Samoa’s Electoral System: Cultural Propriety & Constitutional Anomalies

Abstract

The paper critically analyzes Samoa’s current electoral system, highlighting its relative congruence with Samoa’s traditional universe of meaning, social practice and discourse, and nuancing constitutional anomalies embodied in the system as a result of fusing South, North and West. The analysis focuses on the issues of the dual voting system (the individual voters roll and the territorial constituencies roll, both of which now adopt the ‘one-person, one-vote, one-value’ principle for the purpose of all elections and by-elections) and the matai-only qualification for parliamentary candidature in the case of territorial constituencies. The paper advances the proposition that Samoa’s electoral system cannot be sensibly detached from the normative context of Samoa’s particular history, social structure, custom and cultural norms, value-system and sense of collective well-being. Be that as it may, political rights must not be lightly sacrificed in the worship of some imagined socio-cultural good, not without any reasoned justification at least. This defines the major objective of the paper: conflict resolution and negotiating an electoral system that is compatible with both Samoan protocols and constitutional principles.
(1) Approach

The nature of the topic does not allow the author to jump out of his brown skin and treat the issues from some transcendental perspective. This needs to be stated at the outset in the interest of intellectual honesty and to avoid the offence of veiled subjectivism. Indeed, critical analysis demands a significant measure of objectivity, large enough to enable a reasonably scientific examination of the issues and minimal enough lest objectivity becomes a tranquilizing agent of the human senses.

While adopting a primarily internal point of view of the law, the paper also analyzes the topic from external, extra-legal perspectives. This is necessary to counterpoise the somewhat static focus of syllogistic reasoning and to take account of the multifaceted nature of Samoa's electoral system placed as it is within the conundrum of Samoan culture, politics, religion, and laws.

(2) The Constitutional Convention and Constitution 1960

Colonialism did crown Samoa with a stir, and the stir was a sedulous struggle for political autonomy and cultural survival.

From a paradise for beachcombers and a haven for escaped convicts to a colony and trust territory, Samoa finally developed into the status of being the first independent nation in the South Pacific.¹ At the centre of Samoa’s legal-political order stands the written Constitution of Samoa 1960. Marking a decisive rupture with the colonial past and the birth of an independent nation, the Constitution serves as the linguistic expression of the compact “of the people with each other, to produce and constitute a government.”² As the fitting culmination of Samoa’s political development, the adoption of the Constitution in 1960 marked a point in time at which the vertex of the development of Samoa's political culture became the promise of Samoan life, one supposed to be governed by the rule of law and its dictates, binding both government and governed.

Behind the Constitution’s enigmatic words, terse clauses, crisp imperatives, succinct injunctions, and noble intention stand the constitutional Framers of the Constitutional Convention 1960. Established by the Constitutional Convention Ordinance 1960 to make “provision as to the Constitution of Western Samoa,” the Convention’s work started on 16 August 1960 and, by the final recital of the Preamble, the Constitution was adopted, enacted, and given to the people on 28

¹ From 1900 to 1914 Samoa was a German protectorate. That was succeeded by the New Zealand administration of Samoa, first, as a mandate of the League of Nations and, subsequently, as a trust territory of the Trusteeship Council of the United Nations. In 1961, the United Nations dissolved the Trusteeship Agreement for the Territory of Western Samoa 1946 and New Zealand enacted the Western Samoa Act 1961. Section 3 of the latter provides: “Independence of Western Samoa – It is hereby declared that on and after Independence Day [1 January 1962] Her Majesty in right of New Zealand shall have no jurisdiction over the Independent State of Western Samoa.”

October 1960. All but a few of the constitutional Framers were Samoans by birth and matais in status. In temperament, they were “moderate and realistic men; necessity would be their spur.” As Samoans, they were creatures of a culture with a mind of its own and a heart that follows its own logic. Yet, it was a culture already exposed to Western ideologies and was consequently afflicted with the tension between native and alien, traditional and modern. That tension, in the rhetoric of Professor J. Davidson (one of the two constitutional law advisors to the Convention), is “the inevitable conflict between the conventions appropriate to a modern system of government and those sanctioned by the traditional culture.”

The Framers’ task was doubtlessly an onerous one, charged as they were with the responsibility of erecting a constitutional democracy suitable to the context of Samoa with its distinctive universe of meaning, social practice, and discourse. The colonial past, the needs of postcolonial times, the interests to be guarded, aspirations for the future, and the temperament of the Framers themselves guided selection among viable alternatives relevant to “establishing a basically Western type of government in a non-Western society.” Seeking some kind of synthesis, the Framers were driven by the demands of circumstances to a new political allegiance, a constitutional arrangement that was supposed to provide a solution to a perennial tension which must be continually addressed. The result is a new order in which old and new, South and North and West have been woven together to form the legal-political fabric of the independent State of Samoa.

When by the second recital of the Preamble the Framers pledged that “Western Samoa should be an Independent State based on Christian principles and Samoan custom and tradition,” it was not an empty promise designed to dupe the Samoan people into submission to the rule of a few. It was, rather, a solemn promise that Samoan protocols, practices, and institutions would be adopted in the way the government of Samoa would be conducted. In this, they were aided by High Commissioner J. B. Wright of New Zealand who, in his official opening of the Convention 1960, emphatically reminded the Framers that “your customs are your constitution. No constitution, if it is to survive, can be anything but the written embodiment of a people's political customs.”

