional competence and confidence.

Knowledge is the capacity that keeps one free and fearless to carry out one's duty with unwavering commitment. Learning is the key, which is why capacity building, both individually and institutionally, is an on-going process the world over. This Bench Book provides an excellent resource in this endeavour.

The contents of this Bench Book are not designed to provide an exhaustive and comprehensive discussion of the Land and Titles Court's mandate, nor all that a Judge of that Court should know. It includes useful background information, but is primarily designed to provide quick and practical assistance in the conduct of proceedings, and to be easily referred to on the Bench.

The Bench Book is in 8 parts. Parts I and II provide the context in which the Land and Titles Court operates. Parts III to VIII set out the laws and processes governing the operation of the Land and Titles Court and provide guidance and explanation.

Relevant legislation is referred to throughout. All references to legislation are to the Land and Titles Act 1981 unless otherwise stated. It is important to remember that the contents of this Bench Book provide guidance, but are not the law and should not be a substitute for reading the Statutes.

I gratefully acknowledge the initiative and commitment on the part of the Pacific Judicial Education Programme (PJEP) to produce this Bench Book, and the financial backing by the Governments of Australia and New Zealand through their respective aid agencies, AusAID and NZAID. In addition, the assistance provided by the Government of Canada through the Canada Fund, the Department of Foreign Affairs and International Trade as well as the University of Saskatchewan Native Law Centre.

I particularly commend the outstanding work of Senior Judge Fonoivasa Seiuli Ah Ching; Tina Pope, the Bench Book Consultant; and Crystal Reeves, the Legal Researcher. They collaborated tirelessly in true team spirit to prepare and produce this Bench Book.

I appreciate the valuable contributions of PJEP Co-ordinator, Afioga Tagaloa Enoka Puni; PJEP Administration Manager, Mrs Vere Bakani; and the Honourable Justice Lesatele Rapi Vaai, Samoa's PJEP National Co-ordinator.

The Bench Book has been produced in loose leaf format to enable on-going revision and improvement. Comments are invited and should be referred to Judge Fonoivasa Seiuli Ah Ching.

The Honourable Chief Justice Patu F M Sapolu
President of the Land and Titles Court

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PART I

THE CONSTITUTIONAL AND COURT FRAMEWORK OF SAMOA

1 The Constitutional Framework of Samoa

1.1 The Constitution of the Independent State of Samoa Act 1960

Samoa's Constitution was adopted by the people of Samoa through the Constitution Convention of 1960, following a plebiscite in which the majority of the people declared independence to be upon the Matai vote only.

The Constitution establishes Samoa's modern system of government and details its basic elements by defining:

- the organisation and structure of the legal system; and
- the roles, responsibilities and powers of the Executive, Parliament and the Judiciary.

The Constitution embodies the doctrine of the Separation of Powers.

The Doctrine of the Separation of Powers

There should be three distinct and separate branches of government:

1. the Executive: administrator and policy maker;
2. the Parliament (Legislature): law maker;
3. the Judiciary: interpreter of law.

Each branch of government checks the roles and functions of the other branches. This checking maintains the balance of power between the three branches and does not allow the Executive to assume too much power.

The independence of the Judiciary is an important element of the doctrine of the Separation of Powers and is vital for maintaining the balance of power.

Independence of the Judiciary

A pillar of the Constitution is that the Judiciary is independent of all political and other influence.

This independence is protected by:

- processes by which judicial officers are appointed, removed and paid;
- conventions and rules limiting criticism of Judges.

For example, a Judge cannot be removed because of disagreement with a decision. A Judge can be removed only due to extensive misconduct. Judges are immune from civil actions.

1.2 The Branches of Government in Samoa

The Executive

The role of the Executive is to formulate and implement government policy.

The Executive and Parliament are distinct even though they have many people and positions in common.

The Executive of Samoa has four parts:

1. Head of State

O le Ao o le Malo:

- is elected by the Legislative assembly under the provisions of the First Schedule;
- must be qualified to be elected as a Member of Parliament or on resolution of the Legislative Assembly if they do not meet this requirement;
- shall hold office for a term of 5 years;
- generally acts as the ceremonial and diplomatic Head of State;
- calls Parliament together, prorogues or dissolves it on the advice of Ministers of the Government, even though the Head of State is not necessarily bound by such advice in all circumstances;
- assents to Bills;
- appoints Ministers;
- chairs meetings of the Executive Council.

2. Head of Government

Prime Minister:

- is appointed by the Head of State;
- must be a Member of Parliament and have the confidence of the majority of Parliament;
- presides over Cabinet.

A Deputy Prime Minister is appointed and will act when the Prime Minister is temporarily prevented from performing the functions of his office in Samoa.

3. Cabinet

Cabinet of Ministers:

- comprises the Prime Minister and 12 other Ministers appointed by the Head of State on the advice of the Prime Minister;
- makes government policy and conducts the business of government.

4. Executive Council

The Executive Council consists of Head of State, Prime Minister, Deputy Prime Minister and Cabinet.

The Parliament (The Legislature)

Parliament consists of the Head of State together with the Legislative Assembly. It:

- is unicameral, with 49 Members;
- has Members of Parliament who are elected by popular vote;
- serves a five year term.

Parliament's role is to:

- pass laws;
- approve the expenditure of money;
- conduct debates on Bills and enact Statutes;
- provide a forum for political debate.

The Judiciary

The Judiciary is the third branch of government in Samoa. It:

- is an **independent** body which is responsible for interpreting and applying Parliament's laws;
- creates and interprets case law;
- solves disputes of fact and law between individuals as well as between individuals and the State;
- comprises Judges of the Court of Appeal, the Supreme Court, the District Court and the Land and Titles Court.

2 The Court System of Samoa

2.1 General Characteristics of the Samoan Court System

The Samoan Court system has **two branches** (see Figure 1):

- One branch deals specifically with Samoan customary disputes. This is the Land and Titles Court.
- One branch deals with civil and criminal matters and matters relating to the Constitution. This is the Court of Appeal, the Supreme Court and the District Court.

The Samoan Court system is **hierarchical** (see Figure 1):

- This hierarchy is essential to the Doctrine of Precedent, meaning that decisions of a Court higher in the hierarchy are binding on the lower Courts.
- The hierarchy also provides an appeal system which allows decisions to be checked by more senior Courts. This helps prevent inconsistency within the Courts and provides a check and balance system.

2.2 Jurisdiction

Jurisdiction is the power and authority to hear or determine a particular matter. Courts may only act within their jurisdiction, as defined by law.

If a non-Superior Court acts outside its jurisdiction, it is said to be acting *ultra vires* (outside its jurisdiction), which makes the Court's decision invalid on that matter.

An example where a Court would be acting outside its jurisdiction would be if the Land and Titles Court chose to hear a case for murder. The Court that has jurisdiction to hear this type of case in Samoa is the Supreme Court and not the Land and Titles Court.

There are different kinds of jurisdiction in Samoan Courts:

Jurisdiction derived from Statute

A Court's power and authority comes from a Statute. For example, the power and authority given to the Samoan Lands and Titles Court is set out in s34 *Land and Titles Act 1981*.

Inherent jurisdiction

Inherent jurisdiction means that the Court can fill in any gaps left by a Statute or by case law. The Court of Appeal and the Supreme Court have inherent jurisdiction.

Original jurisdiction

This means that a Court is given power to hear certain kinds of cases in the first instance, for example:

- the Supreme Court has been given the power to hear first any cases dealing with fundamental rights;
- the Land and Titles Court has been given the power to hear first any cases related to customary land and titles.

The Constitution has specifically established the Supreme Court and the Land and Titles Court as Courts with original jurisdiction.

Appellate jurisdiction

This is the right of a Court to hear appeals from a lower Court. The Court of Appeal has primarily appellate jurisdiction. The Supreme Court and the Land and Titles Court also have appellate jurisdiction.

Criminal jurisdiction

A crime is:

- the commission of an act that is forbidden by Statute or the omission of an act that is required by Statute;
- an offence against the state.

There are different categories of crime and the penalty provided for a crime determines which Court has jurisdiction to hear and determine the matter.

Criminal prosecutions are generally brought by the State against a person who is alleged to have committed an offence but an individual may also bring a private prosecution.

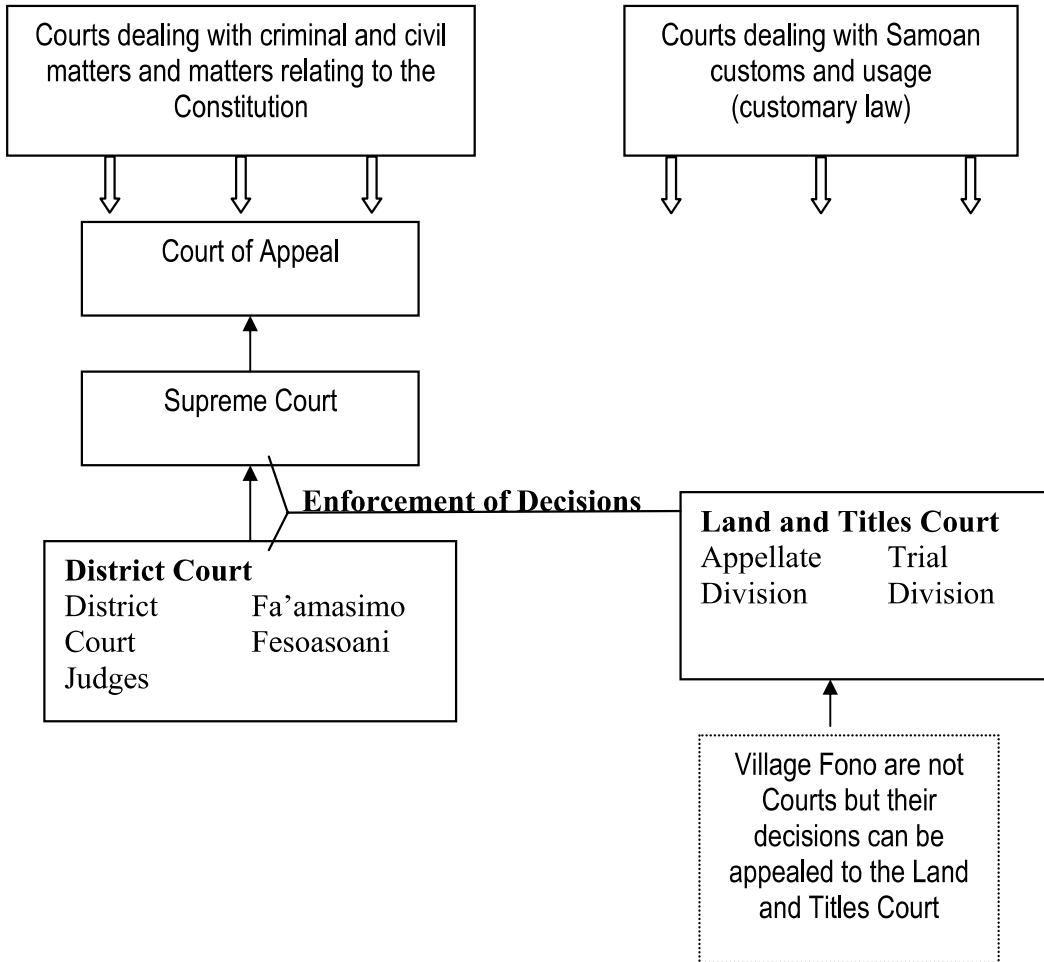
Civil jurisdiction

This covers disputes between individuals and between individuals and the State that are not criminal matters.

