

Controversial Land Legislation in Samoa: Its not just about the land¹

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Introduction

Recent land legislation in Samoa has stirred controversy over its implications for Samoan customary land. During the two years prior to the passing of the Land Titles Registration Act 2008, non-government organizations (NGOs), political opposition, and critical political commentators voiced opposition at what they warned was a land registration system that would undermine customary land ownership rights. In response, the Government floated between denying that this was the case and admitting that it is. This has fuelled criticism, compounded suspicions about the Government's intentions, and seriously undermined the Government's integrity. The critics concerns are not unfounded; the Government's shiftiness suggests that there is something underhanded going on, and there are several clauses in the Act that underscore the critics' position. However, the exact implications of the Act for customary land, and perhaps the motives behind it, cannot be fully understood until the Act is brought into effect and land registrations are carried out under its auspices. Nevertheless, given that the critics, ostensibly, have a case, it is worth investigating the issue of what the implications of the Act might be if it does alienate customary land.

This paper argues that if the Act alienates customary land, the repercussions will extend beyond being a land ownership issue. Instead, it will have very significant implications for the traditional Samoan political framework. This comprises the customary socio-political practices and institutions that Samoans believe were in place prior to contact with Europeans, and which have been incorporated into their contemporary political framework on this basis. The traditional political framework applies primarily to the local governance sphere of the *nu'u* (polity), which is made up of *āiga* (extended families) whose

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origins and/or roots are/or have been intertwined into the *fa'alupega* (constitution) of a *nu'u*. During pre-contact times, *nu'u* were autonomous political entities, and despite the formation of a national political domain in 1962, which introduced a national government, many still operate as if their autonomy and independence remains unchanged (Iati 2007). Land forms the foundation of this framework; it is attached to *suafa* (titles), which are owned and controlled by *āiga* and *nu'u*. *Āiga* and *nu'u* bestow these on individuals who they elect to be their *matai*, and the *suafa* gives the *matai* the authority to govern the lands associated with the *suafa*. If land is separated from *suafa*, then the *āiga* and *nu'u* lose control over these lands, because their ownership is based on their control of *suafa*. Consequently, their authority in the political arrangement pertinent to this governance sphere is undermined. Without this authority, the role and existence of the *nu'u* and *āiga* as pillars of governance in Samoa will rest on precarious foundations.

The Land Titles Registration Bill

In September 2006, while undertaking field research for my PhD, I attended a meeting of *Pulenu'u* (representative of a *nu'u*, similar to a mayor) in Savaii. The meeting was organized by O Le Siosiomaga Society Incorporated (OLSSI), a non-government organization focussed on addressing environmental issues in Samoa. The purpose of the meeting was to raise awareness about what OLSSI claimed was a land bill, soon to be introduced into Samoa, that would ultimately threaten customary land ownership. In general, OLSSI argued that the bill would introduce the Torrens Land system to customary land, and warned that this system would directly conflict with customary land ownership principles and practices. OLSSI representatives urged the *Pulenu'u* to raise awareness within their *nu'u* and to constructively engage the government on this matter, in terms of making enquiries about the specific nature of the proposed bill and its implications. Also in attendance were a few public servants who, surprisingly, supported OLSSI's call for the *Pulenu'u* to help raise awareness about this issue. This was the first time I became aware of this bill, and in particular the possible application of the Torrens land system to Samoan customary land.

This was not the only warning that Samoan people received about this bill, during this period. According to the leader of the Samoa Party (a political party in Samoa), Su'a Rimoni Ah Chong, they had, in their 2006 Election Manifesto, raised the issue "that the HRPP government was secretly planning", if returned to power, "to register Customary Land under the Torrens Land Registration System" (Ibid). Both OLSSI's and Ah Chong's concerns

stemmed from the view that under the Torrens land system, titles to customary land would be registered under individuals' names. This, they feared, would not reflect customary land ownership principles, in particular the principle that land is owned by a kin group but controlled by their elected leader, the *matai*, as their trustee. Up to this point, while the Act is yet to be enforced, the land registration system is the Deeds Conveyance system. Critics argue that ownership principles and practices, in particular the relationship between land, kin groups, and trustees, are reflected much better when registered under this system.

