

THE CONSTITUTION AND THE FRANCHISE IN WESTERN SAMOA

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The constitutional systems of the non-European islands of the Pacific offer a rich and largely unexplored field for study by the comparative constitutional lawyer.¹ Of the independent states, Tonga (1875) offers an example of the nineteenth century constitutions. The constitution of Western Samoa (1962) was enacted at a time (1960) when only a few of the former British colonies had constitutions, and although its framers obviously drew on such precedents as existed, in some respects its content, and in particular, its autochthonous method of enactment, present contrasts to the Westminster/Whitehall model (which had found an influential expression in the Nigerian constitutions of 1959 and 1960).² This model also influenced, in varying degrees, the constitutions of Nauru (1968), Papua New Guinea (1975), Solomon Islands (1978), Tuvalu (1978) and Kiribati (1979), although some of them (Papua New Guinea in particular) are elaborate extensions of the 1959 Nigerian constitution. The most recent constitution is that of Vanuatu (1980), and in keeping with its antecedents, it is perhaps the most idiosyncratic of the modern constitutions. There is also a considerable number of and diversity between the constitutional systems of the non-independent islands.

This essay is largely a critique of the decisions³ first, of St. John C.J. of the Supreme Court of Western Samoa, and secondly of the Court of Appeal of Western Samoa, in *Attorney-General v. Saipa'ia Olomalu*, but the analysis is directed also to an exploration of the techniques that are and might be adopted for the interpretation of the Pacific Island constitutions.

Introduction and historical background

At independence, the qualifications for electors in Western Samoa were provided for by the *Western Samoa Legislative Assembly Regulations* 1957 (New Zealand). In 1963, these

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1. P. Sack (ed) *Pacific Constitutions* (1982) (Law Dept., RSSS, ANU) is a collection of 24 essays on the constitutional law of the Pacific, and some of this essay draws on P.J. Bayne, 'Judicial Technique and the Interpretation of Pacific Island Constitutions', 291-306. The bibliography to the book is a valuable guide to the literature. I am indebted to Guy Powles of the Monash University Law School for his comments on an earlier version of this article. The responsibility for error is mine alone.
2. S. A. de Smith, *The New Commonwealth and its Constitutions* (1964) is the major commentary on those constitutions influenced by the model. O. I. Odumosu, *The Nigerian Constitution: History and Development* (1963) contains the 1960 *Constitution of the Federation of Nigeria*. The 1960 (independence) Constitution had been preceded by an Order-in-Council (S.I.1959 No. 1772) which had introduced the Bill of Rights prior to independence; see G. Ezejiiofor, *Protection of Human Rights Under the Law* (1964), at 182. See too K. Roberts-Wray, 'Human Rights in the Commonwealth' (1968) 17 *I.C.L.Q.* 908 at 916.
3. *Saipa'ia Olomalu v. Attorney-General* (Unreported, 5 April 1982, St. John C.J.); *Attorney-General v. Saipa'ia Olomalu* (Unreported, Misc. Nos. 5895, 5896, 5946, 5951, undated judgment, Court of Appeal of Western Samoa, Cooke P., Mills and Keith JJ.) The judgment of the Court of Appeal has been reported in (1984) 14 *Vic. Univ. of Wellington L.R.* 275. References to particular pages of the judgment of St. John C.J. have been omitted in order to reduce the number of the footnotes. These cases are the subject of some comment in G. Powles 'Legal Systems and Political Cultures: Competition for Dominance in Western Samoa', (paper presented to a seminar on Legal Pluralism and Comparative Law, to be published in 1985 by the Law Dept., R.S.S.S., A.N.U.).

were repealed and replaced by the *Electoral Act* 1963, and two of its provisions were in issue in the *Olomalu* case. The material provision of section 16 was that 'every person shall be qualified to be registered as an elector of a constituency if (a) He is the holder of a Matai title . . .'. Section 16 governs the suffrage for the purposes of elections for the territorial constituencies held under Article 44(1)(a) and (aa) of the Constitution. Section 19 governs the suffrage for the purposes of elections for the individual roll constituencies held under Article 44(1)(b), and it disqualifies a person who has taken a *matai* title, and the spouse or children of such a person. (Article 44 is set out in full below). Olomalu and four others sought declarations that ss.16 and 19 were void pursuant to Article 2 of the Constitution (the supremacy clause) on the ground that these sections were inconsistent with Article 15(1) and (2). In early 1982 the effect of these provisions was that some 14,000 *matais* qualified under s.16, and some 1,500 other persons qualified under s.19. The potential electorate if universal suffrage applied was some 90,000. (Four of the five applicants were concerned primarily with the operation of s.19, but one was an untitled person who had no claim to be registered on the individual voters' roll and thus the validity of s.16 was raised squarely for decision).

The application for declarations that ss.16 and 19 were void came before St. John C.J., (an Australian seconded from the bench of the Federal Court of Australia), in February 1982, and in April his Honour declared that ss.16 and 19 were void 'by reason of their infringement of both sub Articles (1) and (2) of Article 15'. The Attorney-General then appealed to the Court of Appeal for Western Samoa, which was constituted for the occasion by three New Zealanders, two of whom held judicial office in New Zealand. The Court of Appeal allowed the appeals, and held that ss.16 and 19 were valid. St. John C.J. had found there was discrimination on the basis of family status between *matais* and untitled people in s.16, and that the untitled persons on the individual voters' roll under s.19 were placed there on the basis of descent. The Court of Appeal held that both sections involved discrimination on the basis of family status, but concluded 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.'⁴

The Independent State of Western Samoa is comprised primarily of two islands (Upolu and Savai'i) and has a population of approximately 155,000. After a period of sometimes hostile and deadly rivalry between European powers, the islands were colonised by Germany in 1900. The possession and control taken by New Zealand at the outset of the First World War was followed by the grant to that country of a mandate by the League of Nations, which, after the Second World War, was converted into a trusteeship by the United Nations. Colonial administration revolved around a High Commissioner responsible to the New Zealand government, but in the 1950's an Executive Council and a Legislative Assembly became vehicles for more Samoan participation in the affairs of government.

The question of constitutional development was addressed in 1954 by a Working Committee and a Constitutional Convention, and its plan for development was largely followed by a 1960 Convention, (see below). The first major formal step which led to the Independence Constitution was the establishment in January 1959 of a new Working Committee (of Samoan citizens and two New Zealand advisors) which, after dealing with matters necessary to enable a large measure of self-government, turned its attention in January 1960 to the drafting of a constitution to come into operation on independence. In February 1959, the committee had resolved that its draft 'should be placed before a

4. (1984) 14 *Vic. Univ of Wellington Law Review* 275 at 288.

constitutional convention for consideration and for enactment'.⁵ The procedure adopted was designed to make the new constitution legally autochthonous; that is, to ensure that its validity could not be said to derive from the law of New Zealand, but rather, that it lay simply in the authority of those who, without warrant from New Zealand law, declared that the document should be the constitution.