2.3 The Structure of the Samoan Courts

Figure 1 on the following page outlines the structure of the Samoan Courts.

Figure 1 **The Structure of the Samoan Courts**



2.4 A Brief Description of the Courts and Village Fono

The Court of Appeal

The Court of Appeal is Samoa's highest Court. It is a superior Court of Record.

The Court of Appeal's general jurisdiction is to hear and determine appeals as provided by Act.

The Court of Appeal may hear and determine **appeals** from the Supreme Court in the following circumstances:

1. The Supreme Court certifies that the case involves a substantial question of law involving the interpretation or effect of any provision in the Constitution. See *In re the Constitution, Taamale v Attorney-General* [1995] WSCA 1 (18 August 1995); C.A. 2/95 B
<http://www.paclii.org/ws/cases/WSCA>
2. The Supreme Court refuses to certify that the case involves a substantial question of law involving the interpretation or effect of any provision in the Constitution, and the Court of Appeal grants special leave.
 - This has the effect of essentially overriding the Supreme Court's refusal to grant a certificate of appeal.
 - *Malifa v Sapolu* [1998] WSCA 1 (4 March 1998); C.A. 6/97 provides an example where the Court of Appeal granted special leave to appeal.
<http://www.paclii.org/ws/cases/WSCA>
3. Proceedings involving Article 4 of the Constitution.
 - Article 4 regards remedies for the enforcement of any fundamental right established by the Constitution.
4. Criminal proceedings have originated in the District Court **and** the Supreme Court has heard the appeal **and** the Court of Appeal grants special leave.

The Court of Appeal may hear and determine proceedings in the **first instance** where the proceedings are removed by order of the Supreme Court. See *Reid v Fiso* C.A. 23 November 2001 for an example of this kind of case.

http://www.vanuatu.usp.ac.fj/paclawmat/Samoa_cases/N-Z/Reid_v_Fiso.html

The Supreme Court

The Supreme Court is a superior Court of Record.

The Supreme Court has unlimited **original** civil and criminal jurisdiction. See:

- *Police v Anesi* [2003] WSSC 3 (28 January 2003) for an example of criminal jurisdiction;and

- *Ah Far v Ah Far* [2003] WSSC 1 (9 January 2003) for an example of civil jurisdiction. Both cases can be found at <http://www.paclii.org/ws/cases/WSSC>

The Supreme Court has **original** jurisdiction over cases dealing with fundamental rights or other constitutional matters.

The Supreme Court may have a question referred by the Head of State, on the advice of the Prime Minister, on a matter relating to the interpretation or effect of any provision of the Constitution which has arisen or is likely to arise in the future. The Court will give its opinion on any question such as this.

The Supreme Court may hear and determine **appeals** in the following circumstances:

1. Civil appeals from a District Court where:

- there has been a decision involving \$1000 or more;
- the title to land is in question.
 - ⇒ In this case they can determine whether land is freehold land, customary land or public land if it is in dispute. See *Board of Trustees of the Congregational Church of Samoa v Pouvi* [2003] WSSC 4 (14 February 2003). <http://www.paclii.org/ws/cases/WSSC>

In this case the defendants, a matai title-holder and his family, claimed that the land they were living on was customary land. The plaintiffs, the Congregational Church of Samoa, argued that the land was freehold land and that they could remove the defendants. At the hearing, the Supreme Court ruled part of the land was freehold land and part of the land was customary land. The Supreme Court used *s31 Judicature Ordinance 1961* to give itself jurisdiction to declare part of the land to be customary land which had been held and used by the defendants in accordance with Samoan custom and usage and customary law;

- leave has been granted by the District Court.

2. Criminal appeals brought by an appellant who has:

- been convicted; or
- had an order made against him/her other than for payment of costs on the dismissal of information.

District Court

The District Court can be constituted by District Court Judges or by Fa'amasino Fesoasoani (assistant District Court Judge).

Court presided over by District Court Judges

The District Court, when presided over by District Court Judges, has jurisdiction to hear and determine:

- any action found in tort or in contract where the debt, demand or damage or value of chattels claimed is not more than \$10,000;
- claims for money recoverable by Statute;
- actions for the recovery of freehold land where the value of land or interest in land does not exceed \$10,000;
- claims in equity where the sum claimed does not exceed \$10,000;
- offences punishable by fine, penalty, forfeiture or a period of imprisonment not exceeding five years.

Customary land is excluded from the District Court's jurisdiction although it can enforce decisions, or sanction breaches of decisions, of the Land and Titles Court.

- See *Leavea v Lavasa* D.C. 14 February 2001.
http://www.vanuatu.usp.ac.fj/paclawmat/Samoa_cases/A-M

Courts presided over by Fa'amasino Fesoasoani

The District Court, when presided over by Fa'amasino Fesoasoani, has jurisdiction to hear and determine:

- any action found in contract or tort where the amount involved does not exceed \$1000;
- actions for recovery of any penalty (except a criminal fine), expense or contribution which is conferred by legislation and the amount claimed does not exceed \$1000;

- criminal matters. Under *s9 District Courts Amendment Act 1992/1993*, a Fa'amasino Fesoasoani may not impose a fine of more than \$1000 and may not impose a sentence of imprisonment instead of a fine unless it is a specific matter under *s39 District Court Acts 1969* or has been granted jurisdiction by the Chief Justice.

Land and Titles Court

The Land and Titles Court is a Court of record established under Article 103 of the Constitution and the Land and Titles Act 1981.

The Land and Titles Court has **original** jurisdiction over:

- all matters relating to Samoan names and titles;
- all claims and disputes relating to customary land and the right of succession to property held in accordance with custom and usage.

The Land and Titles Court has **appellate** jurisdiction over decisions of Village Fono and its own decisions.

Village Fono

A Village Fono is not a Court *per se* but is included here because it is a rule making body whose decisions can be appealed to the Land and Titles Court.

Village Fono have the power to deal with affairs of the village, in accordance with the custom and usage of that village. This authority is limited to persons ordinarily resident in the village.

Acts which are contrary to Samoan customary law may also be subject to criminal or civil proceedings. See for example:

- Criminal proceedings - *Police v Tofa* [1999] WSSC 2 (14 May 1999) and *Police v Pe'e (Sentence)* [2001] WSSC 5 (20 February 2001). http://www.paclii.org/Samoa_cases
- Civil proceedings - *Lemalu Pui'a v Jessop* [1969] WSSC 1 (30 July 1969); [1969] WSLR 214.

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

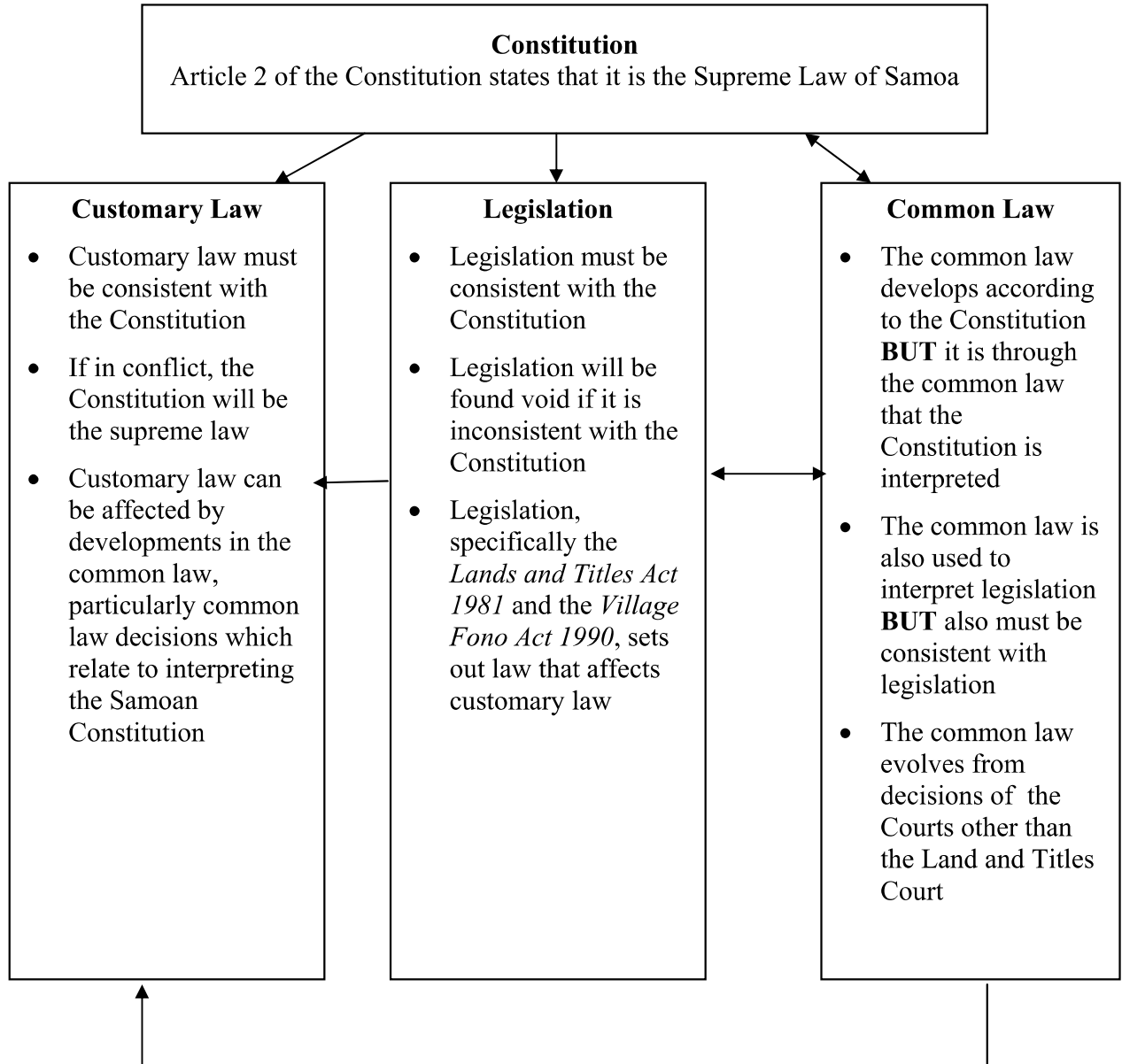
1.5 Customary Law

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".