These warnings marked the beginnings of a strong although uncoordinated opposition to what was first the Land Titles Registration Bill, and later the Land Titles Registration Act 2008. In addition to OLSSI and the Samoa Party, the Samoa Umbrella for Non-Government Organizations (SUNGO) also publicly opposed the Bill (Samoa Observer 2008, 10 March). They made a request "with the interest of all the Non Government Organizations and Civil Based Societies" to the Government to amend the Bill so that it would be in line with "the Customs and Traditions of Samoa" (Ibid). They, like OLSSI and AH Chong, also feared that these customs and traditions would be undermined by the introduction and application of the Torrens land system to Samoan customary land (Ibid). Under SUNGO, a sub-committee was formed to specifically address concerns with the Bill. This sub-committee, known as Komiti e Puipuia Eleele Tau Samoa (KPETS), also argued that the Bill introduced the Torrens land system, but delved into greater detail as to why this system was incompatible with, and a threat to Samoan customary land tenure practices (Samoa Observer, 2008, 2 May). Confident of their position, in May 2008, they challenged the Prime Minister and the Attorney General to a public debate on this matter. The challenge was not taken up by the latter parties (Ah Mu 2008, 9 May).

Other politicians made similar criticisms. Former Minister of Parliament, Le Tagaloa Pitapola, publicly reiterated this argument, focussing on how the Bill would lead to an "alienation of Customary Land" and how it was "contrary to the provisions" of the Constitution (Le Tagaloa 2008, 4 May). Asiata Saleimoa Vaai, leader of the Samoa Democratic United Party (SDUP) has expressed a desire to launch a legal challenge to the Act (Samoa Observer, 3 July). The fact that opposition to the Bill stemmed from a variety of sources, without coordination, yet advancing very similar concerns strongly hints that the points of criticism might be self-evident.

Opponents of the Bill criticized it on a number of points. First, the Bill was unconstitutional. It was argued that under the Torrens land system, customary lands would be

registered under individual ownership titles, as opposed to *matai* titles (Ah Chong 2008; Samoa 2008, 10 March; Samoa Observer 2008, 7 April). According to SUNGO, this made it unconstitutional because it would lead to “personal private property registration”, but customary land in Samoa was not held under the private property principles, but instead under a principle of trusteeship (Samoa Observer 2008, 10 March). Under the current land registration system, those whose names are recorded as owners in the land register can only act as trustees for all the rightful owners. They cannot claim any ownership of the land. SUNGO argued that this principle would not be reflected and upheld under a Torrens land system of registration (Interviews, Samoa 2008). According to Ah Chong (2008), the Bill would allow for “the registration of the Customary lands in individual names of people”. He argued that the registration of the customary land under this system was inconsistent with Section 102. Under this section, it is unlawful “to make any alienation or disposition of customary land or of any interest in customary land, whether by way of sale, mortgage or otherwise howsoever, ...” (Constitution of the Independent State of Samoa, Section 102). By registering individual names rather than the *matai* title, otherwise known as *suafa*, land was being alienated from its rightful owner, because land is owned by “*Matai* Titles”, and “Once you separate the Land from the *Matai* Title, you are ALIENATING it from its owner” (Ah Chong 2008).

Second, it was argued that a number of provisions would allow for unscrupulous elements to creep into the registration process. This was exemplified in the imbalance between the powers granted to the Registrar to administer the registration system, and the checks and balances placed on this position. Critics noted that the Registrar was given “wide discretionary powers to manage the system”, but provided very little checks and balances on this position (Samoa Observer 2008, 7 April). Critics argued, for example, that the Registrar was given the “discretion in the Bill to make changes to the Folio at any time with or without notifying and affirming that changes were made with the concerned parties” (Ibid). At the same time, they noted, the Bill indemnified those managing the system by stipulating “the Ministry shall not be liable to any action or proceedings for or in respect of any act or matter done or omitted to be done in good faith” (Ibid). They expressed concern that this clause provided a way that could be exploited unscrupulously for corrupt, fraudulent, and unfair registrations (Interviews, Samoa 2008).