Since 1960, the Framers’ promise – general, brief, and ambiguous – continues to challenge every Samoan generation to: distinguish between possible and absurd; smartly adjust the Framers’ intention to changing times, novel situations, and fresh currents of opinion; cautiously extend or limit its ambit where and when appropriate; and, carefully safeguard the important values which that noble intention enshrines, while allowing it to be newly pointed and to be freighted with new interests. And as each generation addresses and renegotiates the scope and

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4 Davidson, *Samoa Mo Samoa*, 368.
5 Davidson, *Samoa Mo Samoa*, 368.
6 See the *Constitutional Convention Debates 1960* (Official Report, 2 Volumes), Vol I, 6-7 (abbreviated *CCD*).
depth of that pledge, the fathers of the Constitution become what their children make of them. This is my point of entry: to acknowledge the wisdom of past generations and to assume the responsibility of making the past relevant to the present.

This raises the important issue of constitutional change, change that is needed if the ideals embodied in the Constitution are to be realised. The Constitution, in other words, is not only a reminder of Samoa’s past history but a repository of its hopes for the future. When those hopes are no longer seen as realistic or plausible, or when they seem to be incomplete, there will be pressure for constitutional change. Put simply, we need to change what needs to be changed and retain what should not be changed. That also applies to Samoa’s electoral system.

(3) The Matai System: Promise, Demise and Change

A proper understanding of the electoral system and selected constitutional issues could only be achieved within the broader context of Samoa’s distinctive universe of meaning, history, and social structure. At the heart of Samoa’s symbolic universe is the matai system, a ubiquitous feature of Samoan culture and a complex phenomenon which ought to be analysed in light of both its creative and destructive possibilities.7

The term matai comprises the noun ‘mata’ (meaning ‘eye’ as a proper noun or the more abstract noun ‘seeing’ or ‘looking’) and the preposition ‘i’ which, in the accusative case, connotes direction ‘towards’ or ‘at’ someone or something. Taken together, the term matai denotes the act of ‘looking towards or at’ someone or something, i.e. away from oneself.

The term matai in fact evokes a social attitude and is expressive of the disposition of the Samoan people, manifested in what may be conveniently described as the Samoan dyadic personality. This is not the ‘Dr Jekel-Mr Hyde’ split personality syndrome as the word ‘dyadic’ (from δύο, meaning ‘two’) seems to imply. Nor is it the classic case of extroversion which empties the self of any meaning or value. Rather, dyadic personality means that Samoans are, by nature and through socialization, other-oriented, i.e. oriented very strongly towards others. This highlights the fundamental importance of a Samoan’s “significant others”8 – parents, relatives, elders, matais, fellows, and so forth – who constitute the individuals “chorus of significant others”. The matai system as a whole and individual matais operate within this world view as their modus operandi. This mundane world of social relationships, political alliances, mutual expectations, and

7 See S. Vaai, Samoa Faamatai and the Rule of Law (Samoa: The National University of Samoa, 1999) 1, 29-55.
economic ties gives the matai system and holders of matai titles meaning, value and significance.

To some extent, the word matai also carries the quasi-metaphysical connotation of being set apart or consecrated.\(^9\) Seen in this light, the bearer of a matai title is seen as in some sense divinely consecrated for a particular office, a kind of priest *ex officio*. While this may explain the special place which matais and the matai system now hold in Samoa’s cosmology, it tends to misrepresent the place of matais in the socio-cultural system. By structuring society on a vertical axis pursuant to a religious hierarchical ordering of the universe, this explanation runs the risk of elevating matais above the common fray and abstracting them from the horizontal *modus operandi* which actually gives them meaning, value and significance. And, quite frankly, God is not a matai and he does not appoint matais as some are wont to maintain in the quest for divine legitimation of the matai system.

Nor does one become a matai by force, or coercion, or torture, or invasion, or staging a coup d’état. Through the process of selection, a person is appointed by the members of his extended family to be the holder of the family title with its ascribed social status, authority, and corresponding duties. In most cases, the appointment has to be endorsed by a wider cluster of extended families with connections (either direct or indirect) to the matai title. And, in all cases, the appointment has to be endorsed by the village council of matais whose consent is vital in conferring legitimacy on the title-holder for the purposes of village affairs. The appointment of a matai is therefore a process of election at more than two stages, and the consent of a lot of people is indispensable. In light of that, it must be said that the matai system is basically democratic.\(^10\)

Essentially a servant, a matai’s role is that of a *de facto* trustee of his family’s title and lands, the “caretaker of the family property”\(^11\) as one Framer put it. He is not, strictly speaking, the king of the family; he has no right or authority either in custom or by law to dispose of the family’s title and lands. His family and village fellows are also entitled to their legitimate expectations, including the matai’s proper exercise of authority in an equitable manner, with integrity, and within the prescribed criteria of accountability. In fact, a matai who abuses his authority risks losing the trust and acquiescence of his family and village comrades. But just as a

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\(^9\) See M. Meleisea, *The Making of Modern Samoa* (Suva: Institute of Pacific Studies, USP) 1987) 5-7. Note, however, that Meleisea’s construction seems to be a play on the word ‘mata-i-ai’ as an extension or cognate of the word ‘matai’. The term ‘mata-i-ai’ connotes the idea of looking towards or at the matai, thus reversing the process. Instead of the matai looking outwards and away from himself towards or at others, the reverse process makes the matai the focus of attention. This seems to be predicated on the modern presupposition that the matai occupies the centre of the socio-cultural system, and wedded to the Christian notion of consecration, the matai then becomes some kind of semi-divine being who, as such, occupies a position of pre-eminence in the pecking order. The unhappy, absurd result is the matai with a divine mandate to rule and, whenever that happens, we are not very far away from the Stuart kings’ rule by divine right. The notion of rule by divine right, however, is clearly alien to traditional thinking and praxis.