The procedure adopted did not perhaps go as far towards this objective as might have been possible.⁶ An Ordinance of the Legislative Assembly, enacted under power conferred on the Assembly by the Samoa Act of New Zealand, established a Constitutional Convention. The Convention comprised the members of the Assembly (including the Prime Minister and other Ministers), holders of the three highest titles according to Samoan custom, and some 130 representatives chosen (largely on the basis of *matai* suffrage) by the existing constituencies. In the words of Davidson:

The Ordinance declared that the convention was established 'for the purpose of making provision as to the constitution of Western Samoa'; but it conferred no powers upon it. Since the intention was to create a break with the law of New Zealand, the power to adopt the Constitution was to be assumed by the convention itself.⁷

The Convention met first on 16 August 1960, and closed on 28 October 1960 with the passing of a motion for the adoption and enactment of the Constitution of the Independent State of Western Samoa. The Constitution provided in Article 113 that it should come into force on the day approved by the General Assembly of the United Nations as the date of the termination of the Trusteeship Agreement for the Territory of Western Samoa. This date was later fixed as 1 January 1962, but before turning to the role of the United Nations, some of the details of the composition of the Legislative Assembly need to be explored.

The Assembly was created by the Samoa Amendment Act 1948, and for the elections of 1948, 1951 and 1954 the Samoan members were elected by the *matai* of the various constituencies. In 1954, a constitutional convention dominated by Samoans recommended that the Samoan members be elected 'for the time being' by *matai* suffrage. The New Zealand government accepted this, (although reluctantly according to one commentator),⁸ and the recommendation was given effect to by the Samoa Amendment Act 1957. *Matai* suffrage meant (and still means) considerably less than universal suffrage. A *matai* is the head of an extended family, and as such administers the use of land which belongs to the family, and has important functions in relation to social control in the family, the village and the wider community. *Matai* titles are ranked, and some have national significance. The *matai* title is not inherited, and disputes as to succession, which can be sharply divisive, may be determined by a Land and Titles Court.⁹ Both males and females may hold the titles, although males predominate. There is approximately one title-holder for every five adults who do not hold a *matai* title.

Both the Working Committee and the Constitutional Convention debated whether the independence constitution should guarantee universal suffrage and both decided that it should not. Speaking of the Working Group, Davidson records that '[t]he committee took the view, which was shared by a majority of Samoans already possessing the vote, that no

5. J. W. Davidson, *Samoa mo Samoa: The Emergence of the Independent State of Western Samoa* (1967) at 355. This book is a general historical reference work. See at 326-327 concerning the 1954 Committee and Convention.

6. K. Roberts-Wray, *Commonwealth and Colonial Law* (1966), at 295-301.

7. Davidson, *supra* n.5.

8. C. G. Powles, *Fundamental Rights in the Constitution of Western Samoa* (Manuscript, 1970), 3.

9. C. G. Powles, *The Status of Customary Law in Western Samoa* (Manuscript, 1973), Ch V. See B. Foster, 'A Pacific Paradox' *The Listener*, November 1982, for a critical comment on the *matai* system in contemporary Western Samoan society.

extension of the existing Samoan franchise was immediately desirable',¹⁰ and that in this regard the draft it prepared for the Convention provided only that 'the qualifications of electors . . . shall be prescribed by Act'.¹¹ But Davidson further explained that:

It was assumed that the right to vote in the territorial constituencies would initially be limited to the *matai*; but this restriction was omitted from the Constitution itself, in order that the suffrage could be widened as soon as there was a majority in the assembly in favour of such a change.¹²

There was a motion put to the Convention that the constitution should guarantee universal suffrage, but it was lost on the voices.¹³ Again, however, one of the leading Samoans argued that in the future the suffrage would need to be extended beyond the *matai*.¹⁴

The question of the suffrage was bound up to some extent with the question of whether, before the Trusteeship was terminated, the constitution should be put to a plebiscite to be determined in accordance with universal suffrage. A United Nations Visiting Mission had in early 1959 intimated to the Working Committee that the General Assembly would require such a plebiscite, and, with some misgivings, the Committee accepted this.¹⁵ The Convention tried to limit the scope of the plebiscite to the single question of whether Western Samoa should be 'independent or under foreign rule',¹⁶ but the Fourth Committee (Trusteeship) of the United Nations insisted that in addition to a question of this nature, it should also be asked of the voters whether they agreed with the constitution that had been adopted by the Convention. The plebiscite was held on 9 May 1961, under the supervision of the United Nations Plebiscite Commissioner. Some 38,000 persons voted, and both questions were answered in the affirmative by majorities of 79% and 83%.¹⁷

It might thus be argued that 83% of the voters, voting on the basis of universal suffrage, approved of a constitution which it was clear did, initially at least, limit suffrage in elections to the *matai*. But this argument needs to take into account the circumstances in which the plebiscite was conducted. Davidson records that there was an attempt at persuasion 'through the impartial dissemination of information', but also that '[s]hortly before the plebiscite, Tupua Tamasese, Fiame and other leaders delivered broadcast addresses, in which they not only stated the case for the Constitution and for independence but also suggested that casting a negative vote would be an act of treachery'.¹⁸ Powles observes that an argument of the kind under analysis would underestimate the extent to which the non-*matai* 'would traditionally accept the judgment of their leaders . . . because the *matai* have always made the decisions and [this] is particularly so when the subject is one which is not fully understood'.¹⁹

The provisions of the Constitution

It is now desirable to examine in more detail what the Constitution provided in relation to equality and suffrage. Part II is headed 'Fundamental Rights' and contains Articles 3 to 15. Davidson says nothing as to the precedents upon which these provisions are based, but a comparison with the similar provisions in the (pre-independence) 1959 constitution of

10. Davidson, *supra* n.5 at 375.

11. *Ibid.* at 377.

12. *Ibid.*

13. *Ibid.* at 389-390.

14. *Ibid.* at 390, and see below n.81.

15. *Ibid.* at 361.

16. *Ibid.* at 403.

17. *Ibid.* at 406.

18. *Ibid.* at 404-405.

19. Powles, *supra* n.8 at 4.

Nigeria indicates that the Nigerian provisions were used as the model.²⁰ There is too much identity of wording to conclude otherwise. It is also evident that the 1957 Constitution of Malaya was drawn upon as a source of precedent in this regard.²¹

Article 15 was in issue in the *Olomalu* cases. It provides:

Freedom from discriminatory legislation

15.(1) All persons are equal before the law and entitled to equal protection under the law.

(2) Except as expressly authorised under the provisions of this Constitution, no law and no executive or administrative action of the State shall, either expressly or in its practical application, subject any person or persons to any disability or restriction or confer on any person or persons any privilege or advantage on grounds only of descent, sex, language, religion, political or other opinion, social origin, place of birth, family status, or any of them.

(3) Nothing in the Article shall —

(a) prevent the prescription of qualifications for the service of Western Samoa or the service of a body corporate directly established under the law; or

(b) prevent the making of any provision for the protection or advancement of women or children or of any socially or educationally retarded class of persons.