Third, it was argued that the Bill utilised vague terminology, which could be misconstrued and used unfairly to favour certain positions and parties. In addition to the

provision that exempts Ministry personnel from liability, if they act in “good faith”, critics also pointed out the problematic usage of phrases such as “can”, “may or may not”, “as the Registrar see’s fit” or “the Registrar may assume” or “may refuse” throughout the Bill (Samoa Observer 2008, 7 April). As an example of the kinds of passages SUNGO was alluding to, Part 2, Section 3(1) states, “the Registrar may maintain a record of customary land showing location, description, details of persons having administrative or trustee responsibilities in respect of the land and such other details as the Registrar sees fit to include” (Land Titles Registration Bill 2007). They argued that unless the clauses which used these phrases were made more definite, it could “result in the Registrar and/or staff taking advantage under undue influence” (Samoa Observer 2008, 7 April).

Finally, it was argued that the Bill would lead to the destruction of Samoa’s traditional socio-political system. It has been argued that “Family, village and district cohesiveness and functioning will be negatively impacted. Community values of cooperation and looking after one another will also suffer” (Archival research material, KPETS 2008, “Powerpoint Presentation – Protection of Customary Land Committee”). The implication is that the cohesiveness which marks Samoan society, and which is underscored by a principle of putting the community before the individual, will be undermined by the Bill. Elsewhere, KPETS argued that the Bill “is capable of destroying the underpinnings of Samoan society and village functioning” because it encouraged the pursuit of self-interest, rather than the interests of the community (Samoa Observer 2008, 7 April).

The arguments put forward by the critics were fiercely rejected by the Government. In fact, in 2006 when Ah Chong claimed that the Government was planning to apply the Torrens land system to customary land, the Prime Minister not only denied this, but threatened to bring a law suit against Ah Chong, and the Samoa Party. The law suit never eventuated. Shortly before the Bill was passed in 2008, and amidst the criticisms discussed above, the Prime Minister again stipulated that customary land was not included in the Bill. The question of whether the critics or the Government is right is difficult to determine.

However, the Government’s behavior before the Bill was passed is cause for concern about its integrity. Firstly, the Prime Minister’s early denials that the Bill would apply the Torrens land system to customary land were later revealed to be untrue. Ah Chong notes that in response to the Samoa Party’s claims that the Government was secretly planning to introduce a land bill, which would apply the Torrens land system to customary land, the Government had “appeared many times on all Television Channels and told the Samoan

people that what the Samoa Party was saying was a lie and it will be sued” (Ah Chong 2008). Despite the Government’s strong reaction, the law suit never eventuated, which could be interpreted as a sign that the Samoa Party’s claims were not unfounded. Research conducted in Samoa in 2008 revealed that this was the case. According to a local lawyer and the Chief Executive Officer of the Samoa Umbrella for Non Government Organizations (SUNGO), a public meeting was organized by SUNGO, in February 2007, to discuss the issue of the Land Titles Registration Bill. At the meeting, a spokesperson for the Ministry of Natural Resources and Environment (MNRE) admitted that the intention of the Bill was to apply the Torrens Land System to Samoan customary land (Interviews, Samoa, June-August 2008). This admission carried authority because the MNRE was one of the main Government ministries working on the Bill. The other was the Attorney General’s office.

Second, the Government’s denials shortly before the Bill was passed in 2008 appear unfounded, and even refuted by statements from the Attorney General’s office. In May 2008, the Prime Minister publicly stated that the Bill affected only freehold and public lands, and did not affect customary lands (Ah Mu 2008, 14 May). However, critics noted that this was not reflected in the language of the Bill, which they argued significantly implicated customary lands. KPETS noted, for example, that the title of the Bill made a general reference to land, rather than specifically limiting the land in question to freehold and government lands. They also noted that the term customary land was included in the definitions of land covered in the Act (Ibid). Comments by the Attorney General, made at that time, supported the critics claims. In statements provided to a local newspaper, intended to allay fears about the alienation of customary land, the Attorney General noted, “the registration of customary land is ALREADY permitted under our CURRENT laws in two instances” (Ah Mu 2008, 11 May). He then went on to say, “The Bill merely continues the current law in relation to the registration of customary lands” (Ibid). This clearly shows that the Bill did include customary lands, as the critics claimed.