\(^10\) See, for example, the *Official Records of the United Nations General Assembly*, Document A/4840.

king without a people is a king without a kingdom, so also a matai without a family is a head without a body. Put bluntly, a matai needs both his head and his body. The latter evidences the political legitimation of his authority.

As the representative of his family in the village council of matais, he performs an important political function in the conduct of village affairs. Although there is a hierarchy of titles in the village structure, every matai has the right to be on the village council as representative of his family. His views on matters relating to the governance of village affairs are supposed to be informed by the perspectives and interests of his family members. The dynamics of consultation, mediation, and representation make the matai’s exercise of authority democratic. In a speech at the United Nations General Assembly on 18 December 1960, the first Prime Minister of Samoa aptly expressed the true nature of the matai system as “a system of representation; not one of domination.”

Underpinning the matai’s power of representation are important democratic principles: trust reposed in the matai as a decision-maker; the transfer of authority from the many to their representative; the exercise of that authority within prescribed limits and in accordance with the principles of justice, fairness, love, and service; and, the consent of those with a vested interest in how the matai exercises their representative authority. These governing principles regulate the exercise of the matai’s authority.

This complex web of social relationships, organisation, powers, rights and corresponding duties, mutual expectations, property relations, and group ideals constitutes what is called the matai system. Today, the majority of the Samoan people still live under the authority of the matai system which is “held dearly in the hearts” of the people as a fundamental feature of Samoa’s social structure. Framed in Kelsenian terms, the matai system may be described as “the fundamental groundnorm of Samoan customary law.” Rooted in centuries of cultural heritage, this institution persists today because it continues, and will continue, to serve the people’s legitimate interests, e.g., affording the basis of social continuity, furnishing an effective bond of social solidarity, providing a sense of collective identity, and performing important law and order functions in most rural villages where there are no police officers.

I need note in this connection that as a constitutional democracy Samoa has enjoyed its independence largely undisturbed by internal revolutions. That tranquility is due to a number of factors. The temper of the Samoan people is one. Predisposed to deal with issues through consultation, negotiation, and mediation

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Samoans usually make decisions by consensus opinion, by talking things over without cutting throats as it were. And more often than not, the matai system has played a vital role in this peace-keeping enterprise, saving Samoa from plunging into civil war whenever the body politic threatens to relapse back into the Hobbesian state of war of everyone against everyone else.

Unfortunately, the matai system (like any other system of politics) is not perfect and it is also inherently amenable to abuse. A major problem is the reification of the system, undergirded by culturo-religious traditions. One such tradition is that “the authority of all matai [is] divinely sanctioned.”\(^\text{15}\) This fallacious divine legitimation of the authority of matais is reinforced by a related tradition that it is the will of God “that Samoa [should] be controlled by matai [b]ecause he has shared his authority with them.”\(^\text{16}\) To rule, to exercise “control, rigid control”\(^\text{17}\) – these ill-conceived notions resonated throughout the course of the Convention 1960 and, interestingly enough, continue to tickle the imagination of some Samoans. Related to that is the problem of the prostitution of the matai system in response to the matai-only franchise (now, thankfully, defunct). The *Report on Matai Titles, Customary Land and the Land and Titles Court* (1975) aptly summed up the nature of abuses as “the wholesale and reckless creating of new [matai] titles and splitting of [existing] titles without regard for the real needs of the people,” and that this was due, in part, to the “[e]fforts by politicians and their supporters to increase the number of matai for voting purposes.”

I am not being blunt enough when I categorically denounce these traditions as misconceptions, misconstructions, and misrepresentations concocted to gratify the craving for power of the insecure, perpetuated to justify the greed of those who prostitute Samoan custom for personal gain, and sometimes promulgated as convenient working hypotheses. Correcting misconceptions such as these is therefore an imperative. Dressing the system with divine legitimacy has the effect of elevating it above the people whose interests and needs the system exists to serve. The system, it must be emphasised, has no reified existence apart from the people that make it up. The notion that matais are born to rule is misleading. A matai’s significance is primarily functional; he is not, in some strange ontological sense, superior to the members of his family or anybody else for that matter. He is essentially a servant and trustee of his family’s legitimate interests. In the exercise of his representative authority, it is incumbent on him to explain and justify the exercise of that authority every step of the way. In short, a matai’s authority is not unencumbered, and Samoans are intelligent enough to put bridles on their own matais.

For better or worse, the matai system has changed and will continue to change in response to both external stimuli and internal pressures. The most significant change so far was the abolition of the matai franchise following a plebiscite in 1990

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\(^\text{15}\) For a discussion of this tradition see, for example, Meleisea, *The Making of Modern Samoa*, 13.


\(^\text{17}\) See *CCD*, Vol II, 498.
which mandated universal suffrage.\textsuperscript{18} What other changes are in the offing remains to be seen. Whether or not the matai system will eventually disappear, either swallowed up by the forces of change or when its usefulness is spent, is a moot point. It seems certain though that, in the foreseeable future, Samoa without the matai system is an incongruous anthropological proposition. It seems certain also that the matai system - minus misconceptions, misconstructions, misrepresentations, religio-cultural politics which reify socially-constructed institutions, political greed, and so on - is a good, workable, and viable one, fully compatible with the Samoan psyche, temperament, and cosmology.