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. <p>In Samoa, the District Court, Supreme Court and Court of Appeal are based on the adversarial system</p>	<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 Land and Titles Court is based on the inquisitorial system. In this way it is unique.</p>

PART IV

JURISDICTION

1 Jurisdiction

1.1 General

Article 103 of the Constitution requires that the Land and Titles Court has jurisdiction in relation to matai titles and customary land, as provided by any Act.

The Court has all the powers inherent in a Court of record.

See s25(2)

The jurisdiction may be exercised on the petition of anyone claiming a bona fide interest or the Registrar.

See s38

In all proceedings, the Court can exercise its jurisdiction in terms of the petitions before it or in accordance with what it considers to be fair and just between the parties. This gives the Court power to do whatever it considers to be fair and just, so long as it applies:

- custom and usage;
- the law relating to custom and usage;
- the Land and Titles Act and any other enactment that applies to the Court.

See ss37(1) and 37(2)

1.2 Exclusive Jurisdiction

The Court has exclusive jurisdiction over:

4. Samoan names or matai titles

All matters of claims and disputes relating to Samoan names or matai titles, in accordance with custom and usage, which include among other things:

- authority over matai titles;
- rights or obligations attaching to any title;
- defining heirs to matai titles;
- appointments to matai title, including an intention to appoint.

See s34(2)(a) and (b)

5. Customary Lands

All matters of claims and disputes relating to customary lands, in accordance with custom and usage, which include:

- ownership and control;
- right of succession and occupation;
- eviction;

- banishment;
- defining boundaries;
- pulefaamau.
See s34(2)(c)

6. Appeal from decisions by Village Fono

All matters, including:

- punishments;
- other customary disputes/issues;
- decisions relating to hygiene and economic development, even where these are not the village's customs and usage.
See Village Fono Act – s11

7. Hearing appeals from the Land and Titles Court

Any final decision of the Land and Titles Court is subject to appeal by way of rehearing by the Court. Refer to Part VIII: Appeals.

See ss76-89

2 Exercise of Jurisdiction

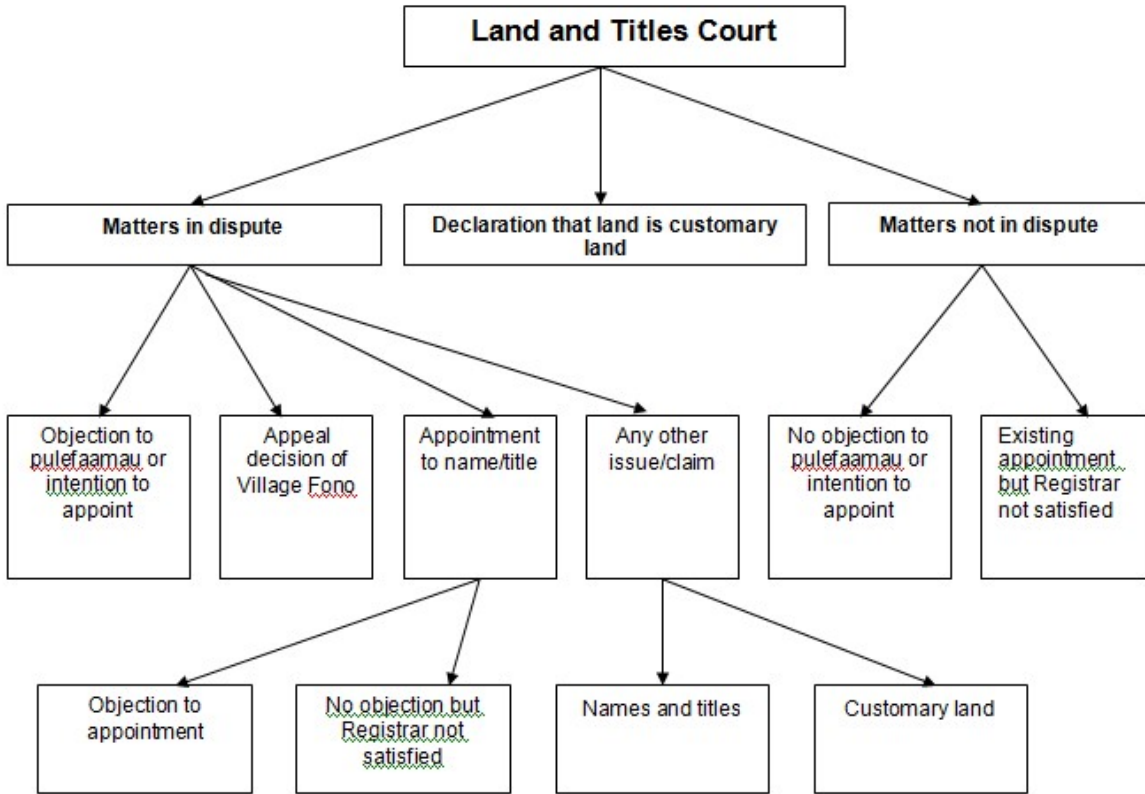
The jurisdiction of the Court is exercised in different ways, depending on which of the following three categories the proceedings fall within:

- matters in dispute;
- matters not in dispute;
- declaration that land is customary land by consent.

2.1 Exercise of Jurisdiction – A Summary

Figure 4 shows the matters that may be heard by the Land and Titles Court.

Figure 4 Matters that May be Heard by the Land and Titles Court



2.2 Proceedings Over Matters in Dispute

Composition of Court

The Court consists of the President or Deputy President and at least four Judges and Assessors, (of whom two or more must be Judges).

See s35

Subject Matter of Proceedings

The subject matter of proceedings can be any customary issue or matter in dispute between two or more parties relating to:

- claims of pulefaamau or a published intention to appoint any person to be a holder of a matai name or title;
- appointments to names or titles;
- any other issue relating to names, titles or customary lands;
- decisions by a Village Fono, including punishments for misconduct.

Jurisdiction

a) Any form of dispute relating to names, titles or customary land

In proceedings relating to names and titles, or rights and obligations attaching to names and titles, where there is a dispute, the Court has jurisdiction to make any order or declaration to preserve or define these, including an order for costs:

- in terms of petitions before it; or
- in accordance with what it considers to be fair and just between the parties.

See ss34(2)(a) and (b); s37(2)

In proceedings relating to customary land, where there is a dispute, the Act is not explicit about what orders the Court may make. By implication, however, the Court has jurisdiction to make any order, including an order for costs:

- in terms of petitions before it; or
- in accordance with what it considers to be fair and just between the parties.

See ss34(2)(c); s37(2)

b) Village Fono decisions or punishments: s11 Village Fono Act 1990

In proceedings relating to decisions, including punishments imposed, by a Village Fono, the Court has jurisdiction to:

- allow the appeal and the original decision becomes null and void;
- dismiss the appeal;
- refer the decision back to the Village Fono for reconsideration. Note that there is no further right of appeal against the Village Fono's decision if the Court refers it back for reconsideration.

The Court may act in terms of petitions before it, or in accordance with what it considers to be fair and just between the parties.

Note that the Court has no power or jurisdiction to impose any punishment or penalty or to substitute one punishment or penalty for another in cases of appeal against a Village Fono decision.

See ss37(1) and 37(2); s11 Village Fono Act 1990

2.3 Proceedings Over Matters Not in Dispute

Composition of the Court

The Court consists of the President or Deputy President alone and with just one party present (ex parte).

See ss19 and 22(9)

Subject matter of proceedings

The subject matter of proceedings can be:

- claims of pulefaamau or a published intention to appoint any person to be a holder of a matai name or title, where no valid objection has been lodged at the expiry date of the statutory three month publication period;
- existing names and titles where the Registrar later becomes satisfied that the original appointment was not made in accordance with customs and usages.

See ss19 and 22(9)

Jurisdiction

The Court (sitting without Samoan Judges or Assessors) has jurisdiction, *ex parte*, to:

- confirm, wholly or in part and with or without modification, any uncontested *pulefaamau* claim or the making of any appointment where the notification of the intention to appoint is uncontested;
- determine whether a name or title is to be deleted from the Register of Matais.

The Court may act in terms of petitions before it, or in accordance with what it considers to be fair and just between the parties.

See ss19, 22(9) and 37(2)

2.4 Declaration that Land is Customary Land by Consent

Composition of the Court

The Court consists of the President or Deputy President and at least four Judges and Assessors, (of whom two or more must be Judges).

See s35

Subject matter of proceedings

The subject matter of proceedings can be:

- any freehold land;
- any land in respect of which the customary or freehold status is claimed to be in doubt.

Jurisdiction

The Court may declare land to be customary land, only by consent of all persons listed *in ss9(3) and (4)*.

See s9

The Court has jurisdiction to make any order (including an order for costs):

- in terms of petitions before it; or
- in accordance with what it considers to be fair and just between the parties.

See section 37(2)

3 Adjourments

Generally, it is within the jurisdiction of the Court to adjourn proceedings on any matter, in the interest of justice and with such conditions as it thinks fit.

See s39(2)

Because of a steadily growing increase in the volume of cases, the question of adjournment should be considered with care, reasonableness and fairness.

Remember, justice delayed is no justice at all.

If parties request an adjournment, they must pay a prescribed fee.

Note that the Court can adjourn proceedings to enable verification of land status by the Land Titles Investigation Commission.

See s9(6)

4 Surveys

It is within the jurisdiction of the Court to order a survey of customary land which is the subject of proceedings:

- either before commencement of proceedings; or
- by Order as part of its final decision.

5 Land Inspections

Land inspections form the integral part of many proceedings relating to customary land. Inspections assist the Court in:

- weighing the evidence adduced by each party;
- making findings of facts for the purpose of its final decision.

6 Interim Orders

By the President

The President has discretionary power to make such interim orders as he thinks fit as to:

- the possession of land;
- the using of a matai title;
- the exercise of the right to which the petition relates.

The exercise of this discretionary power becomes operative upon the commencement of any proceedings and pending the final determination of the petition to the Court.

See s49

By the Registrar with the concurrence of the President or two Samoan Judges

The Registrar has discretionary power to make such interim orders, with the concurrence of the President or two Samoan Judges, restraining any Samoan from:

- remaining in possession of or entering upon any land;
- holding or using any Samoan name or title;
- exercising any right or doing any act, matter or thing concerning or affect only customary land or Samoan names or titles.

The Registrar should confer with either the President or two Judges, giving them the full information and surrounding circumstances giving rise to the need for an interim order.