(4) Nothing in this Article shall affect the operation of any existing law or the maintenance by the State of any executive or administrative practice being observed on Independence Day:

Provided that the State shall direct its policy towards the progressive removal of any disability or restriction which has been imposed on any of the grounds referred to in Clause (2) and of any privilege or advantage which has been conferred on any of those grounds.

In relation to Article 15(1), Powles comments that '[e]quality was not explained in any context other than the administration of justice', although it was explained in such a way as to make it clear that the provision 'was intended to ensure equality between matai and [non-matai]'.²² There appears to have been somewhat more explanation of Article 15(2), and, in particular, Davidson explained it to the Convention in terms which according to Powles made it clear that the opening words of the provision ('Except as expressly authorised under the provisions of the Constitution, . . .') 'enabled the Constitution to make later provision for qualifications for voting and election which would otherwise be discriminatory'.²³

The 1959 Constitution of Nigeria contained a more limited equality provision,²⁴ and the relevant provision in the (1950) First Protocol of the (European) Convention for the Protection of Human Rights and Freedoms (which was the source for much of the 1959 Constitution of Nigeria) provided only for a right to equal benefit to the rights otherwise provided for in the Convention.²⁵ The relevant provisions of the 1948 Universal Declaration of Human Rights²⁶ of the General Assembly of the United Nations are also

20. Odomusu, *supra* n.2 at 322-332. Section 27 of the 1960 Constitution of Nigeria may have been a model for Article 15, but a more direct precedent may have been Article 8 of the Constitution of the Federation of Malaya of 1957; see L. A. Sheridan, *The Federation of Malaya Constitution* (1961), at 12, 13.

21. See preceding note.

22. Powles, *supra* n.8 at 49.

23. *Ibid.* at 50.

24. Odomusu, *supra* n.2 at 328. Section 27 of the 1960 Constitution of Nigeria did not contain an equivalent to Article 15(1).

25. J.E.S. Fawcett, *The Application of the European Convention on Human Rights* (1969), at 232 ff.

26. Articles 2 and 7.

closer to the European Convention than to the more general right to equal treatment in Article 15 of the Constitution of Western Samoa. It would appear from their similarity of wording that Article 15 was based on Article 8 of the 1957 Constitution of Malaya,²⁷ which in turn might have drawn on Articles 14 and 15 of the Constitution of India.²⁸

In 1960, democratic Bills of Rights did not necessarily provide for universal suffrage. Article 21(3) of the Universal Declaration declared that the 'will of the people . . . shall be expressed . . . by universal and equal suffrage', but the European Convention, as it had been interpreted at 1960, did not make such provision.²⁹ Nor did the 1959 Nigerian constitution, which left the question of suffrage for regulation by the legislature.³⁰ Pausing here, it should be observed that none of these documents contained a general right to equal treatment provision such as Article 15 of the Western Samoa Constitution. But the Constitutions of India and of Malaya,³¹ which did contain such a provision, provided also for universal suffrage. The Constitution of Western Samoa however did not. Article 44, the other provision in issue in the *Olomalu* cases, provides:

Members of the Legislative Assembly

44.(1) The Legislative Assembly shall consist of:

- (a) One member elected for each of the forty-one territorial constituencies having such names and boundaries and including such villages or sub-villages or villages and sub-villages as are prescribed from time to time by Act:
- (aa) Four additional members being one additional member elected for each of such four of those territorial constituencies as are prescribed from time to time by Act.
- (b) Members elected by those persons whose names appear on the individual voters' roll.
- (2) The number of members to be elected under the provisions of sub-clause (b) of Clause (1) shall be determined under the provisions of the Second Schedule.
- (3) Subject to the provisions of this Constitution, 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' roll shall be established and kept shall be prescribed by law.
- (4) Members of the Legislative Assembly shall be known as Members of Parliament.

The nature of legal argument in constitutional review

The critique offered in this essay proceeds from a number of standpoints which should be made clear. First, it is not assumed that the correct answer to a legal problem can be deduced by the application of the appropriate premises, that is, by a mode of legal reasoning, whereby 'the applicable rule of law is the major premise of a given piece of legal reasoning; the relevant facts of the case constitute the minor premise, and the conclusion (the decision that the judge is to make) is arrived at by a straightforward and airtight piece of deductive reasoning'.³² This characterisation of the nature of the legal reasoning is now

27. Sheridan, *supra* n.20 at 12, 13.

28. H. M. Seervai, *Constitutional Law of India* (1975), Vol. 1, Appendix 1, 6; and see commentary at 199-321.

29. Fawcett, *supra* n.25 at 355,356; Z. M. Nedjati, *Human Rights Under the European Convention* (1978), at 204,205.

30. Odomusu, *supra* n.2 at 339.

31. Sheridan, *supra* n.20 at 118 (Malaya); Seervai, *supra* n.27, Appendix 1, 89 (India).

32. T. M. Benditt, *Law as Rule and Principle* (1978), at 2.

almost universally rejected, for it is recognised that in the selection of legal rules (and, moreover, in the choice of facts which determine which rules apply) the judges have considerable room for choice. Legal reasoning 'is not a chain of demonstrative reasoning. It is a presenting and re-presenting of those features of the case which severally co-operate in favour of the conclusion, in favour of saying what the reasoner wishes said, in favour of calling the situation by the name which he wishes to call it. The reasons are like the legs of a chair, not the links of a chain'.³³ Thus, the determination of a rule is often problematic, even in areas of 'technical law'. The law of a constitution, and particularly one which contains a bill of rights, is quite obviously of an open texture. In reference to the United States Bill of Rights, Judge Learned Hand observed that '[t]he answers to the questions which they raise demand the appraisal and balancing of human values which there are no scales to weigh'.³⁴

Secondly, there are nevertheless some kinds of arguments which a lawyer would say lie outside the range of the arguments which are permissible, (for example, it would ordinarily be impermissible to have regard to the political beliefs of one of the parties concerned in a particular matter). Moreover, within the spectrum of what is permissible, there are good (more persuasive) and less good (less persuasive) arguments. Lawyers argue about how a particular argument should be rated in the context of a particular matter. Their arguments draw on both an appeal to legal culture, (in particular, the previous decisions of courts), and the wider social culture.

Thirdly, a decision of a court in the exercise of its function of judicial review under a constitution necessarily makes the court a political institution. Its decision shapes what the government can and cannot do, and thus bears on how resources are distributed in the society. So much is trite, and, as has been observed, the insight that courts are political institutions is 'not the end of the discussion, but its beginning'.³⁵ It certainly does not follow that the courts should behave in the same manner as other political institutions, but it does raise the question of legitimacy of the courts' authority, or, to put it another way, how the courts can distinguish their role from the roles of other, particularly the representative, political institutions. It is a standpoint of this essay that the manner in which a constitutional court justifies its review is critical to the legitimacy to exercise the function of review at all. Chase and Ducat put the point well in their argument that 'any difference which inheres in the judicial institution exists because of the justification which judges are compelled to offer for their decisions'.³⁶ Another United States writer, Bork, identifies in a general way the kind of justification that judges must give:

the Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom.³⁷

The essay will now consider the kinds of justifications offered by St. John C.J. and by the Court of Appeal.