(4) Constitutional Issues

The following analysis is undertaken against the backdrop of the preceding discussion of Samoa’s universe of meaning, its particular history and distinctive social structure, and the significance and value of the matai system therein.

The Two Electoral Rolls

Article 44 provides for the election of members of parliament under two types of electoral rolls. Clause (1) (a) and (aa) provides for the election of the majority of members of parliament from territorial constituencies, formerly by matais only and presently through adult suffrage. Under the second electoral roll, pursuant to clauses (1) (b) and (2), a limited number of parliamentarians are elected through universal suffrage by Samoan citizens “whose names appear on the individual voters roll,” i.e. persons who do not enjoy the privileges of membership of a Samoan family such as holding a matai title and using customary land, and could not therefore be said to be represented through the traditional franchise.

Article 44 (3) provides that “the mode of electing members of the Legislative Assembly, the terms and conditions of their membership, the qualifications of electors, and the manner in which the roll for each territorial constituency and the individual voters role shall be established and kept shall be prescribed by law.” Parliament, established by article 42, is supposed to have supreme lawmaking power under article 43 (if we adopt the Diceyan doctrine of parliamentary sovereignty literally), subject (hopefully) to the Constitution as supreme law and the review jurisdiction of the courts under article 2. Article 45 defines the qualifications of members of parliament and imposes disqualifications under the Constitution itself and any Act of Parliament. By the Constitution Amendment Act

\textsuperscript{18} It may be noted that when article 44 was introduced for discussion in the Convention 1960, an amendment in favour of universal suffrage was proposed and defeated. See \textit{CCD}, Vol. II, 485-500. The formal introduction of universal suffrage was facilitated by the Plebiscite Act 1990 which authorized a poll of electors 21 years and over. The Electoral Amendment Act 1990 finally introduced universal suffrage while, by section 4, maintaining matai-only candidature for the territorial constituencies.
1963, parliament enacted the Electoral Act 1963. This Act (and amendments) has been the main legal instrument governing Samoa’s electoral system. Article 47 guarantees a right of access to the Supreme Court on any question relating “to the right of any person to be or to remain a Member of Parliament…”

The legitimacy and congruence of the two electoral rolls with Samoa’s distinctive history and social structure was aptly confirmed by Lord Cooke (then Sir Cooke) in the Samoa Court of Appeal case of Attorney General v Saipaia Olomalu [1982] WSCA 1\(^1\) at 14: “The provisions in the Western Samoan Constitution for territorial constituencies and an individual voters’ roll are unique. They are explained by the particular history and social structure of Western Samoa.”

The Court’s confidence, however, deserves another look.

The Individual Voters Roll and the Right to Vote Under Threat

A Resolution of the Constitutional Convention 1960\(^2\) clearly reveals the Framers’ intention in respect of the individual voters roll: to secure the right to vote of this class of Samoan citizens, subject to special qualifications - holding Samoan citizenship (by birth or naturalization); the age requirement of twenty one years; and, registration on the individual voters roll provided they do not hold matai titles, and/or exercise any right or privilege relating to customary lands, and/or are married to persons holding matai titles or are exercising rights or privileges relating to customary lands.

The number of representatives for those on the individual voters roll is to be determined by an Electoral Commissioner under the Second Schedule of the Constitution. The relevant principles of determination include a number of representatives proportionate to the number of voters to ensure effective political participation, and special treatment provisions under the Schedule favouring “the people on the individual voters roll, because they are only a small minority and should have as much representation as can fairly be given to them.”\(^3\) It is clear from the Records of the Convention that the Framers’ overriding concern was to do “complete justice to the minority.”\(^4\) For that reason, the calculation of the number of their representatives is by a special formula set out in the Second Schedule.\(^5\)

\(^1\) The case is also reported as The Attorney General v Saipaia Olomalu and Others (1984) 14 VUWLR 275.

\(^2\) See the Resolutions Adopted By The Constitutional Convention of Western Samoa 1960, 5-6.

\(^3\) See CCD, Vol II, 482-3.

\(^4\) See CCD, Vol II, 483.

\(^5\) See CCD, Vol II, 483. The formula requires the multiplication of the actual number of voters on the individual voters roll by three (i.e. the representatives are deemed to represent three times as many people as have their names actually on the roll) in order to make “full allowance for all their children under the age of 21 and also for people who [are] entitled to go on the roll but had not bothered to do
Introduced for the deliberation of the Convention on September 23, the merits and substantive issues raised by the individual voters roll were extensively debated before the article was finally adopted on September 26 (with a division). The Framers’ intention seems evident. While giving the opportunity to those who choose to have their names on the individual voters roll, the Convention also resolved to progressively phase out this special roll by imposing quite rigid rules of eligibility. A person who, on 1 January 1962 and thereafter, would be exercising any privilege in respect of a matai title and customary land shall not be eligible to be on the individual voters roll. The same rule applies to a person married to someone holding a matai title or exercising any right or privilege relating to customary land. And when a person loses his right to be on that role (e.g., by taking on a matai title or exercising the rights and privileges relating to customary land), he loses that right permanently. The objective of these rigid rules is “to bring about a situation in which all citizens of Western Samoa are fully absorbed into Samoan society in future.”24 That is, “to encourage the formation of a fully unified Samoan community.”25 The Framers’ intention seems clear: the individual voters roll was to be a temporary expedient measure.