Judges should ensure that they have full information before concurring.

The Registrar may exercise his/her discretion where:

- a dispute has arisen between Samoans;
- the dispute is likely to be the subject matter of Court proceedings;
- Court proceedings have not commenced as no petition has been filed.

Any interim orders by the Registrar remain in full force until the final judgment of the Court.

The President however has discretion to vary, modify or rescind any such interim order made under s50, after the commencement of proceeding, on application by any party affected by the Order.

Before the commencement of the proceedings, the Registrar at any time can make, modify, vary or rescind the order upon application by any person(s) affected by such an Order.

7 Unpublished Petitions

The Court has a discretionary power with regards to unpublished petitions.

Section 46 states that a petition, which has not been notified in the Savali, cannot be heard, except by leave of the Court given on terms and conditions the Court may impose.

The exercise by the Court of its discretion to dispose of any unpublished petition must be made with extreme caution and flexibility. This is because the decisions of the Court will be binding on those who have an interest in the matter, even if they have not had notice of the matter.

- For example, someone living in another country or the unborn may be affected by a decision of the Land and Titles Court. If the petition is not published, these individuals will not be able to respond. This will affect their right to be heard and right to a fair trial.

Some examples of unpublished petitions for the exercise of the Court's discretion:

- Petition by Registrar relating to pulefaamau or proposed appointment that has been published for 3 months and no objection lodged.
See ss14,15,16,18
- Petition by a new appointee to a matai title. The appointment has been published in the Savali for 3 months and no objection lodged, but the Registrar has given written notice declining recognition of the new appointee as rightful holder.
See ss23(6),(7),(8)
- Petition by any party additional to a petition already published.
- Petition by any party in reply to a petition by any other party already published.
- Petition by any villager against a decision imposed by a Village Fono.
See s11 Village Fono Act 1990
- Petition relating to the eviction of any person from occupation of customary land.
- Petition relating to banishment.

8 Appeals

Refer to Part VIII: Appeals, below.

PART V

PROCEDURES

1 Introduction

The procedure of the Land and Titles Court is governed by the *Land and Titles Act 1981*.

In any matter of practice or procedure not provided for, or where the strict compliance with any rule of practice or procedure may be inequitable or inconvenient, the Court may act in such manner as it considers to be most consistent with natural justice and convenience.

Proceedings are commenced by way of petition prepared by the Registrar, the petitioner, or his/her solicitor.

As all people having an interest in the land or matai title in question will be bound by the Court's decision, notice of the proceedings is very important, therefore:

- the petition is served on all known parties; and
- all petitions are published in the government newspaper, the Savali, including details and date of Court sitting.

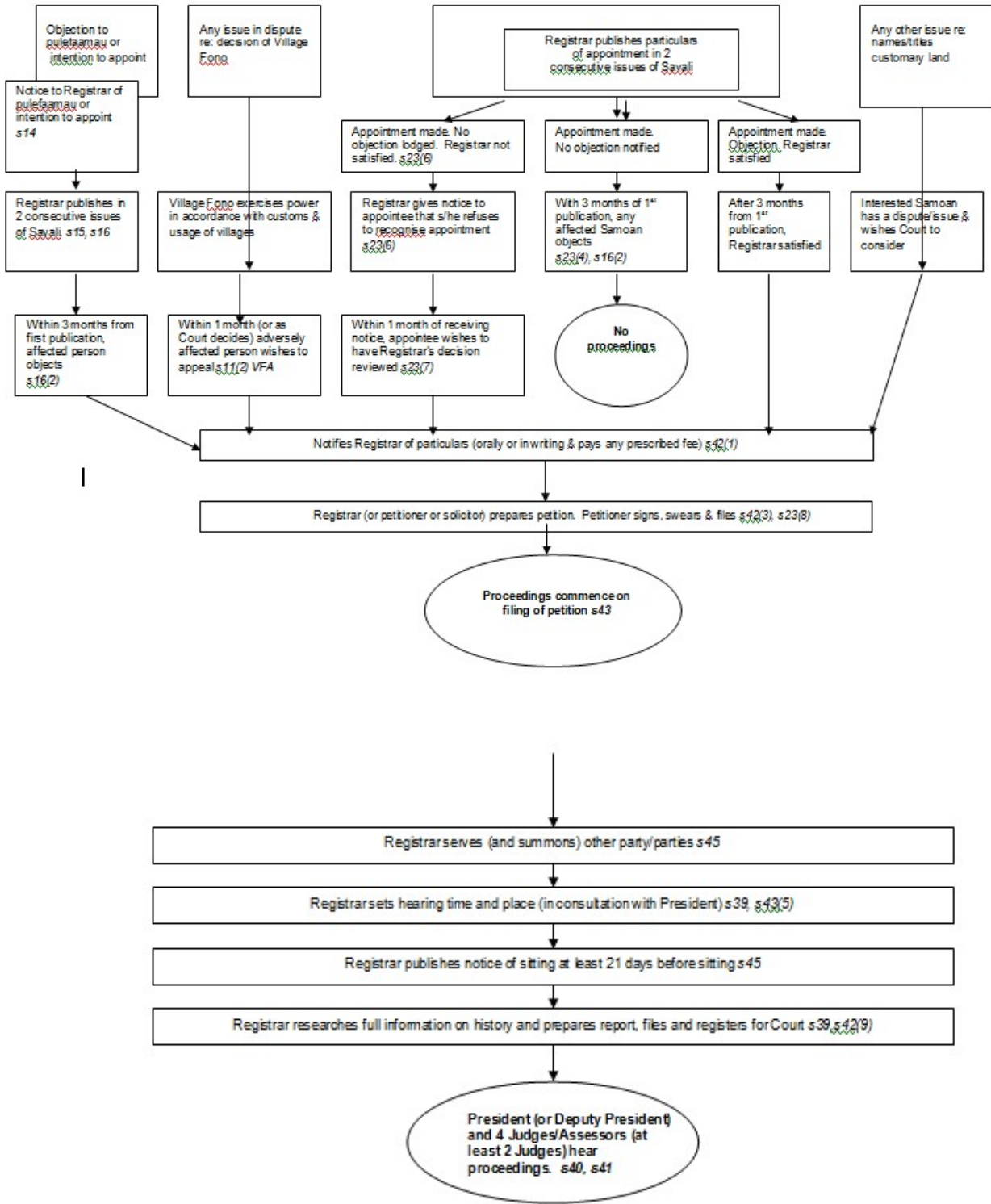
2 Pre-Hearing Processes

This section shows the processes leading up to the sitting of the Court.

2.1 Pre-Hearing Process for Matters in Dispute

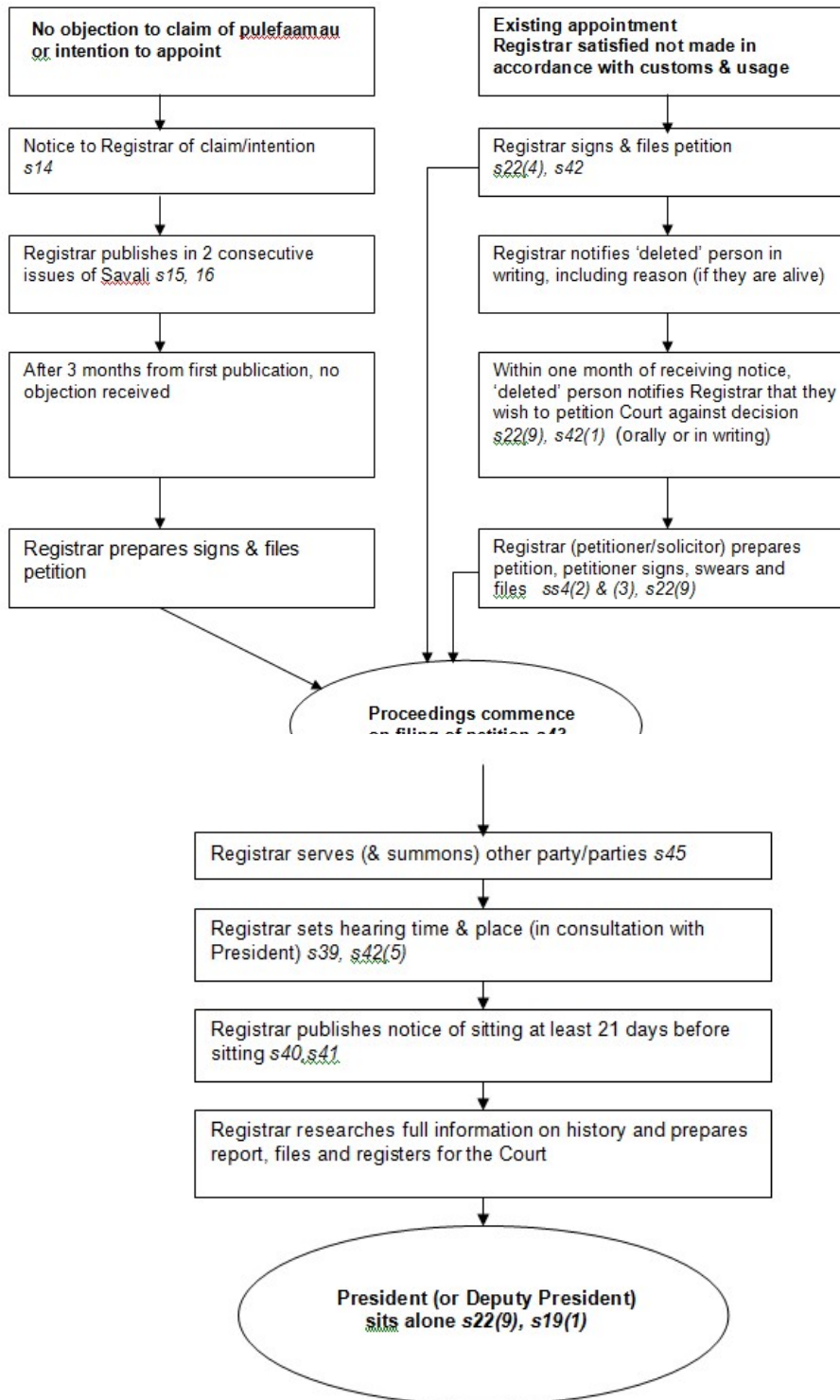
The diagram on the following page shows the pre-hearing processes for matters in dispute.

Figure 5 Pre-Hearing Process for Matters in Dispute



2.2 Pre-Hearing Process Where There is No Dispute

Figure 6 Pre-Hearing Process for Matters Where There is No Dispute



3 Reference Guide to Various Proceedings

The following pages are intended as quick reference guides for each type of proceeding. These pages detail:

- where the Court's jurisdiction comes from;
- how proceedings are initiated;
- who may apply;
- composition of the Court;
- what the Court can do;
- whether there is a right of appeal.