The words of the Constitution

St. John C.J. began by affirming that '[i]f the relevant part of the constitution is clearly expressed the court is bound to give effect to those clear words', and later that 'the prime matter for the task [of interpreting a constitution] is the words used by the framers'. The Court of Appeal expressed its full agreement with this latter statement.³⁸ It is common for courts to make such declarations, and in looking at the words they usually seek their

33. J. Wisdom, (1944), quoted in W. Twining and D. Miers, *How To Do Things With Rules* (1976), 148, 149.

34. (1959), quoted in P. Brest, *Processes of Constitutional Decision Making: Cases and Materials* (1957), at 958.

35. H. W. Chase and C. R. Ducat, *Constitutional Interpretation* (1979), at 56.

36. *Ibid.* at 57.

37. R. Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 *Indiana Law Journal* 1 at 3.

38. *Supra* n.4 at 284.

ordinary meaning, in the context of course of both the syntax of the sentences in which they occur, the surrounding sentences, and the whole document. The courts will also draw inferences from those contexts. The analysis of both St. John C.J. and the Court of Appeal proceeded primarily in this way, but they came to opposite conclusions as to what the words of Articles 15 and 44 meant.

The fact of such disagreement derives from the limitations of the English language as a vehicle for precise communication.

Words are vague; they have only a core of settled meaning, but beyond that a penumbra of borderline cases which is not regimented by any conventions . . . Words are ambiguous; i.e. they have more than one relatively settled use . . . Perhaps the words stand not merely for one kind of thing but for a range of diverse, though related things.³⁹

Poor grammatical construction, such as syntactical ambiguity, may also obscure the intention of the framer of a rule.⁴⁰ Where vagueness or ambiguity in words or in sentences creates a problem of interpretation, a court is left with a measure of choice as to the outcome in the matter before the court by reason of its choice as to the manner in which it solves the problem. The contrast between the ways in which St. John C.J. and the Court of Appeal solved the problem of whether Article 15 qualified the power of the Parliament under Article 44(3) is ample illustration of this point.

First, St. John C.J. argued that '[i]f the framers intended that only matais should vote in the territorial electorates they could have said so. They did not and this again is against an interpretation supporting section 16.' The Court of Appeal responded that the issue was not whether *matani*-only suffrage was entrenched, but whether it was permitted.⁴¹

Secondly, both St. John C.J. and the Court of Appeal based reasoning on the argument often applied to the construction of documents that 'the mention of some matters warrants an inference that other cognate matters were intentionally excluded'.⁴² St. John C.J. pointed to Article 15(3) to reason that the omission from that Article of any exemption from Article 15(1) and (2) of the qualifications for electors carried an implication that those qualifications were subject to those two provisions. Describing this as 'a verbal point' the Court of Appeal said simply that it could not find the express exemptions in Article 15(3) 'of any real help' in determining whether Article 15 extended 'to the entirely different subject of parliamentary franchise'.⁴³

The Court of Appeal itself however applied this general kind of argument in several ways to justify its opposite conclusion as to the reach of Article 15. The Preamble to the Constitution speaks in one recital of 'the chosen representatives of the people' (and does not specify universal suffrage), and in the next of the 'fundamental rights' of the people. From this contrast the Court drew an implication that these rights were 'a different subject from the manner in which representatives are to be chosen'.⁴⁴ The Court also pointed to the omission from Article 13 of any mention of the right to vote, and argued that Article 13 would have been 'a natural place to have included' such a right.⁴⁵ At another point in its judgment, the Court drew from the prescription in Article 45 of the qualifications of those who could be elected an inference 'that the qualifications to be electors are not prescribed by the Constitution'.⁴⁶

39. H. L. A. Hart(1958), quoted in Twining and Miers, *supra* n.33 at 122.

40. *Ibid.* at 123.

41. *Supra* n.4 at 284, 285.

42. R. Cross, *Statutory Interpretation* (1976), at 121.

43. *Supra* n.4 at 285.

44. *Ibid.* at 288.

45. *Ibid.*

46. *Ibid.* at 289.

A third kind of linguistic reason was advanced by St. John C.J. to justify his view as to the correlation between Articles 15 and 44(3). His Honour argued that the inclusion of the words 'subject to the provisions of this Constitution' in Article 44(3) 'clearly indicate that the framers intended Article 15, inter alia, to apply to Article 44'. This conclusion was linked to an assumption made by St. John C.J. that the first words of Article 44(3) were added to a later draft of the Constitution, and, as the Court of Appeal argued, this assumption was very likely incorrect.⁴⁷ But this error of history does not dispel entirely the force of the argument, which the Court of Appeal recognised by its argument that while the qualification 'subject to' indicates which provision is to govern in the case of conflict, it 'throws no light, however, on whether there would in truth be a conflict without it'.⁴⁸ The Court therefore found these words to be no bar to its conclusion arrived at on other grounds that Article 15 did not conflict with Article 44(3), and went on to offer as the most probable explanation of the first words of Article 44(3) 'that these words intended to make crystal clear that (unless the Constitution is amended in this respect) the persons whose names appear on the individual voters' roll are entitled to elect a number of members determined under the Second Schedule'.⁴⁹

This reference to the possibility of amendment is puzzling, for, apart from Article 102,⁵⁰ any provision of the Constitution can be amended by an Act passed by 'not less than two-thirds of the total number of Members of Parliament (including vacancies)' (Article 109(1)), and there would not appear to be any reason to single out Article 44(3). Perhaps the Court was conscious of the fact that the persons on the individual roll were part Europeans and part-Chinese, and that its conclusion on the effect of Articles 15 and 44 meant that while the Constitution guaranteed the suffrage of these people, it made no provision for the Samoans. If this result had been made explicit, the Court might have had to contemplate whether such a result could have been in the minds of the Samoans who drafted the Constitution. The answer to this question could have been 'yes' on the basis that all the Samoans in the Convention were *matai*, and since the electoral law and the Constitution did not, at Independence at least, provide for other than *matai* suffrage, they would not have been concerned that Article 44 provided no guarantee of their vote. But another answer is also possible. There might have been an appreciation that Article 15, qualified by Article 15(4), provided the source of the right to vote of Samoans. This question is explored below.

The analysis so far has indicated some of the ways in which the Court of Appeal employed linguistic analysis. This analysis is inextricably mixed with arguments based on the Court's assertions of what must have been intended by the framers, and buttressed by resort to principles of interpretation drawn from English and New Zealand cases. There were however some other primarily linguistic points which were put forward by the Court to reinforce its conclusion that Article 15 did not extend to the franchise. These were, first, the fact that the Constitution maintained the distinction between the territorial constituencies and the individual voters' roll; secondly, the contrast between Article 44(1)(a) and (aa), which speak of members 'elected for' constituencies, and Article 44(1)(b), which speaks of members 'elected by' the individual voters; and thirdly, 'the clear link' the Court discerned 'between customary land and the matai system' in Part IX of the Constitution, from which the Court drew the inference 'that the framers of the Constitution saw a similar link between the matai system and the territorial rolls'.⁵¹

47. *Ibid.* at 291, 292.