For present purposes, the issue is whether or not this special franchise is still constitutional (in light of the Framers’ 1960 intention), or even necessary any more. In the Convention 1960, none of the Framers was expressly against the adoption of the individual voters roll.26 That said, there appears to have been a largely unspoken disquiet regarding the adoption of two different electoral systems, partly because of the incongruence of universal suffrage and the parliamentary candidature of non-matais with cultural norms and practices. This issue has been re-ignited by Recommendation 13 of the Commission of Inquiry 2001 that the individual voters roll should be abolished forthwith. The reasons given include: the special roll is no longer needed; it is incongruent with Samoan custom; and, it is discriminatory in the respect that whereas individual voters may elect to become voters in the territorial constituencies (by assuming a matai title and enjoying the privileges pertaining to customary land), voters in the territorial constituencies cannot elect to become individual voters. In proposing the abolition of the individual voters roll, the Commission also appears to be harking back to the Framers’ intention that the special roll was to be a temporary measure only.

There are, of course, important issues which need to be carefully considered (the Framers’ intention notwithstanding) before such a monumental action is finally taken. One is the right to vote of even one Samoan citizen on the individual voters roll, a right which should be protected at all costs. Arguments of historical contingency, political necessity, social harmony, nationalism, public interest and the like must justify the violation of a citizen’s rights and civil liberties. Violating

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24 See CCD, Vol II, 483.
25 See Davidson, Samoa Mo Samoa, 376.
26 Note, however, that an amendment proposed by one of the members would have, if it had been adopted, eliminated the special arrangement for individual voters altogether. See CCD, Vol II, 489.
rights to end social fragmentation (i.e. to produce a “fully unified” nation) is like casting out the devil with the aid of Belzebub. Furthermore, democracy simplistically construed as mere majority rule courts the evil of the majority riding roughshod through the rights of the minority. Anti-majoritarianism is one thing; protecting the rights of a minority is something else.

Another issue is that discrimination cuts both ways: Samoans under the matai system do not have the choice to be on the individual voters roll; individual voters with some association with matai titles and customary lands (however distant or minimal) permanently lose the right to be on the individual voters roll. Either way, it is discrimination on the basis of family status which, on a normal reading of the Constitution, is prohibited by article 15 which mandates equality before the law and equal protection under the law, and proscribes special treatment or discrimination “on grounds only of descent, sex, language, religion, political or other opinion, social origin, place of birth, family status, or any of them.”

Yet the Court of Appeal has taken an interesting approach to the issue of political rights as in the case of the Attorney General v Saipaia Olomalu27 (a test case on political rights and is the authority on the issue). My specific interest in the case relates to certain findings (at 15-16) of the Court that are of particular interest for present purposes.

First, the political right to vote is not protected by article 13 which guarantees freedom of speech and expression, peaceful assembly, association, movement and residence. Noting that the rights guaranteed by article 13 are “of particular political value,” the Court then added that “[I]t is significant that electoral rights are not specified there or anywhere else in Part II [on fundamental rights].”

Secondly, in keeping with its preceding finding and relying on the Records of the Convention 1960, the Court observed that “[I]n the Constitution a natural place to have included the right to vote, had it been intended, would have been article 13.”

Thirdly, the concomitant corollary of the Court’s reasoning was that article 15 “was not intended to and does not relate to voting at general elections … Parliamentary electoral qualifications are a special subject, outside the purview of article 15 and not dealt with at all in Part II of the Constitution. Such provisions as the Constitution makes on the subject are to be found in Part V.”

27 The case involved declarations sought by the respondents to the effect that sections 16 and 19 of the Electoral Act 1963 were discriminatory against the respondents on the basis of family status and were therefore violative of article 15. The facts included the removal of the names of four respondents from the individual voters roll on the grounds that one had taken a matai title, another had married a person with a matai title, and two others (blood sisters) were descended from a part-European father who held a matai title from 1958 to 1965. The last respondent alleged that he had been denied the right to seek parliamentary election because his application for registration as an elector was refused on the ground that his name was neither on the matai register nor on the individual voters roll. The case reached the Court of Appeal on a question of law relating to the interpretation of the Constitution.
And, finally, citing Professor Davidson’s explanation of article 15 in the Convention 1960 as authority, the Court (at 19) ultimately committed the heinous legal sin of allowing discrimination on the ground that “the Convention proceeded on the advice and basis that the equality guarantee of article 15 did not prevent discrimination in important political rights.”

Granted that the Court had to defer to the particular history and social structure of Samoa, as well as to the Framers’ intention, nonetheless, the Court’s findings have interesting implications for the electoral system which need to be nuanced and analyzed. Since political rights (the right to vote and seek parliamentary election) are placed in Part V which is headed ‘Parliament’ (following the three-fold classification of the branches of government), one cannot avoid the inference that:

(a) the Court is giving parliament absolute authority to deal with political rights as parliament sees fit;
(b) adopting the politics/law and policy/principle dichotomies, the Court seems to have treated political rights as no more than matters of politics and policy within the domain of parliament’s lawmaking power;
(c) given the Court’s approach, abolishing the individual voters roll (as the Commission of Inquiry has urged) and, in the process, denying even one Samoan citizen his constitutional right to vote would not be ultra vires the Constitution because it is not a species of discrimination prohibited under article 15;
(d) article 4 which provides remedies for the enforcement of rights under Part II of the Constitution does not apply to political rights in Part V;
(e) the Constitution does not explicitly guarantee that all rights being given and protected are equal rights (at least, not in practice), and that discrimination in the case of political rights attracts a lower standard of judicial concern; and,
(f) while the right to parliamentary candidacy is protected by article 47 which empowers the Supreme Court to examine any matter relating to the exercise or violation of that right, the only saving provision and protection for the political right to vote is article 2 which empowers the judiciary to declare invalid laws that are inconsistent with the provisions of the Constitution, i.e. to the extent of the inconsistency. This presupposes that (1) the courts will exercise their review jurisdiction of legislative and executive decisions (which they rarely do), and (2) the non-application of the guarantee and protection of article 15 to political rights is not ultra vires the Constitution (as the Court of Appeal itself held).