Further guidance is given where appropriate.

3.1 Claim of Pulefaamau or Intention to Appoint – Objection Filed

Where jurisdiction comes from *s34(2).*

Pre-hearing process Notice is given to Registrar of claim of pulefaamau or intention to appoint a person to be a holder of a matai name or title, and pays prescribed fee – *s14*.

If Registrar is satisfied the claim or intention is bona fide and the fee is paid, Registrar publishes claim or intention in 2 consecutive issues of the Savali in prescribed form, including time and place objections by affected persons may be lodged - *ss15, 16*.

Within 3 months from 1st publication, an affected person objects – *s16(2)*, and notifies Registrar of particulars (orally or in writing) and pays prescribed fee – *s42(1)*.

Registrar prepares petition (in the prescribed form) – *ss 17, 42(2)*.

Registrar arranges service of the petition on every party to the proceedings, including a summons to respondents requiring them to appear at the hearing – *s45*.

Registrar consults the President and sets the time and place of the sitting – *ss39, 42(5)*.

Registrar publishes notice of sitting in Savali (at least 21 days before sitting commences), stating:

- time and place;
- names of parties to each petition; and
- nature of relief sought – *ss40, 41*.

Who may apply? Any Samoan who may be affected by the claim or appointment – *s17*.

Composition of Court President (or Deputy President) and at least 4 Judges and Assessors (at least 2 of whom are Judges) – *s35*.

What the Court can do

The Court can make any orders or declarations in relation to names, titles and customary land – *s34(2)*.

The Court can decide all matters in accordance with what it considers to be fair and just between the parties. They are not limited to terms of petition – *s37(2)*

Is there a right of appeal?

Yes – *s76(1)*. Must have leave of President – *s78*.

Note the limitations regarding costs and interim orders – *ss72, 49, 50*.

Note *s71* states that decisions are not reviewable by another Court. However, there are cases where the Supreme Court has reviewed decisions of the Land and Titles Court in relation to matters of fundamental rights.

See Part VIII: Appeals, below.

Additional guidance

Refer to Part VI: Managing Proceedings and Part VII: Decision Making, below.

3.2 Claim of Pulefaamau or Intention to Appoint – No Objection

Where jurisdiction comes from *s19.*

Pre-hearing process Notice is given to Registrar of claim of pulefaamau or intention to appoint a person to be a holder of a matai name or title, and pays prescribed fee – *s14.*

If Registrar is satisfied the claim or intention is bona fide and the fee is paid, Registrar publishes claim or intention in 2 consecutive issues of the Savali in prescribed form, including time and place objections by affected persons may be lodged - *ss15, 16.*

If no objection is received within 3 months from 1st publication, Registrar prepares, signs and files a petition to the Court for confirmation of the claim or appointment – *s18.*

Registrar prepares petition in the prescribed form – *ss17, 42(2).*

Registrar consults the President and sets the time and place of the sitting – *ss39, 42(5).*

Registrar publishes notice of sitting in Savali, at least 21 days before sitting commences, stating:

- time and place;
- names of parties to each petition; and
- nature of relief sought – *ss40, 41.*

Who may apply? Any person who claims a pulefaamau or notifies an intention to appoint initiates this process, but it is the Registrar who files the petition – *s18.*

Composition of Court President (or Deputy President) alone – *s19(1).*

What the Court can do Confirm claim or appointment, wholly or in part, with or without modification – *s19(1)*, although any claim or proposed appointment confirmed by the Court may be set aside for reason of error, misconduct or bad faith – *s19(2).*

Is there a right of appeal?

Yes – *s76(1)*. Must have leave of President – *s78*.

Note any claim or appointment confirmed under *s19* may be set aside for reasons of:

- error;
- misconduct;
- bad faith.

Note the limitations regarding costs and interim orders – *ss72, 49, 50*.

Note *s71* states that decisions are not reviewable by another Court. However, there are cases where the Supreme Court has reviewed decisions of the Land and Titles Court in relation to matters of fundamental rights.

See Part VIII: Appeals, below.

Additional guidance

Refer to Part VI: Managing Proceedings and Part VII: Decision Making, below.

3.3 Appeal from Decision of Village Fono

Where jurisdiction comes from *s11(1) Village Fono Act 1990.*

Pre-hearing process Village Fono exercises its power/authority in accordance with the customs and usage of the village, including:

- making rules for the maintenance of hygiene and regarding economic development – even if not part of their customs and usage;
- punishments.

Adversely affected person gives oral or written notice of the matter of appeal to Registrar – *ss11(7) Village Fono Act; s42(1).*

Registrar prepares petition (in the prescribed form) – *s42(2).*

Petitioner signs, swears and files the petition – *s42(3).*

Registrar arranges service of the petition on every party to the proceedings, including a summons to respondents requiring them to appear at the hearing – *s45.*

Registrar consults the President and sets the time and place of the sitting – *ss39, 42(5).*

Registrar publishes notice of sitting in Savali (at least 21 days before sitting commences), stating:

- time and place;
- names of parties to each petition; and
- nature of relief sought – *ss40, 41.*

Who may apply? Any person adversely affected by a decision of a Village Fono (including punishment) – *s11(1) Village Fono Act.*

Composition of Court President (or Deputy President) and at least 4 Judges and Assessors (at least 2 of whom are Judges) – *s35.*

What the Court can do

The Court may:

- allow the appeal and the original decision becomes null and void;
- dismiss the appeal;
- refer the decision back to the Village Fono for reconsideration. Note that there is no further right of appeal against the Village Fono's decision if the Court refers it back for reconsideration.

The Court may act in terms of petitions before it, or in accordance with what it considers to be fair and just between the parties - *s37(2)*.

NOTE: the Court has no power or jurisdiction to impose any punishment or penalty or to substitute one punishment or penalty for another in cases of appeal against a Village Fono decision - *s11(6) Village Fono Act*.

Is there a right of appeal?

Yes – *s76(1)*. Must have leave of President – *s78*.

See *s11(6) Village Fono Act* for the exception to the ability to appeal.

Note the limitations regarding costs and interim orders – *ss72, 49, 50*.

Note *s71* states that decisions are not reviewable by another Court. However, there are cases where the Supreme Court has reviewed decisions of the Land and Titles Court in relation to matters of fundamental rights.

See Part VIII: Appeals, below.

Additional guidance

Refer to Part VI: Managing Proceedings and Part VII: Decision Making, below.

3.4 Appointments to Names or Titles

Where jurisdiction comes from *s34(2); s23.*

Pre-hearing process Within 7 days of traditional appointment ceremony, new appointee must give notice in writing to Pulenu'u of the village, and to the Registrar – *s23(1)*.

Within 14 days of learning of traditional appointment ceremony, Pulenu'u must ascertain that the title belongs to the village, and record the particulars of the appointment (a copy of which must be kept for 10 years). A copy is given to the appointee and the original is forwarded to the Registrar – *s23(2)*.

Registrar publishes particulars of the appointment in 2 consecutive issues of the Savali, including a notice fixing the time and place at which objections to the appointment may be lodged (not less than 3 months from date of first publication) – *s23(4), s16*.

No objection:

If Registrar is satisfied that:

- title belongs to the village;
- traditional ceremony held; and
- appointment complies with customs and usages,

then the Registrar issues certificate to new appointee and enters name into Register of Matais – *s23(6)*. There are no proceedings before the Court.

Objection lodged:

Any interested Samoan gives oral or written notice of the matter in dispute to Registrar – *s42(1)*.

Registrar prepares petition (in the prescribed form) – *s42(2)*.

Petitioner signs, swears and files the petition – *s42(3)*.

Registrar arranges service of the petition on every party to the

proceedings, including a summons to respondents requiring them to appear at the hearing – *s45*.

Registrar consults the President and sets the time and place of the sitting – *ss39, 42(5)*.

Registrar publishes notice of sitting in Savali (at least 21 days before sitting commences), stating:

- time and place;
- names of parties to each petition; and
- nature of relief sought – *ss40, 41*.

No objection, but Registrar not satisfied:

If no objection is received within the time limit but the Registrar is not satisfied that:

- title belongs to the village; or
- traditional ceremony held; or
- appointment complies with customs and usages,

then the Registrar gives notice to the ‘appointee’ that he/she refuses to recognise the appointment (and makes sure that the names are not entered into the Register of Matais) – *s23(6); s23(9)*.

Within 1 month of receiving the notice, if the ‘appointee’ wishes to have the decision of the Registrar reviewed by the Court, he/she notifies the Registrar of the particulars of the matter (orally or in writing) and pays any prescribed fee – *s42(1)*.

Registrar prepares petition (in the prescribed form) – *s42(2)*.

Petitioner signs, swears and files the petition – *s42(3); s23(8)*.

Registrar arranges service of the petition on every party to the proceedings, including a summons to respondents requiring them to appear at the hearing – *s45*.

Registrar consults the President and sets the time and place of the sitting – *ss39, 42(5)*.

Registrar publishes notice of sitting in Savali (at least 21 days

before sitting commences), stating:

- time and place;
- names of parties to each petition; and
- nature of relief sought – *ss40, 41*.

Who may apply?

Objection lodged:

Any interested Samoan – *s34(2)*; any Samoan who may be affected - *s16(2)*.

No objection, but Registrar not satisfied:

The ‘appointee’ – *s23(7)*.

Composition of Court

President (or Deputy President) and at least 4 Judges and Assessors (at least 2 of whom are Judges) – *s35*.

What the Court can do

Court can make any orders or declarations in relation to names, titles and customary land – *s34(2)*.

The Court can decide all matters in accordance with what it considers to be fair and just between the parties. They are not limited to terms of petition – *s37(2)*.

Is there a right of appeal?

Yes – *s76(1)*. Must have leave of President – *s78*.

Note the limitations regarding costs and interim orders – *ss72, 49, 50*.

Note *s71* states that decisions are not reviewable by another Court. However, there are cases where the Supreme Court has reviewed decisions of the Land and Titles Court in relation to matters of fundamental rights.

See Part VIII: Appeals, below.

Additional guidance

Refer to Part VI: Managing Proceedings and Part VII: Decision Making, below.

3.5 Any Other Issue re: Names or Titles and Customary Land

Where jurisdiction comes from *s34(2).*

Pre-hearing process Any dispute arises relating to names and titles, or customary lands, that cannot be resolved between the parties.

Any interested person who wishes the Court to consider the matter gives oral or written notice of the matter in dispute to Registrar – *s42(1)*.

Registrar prepares petition (in the prescribed form) – *s42(2)*.

Petitioner signs, swears and files the petition – *s42(3)*.

Registrar arranges service of the petition on every party to the proceedings, including a summons to respondents requiring them to appear at the hearing – *s45*.

Registrar consults the President and sets the time and place of the sitting – *ss39, 42(5)*.