Third, despite consistently denying that customary land was covered in the Bill, the Government later revised the Bill, in order to exclude customary lands from it (Tait 2008, 12 May). Up to that point it had constantly denied that customary lands would be affected, which begs the question - if customary land was not included in the Bill, as the Government had consistently claimed, why was there a need for the additional provisions? The move could be explained in one of two ways, if not both. Firstly, the new provisions were additional safeguards to ensure the exclusion of customary lands from the Bill and Act.

According to the Attorney General, they were added in order to “really clarify that the Bill will not affect the ownership or alienation of customary land” (Ah Mu 2008, 11 May).

Secondly, that the Bill did affect customary lands, but in response to public criticism, the Government changed its position. The second explanation resonates with a statement made by Tait (2008):

Government officials said that the Land Titles Registration Bill, due for its third reading within weeks, had now been amended following advice from Attorney-General Aumua Ming Leung Wai. The change followed opposition by a Samoa Umbrella for Non-Governmental Organisations (Sungu) committee which organised public meetings on the bill.

From what transpired during the Bill stage, it is not unreasonable to consider the Government’s actions as either a result of mismanaging publicity about the Bill or a poor effort to conceal the true intentions behind the Bill. Furthermore, it is understandable why the critics were so concerned about the Bill’s implications for customary land. Up until the government revised the Bill to exclude customary lands, it would be fair to conclude that customary land, and by consequence customary land tenure was affected by the Bill. The question that remains, then, is whether these changes did, as the Government argued, exclude customary land.

The Land Titles Registration Act 2008

According to the Government, the additional provisions, Sections 9(4) and (5), exclude customary land from the Bill. Tait (2008) makes this point very clearly: “The changes excluded customary land”. This conclusion was drawn from statements made by the Chief Executive Officer of the MNRE, Tuuu Ieti Taulealo. In fact, Tait (2008) quotes Taulealo as saying, “We will only use the new legislation for freehold land and government land.” When the Bill was passed, these sections were retained. The Land Titles Registration Act 2008, Section 9(4) states,

“No provision of this Act may be construed or applied to: (a) permit or imply the alienation of customary land in a manner prohibited by Article 102 of the Constitution; or (b) permit or deem ownership in any customary land to vest in a person otherwise than as determined under any law dealing with the determination of title to customary land.”

Section 9(5) states,

“Nothing in this Act shall permit the exercise of any power or affect any interest in customary land that could have been applied by law prior to the commencement of this Act.”

At first glance, these sections do not appear to exclude customary land from the Act, as the government claims. In fact, it conflicts entirely with this claim, and demonstrates very clearly that customary land is included in the Act. What Section 9(4) merely accomplishes, or at least appears to accomplish, is to protect customary land from being alienated in a manner prohibited by Article 102 of the Constitution, and from being owned in a manner that is inconsistent with “any law dealing with the determination of title” to it. Ostensibly, Section 9(5) affirms that the Act does not change existing legal relations to land. If the government attached a different meaning to the statement that customary land would be excluded from the Act, it is difficult to determine exactly what that could be.

One alternative interpretation is that customary land is excluded from the changes that the Act makes concerning freehold and government land. This means that the Torrens land system would be applied to freehold and government land, but not to customary land. However, customary land leases or license would be included. This accords with Section 9(1) of the Act, which states,

“Where after the commencement day any land becomes public land, freehold land, or customary land leased or licensed under the provisions of the Alienation of the Customary Land Act 1965, it shall be the duty of the Registrar to include such public land, freehold land or customary land lease or license in the Register.”

The Register, ostensibly, is managed according to the new land registration system, which critics argue is the Torrens system. The determinations of the Land and Titles Court, which deals only with customary land, would also be included. This is stated in Section 9(2),

“The Registrar may also include in the Register customary land in respect of which judgment has been made by the Land and Titles Court under the provisions of the Land and Titles Act 1981.”

The inclusion of customary land in this way corresponds with the Acts stipulations that there would be no changes to customary land that are not in accordance with the Constitution, and not already covered by other legislation (Section 9(4) and (5)). This interpretation of the government’s statement about excluding customary land was, in some ways affirmed with interviews conducted at the MNRE during 2008. It was explained to the author that customary land leases and Land and Titles Court decisions would be included in the Act (Interviews, Samoa 2008). There was no mention of other ways that customary land would be included.