It may be noted as a matter of interest that:

(a) the dichotomies (e.g., politics/law, policy/principle) which the courts are wont to uphold are sometimes over-blown;
(b) “politics, in its ordinary institutional forms, should be the servant of justice rather than its master”;28

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(c) justice must be done and must be seen to be done;
(d) democracy is often simplistically understood as mere majority rule through the elected representatives of the people;
(e) “the notion of the separation of powers which is at the heart of Samoa’s system of constitutional democratic government,” as the Supreme Court observed in the case of Tuiatua Tamasese Efi v The Attorney General (1st August 2000), demands not only interdependence among the three branches of government, but more primarily the independence of the judiciary as a fundamental tenet of the rule of law;
(f) in a constitutional democracy like Samoa, the judiciary is the primary guardian of the rule of law and its correlates of rights and liberties;
(g) the Samoan parliament is limited in theory and should also be limited in practice; and,
(h) taking the Westminster doctrine of parliamentary sovereignty undiluted is tantamount to empowering parliament (using what is now a common legal metaphor) to legislate that all blue-eyed babies be killed, i.e. according to the law.

Matai-only Candidature for the Territorial Constituencies: A Reasonable Accommodation of Different Worlds

Article 44 (1) (a) and (aa) provides for the election of members of parliament by and from traditional constituencies (apart from those elected on the individual voters roll). Article 45 (1) sets out general qualifications for parliamentary membership: “(1) Any person shall be qualified to be elected as a Member of Parliament who – (a) is a citizen of Western Samoa; and (b) is not disqualified under the provisions of this Constitution or of any Act…” By the Electoral Act 1963 (and amendments), qualifications and disqualifications of members of parliament now include inter alia: Samoan citizenship; matai status; registration of the matai title; a certificate of identity; residence in Samoa for three years prior to an election. In respect of the matai-only qualification the Framers’ intention seems clear:29

This subclause [article 45 (1) (b)] makes it possible for non-titled people to be disqualified as Members of the Legislative Assembly and for that right to be restricted to matais. In other words, this clause seeks to ensure that everyone has equal rights before the ordinary law of the country, but does not impose equality in regard to political rights.

Construed in a positive light, this is a form of disqualification like any other, e.g., an undischarged bankrupt, insanity, people in prison, and conviction of a serious offence. While recognizing the right to vote and the correlative right to seek election, the Framers apparently decided to limit the latter to matais only. In a broad sense, such limitations could be explained on the broad policy ground that

29 See CCD, Vol I, 221-2 (italics added for emphasis).
parliamentary elections would prove unmanageable and chaotic in the absence of some form of organization or regulatory procedure.

Negatively, it is discrimination pure and simple, based on family status and is therefore incompatible with equality before the law and equal protection under the law guaranteed by article 15. The philosophical argument that non-matais have the right to vote but not the right to become members of parliament short-circuits the political participation of non-matais. To justify such an argument we may have to invoke the Orwell maxim that all animals are equal but some animals are more equal than others. A communist commune may indulge such a repugnant assumption, but it is certainly out of order in a democratic society governed by principles such as the equality of all citizens. In the politics of voice, giving matais a mandate to speak on behalf of non-matai voters stifles freedom of choice, thought and expression. The much-vaunted ‘what about me?’ argument that matai-only candidature excludes better qualified non-matais from parliament also has a grain of truth. And finding the true legal pedigree of the matai-only qualification may be difficult.

The cumulative effect of opposing arguments such as the above is the problematization of matai-only candidature. Why have it then? Why should we in 2004 be held hostage to the will of the Framers 1960? But is there such a thing as original intention, or is it something that we ourselves invent? And what factors or forces bind us to the Framers’ will like Ulysses binding himself to the mast of his ship lest he destroy himself?

(a) As already indicated, matai-only candidature is fully consistent with the Framers’ intention which, in my view, is not some fiction, or creative invention, or complex esoteric wisdom locked away in the Records of the Convention waiting to be discovered. In fact, the Records of the Convention 1960 clearly show that it was always the Framers’ intention to limit parliamentary candidature to matais. Proposed for discussion on 26 September 1960 and adopted (without division) the next day, the Convention’s deliberation on article 45 (1) did not take long (one hour at the most). Nor did the meaning and objective of the article cause intellectual confusion or a major difference of opinion among the Framers. Only three members had something to say. One spoke about article 18 instead of article 45, and was therefore out of context. The other two raised important substantive issues: the exclusion of non-matais who are better qualified and the discriminatory nature of the disqualification. Other than that, the force of the article as imposing legal disqualifications on parliamentary candidature was, in the end, unanimously accepted. Matai-only candidature thus carries the constitutional authority and legitimacy of popular will, voice, authorship, and consent. Popular

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30 Marshall CJ in Marbury v Madison 5 U.S. (1 Cranch) 137 (1803) at 176.
31 See, for example, B. Ackermann, We the People. Foundations (Mass.: Harvard University Press, 1991) 185.
sovereignty, manifested in the declaration “We the people of Western Samoa,” demands the adoption of the people’s own values, practices, and institutions as criteria, benchmarks, and mechanics for the conduct of government. Likewise the principle of government by consent means that the people consented to the State of Samoa to be “based on Christian principles and Samoan custom and tradition.”