Registrar publishes notice of sitting in Savali (at least 21 days before sitting commences), stating:

- time and place;
- names of parties to each petition; and
- nature of relief sought – *ss40, 41*.

Who may apply? Any interested Samoan – *s42(1)*.

Composition of Court President (or Deputy President) and at least 4 Judges and Assessors (at least 2 of whom are Judges) – *s35*.

What the Court can do Court can make any orders or declarations in relation to names, titles and customary land – *s34(2)*.

The Court can decide all matters in accordance with what it considers to be fair and just between the parties. They are not limited to terms of petition – *s37(2)*.

Is there a right of appeal?

Yes – *s76(1)*. Must have leave of President – *s78*.

Note the limitations regarding costs and interim orders – *ss72, 49, 50*.

Note *s71* states that decisions are not reviewable by another Court. However, there are cases where the Supreme Court has reviewed decisions of the Land and Titles Court in relation to matters of fundamental rights.

See Part VIII: Appeals, below.

Additional guidance/comments

Refer to Part VI: Managing Proceedings and Part VII: Decision Making, below.

3.6 Deleting Name or Title from Register of Matais

Where jurisdiction comes from *s42(2); s22.*

Pre-hearing process Where the Registrar is satisfied that an existing appointment was not made in accordance with custom and usage, he or she prepares, signs and files petition for the Court to determine whether or not the name or title should be deleted from the Register – *s22(4); s42.*

The Registrar notifies the ‘deleted’ person in writing of the deletion and reasons (if he/she is still alive) – *s22(8).*

Registrar arranges service of the petition on every party to the proceedings, including a summons to respondents requiring them to appear at the hearing – *s45.*

Registrar consults the President and sets the time and place of the sitting – *ss39, 42(5).*

Registrar publishes notice of sitting in Savali (at least 21 days before sitting commences), stating:

- time and place;
- names of parties to each petition; and
- nature of relief sought – *ss40, 41.*

Within 1 month of receiving notice, the ‘deleted’ person notifies the Registrar that they wish to petition the Court against the deletion of their name or title (orally or in writing) - *s22(9); s42(1).*

Registrar prepares petition (in the prescribed form) – *s42(2).*

Petitioner signs, swears and files the petition – *s42(3).*

Who may apply? The Registrar and the ‘deleted’ person – *ss22(8) and (9).*

Composition of Court President sitting alone – *s22(9).*

What the Court can do Court can make any orders or declarations in relation to names, titles and customary land – *s34(2)*.

The Court can decide all matters in accordance with what it considers to be fair and just between the parties. They are not limited to terms of petition – *s37(2)*.

Is there a right of appeal? Yes – *s76(1)*. Must have leave of President – *s78*.

Note the limitations regarding costs and interim orders – *ss72, 49, 50*.

Note *s71* states that decisions are not reviewable by another Court. However, there are cases where the Supreme Court has reviewed decisions of the Land and Titles Court in relation to matters of fundamental rights.

See Part VIII: Appeals, below.

Additional guidance/comments Refer to Part VI: Managing Proceedings and Part VII: Decision Making, below.

3.7 Declaration that Land is Customary Land

Where jurisdiction comes from *s9.*

Pre-hearing process Any person or the Ali'i and Faipule of village claims interest in:

- freehold land; or
- land in which the customary or freehold status is claimed to be in doubt.

Notifies Registrar of particulars of claim (orally or in writing) and pays prescribed fee – *s9(1); s42(1).*

Registrar publishes the petition in 2 consecutive issues of Savali, giving notice of time and place for filing objections at least 3 months from 1st publication – *s9(2).*

Any Samoan affected by the petition may lodge an objection within the timeframe – *s9(2).*

Registrar arranges service of the petition on every party to the proceedings, including a summons to respondents requiring them to appear at the hearing – *s45.*

Registrar consults the President and sets the time and place of the sitting – *ss39, 42(5).*

Registrar publishes notice of sitting in Savali (at least 21 days before sitting commences), stating:

- time and place;
- names of parties to each petition; and
- nature of relief sought – *ss40, 41.*

Who may apply? Any person or the Ali'i and Faipule of village who claims interest in freehold land or land in which the customary or freehold status is claimed to be in doubt – *s9(1).*

Composition of Court President (or Deputy President) and at least 4 Judges and Assessors (at least 2 of whom are Judges) – *s35.*

What the Court can do

Make (or decline to make) a declaration that land is customary land, by consent – *s9*; *s34(2)*.

Note the Court may also:

- separately consider questions of matai title or pule after making such a declaration – *s9(7)*.
- adjourn proceedings so that an objector may make a claim of freehold interest to the Land Titles Investigation Commission, and wait for its decision – *s9(6)*.

Note the limitations to the Court’s power in *ss9(3) and (4)* – in effect, all people with any interest in the land must consent to the declaration that the land is customary land (except where their claim to a freehold interest has been rejected by the Commission) – *s9(5)*.

Is there a right of appeal?

Yes – *s76(1)*. Must have leave of President – *s78*.

Note the limitations regarding costs and interim orders – *ss72, 49, 50*.

Note *s71* states that decisions are not reviewable by another Court. However, there are cases where the Supreme Court has reviewed decisions of the Land and Titles Court in relation to matters of fundamental rights.

See Part VIII: Appeals, below.

Additional guidance/comments

Refer to Part VI: Managing Proceedings and Part VII: Decision Making, below.

PART VI

MANAGING PROCEEDINGS

1 Introduction

Hearings follow procedures that are a combination of Samoan custom and Court convention:

- Parties are required to submit written summaries of their arguments in advance.
- Court officials seek to mediate.
- Parties do not cross-examine one another.
- Lawyers are not permitted to appear.
- The Court applies custom and usage and law relating to the application of custom and usage.
- Where such custom and usage does not apply, the Court acts as it considers fair and just.

2 Preparing for a Case

2.1 Role of the Registrar and Staff

All things being ready (petitions prepared, signed, sworn, filed, published and served on all other parties, and the date, time and place of hearing duly notified, in accordance with the requirements of the law), the Registrar and staff:

- conduct a thorough and methodical research of the full information on the history of the matters in dispute and forming the basis of proceedings;
- prepare and distribute to sitting members of the Court, at least 3 clear days prior to the hearing, a comprehensive and factual report on the background of the case, including:
 - certified true copies of every petition;
 - certified true copies of previous related decisions;
 - written related agreements;
 - notices of publications, e.g. pulefaamau, leases and the like;
 - maps, plans of survey carried out or sketch plans prepared during office inspections, where land is the matter in dispute;
- make available all related files and registers for perusal and examination by the Court;
- immediately inform the Court on any development likely to affect the hearing of the case, e.g. the non-service of documents or notices on parties;

- generally provide administrative support service including, among other things:
 - ⇒ traditional welcoming of parties and the public;
 - ⇒ swearing of parties;
 - ⇒ collecting written statements from parties;
 - ⇒ reading party statements in open Court;
 - ⇒ taking full notes of proceedings;
 - ⇒ interpreting aspects of proceedings where necessary.

2.2 Judge's Preparations Before Proceedings Begin

- Ensure you have studied and understood:
 - ⇒ the contents of the Registrar's report on the history of the case;
 - ⇒ all the petitions forming the basis of the hearing.
- Identify the issues in dispute and the relief sought.
- Peruse all related files.
- Make note of precedents, existing relevant decision and other important information and their significance to the present case.
- Study and marshal the information contained in statements by each party.

3 Forms of Hearings

All hearings in the Land and Titles Court are formal, whether they involve just a single party, or two or more parties.

All such hearings are to be conducted in a Courtroom. However, in proceedings relating to land disputes, part of the hearing will have to be conducted on the land in question, where inspection by the Court of that land is necessary.

The Court may comprise:

- the President or a Deputy President sitting alone. This will be in proceedings involving a single party; or
- the President or Deputy President and at least four Judges and Assessors (at least two of whom are Judges). This will be in proceedings involving two or more parties.

All references elsewhere in this Benchbook on the collective role of Judges in the conduct of a hearing relate equally to the President or Deputy President sitting alone for all practical purposes.

The President or Deputy President presiding has discretion to require additional Judges and Assessors in respect of any hearing, if considered necessary in the interest of justice, or if the importance of the case requires it.

The Court composition for the hearing of any case cannot be changed until the Court has given its final decision.

Every Judge and Assessor, hearing the case has an equal voice in all aspects of the hearing.
See ss35 and 63

4 Rules

4.1 Rules of the Court

In the absence of specific rules made, the rules of the Supreme Court determine the practice and procedure of the Land and Titles Court, unless inconsistent with or inapplicable to the matters within the jurisdiction of the Land and Titles Court.

See s47 and 48

In any matter of practice and procedure not provided for, or where strict compliance with any rule of practice and procedure may be inequitable or inconvenient, the Court has discretion to act in each case in such a manner as it considers being most consistent with natural justice and convenience.

See s47(2)

4.2 Supreme Court Rules

The rules of the Supreme Court, as in any other Court of law, are many, diverse and complicated.

Most rules relating to procedures, burden of proof, standard of proof, Judges' rules, types of evidence and their admissibility may not be applicable to proceedings in the Land and Titles Court.

It is essential, however, that the principles of judicial conduct and ethical principles are taken into account by the Court. Refer to Part III, section 4: Judicial Oath and Ethical Principles, above.

5 Court Protocol

The Court Clerk precedes the full panel into the Courtroom, calling out “All stand for their Honours” or words to that effect. If there is no orderly, normally a Police Officer is available.

You walk up to the Bench in a dignified manner, face the public, then bow first to the presiding President/Deputy President and then to the public.

You then sit down, and the public sit down.

The presiding President/Deputy President or a designated member of the Bench says a prayer.

The Court clerk announces “This Court is now open,” and carries on with the traditional welcoming of parties and the public who will reciprocate the salutations.

6 The Hearing Process

The Court Clerk reads out all the petitions.

The Chair calls upon each petitioner for confirmation of his/her petition, and then:

- addresses and rules on any preliminary matter raised by any party, for example, amending a petition, unavailability of party leader, adjournment, etc, unless he considers that circumstances warrant discussion of any such matter by the full Bench;
- admits the inclusion of additional parties upon application;
- announces the order in which parties will be called;
- ascertains from each party the names of their leaders and witnesses.

The Court Clerk administers the Oath of Truth on each party.

7 Conducting the Hearing

7.1 Principle that Affected Parties have the Right to be Heard

It is a well established principle, evolved from common law, that parties and the people affected by a decision should have a full and fair opportunity to be heard before the decision is made.

This principle focuses on the procedural steps implemented by the Courts. The purpose of the principle is to ensure that the Court considers all relevant information before making a decision.