48. *Ibid.* at 289.

49. *Ibid.* at 290.

50. By Article 102, it is not 'lawful or competent for any person to make any alienation or disposition of customary land . . .'

51. *Supra* n.4 at 289, 290.

With respect, none of the variety of linguistic arguments advanced by either St. John C.J. or by the Court of Appeal is compelling, either one way or the other, on the issue of the relationship between Articles 15 and 44. The very fact of disagreement between the two courts is indicative of the uncertainty inherent in the language of the Constitution. The search for the meaning of words is in many cases (of which *Olomalu* is one) not only illusory, but productive of uncertainty. The point has been well put by a former Justice of the High Court of Australia.

The law which seeks certainty in reasoning, which attends to verbal distinction while ignoring or affecting to ignore social reality, becomes truly uncertain in the sense that it becomes increasingly impossible to predict the course which decisions are likely to take.⁵²

Neither St. John C.J. nor the Court of Appeal rested their analysis on a search for the meaning of words, and the other kinds of justification offered now fall for consideration.

The intentions of the framers: comparison with the Universal Declaration of Human Rights

Although the Court of Appeal agreed with St. John C.J. that the words of the Constitution were of prime importance, and although it put forward a range of linguistic arguments, a careful reading of the judgment reveals, it is submitted, that it placed in the forefront of its analysis a view as to what was intended by the framers of the Constitution. The Court derived its view from a comparison between the Constitution of Western Samoa and the Universal Declaration of Human Rights. This argument is of importance both for the weight attached to it and its influence on how the Court read the words of the Constitution.

After outlining all of and rebutting some of the reasons of St. John C.J., the Court began its own analysis by stating that there was no 'close analogy' between the Constitutions of Western Samoa and the United States of America.⁵³ (St. John C.J. had cited some United States decisions to illustrate that an equality guarantee required a system of universal suffrage).⁵⁴ But the Court then asserted that 'some help' could be gained from considering the Universal Declaration of Human Rights, and it pointed in particular to Article 21 (see above), and the fact of the absence of a substantially identical provision in the Constitution of Western Samoa. Such absence was, the Court continued,

especially striking in the light of a fact of history which, in our view no principle requires this Court to ignore. It was a United Nations Visiting Mission in 1959 which pointed out that consideration had not yet been given to including some provisions concerning human rights in the Western Samoan Constitution. The Mission recommended that the Constitution should contain provisions on the lines of the Universal Declaration and the constitutions of other States. (Official Records of United Nations, T/1449, para.79). Against that background we can only assume that when the draftsmen came to prepare Part II of the Constitution, mindful of the clear position always taken about the suffrage, they deliberately omitted a provision for universal suffrage.⁵⁵

It should be noted in the first place that the Court cited no principle to justify its reference to the Visiting Mission report. Later in its judgment the Court accepted the Convention Debates only reluctantly and for a limited purpose, (see below), and some justification for its reliance on the Visiting Mission Report could have been expected.

Secondly, this statement of the Court begs the very question before the Court, that is, whether Article 15 had failed to follow 'the lines of' the Universal Declaration and provide

52. K. S. Jacobs, 'Lawyers' Reasonings: Some Extra-Judicial Reflections', (1965-1967) 5 *Sydney Law Review* 425 at 428.

53. *Supra* n.4 at 286.

54. *Ibid.* at 284.

55. *Ibid.* at 286, 287.

in some way for universal suffrage. If the Court had noticed that the Declaration did not contain an equality guarantee as strong as Article 15 it might not have come so readily to its conclusion that there had been a deliberate omission of a guarantee of universal suffrage.

Thirdly, the Court did not analyse the provisions of 'other States' as they stood in 1960, and if they had, might have noticed that neither the European Convention nor the 1959 Constitution of Nigeria contained a guarantee of universal suffrage (see above). But nor did they contain a provision as general as Article 15. The Court did point by way of contrast with the Constitution of Western Samoa to the provisions governing the franchise in several of the post-1968 Pacific Island constitutions, although it acknowledged that the dates of these constitutions meant that their relevance was less on that account. But, the Court said,

[l]ike the Universal Declaration itself, they imply that the parliamentary suffrage is naturally regarded by constitution-makers as a separate and special subject: at least not necessarily covered by general provisions regarding fundamental rights. In that way they confirm that it would be wrong for this Court to approach Article 15 with any assumption that such an article is likely to be meant to extend to the suffrage.⁵⁶

There are, with respect, obvious weaknesses in this line of argument. The question should have been what was common or not in 1960, and it is very difficult to see how what happened several years later could be relevant at all. Further, the question should have been whether it was common or not for constitutions to contain provisions as strong and as general as Article 15, *together with* a guarantee of universal suffrage. The Constitutions of India and Malaya did indeed contain both sets of provisions (see above), although this was not noticed by the Court. But is this enough to warrant the conclusions reached by the Court as to what must have been assumed by the framers of the Constitution of Western Samoa?

There has been close analysis of the reasoning of the Court based on Article 21 of the Universal Declaration because it had an influence on other kinds of reasons advanced by the Court. But before proceeding further, some general comment on this kind of reasoning is warranted. Guesses as to what models were followed by the drafters will usually always be somewhat speculative, and the Court of Appeal failed to notice the influence of the Indian, Malayan and Nigerian Constitutions. By selecting which other constitution (in this case, the Universal Declaration) should be chosen as the basis for comparison, the Court of Appeal was able to create a basis for an interpretation of Article 15 which was only one of a number of possible interpretations. There are many cases where it may be surmised that the drafters of a constitution may have based some of its provisions on some foreign precedent, but it is a further step from this to argue that there was any intention to reject other kinds of provisions in the foreign constitution. A more fundamental objection to this technique of interpretation was well expressed in the report of Papua New Guinea's Constitutional Planning Committee:

The first point we wish to make about the nature of our recommendations is that we have taken the idea of a "home grown" constitution seriously . . . An examination of our recommendations would send a specialist in many directions if he was looking for origins, and in some cases there are no external precedents at all. What has influenced us above all in seeking formulations and adapting them, has been the desire to meet Papua New Guinea's needs and circumstances.⁵⁷

Continuity with the law of New Zealand

The Papua New Guinea Committee's emphasis on the 'home grown' nature of their constitution leads to analysis of another distinct step in the reasoning of the Court of Appeal

56. *Ibid.* at 287.

57. *Final Report of the Constitutional Planning Committee*, (1974) Government Printer, Papua New Guinea, 1/2.

in *Olomalu*. The Court noted the omission from Article 13 of any reference to the suffrage, and continued as follows:

The omission has added significance in the Western Samoan context. It is well-settled principle of interpretation that momentous constitutional changes are not held to be brought about by a side wind or loose and ambiguous general words. Illustrations of the principle are *Nairn v. University of St Andrews* [1909] A.C. 147 and *Viscountess Rhondda's Claim* [1922] 2 A.C. 339; compare *Commissioner of Inland Revenue v. West-Walker* [1954] N.Z.L.R. 191. Having regard on the one hand to the general commitment of the United Nations to universal suffrage, as evidenced by article 21 of the Universal Declaration, and on the other to the strongly-rooted matai traditions of Western Samoa, it is an inevitable inference that the extent of the suffrage was a prominent issue as independence approached. Confirmation that this must have been so is not really needed, but in fact it is supplied by the United Nations Plebiscite Commissioner's report previously quoted and the earlier report of the 1959 Visiting Mission.