This raises the broader issue of the Framers’ intention to protect the matai system. For example, article 100 protects Samoan custom relating to matai titles which are required to be held according to Samoan custom and usage. The second part of the article provides that the holding of matai titles shall be in accordance with “the law relating to Samoan custom and usage.” This effectively places matai titles outside the jurisdiction of parliament and “to make it clear that no right is being given to Parliament to make laws interfering with Samoan custom and usage, but only laws that will determine how Samoan custom and usage is to be interpreted through the Land and Titles Court in matters in dispute.” In a sense, matai-only candidature is the self-fulfilling prophecy of the constitutional promise to preserve Samoan custom and tradition.

(b) In light of the Framers’ manifest intention, it is not surprising if this is a non-issue for the judiciary. Furthermore, the Court of Appeal does not seem to mind discrimination affecting political rights under Part V of the Constitution, the protection of the right to be or remain a member of parliament under article 47 notwithstanding. The Court’s decision in *Saipaia Olomalu* is suggestive. It is also in keeping with the Court’s mode of constitutional interpretation. Treating the Constitution as *sui generis*, the Court normally emphasizes the distinctive history and social structure of Samoa in which the Constitution continues to find meaning as relevant factors of constitutional interpretation. In the area of fundamental rights and liberties, the Court counsels the avoidance of mechanical legalism and a dogmatic, pedantic approach in favour of a careful balancing of individual rights and liberties with the custom and tradition of the Samoan people.

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34 The recognition of the authority of matais and the matai system was, not surprisingly, a burning issue in the Convention 1960. While the Constitution does not make any express reference to that authority, articles 100 and 101 on the holding of matai titles and customary land in accordance with custom reasonably imply the recognition of matai authority. See CCD, Vol I, 76-93; also G. Powles, “Western Samoa” in M. A. Ntumy (ed), *South Pacific Islands Legal Systems* (Honolulu: University of Hawaii Press, 1993) 395-430, 399. See further the Village Council Act 1990 enacted to “validate and empower” village councils of matais. To all intents and purposes, that Act is *intra vires* the Constitution and is consistent with the clear intention of the Framers for formal recognition of the matai system.

35 See CCD, Vol. II, 674; Davidson, *Samoa Mo Samoa*, 380: “Parliament could make laws to determine the procedure to be followed when any matter relating to the interpretation or effect of custom was in doubt; but it could not overrule custom.”
© Matai-only candidature was adopted with the approval of both the United Nations General Assembly and the government of New Zealand as the administering power in Samoa in 1960. The *Official Records of the United Nations General Assembly*, paragraph 11, refers with approval to the Constitutional Convention 1954 where it was “proposed to apply universal suffrage to the European community only, while in the Samoan constituencies the matai would have the right to vote and to be nominated as candidates for election. The Government of New Zealand accepted these recommendations of the Constitutional Convention as reflecting the wishes of the overwhelming majority of the Samoan people.”

(d) A more compelling argument is that matai-only candidature is congruent with Samoan traditional politics, organization and social structure, protocols, institutions, and values. In support of this proposition I offer the following points of reference:

(i) Matai-only candidature is democratic. As already noted, the election of a matai occurs at a number of stages. Election as a matai member of parliament takes the process further: from the family through clusters of extended families to the village council to the territorial constituency and, finally, to the whole nation. Perhaps it is indirectly democratic, but it is nonetheless democratic.

(ii) As also noted above, democratic principles actually govern the election of matais: trust reposed in the matai; the transfer of authority from the many to the one; the power of representation; the exercise of conferred authority within prescribed limits; the principles of justice, fairness, love and service as the moral mandate of the matai; and, the consent of the family and others in the appointment. Naturally, in the case of a matai seeking parliamentary election, these principles exert a more demanding pull and thrust. And a matai member of parliament who casually ignores or recklessly violates these principles forfeits the privilege of being re-elected. It is tantamount to committing political suicide.

(iii) Both matais seeking parliamentary election and matai members of parliament are particularly susceptible to the scrupulous scrutiny of public opinion, more so than others. Every right-minded Samoan knows the importance of public opinion as a court of reputation. The negative estimate of one’s fellows constitutes a most powerful value judgment against which matais (whether seeking election or not) carefully guard with the utmost diligence because it can make a person into either a king or a bastard virtually over night. In a positive sense, eschewing falling into disgrace has the moral and psychological force to check the degeneration of

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36 Matai-only candidature was, in fact, a feature of the New Zealand administration of Samoa. For instance, the Faipule Election Ordinance 1939 provided for the appointment of matais only to the Fono (Council) of Faipule under the jurisdiction of a New Zealand administrator appointed by the New Zealand Governor General. Matai-only candidature in legislative and executive bodies continued up to the Convention of 1960.
Samoan politics (both traditional and modern) into a morally-neutral monopoly of unaccountable monads.

(iv) It is congruent with Samoa’s value system. In addition to the values mentioned above, Samoa puts a lot of emphasis on according respect to those in authority and deferring to the wisdom, experience, and better judgment of the elderly. Matais are among the main beneficiaries of this cultural mindset. I need enter a caveat in this connection: Samoans are intelligent enough to distinguish between good and bad matais, and to put bridles on both good and bad.