There are two aspects of the principle:

- Prior notice: the Court should be satisfied that adequate notice has been given, as prescribed by law, except in the exceptional case of unpublished petitions. This is particularly important in the Land and Titles Court as decisions can affect many other people besides those who come before the Court.
- Fair hearing: the way the hearing is managed and the way witnesses are examined is extremely important for ensuring that the parties have the opportunity to be heard.

Before a hearing is concluded, the Court should ask itself, has each party had a fair opportunity to state his or her case?

7.2 The Role of President or Deputy President: The Chair

The role of the President or Deputy President presiding is to manage the proceedings. From the perspective of the public and all before the Court, he/she is in charge of the Courtroom. This involves:

- handling all procedures;
- making all pronouncements;
- dealing with any difficult litigant, witness or the public;
- ensuring all before the Court understand what is going on;
- ensuring all before the Court are treated with respect;
- structuring and guiding any discussion in Court, and ensuring discussions are purposeful and relevant;
- ensuring that all other members of the Bench have the opportunity to be heard.

7.3 Role of Judges and Assessors

The role of Judges and Assessors involves:

- appropriately drawing the Chair's attention to particular matters of significance or procedure;
- conducting the examination of parties and witnesses;
- working in partnership with the Chair and other bench members;
- prompting search for new information referred to by any party.

7.4 Role of Registrar and Staff

The role of the Registrar and staff in a hearing involves:

- reading out petitions and parties' written statements;
- administering the Oath of Truth on each party;
- responsibility for taking notes and keeping the record of the proceedings, including the names of party leaders and witnesses and the full script of the evidence;
- typing final decisions and ensuring strict confidentiality of those decisions before pronouncement;
- attending to any other arrangement relating to the hearing as the Court may direct.

7.5 The Role of the Parties

The role of each party involves:

- presenting themselves at the hearing;
- tending their written statements to the Clerk of the Court on the date of hearing, and in good time before proceedings begin;
- informing the Court of their leader and witnesses;
- presenting their case including the production of any documentary evidence;
- answering questions by members of the Bench during examination;
- making statements (written or oral) in reply to issues or matters raised by other parties.

8 Courtroom Conduct for Judges

Judges should exhibit a high standard of conduct so as to reinforce public confidence in the Judiciary, which is the cornerstone of judicial independence.

- Be courteous and patient.
- Be dignified.
- Be humble:
 - ⇒ If a mistake is made you should apologise.
 - ⇒ There is no place on the Bench for arrogance.
 - ⇒ Do not take yourself too seriously.
 - ⇒ Continually remind yourself that a party is not simply a name on a piece of paper.
 - ⇒ The parties are looking to the Court to see justice is administered objectively, fairly, diligently, equally, impartially, and with unquestionable integrity (Refer to Part III, section 4: Judicial Oath and Ethical Principles).

- Never make fun of a party or witness:
 - ⇒ A matter which may seem minor to a Judge, may be very important to a party or witness.
 - ⇒ Remember there are no unimportant cases.
- Never state an opinion from the Bench that criticises features of the legal system or representation by the parties. Your duty is to:
 - ⇒ uphold and administer the law, not to criticise it;
 - ⇒ draw out from the party and witnesses the facts and their own version of the matters or issues in dispute. It is not for you to try and impress on them your own opinion.
- Never say anything or display conduct that would indicate you have already made your decision before all parties are heard. You must not discuss the case or any aspect of it outside of the panel. This includes other Judges who are not sitting on the case.

9 Examining Parties and Witnesses

9.1 Introduction

The examination by Court members of every party to the proceedings is most important. This is central to the operation of the Land and Titles Court.

The purpose of the Court's examination of parties is to draw out the facts that are relevant to the issues at hand and to enable the Court to arrive at a finding of facts which will ultimately form the basis of its final decision.

It is certainly not an interrogation.

9.2 Conducting a Skilful Examination

The art of conducting skilful examination of parties and witnesses in a hearing cannot be learned from any textbook.

Skilful examination is a measure of ingenuity, innovation, common sense and experience.

Failure to bring out the relevant facts by examination is inexcusable. That is the purpose of examination.

It is unwise and improper to make a show of prolonged questioning of a party when there is no reason to believe that any further meaningful information can be elicited.

9.3 Communication

Speaking

- Use simple language without jargon.
- Make sure you know what to say before you say it.
- Avoid a patronising and or unduly harsh tone.
- Maintain eye contact.
- Always express yourself simply, clearly and audibly. It is important that:
 - ⇒ the party examined and every other party understands what is happening in the Court and why it is happening;
 - ⇒ the Court stenographer and other Court officials are able to hear what is being said for accurate note-taking; and
 - ⇒ the public in the Courtroom are able to hear what is being said.

Listening Actively

- Be attentive and be seen to be attentive in Court.
- Make accurate notes.
- Maintain eye contact with the speaker.

Questioning

- Ask questions that are simple, brief and to the point for extracting the truth and/or exposing any falsehood.
- The essence of a good and effective examination is not to question crossly.
- Deal fully with the various matters and issues chronologically, including petitions, written and oral evidence by parties and other useful information available.
- Avoid tedious repetition, except for clarification of any ambiguity.

- Never allow your questioning to descend into an argument with a party or witness.
- Avoid interrupting a party or witness half way through an answer, unless it is necessary to bring them back on track.
- Avoid making long unnecessary statements.
- Never persuade or influence a party to agree on a settlement or reconciliation in the course of your examination.
- Never express or attempt to impress your own opinion on a party.

Leading Questions

- A leading question is one which either:
 - ⇒ suggests to the party or witness the answer which should be given; or
 - ⇒ assumes the existence of facts which are in dispute.
- Leading questions are not allowed during examination of parties, except in certain situations as follows:
 - ⇒ during cross-questioning;
 - ⇒ in regard to introductory or undisputed matters;
 - ⇒ for the purpose of identifying persons or things in question;
 - ⇒ to refresh the memory of the party or witness, provided the answer is not suggested.

9.4 Statement in Reply and Rebuttal

Upon completion of the examination of all parties, each party is given limited time to make statements (oral or written) in reply to important points raised by other parties during the Court's examination.

PART VII

DECISION MAKING

1 Introduction

Every decision of the Land and Titles Court:

- is in accordance with the opinion of the majority of members present;
- is in writing;
- shall include reasons for the decision;
- is to be pronounced in open Court, and each party is entitled to a true certified copy;
- shall be drawn up under seal of the Court and the hand of the President or Deputy President and Judges and Assessors who concur with the decision.

2 Principles Governing Decision Making

There are four principles which collectively translate into the general duty to act fairly:

- Judges must act lawfully.
- Affected parties have a right to be heard.
- Judges must be free from bias.
- The decision must be reasonable.

The principles are intended to ensure:

- the fair, unbiased and equal treatment of all people; and
- the exercise of any discretion only on reasoned and justified grounds

Adhering to these principles does not guarantee that the Court has made a good decision. It does mean, however, that it is likely to have followed a process that is designed to introduce many of the relevant and critical factors, and exclude prejudice and irrelevant material and considerations.

You must act lawfully

This principle is concerned with what the governing legislation or rules require (jurisdiction and procedure).

There are several aspects to the principle of lawfulness. The Court must:

- act within the authority of the law;
- take into account all the relevant considerations and ignore irrelevant considerations;
- not abdicate its discretionary power. Only the members of the panel can make the decision.

Affected parties have a right to be heard

- A party affected by a decision must have a full and fair opportunity to be heard before the decision is made.
- The purpose of this principle is to ensure that the Court considers all relevant information before making its decision.

You must be free from bias

- Judges should not allow their decision to be affected by bias, prejudice or irrelevant considerations.
- They must not have an interest in the matter from which it might be said that they are biased.
- It is not necessary to show actual bias, the appearance of bias is sufficient.
- Bias might be inferred where there is a relationship to a party or witness, a strong personal attitude that will affect a Judge's decision, or a financial interest in the matter.

The decision must be reasonable

- This principle relates to the substantive outcome rather than the process followed. The decision itself must be reasonable in the particular circumstances.

3 Consequences of a Breach of the Principles

If these principles are not adhered to, your decision may be reviewed on appeal.

There are other consequences of breaching the principles. These include:

- undeserved expense, hardship and emotional turmoil for the aggrieved party;
- a loss of faith in the system of justice by the aggrieved party;
- on-going problems from a perpetual litigant;
- wider problems relating to the public's confidence in the Court system.

4 An Approach to Decision Making

4.1 Deliberations

At the conclusion of the formal hearing, the panel sets forth to perform their collective duty to discuss the evidence produced by parties and make a finding of facts.

This is the last important opportunity for the members of the Court to ensure absolute adherence to the underlying judicial principles of conducting a fair hearing, and ultimately to arrive at a just and reasonable decision.

The role of the Chair to manage the proceedings in any hearing continues until after the final decision of the Court has been duly pronounced.

It goes without saying that the Chair will have to ably demonstrate good leadership qualities, professionalism and an impartial attitude.

Where disagreement on any aspect is apparent, sufficient and fair opportunities should be given to each panel member to give reasons in support of his/her view. Note that the right to be heard is not only for parties and witnesses to a hearing, but is extended equally to members of the Court. Every Judge and Assessor hearing a case has an equal voice.

Panel members must work in partnership and with understanding and open minds. No one panel member must strive to overpower or force his/her opinion on other panel members.

During deliberations, they must remind themselves throughout that it is their collective duty to uphold and defend judicial independence, not as a privilege of judicial office, nor a test for professional superiority, but as the constitutionally guaranteed right of everyone to have their disputes heard and decided by impartial Judges.

4.2 A Structured Approach

Decision making is a process of applying particular facts to the relevant law and custom and usage. The way to do this is to employ a structured approach.