Against that background, if the Constitutional Convention had intended to introduce and entrench universal suffrage, we have no doubt that provision for it would have been made in plain and specific terms. It would never have been left merely to general language such as the language of article 15.⁵⁸

The momentous constitutional change the Court had in mind is clearly that from *matai* only suffrage to universal suffrage. Earlier in its judgment the Court noted that sections 16 and 19 of the Electoral Act 1963 corresponded to the relevant provisions in the New Zealand Samoa Amendment Act 1957 and the New Zealand Western Samoa Legislative Assembly Regulations 1957.⁵⁹ At two later points in its judgment the Court made it clear that it thought it uncontroversial to look at 'the Constitution itself and the provisions which it replaced',⁶⁰ or to read its words 'with due regard to their context and antecedents'.⁶¹ It thus emerges quite clearly that the Court was disposed to read Articles 15 and 44 in such a way as would preserve continuity between the pre-Independence colonial law and the law of the Constitution.

Two kinds of justification can be offered to support this kind of argument. One justification is that the framers should be taken to have been aware of the historical and statutory context. Another is that laws should be understood to operate in conjunction with each other, and that it is therefore relevant to look for continuity or discontinuity between pre-Independence law and the Constitution. There is however a fundamental problem with both kinds of justification. A constitution is not an ordinary statute, but as the Chief Justice of Nauru said in *In re Dagabe Jeremiah*, it is 'the bedrock of the future law of the new state. It is the creation out of nothing and involves the examination of first principles'.⁶² The founding fathers of some of the Pacific Island constitutions went to considerable trouble to ensure that the constitution was enacted in a manner which made it clear that it was *not* to be regarded as continuous with the colonial legal system. Western Samoa is indeed such a case. Even in cases where the constitution was promulgated as a law of the former colonial power, it is still proper to regard it as the beginning of a new legal order. It can be argued therefore that there is no basis in law (or in any other kind of argument) for an assumption

58. *Supra* n.4 at 288.

59. *Ibid.* at 281.

60. *Ibid.* at 289.

61. *Ibid.* at 291.

62. Unreported, Supreme Court of Nauru, Miscellaneous Cause No. 2 of 1971, 3. See too the decisions of the Supreme and National Courts of Papua New Guinea discussed in P. J. Bayne, 'The Constitution in the Courts 1975-1980', in D. Weisbrot, *et al*, (eds) *Law and Social Change in Papua New Guinea* (1982), 219 at 223, 224.

that the drafters or framers of the independence constitutions meant to follow the colonial system. It is just as plausible to assume that they intended to make major changes. The provisions in all of the constitutions for the protection of the rights of the individual were indeed a major break with the legal order of the colonial system.

Of course, in relation to Articles 15(1) and (2), account must be taken of Article 15(4), which did contemplate continuity for some period of colonial laws which were in breach of those Articles. But neither Article 15(4), nor Article 44(3), (which contemplates legislation concerning the suffrage), is a basis for an argument that continuity with colonial law concerning the suffrage would be sufficient for all time.

Common law and the principles of statutory construction

The citation by the Court of Appeal of English and New Zealand decisions to justify its principle of interpretation also calls for comment. The comment will also be addressed to the allied question of the relevance of common law concepts to the interpretation of the Pacific Island constitutions.

It is common to find in the decisions of the Pacific Island courts an argument that the meaning of the terms in a constitution should be understood to correspond to their meaning according to the pre-Independence common law of the country.⁶³ In essence, the common law was the law introduced by the colonising power, primarily for the purpose of regulating affairs between the colonists — the administrators, the planters and businessmen, and the missionaries.⁶⁴ The common law was the law that applied in the home country, and it was hardly surprising that these foreign settlers should want to continue to have their relations with one another governed by this law. Thus, it was a rule of the colonial constitutional system, usually found in an ordinance or an Act, that the common law, or (even in the non-United Kingdom colonies) the common law of England, should apply in the colony. To deal with the indigenous inhabitants, the colonial powers devised special codes of regulation (often called Native Regulations), which in major respects did not follow common law principle, although the criminal law which governed the colonisers was usually also applied to the colonised. Over the course of the colonial period, more of the activities of the colonised were affected by the common law, and this was in particular true of those indigenous persons who, while often retaining links with their village, engaged in activities and acquired interests and values distinct from those of the villager. On independence, all of the countries of the Pacific Islands have in one way or another provided for the continuation of almost all of the pre-Independence law. This law embraced both the statute and the common law.

The situation in Western Samoa presents something of a paradox. It would seem that Samoans are deeply resentful of Western intrusion, including the introduction of English law. For example, the 1976 *Report of the Commission of Inquiry into the Police and Prisons Service of Western Samoa* observed that the British system of justice had been introduced 'due principally to the advance of so-called "civilization" and the oft unwelcome attentions of the outside world in Samoa . . .'.⁶⁵ Yet, with one significant exception, the Constitution does not provide a sound basis for the recognition and enforcement of customary law within the official legal system. The exception is Article 100, which provides that '[a]matai title shall be held in accordance with Samoan custom and usage and with the law relating to Samoan customs and usage'. Article 101(2) provides also that customary land is held 'in accordance with Samoan custom and usage and with the law relating to Samoan custom and

63. See Bayne, *supra* n.1 at 297-301, and Bayne, *supra* n.62 at 235-237.

64. See P. J. Bayne, 'Legal Development in Papua New Guinea: The Place of the Common Law', (1975) 3 *Melanesian Law Journal* 9.

65. Parliamentary Paper No.8 of 1977, 11.

usage'. The holders of *matai* title control important aspects of land use and thus questions relating to customary land are embraced within Articles 100 and 101. However, the Constitution and the law governing the official legal system treat this as an exceptional situation, and there is little formal provision for the integration of customary law into the general legal system.

The Constitution does not provide a clear or consistent statement of the sources of law in Western Samoa. In its Preamble it declares that 'the Leaders of Western Samoa have declared that Western Samoa should be an Independent State based on Christian principles and Samoan custom and tradition', and that 'the impartial administration of justice should be fully maintained'. This general recognition in the Preamble of Samoan custom and tradition could be the basis of an argument that it should provide a source of legal principle. However, the Constitution does then deal explicitly with the law to apply in Western Samoa, and these provisions would perhaps prevail over the Preamble. Article 111(1) provides that:

In this Constitution, unless it is otherwise provided or the context otherwise requires -

...
 "Law" means any law for the time being in force in Western Samoa; and includes this Constitution, any Act of Parliament and any proclamation, regulation, order, by-law or other act of authority made thereunder, the English common law and equity for the time being insofar as they are not excluded by any other law in force in Western Samoa, and any custom or usage which has acquired the force of law in Western Samoa or any part thereof under the provisions of any Act or under a judgment of a Court of competent jurisdiction . . .