Even if this interpretation fits with the Government’s plans, it is still highly contradictory of its statement that customary land is excluded. Customary land leases, licenses, and decisions of the Land and Titles Court still pertain to customary land. Moreover,

these also affect customary land ownership. Ultimately, regardless of whatever way this Act is interpreted, customary land and customary land ownership is intricately implicated. Therefore, the issue about whether customary land is affected by the Act is immaterial. The real issue is, how is customary land affected by the Act? Here, the concern is with the particular issue of whether it will, as the critics argue, result in the alienation of customary land?

Will the Land Titles Registration Act 2008 alienate customary land?

To be sure, the answer to this question cannot be known for certain until the Act is enforced, and the machinations involved with this are revealed. Although the Act was passed on June 17, it has not yet been brought into effect. When it is, what will prove crucial in determining this issue is how the Constitutional provisions dealing with customary land and in particular the “alienation” of customary land are defined by the Judiciary, and in particular the Supreme Court. The Supreme Court is central to this issue because it is the final arbiter of the constitutionality of the decisions and actions of the Cabinet and the legislative assembly, indeed of any question arising out of “the interpretation or effect of any provision” of the Constitution (Constitution of the Independent State of Samoa, Section 73(2)). It is here that those who are interested in this Act, and its implications for customary land and customary land ownership need to focus their attention.

There are a number of points on which judicial interpretation will prove crucial, for example, on how some of the vague phrases are interpreted. What mistakes and similar acts, for example, can be claimed to have been done in “good faith”, and therefore exempt officials from prosecution? Some critics have argued that Section 9(4) and (5) do not provide protection for customary land ownership rights, but instead expose customary land ownership to other avenues by which they can be alienated. They contend that the use of the word “may” and the phrase “in a manner” eliminate certainty with regards the inalienability of customary land. They note that more certainty would be achieved with the use of the word “will” instead of “may”. Moreover, they note that the use of the phrase “in a manner” opens up the relevant Constitutional provisions concerning customary land to court hearings in order to debate and define their meanings and, ultimately, judicial interpretation (Interviews, Samoa 2008, Tasi Malifa). Although critics’ interpretations are debatable, they are not without merit, and exemplify the point that these matters will be decided in the Courts, in particular the Supreme Court.

One point where judicial interpretation will be crucial, controversial, and have profound implications concerns the interpretation of “alienation” in Section 102 of the Constitution. Here, the critics concern about the use of the phrase “in a manner” is relevant. Once alienation is defined by the Supreme Court, then all forms of alienation that are not considered to be “in a manner” prohibited by Section 102 will be allowed. According to Ah Chong, alienation should be defined in terms of customary land being owned by the *suafa*. His view is shared by others (Interviews, Samoa 2008). If the Land Titles Registration Act 2008 registers customary land ownership under a *suafa*, then, ostensibly, alienation does not occur. However, if it is registered under an individual name, such as the person holding the *suafa* at the time, then alienation has occurred because of the separation of the land from the *suafa*. Again, this is a matter that will, ultimately, be decided in court.

Although this issue is indeterminable at this stage, one issue is not: the socio-political implication of disassociating customary lands from its customary owners. If this takes place, the implications of the Act will go significantly beyond making changes to customary land tenure. Arguably, it will undermine the entire traditional Samoan socio-political system, the national political system, and ultimately, Samoan society in general. Ostensibly, this result is inevitable because in the holistic nature of Samoan society, every major element of their socio-political structure, and land is one of these, are inextricably intertwined. Consequently, this will have very significant repercussions on the national political system, because it is made up of the combination of Samoan political customs and traditions on the one hand, and a Western political framework on the other. It is difficult to draw any other conclusion than that by transforming the traditional elements of the national system, the latter is itself transformed and ultimately, Samoan society will undergo transformation.

Land and the traditional Samoan socio-political system.