There are three tasks involved:

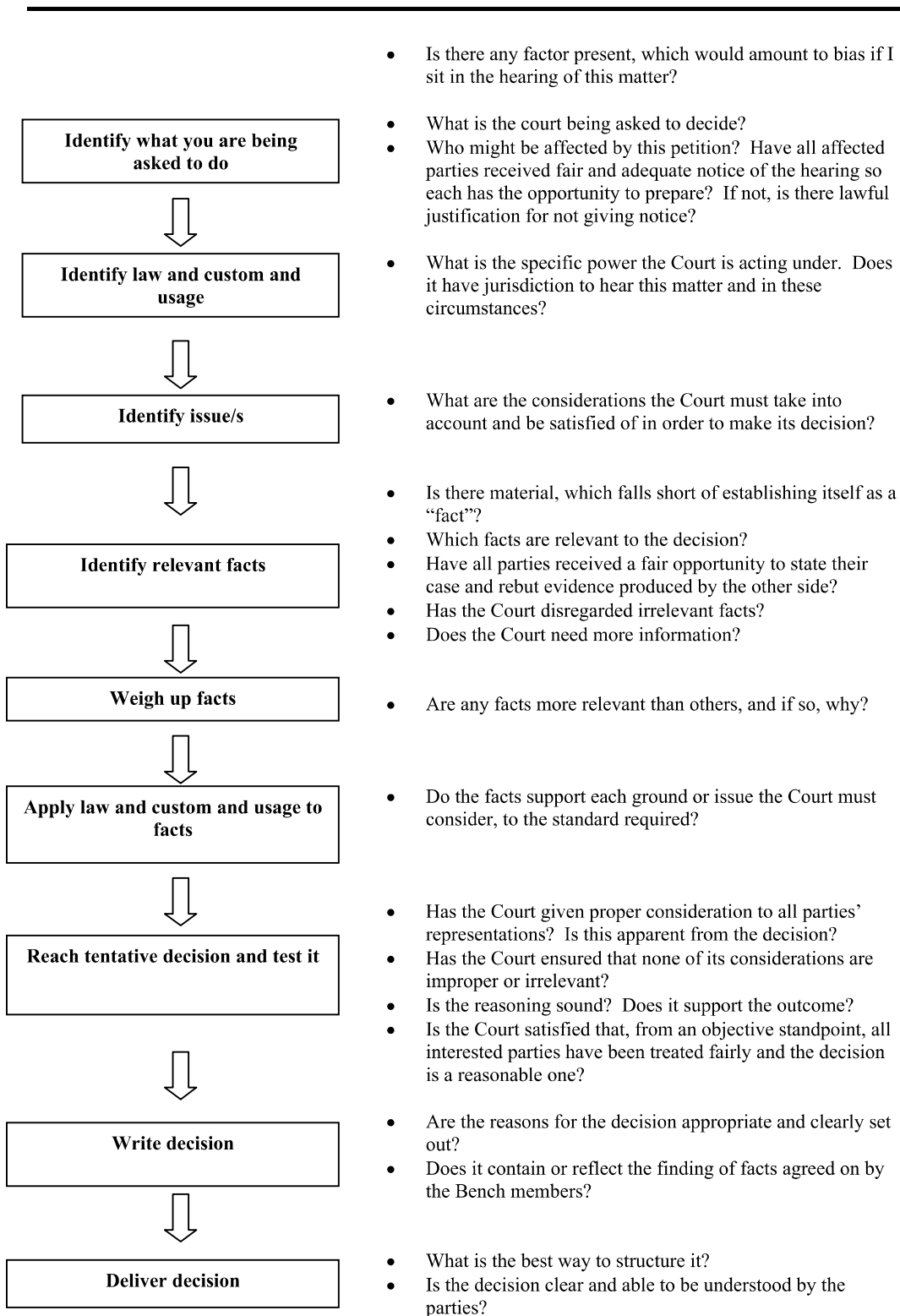
- to be clear with what the Court is being asked to do;
- to determine what the facts of the case are; and
- to make your decision, according to the law.

4.3 Decision Making Checklist

Figure 7 provides a checklist of issues to be considered at each step of the decision making process.

Figure 7

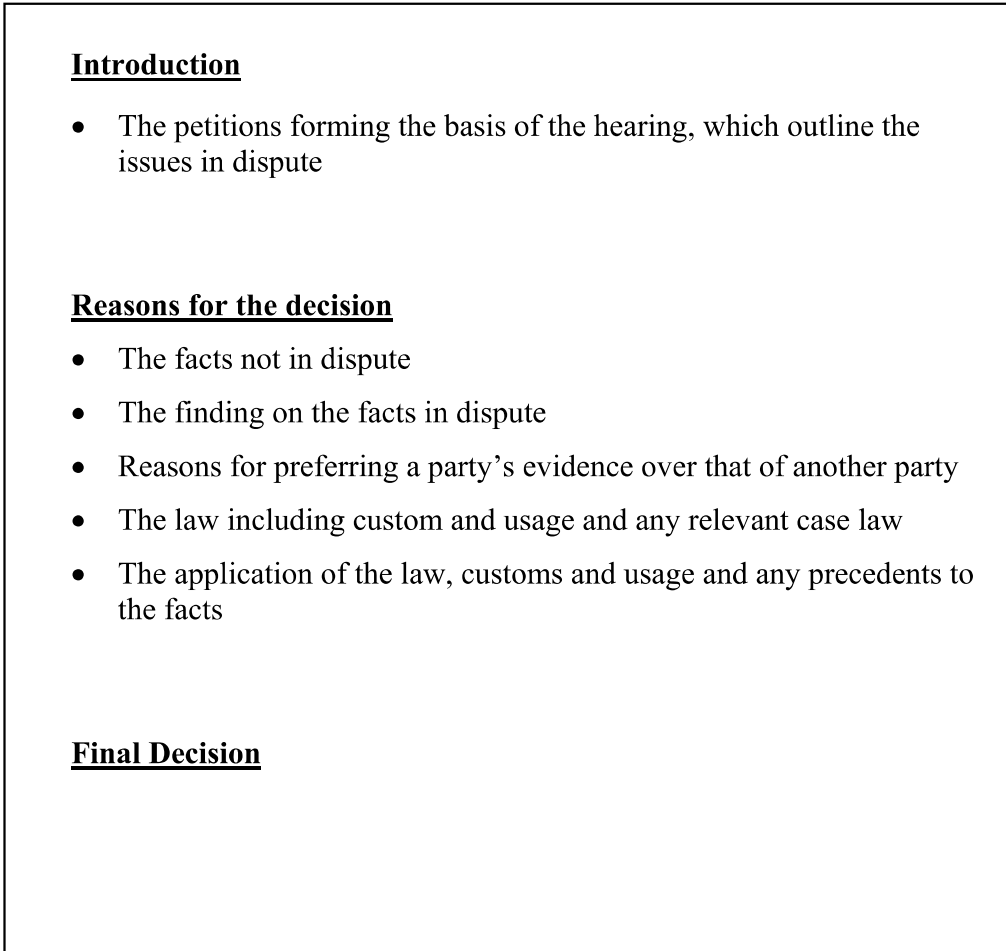
Decision Making Checklist



5 Writing a Decision

The following structure may be useful when writing decisions.

Figure 8 **Decision Writing Structure**



PART VIII

APPEALS

1 Right of Appeal

Any party to any proceedings has the right to appeal against any final decision of the Court, except in the following circumstances.

There is no right of appeal against:

- an interim order made under *ss49 or 50*;
- an order for costs under *s72(2)*;
- offences under *s75*;
- a decision made under *s11(5)(c) Village Fono Act 1990*.
See s76(2) and s11(6) Village Fono Act 1990

2 Jurisdiction

2.1 Leave to Appeal

The President sitting alone may grant leave to appeal or refuse leave to appeal.

2.2 The Appeal

The Land and Titles Court hearing every appeal may:

- dismiss the appeal;
- uphold the appeal;
- set aside or vary the final decision which is being appealed;
- make such order as to costs as it thinks fit.

The Court may dismiss the appeal on the application by any other party if the applicant does not prosecute his/her appeal with due diligence or if the appellant does not appear at the time appointed for hearing his/her appeal.

3 Effect of Appeal Decisions

3.1 Leave to Appeal

If leave to appeal is refused, the process ends and the original decision of the Court is final.

The President may make an order as to hearing and/or costs to any party.

If leave to appeal is granted, the President may order a stay of proceedings against the original decision.

3.2 The Appeal

The decision of the Land and Titles Court hearing the appeal is final and marks the end of the process.

4 Leave to Appeal

4.1 Application Process

Role of the applicant

The applicant:

- files his/her application within 21 days from the date of the original decision. If the President grants extra time to lodge an appeal, the appeal must be made no later than 2 months after the original decision is delivered;
- pays the prescribed fee and security for the appeal on the date their leave for appeal is filed;
- must state whether the appeal they are seeking leave for is against the whole or only part of the original decision.

Role of the Registrar

The Registrar:

- serves copies of the application for leave to appeal on all other parties;
- serves copies of reply in opposition to the application for leave to appeal on the applicant;
- prepares and produces for the President:
 - ≡ a full record of proceedings leading up to the application for leave; and
 - ≡ all evidence that was given at the original Court hearing.

Role of the Opposing Parties

Each party wishing to oppose the application for leave to appeal should file its reply within 21 days after the date of receiving the copy of the application for leave to appeal

4.2 The Hearing Process

The appeal is heard by the President sitting alone.

All parties are to be heard and may make submissions.

The hearing is not open to members of the public.

5 The Appeal

The appeal shall be heard by a Court comprising the President and two Judges of the Land and Titles Court after leave to appeal has been granted.

The appointed Judges and the President cannot have been part of the Court which rendered the decision which is now the subject of the appeal.

The Court hearing every appeal has all the powers and jurisdiction of the Land and Titles Court.

Every appeal shall be by way of rehearing:

- Judges can hear either part or the whole of the original decision, depending on what was granted in the leave to appeal application;
- Judges may also exercise their discretion in this matter.

The decision of the Court hearing the appeal is final and binding.

6 Grounds of Appeal

Leave to appeal may be based on any of following grounds:

- New and material evidence found since the hearing, which the applicant had no prior knowledge of, or could not reasonably have been adduced at the hearing;
- The successful party is guilty of misconduct in relation to the hearing, which has affected the result of case;
- A witness is guilty of misconduct in relation to the hearing which has affected the result of the case;
- A Court member or officer made a mistake or misconducted himself/herself in relation to the hearing and has affected the result of the case;
- The Court did not have jurisdiction to make the final decision or Order;
- The decision or Order is wrong in law or not in accordance with custom and usage;
- The decision or Order is manifestly against the weight of evidence adduced at the hearing.

Despite the above mentioned grounds, leave to appeal cannot be granted unless the President is of the opinion that some substantial wrong or miscarriage of justice has occurred.

See s79

MISCELLANEOUS

1 Useful Materials

Canadian Judicial Council. *Ethical Principles for Judges*. November, 1998. Ottawa, Ontario.
<http://www.cjc-ccm.gc.ca>

Corrin Care, Jennifer, Tess Newton and Don Paterson. 1999. *Introduction to South Pacific Law*.
London: Cavendish Publishing

Esau, Alvin. *Formal Court Adjudication: Adversary System v. Inquisitorial System*. University of
Manitoba Faculty of Law Lecture No. 18.

Ntummy, Michael (ed.). 1993. *South Pacific Islands Legal Systems*. Honolulu: University of
Hawaii Press.

Powles, Guy and Mere Pulea (eds.). 1988. *Pacific Courts and Legal Systems*. University of the
South Pacific.

Pacific Legal Information: <http://www.paclii.org>

University of South Pacific Law School, Pacific Law Materials Online Collection:
<http://www.vanuatu.usp.ac.fj/paclawmat>