(v) It is consistent with the traditional Samoan conceptualization of the individual/collective dialectic. In traditional thinking, a matai is elected to parliament not as an isolated or atomistic individual, but as a representative of his family, village, constituency, and the entire people. This ideal of representation is underpinned by, first, the social construction of the Samoan individual towards other-orientation, manifested in a dyadic personality and epitomized in the term matai (looking at or towards others), as noted above. It is underpinned, secondly, by the constitution and social construction of society whereby the whole, the community, the collective is seen as ontologically and cognitively prior to its constituent parts. This is in line with the socio-cultural emphasis on the common good and collective well-being. While the individual is ultimately important, the notion of the interest-maximizing individual is not an acceptable axis of value in traditional thinking and practice. The main emphasis is on one’s “others”; this is a moral imperative. This, however, is indeed changing as the Samoan ‘self’ becomes increasingly privatized.

(vi) It is reasonable. Reasonableness is a broad concept, with broad categories such as reason and morality providing pointers. It means different things to different people in different situations. Given that, it could be argued that matai-only candidature in the context of Samoa is not so outrageously irrational or defiant of normal canons of reason and morality. True, it is discriminatory and every kind of discrimination (racial, sexual, etc) should never be condoned. But given the particular history and distinctive social structure of Samoa such discrimination is capable of justification, i.e. according to Samoa’s view of the common good that accords with what the Samoan people themselves hold as a rational view of their own collective well-being based on their history, character, and aspirations for the future. In this respect, matai-only candidature may be characterized as part of Samoa’s public reason.

(vii) A case could be made that the matai-only candidature is a customary right correlative with the right to hold a matai title, the right to customary land.

37 Sometimes the problem is the inability of matai members of parliament to properly negotiate the interface between the village, the constituency, and the nation. This has spawned the criticism that matai members of parliament are more concerned with sectional interests (village and constituencies) than national ones. While this may be true, it is naive to assume that politicians and political parties everywhere else in the world (i.e. apart from Samoa) are always the faithful, non-partisan servants of exclusively national interests.
pertaining to that title, and the right to represent non-matais in parliament. Construed thus, the right to be a member of parliament as a matai is a species of a bundle of customary rights conferred and justified by the distinctive nature of the Samoan universe of meaning, political organization, and land tenure system.

(viii) It is consistent with the status of matais in Samoa’s politico-cultural system. As the Court of Appeal in *Pita v Attorney General* [1995] WSCA 6 observed at 23: “It was the status of a matai which gave rise to matai suffrage and matai candidature in Parliament. While political opinion may be expressed in the ballot box, it is only one way of doing so and whether or not the electoral system gave rise to a discrimination depended on the qualifications of electors as ‘prescribed by law’ under art. 44 (3).” However, it needs to be said, again, that the matai’s status is not predicated on some metaphysical ontological notion of superiority but on the functional value of the matai. It follows that when a matai seeking election or a matai member of parliament neglects to fulfil his legitimate functions, he squanders his chances of being elected (in the case of the former) and risks rejection in the next election (in the case of the latter). In either case, the matai loses not only his meritorious status but the authority conferred upon him by the people. The matai, in other words, is really one of ‘us’, subject to the same standards of conduct like everybody else.

(ix) It correlates with the status of the matai as a *de facto* trustee of family lands, subject to the government’s trusteeship of customary land. Article 102 governs that trusteeship by prohibiting the alienation of customary land or any interest therein by way of sale, mortgage, gift or otherwise. Nor shall customary land or any interest therein be used in the execution of loans and so forth. Parliament however may, by legislation, authorize (1) the grant of a lease or licence of customary land or of any interest therein, and (2) the taking of any customary land or interest therein for public purposes subject to adequate compensation as required by article 14. In sum, article 102 was designed to protect Samoan custom in relation to land and to withhold from parliament “power … to interfere [with customary land and titles as] the basis, of course, of the social structure of Samoa.”

Certain conclusions may be drawn in light of the above. First, there is an essential nexus between matai status and customary land. Secondly, preserving customary land entails preserving the matai system. Thirdly, matai-only candidature as a

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38 See *CCD*, Vol II, 673.
mode of political representation is integrally related to other broader social, cultural, and economic institutions. Changing one has a domino effect on others. Fourthly, the principle of government as fiduciary (with matais as *de facto* trustees) of customary land imports equity into the equation and the application of principles of equity like natural justice and fairness. And, finally, the broad thrust of the principle of government as trustee determines the nature and functions of government: government as a servant of the people and protector of the people’s rights, liberties, and property. Most of the principles, values, and expectations which inform, guide, and regulate the matai system are not very different – they are part of Samoa’s own species of equity. In principle, these should inform, guide, and regulate the conduct of matai members of parliament. By the same token, a matai member of parliament who merely pretends to espouse or even flagrantly ignores these principles and values indulges in a mighty act of hypocrisy which, of course, always peeps through. And the people – no longer drunk, but sober and intelligent – can always tell when and where parliamentary representation has become nothing more than a mere fiction.

The Future

In conclusion, I note with interest an observation of the Commission of Inquiry 2001 regarding the future of Samoa’s electoral system:

As far as the electoral process is concerned – and it cannot be stressed too highly that this observation relates exclusively to the electoral process – the Commission contends that no further attempts should be made to assimilate the faasamoa [Samoan custom and tradition] into the electoral system or vice versa, but recognition should be given to the different systems.

Whether or not that is viable is a matter of opinion. But it would most certainly be a remarkable and (I might add) revolutionary innovation.

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