Thus, insofar as the unwritten law is concerned, Article 111(1) indicates two sources: first, English common law and equity for the time being, and secondly, custom or usage. On the face of it, this provision is puzzling in two respects. Why does it refer to English common law? Why is not this body of law qualified in its application to Western Samoa by some phrase such as 'subject to its suitability to the circumstances of Western Samoa'?

There is perhaps an historical explanation for both puzzles. The preface to the 1920-1977 *Reprint of Statutes of Western Samoa* notes that by the terms of the League of Nations mandate under which New Zealand administered Western Samoa from 1920:

Western Samoa was to be administered as an integral part of the Dominion of New Zealand, the laws of which were to apply to it accordingly. It should be noted that this is why the Common Law operates in Western Samoa: it was applied pursuant to the English Laws Act 1908 (N.Z.), which generally continued in New Zealand the law of England as at 14 January 1840.⁶⁶

It seems to have been assumed that English law should apply in Western Samoa in the same manner as it applied in New Zealand, and it might not have been recognised that there would be a problem where English and New Zealand common law diverge. (It is unlikely that prior to 1 January 1962, the date of independence of Western Samoa, a New Zealand court recognised that such a divergence might occur.)

The second puzzle might be answered in the same way. The *English Laws Act* 1908 of New Zealand does contain a suitability qualification, although only in respect of the application of English law in New Zealand. It was perhaps assumed that that clause could have a corresponding effect in Western Samoa. Nevertheless the absence of such a clause in Article 111 is striking and surprising,⁶⁷ and may perhaps have contributed to what seems until very recent years to be a poor record on the part of the Supreme Court of adaptation of the English law in Western Samoa.

66. At 3.

67. Cf. the detailed provisions of the Constitution of Papua New Guinea. See Bayne, *supra* n.62 at 221.

To return to the judgment of the Court of Appeal in *Olomalu*, it may be seen that there is a basis in law for an argument that common law concepts, or approaches to the interpretation of statutes, should govern the meaning of words in the Independence constitutions. It is true, moreover, that the common law exercises a powerful influence on the minds of lawyers educated in its tradition and there are many instances where Pacific Island justices have read the constitutions, and in particular the bill of rights provisions, as if they merely stated the common law. But this method of reasoning avoids the difficult questions of balancing competing interests which the constitutional provisions require. In many of such cases where the common law is invoked, it is apparent that on the whole the judges presume that it should govern and make at best only a cursory examination of its compatibility with the constitution.⁶⁸ Such a presumption inverts the relationship between the constitution and the common law. The simple yet fundamental proposition that flows from the supremacy clauses of the constitution, and specified in detail in some of them, is that stated by Kidu C.J. in relation to Papua New Guinea. 'The common law has no application in post Independence Papua New Guinea if it is in conflict with statutes and the Constitution.'⁶⁹

It is not suggested that common law may not provide a guide to the content of the bill of rights provisions or other provisions of the constitution, and it may very well be the starting point for analysis. But what is further required is analysis of whether it conforms to the constitution and the values and principles it incorporates.

Allied to an acceptance of the common law is a ready willingness to apply the precedents of the courts of the former colonising power and to reject those of other jurisdictions. With the passage of time, several of the Pacific Island justices have adopted a more eclectic approach, and there is now frequent citation of the decisions of Commonwealth courts, of United States law, and of the jurisprudence of the European Commission of Human Rights. But an eclectic approach does not solve all difficulties. Foreign decisions do not simply state rules, but in addition incorporate the social values which those rules reflect, and there must always be a question whether those values are consonant with the Pacific Island society.

The reasoning of the Court of Appeal in *Olomalu* illustrates these points. That the pace of political change should be slow is a social value, and this value is reflected in the two English cases cited by the Court of Appeal to justify its argument that it should presume continuity between the colonial and post-colonial law concerning the suffrage, (see above). In *Nairn v. University of St Andrews*⁷⁰ the House of Lords held that a woman was not a person within the meaning of the phrase 'every person' in a statute which described the franchise for a parliamentary election, and in *Viscountess Rhondda's Claim*⁷¹ a special sitting of the Lords held by a vote of 20 to 4 that a peeress was not entitled to a seat in the House of Lords. The value that political change should be slow is disputed even in countries such as England, and is much less appropriate in a country such as Western Samoa where the rate of social change is much faster. The Court of Appeal, by its uncritical acceptance of this common law principle of statutory interpretation, accepted the social value inherent in that principle without asking whether it was applicable in Western Samoa.

The Constitutional Convention debates

In the final section of its judgment, the Court of Appeal turned to examine the debates of the Constitutional Convention of Western Samoa. St. John C.J. had regard to the debates, but only 'on the assumption that there is doubt, that I am entitled to do so but, without

68. *Supra* n.63.

69. *Avia Aihī v. The State* [1980] P.N.G.L.R.81.

70. [1909] A.C. 147.

71. [1922] 2 A.C. 339.

deciding there is that doubt, or that entitlement'. The Court of Appeal was also reluctant to place reliance on the Convention debates near the forefront of its analysis. The Court eschewed any intention to make a complete statement of the circumstances in which resort could be made to the debates, but it indicated two factors that justified this course in this case. First, the debates could be used here 'only to confirm the interpretation already reached without regard to them'.⁷² Secondly, 'in this case there can be no doubt about what the Convention understood and meant', and '[t]o shut our eyes to it would be artificial'.⁷³

The Court also suggested a limitation on the use of debates — that they should not 'control or alter the meaning of clear words in a constitution as determined with due regard to their context and antecedents'.⁷⁴ (The degree of choice which such seemingly clear principles allow to judges may be gathered from the fact that in this case St. John C.J. was apparently of the view that the words of Article 15 clearly required universal suffrage.) The Court also commented on a suggested limitation to the use of debates — that the weight to be given should 'decline with the passage of time'. The court observed:

This submission was based on the concept that the scope and significance of the Constitution — intended to be the basic law of a State over a long, unpredictable and changing period — may alter. While that may be so as a general proposition, we do not consider that, if it is ever right, it can apply to such a short period in the life of people and a State as 20 years and to such a fundamental question as that which we are considering.⁷⁵

General analysis of the relevance of Convention Debates is made below, but the comment may be made here that it does seem remarkable that the Court was unwilling to concede that there might ever be a point where the weight to be given to Convention debates would decline. Perhaps, given the Court's strict conditions for their admissibility and use, the matter was in its view of no great import.

The use made by the Court of the debates does need analysis. Three points emerge. First, the Court quoted the comments of Professor Davidson (one of the constitutional advisers to the Convention) that Article 15(2) did not 'impose equality in regard to political rights'.⁷⁶ By interpretation of this comment in its context, the Court concluded that the right to vote was among those rights.⁷⁷ (It is nevertheless striking given the sensitivity of the suffrage question, that Professor Davidson did not mention it. Was he trying to preserve the possibility that Article 15(2) would be relevant, given that he would have been aware that *matai* only suffrage would initially continue to operate by virtue of Article 15(4)?)