The traditional Samoan socio-political system is commonly known as the *fa'amatai*. The *fa'amatai* is part of a larger system, the *fa'aSamoa*, which Vaai (1999:29-30) aptly describes as “a generic term for everything Samoan or the Samoan way”. The *fa'aSamoa* refers to norms, values, principles, practices, and institutions that, according to Samoans, constituted their way of life prior to the introduction of comparable elements from Western civilization. The *fa'aSamoa* continues to operate but with the inclusion of different aspects of Western lifestyle. It is sometimes difficult to discern its boundaries, particularly if the observer does not live according to this system. Ostensibly, it is a complete system; it caters

for every aspect of life. It is not simply known as the Samoan way, but the Samoan way of life. It encourages, prescribes, and possesses values, norms, principles, institutions and processes that address social, economic, political and spiritual aspects of life, amongst other things. It also possesses punitive measures and institutions and avenues prescribed for carrying these out, such as *ifoga* (traditional ritual of forgiveness) which deal with violations and violators of this system. The *fa'amatai* refers specifically to the political aspects of the *fa'aSamoa*. These aspects centre on the *āiga* but are most visible in the position of the *matai*, who is the person selected by the *āiga* to be, effectively, their leader. The *fa'amatai* refers to the processes and institutions involved in the intra-relationship of the kin group as well as the inter-relationship between different kin groups.

These processes and institutions are commonly manifest in a domain called the *nu'u*. The *nu'u* is translated by Meleisea (1988) as a polity, conveying one of its key attributes: it is a political entity. In fact, it is an independent and autonomous political entity, with its own geographical boundaries, a identity not unlike an ethnic or national identity, a governing body, and a political system and institutions that are peculiar to it. There are approximately 300 *nu'u* in Samoa (Taulealo et al 2003). The autonomous and independent status of *nu'u* can be transcended if they form alliances. These require strong genealogical and political ties that bind them to this arrangement and its relevant institutions of authority. Although the formation of alliances was not uncommon in traditional times (they are much less common now), the *nu'u* was and is still the primary focus of political activity in traditional Samoan life.

When Samoa gained independence in 1962, the political authority that was once the preserve of *fono a le nu'u* (the ruling council for *nu'u*) was divided between it and the national government. At independence, Samoa assumed the status of a nation-state, the terms of which were enshrined in a national Constitution. It was credited with national boundaries, and accepted the establishment of a national-government that claimed authority over a definable body of citizens. Under the new political arrangement, the *nu'u* and the Samoan nation-state co-exist as independent and autonomous governance spheres. Each has its own governing body: the *fono a le nu'u* and the national government respectively. There is an understanding that they now share political power, but there has been no clear exposition of what the terms of this sharing are, and in particular if one has more authority than the other. This uncertainty over power relations is often visible in cases involving issues of religious freedom. Some *nu'u* prohibit certain religious denominations, and have expelled people who

worship according to religions that are not sanctioned. Aggrieved members often have their Constitutionally guaranteed right to freedom of religion upheld by the courts, but *nu'u* can and have refused to abide by these decisions. The usual result is an impasse, where expelled members refuse to return to their *nu'u* out of fear of being mistreated, despite being supported by the Courts (Samoa Observer 1993, 29 September; Toleafoa 2002; Radio New Zealand 2003). There remains then, a tension filled relationship for political supremacy between the governing bodies of *nu'u* and the national government (See also Va'a 2000).

Just as the *nu'u* remains an integral part of Samoan life, so too does the *fa'aSamoa* and the *fa'amatai*. Indeed, it could be argued that the preservation of the *nu'u* is a large reason why the *fa'aSamoa* and *fa'amatai* remain. This is because the *nu'u* is central to both of the latter. As mentioned above, the *nu'u* is the traditional political sphere, and it is here that the majority of social, economic, and political transactions that are determined according to *fa'aSamoa* and *fa'amatai* principles and institutions take place.

The major institutions are *āiga*, *matai*, *faletua ma tausī*, *aumaga*, and *aualuma*. The *āiga* is a kin group similar to an extended family, which may be spread throughout different *nu'u*, but will normally have their home base in between one and a few *nu'u*. Each *āiga* elects leaders for itself, known as *matai*. *Āiga* control a number of *suafa* which they bestow on those they decide to be their leaders. The *āiga* has complete autonomy in deciding who these are, but require the blessing of the *fono a le nu'u* in order for the process to be completed. The *fono a le nu'u* holds both executive and judicial functions; it makes laws, interprets these laws, and arbitrates between disputing members of the *nu'u*. The *fono a le nu'u* is made up of *matai* from the resident *āiga* of the *nu'u*. In general, any *matai* from a resident *āiga* has the right to be a member of the *fono a le nu'u*, although due to other commitments not all may participate all the time. *Āiga*, *matai*, and the *fono a le nu'u* are the major political institutions that act with the *nu'u*, according to the traditional system.

The other institutions are, politically, no less important, but they tend to have less of a governing role. Politically, they assume advisory roles and execute the decisions by the *matai* and *fono a le nu'u*. *Faletua ma tausī* are an institution constituted by the wives of the *matai*. They can meet and discuss issues that are before the *fono a le nu'u*, but their decisions must be channelled through the *fono a le nu'u* in order to have any authority within the *nu'u*. One of the key ways they can do this is by individually conveying these to their spouses and other relatives within the *fono a le nu'u*. Another is by having the *fono a le nu'u* consider a resolution put forward by the group as a whole. *Aumaga* is an institution constituted by

untitled males in the *nu'u*. Primarily, their duties are to carry out the decisions of the *fono a le nu'u*. However, those from this group are also the heirs to their respective *matai*, and therefore are allowed certain political privileges that prepare them leadership roles. These include deliberating on certain issues within the *nu'u*, and submitting their views to the *fono a le nu'u* for consideration. They are also encouraged and given avenues to be informed about the deliberations of the *fono a le nu'u*. *Aualuma* is an institution constituted by unmarried females. Members of this groups are also heirs of their *matai*, and have the same political privileges as those in the *aumaga*. None of these groups include members of the *nu'u* who are considered too young to carry out the duties associated with them.

The *fa'amatai* is constituted by these groups and the various obligations and duties that constitute their relationship. The political transactions between and within these institutions is the material that constitutes the *fa'aSamoa*, and in the particular the *fa'amatai*. Vaai (1999:29) states, "*fa'amatai* or the *matai* system, is characterized by institutions in which the relationships and interactions of kin and groups are influenced by reference not only to kinship factors but particularly by such considerations as titles, hierarchy of titles, genealogies, and honorifics". These institutions include those aforementioned, as well as those formed out of relationships between *nu'u*, alliances between *nu'u*, and networks of *nu'u* on a scale larger than these. One of the most well known is *Tumua* and *Pule*, an alliance of 11 *nu'u*, which were the centers or capitals of the 11 traditional divisions or districts in Samoa (Samoa 1995, 5 January). Without these transactions, it is unclear what the relevance and continuing justification of the *fa'amatai* would be.

Customary land is integral to these transactions, because it underpins the relationships between key institutions in the traditional Samoan political framework. Currently, approximately 81 percent of the total land in Samoa is customary land, 12 per cent is freehold land, and the rest is public land under the control of the Government (Grant 2008:268-9). All customary land is either owned by the *āiga* and *nu'u*, but controlled by *matai* and *fono a le nu'u*. Here, it is sufficient to look closely at the role of the land in the relationship between *āiga* and their *matai* in order to appreciate how it underpins the traditional system.

It might be argued that customary land is the cornerstone in the relations of power between the *āiga* and the *matai*. All customary land possessed by *āiga* is attached to a *suafa*. The *suafa* is not simply a title to the land. It is a title that the *āiga* bestows on a person it elects to be its leader, *matai*. The *suafa* empowers the *matai*; it gives that person the authority to decide on issues regarding land, and control over the affairs of the *āiga* and its corporate

resources as well as the resources of its individual members. The *suafa* gives the *matai* the privilege as well as burden of being the repository of knowledge about the *āiga*, in particular the genealogy of the *āiga*, its allies, its relation to *suafa* on the periphery of its control, and its rights to decide on issues beyond the sphere of the *nu 'u*, for example in the sphere of alliances. An example of the latter would be a *nu 'u* in the *Tumua* and *Pule* alliance that has the function of calling the alliance to certain political actions. The *suafa* is the key to authority and power.

The authority of the *suafa* in relation to land is a key foundation of the *matai*'s power. All land that is attached to a *suafa* comes under the control of the *matai*. Members of the *āiga* that wish to use this land must gain the approval of the *matai*. In return, they are obligated to follow the instructions of the *matai*. In addition to this obligation, they would also benefit from behaving in a way that puts them in favor with the *matai*, such as giving the *matai* their allegiance and obedience. Without the control that the *matai* has over the land, this allegiance and obedience can still be obtained. However, it would most likely be on the goodwill of the member, and without any threat of punitive action against them, such as refusal for land applications or taking away land. Without the rights that *suafa* have vis-à-vis land, the *matai*'s authority rests on precarious foundations.

The authority given to the *matai* through the *suafa* is not absolute. This is ensured through the relationship between the *suafa* and the *āiga*. The authority of the *matai* is always kept in check because the *āiga* elects the person who holds the *suafa*. Moreover, the *āiga* can withdraw the *suafa* from a *matai* at any time; there is no set term for a person to hold a *suafa*, and more than one person can hold the same *suafa* at the same time. Therefore, the *matai* has authority over the affairs of the *āiga*, but the *āiga* controls the *matai* through their control of the *suafa*. Both hold power through their control of land, the *matai* directly and the *āiga* indirectly. Anyone from the *āiga* can, in principle, be bestowed the *suafa*, which means that all present and future generations of the *āiga* are owners and heirs of their lands. Given the interdependence of both these institutions on their relationship to customary land, detaching customary land from the relevant *suafa* would significantly undermine these relationships.

The place of customary land within this network of institutions is given considerable protection in the Samoan Constitution. According to the Constitution (Section 102), customary land can be leased, licensed, and may be taken for public purposes, but it cannot be alienated or disposed from its rightful owners: *āiga* and *nu 'u*. This protection of customary land is entrenched in a unique way; all sections of the Constitution can be amended by a two-

thirds majority in parliament, but Section 102 can only be amended by a two-thirds majority in a popular referendum (Section 109). This clearly indicates the importance placed on customary land ownership by the Samoan people, in particular the framers of the Constitution. It might be suggested that this importance stems, in part at least, from the centrality of land to Samoan customs and traditions. It should be noted that in the opening sections of the Constitution, it states:

... the Leaders of Samoa have declared that Samoa should be an Independent State based on Christian principles and Samoa custom and tradition (Constitution of the Independent State of Samoa, Preamble).

Conclusion

If the Land Titles Registration Act 2008 detaches customary land from *suafa* it will have profound implications for Samoan society. Indeed, it might even spell the end for both the Samoan national political system and the traditional Samoan political system, as they both currently exist. It is the relationship between *suafa* and customary lands that underpins the political processes, institutions, and transactions which constitute Samoa's traditional political system, the *fa'amatai*, and the broader socio-political system, the *fa'aSamoa*. The relationship gives the *matai* the authority and respect in order to govern the affairs of the *āiga*, and at the same time gives the *āiga* the requisite power to check and balance the authority of the *matai*. The *fa'amatai* constitutes the governance system for the *nu'u*, and makes up half of the national governing system. Ultimately, if these changes are brought about, there is likely to be a significant transformation of Samoan society.

Whether the Act detaches customary land from *suafa* or not is difficult to determine at this time, because the Act has not been enforced. Critics argue that it will, but the Government has strongly denied these claims. The critics position has merit, in fact more than enough to warrant the suspicion that the Act will alienate customary land. Despite the Government's denials, the Act does contain a number of clauses that underscore concerns that customary land may be detached from *suafa* in the process of registering customary land. The credibility of the Government's claims are also undermined by its unusual conduct prior to the Land Titles Registration Bill becoming an Act. Its various claims that customary land would be excluded from the Bill, for example, have proven to be without foundation. Indeed, its refutation of Su'a Rimoni Ah Chong's claim that the Bill would introduce the Torrens Land system to customary land, which was discredited by one of its own ministries, significantly weakens faith in its integrity. The addition of new provisions, that the

Government claims exclude customary land from the Act, may give some people comfort that their lands will not be alienated. However, critics have already noted a number of potential problems with this assurance. Unfortunately, if the shiftiness in the Government's position on the issue thus far are anything to go by, this comfort may not be well founded. Ultimately, however, whether the Land Titles Registration Act 2008 will alienate customary lands, will ultimately depend on the way that the Supreme Court interprets the Constitution, and in particular the constitutionality of the government's conduct vis-a-vis the sections in the Constitution that prohibit the alienation of customary land.

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