Secondly, the Court adverted to a forecast made by Professor Davidson that in time the individual voters' roll would disappear as these voters were absorbed into the Samoan cultural system.⁷⁸ The Court found that this forecast was consistent with its conclusion that *matai* suffrage would continue until altered by Parliament. (It is also however consistent with a view that Article 15(2), as modified by Article 15(4), would at some point govern the question of suffrage.)

Thirdly, and in the Court's view most importantly:

the Constitutional Convention expressly considered and rejected the very position which the respondents seek as a matter of constitutional interpretation in this litigation — the abolition of the *matai* suffrage and its replacement by universal suffrage.⁷⁹

72. *Supra* n.4 at 290.

73. *Ibid.* at 291, 292.

74. *Ibid.* at 292.

75. *Ibid.*

76. *Ibid.* at 291.

77. *Ibid.*

78. *Ibid.*

79. *Ibid.* at 292.

So much is incontrovertible, but does it mean that the Convention did not intend that Article 15, qualified by Article 15(4), should govern the suffrage? The answer to this it is submitted is in the negative, for Article 15(4) did not require immediate universal suffrage, whereas that was the purpose of the motion rejected by the Convention. Before turning to Article 15(4), the general question of the use of debates in the interpretation of the constitutions of the Pacific Island states will be considered.

The notion that the intention of the framers should be the primary criterion to resolve problems of interpretation which arise from the vagueness or ambiguity of the words of the constitution commands wide support among Pacific Island judges. It is attractive for the reason that it seems to offer a value-free method of interpretation, (other than the value of following the framers' intent). While superficially attractive, there are considerable difficulties in the application of this notion. As the Western Samoa experience illustrates, the framers (or the 'founding fathers') of the Pacific Island constitutions have been groups of politicians from the island colonies who worked to greater or lesser extent with colonial officials. There are well-known difficulties in determining the intention of a collective body. Apart from the question whether the votes of dissentients should be entirely disregarded, it is obvious that those who voted for the inclusion of a particular clause may have done so for reasons quite different from others of the majority. There is, too, another difficulty. Even if it is assumed that the intention of the framers on particular points of interpretation can be discovered, can it also be said that they intended that these particular intentions should be adopted by the courts in all cases that might arise in the future? Is it not at least equally reasonable to ascribe to the framers an assumption that as social conditions change, so should the application of the constitution?

It is not suggested that these difficulties should render the preparatory materials of no value. In many cases these materials will give a clear indication of intention, and if there was no dissent expressed this indication is a persuasive argument that that intention be reflected in the interpretation of the constitutional provision. Nevertheless, even in such cases, there is an element of fiction in the notion that the intention of the framers has been adopted. On the other hand, it should generally be axiomatic that a clear statement in the preparatory materials cannot override a clear constitutional provision.

The courts of the Pacific Island States have quite often referred to convention debates and the like, but this experience shows that even if they be regarded as authoritative the further difficulty arises of spelling out from them a clear statement of intention. On some critical questions, the debates are quite obscure or contradictory and offer little guidance to the puzzled interpreter. These obscurities have allowed the courts to draw conflicting conclusions as to what was intended by the drafters.⁸⁰

Article 15(4)

It is submitted that if Article 15(4) is brought into focus, the Western Samoa Convention debates are not so abundantly clear as to what was intended in relation to the suffrage. The Court of Appeal avoided coming to a conclusion on the application of Article 15(4) by reason of its finding that Article 15 had no application to Article 44. This finding relied to a substantial extent on the Court's views as to what must have been assumed or what must have been intended by the drafters. It is submitted that if close attention is paid to Article 15(4), the Convention debates are open to an interpretation that the drafters, while clear that Article 15(1) and (2) would not *on independence* affect the suffrage, assumed that the Article would at some time require the Parliament to introduce universal suffrage. The law of New Zealand which on independence governed the suffrage clearly fell within the

80. See Bayne, *supra* n.1 at 296, 297.

‘existing law’ referred to in Article 15(4), and thus, subject to the proviso, its operation would not have been affected by Article 15(1) and (2). But the proviso requires the State to ‘direct its policy towards the progressive removal of any disability of restriction which has been imposed on any of the grounds referred to in [Article 15(2)]’.

The history reveals that at those times when *matai* only suffrage was advocated by Western Samoan leaders, or accepted by the New Zealand government or the United Nations, the terms of the advocacy or the acceptance were such that it was viewed as a temporary phase. It is true the Convention rejected a motion to introduce universal suffrage on independence, but it is important to note Davidson’s comments on the nature of the debate.

The restriction of candidature to *matai* brought the proposal into line with opinions that had previously been expressed by the Prime Minister, Fiame, Mata’afa and others. Several members, including the Prime Minister, spoke in support of the motion. Paitomaleifi himself contended that universal suffrage would not harm ‘our dignified customs and traditions’, that a growing proportion of untitled people possessed a good education and wide — often including overseas — experience, and that Samoa would not be able to hold many of the most talented of its young people if they remained disenfranchised. None the less, it was clear that a great many members intensely disliked the proposal. The sense of strain which for a time gripped the convention was dissipated by Malietoa, in a carefully diplomatic speech. He likened the education of the present generation of Samoan children to the formation of a new crop of breadfruit. When the crop had reached maturity, a new stick would have to be cut for it to be fully harvested. In the meantime, the old stick would suffice. The motion was lost on the voices. A majority of members was clearly opposed to it; but — of significance for the future — several of those who had not raised their voices in its favour privately indicated that they would have supported it had provision existed for taking a decision by secret ballot.⁸¹

Of course, it would be the post-independence Parliament which would have to cut the new stick by amending or replacing the New Zealand law which governed the suffrage, but this is quite consistent with Article 15(4), which clearly contemplates that those laws which existed on independence and which embodied a discrimination made unlawful by Article 15(2) would need to be ‘removed’.

The only conclusive argument which might be employed to rebut this view of what was assumed or intended by Article 15(4) is that which would compare the Constitution of Western Samoa to that of India or Malaya (see above), and draw from this comparison an inference that the equality clause was not thought to govern the suffrage. This is not however a very strong argument, and moves the focus away from both the words and the history of the debate over suffrage in Western Samoa. It was not mentioned by the Court of Appeal.

St. John C.J. appears to have held that the court could monitor the policy referred to in Article 15(4), and held that sections 16 and 19 of the *Electoral Act* 1963 could not be saved by that Article,

for the reason that disabilities have to be eliminated when the legislature passed a new Act dealing with an area of law where disabilities previously existed. That the Act was passed only eighteen months after Independence does not relieve the legislature of this obligation.

His Honour held further that the 1963 Act could not be saved even if it was eligible for protection under Article 15(4), for otherwise ‘[it] would make a mockery of the phrase

81. Davidson, *supra* n.5 at 390.

“progressive removal” to hold that a delay of twenty years or more was justifiably the intention of the framers’.

A principled interpretation

The major elements of the reasoning of the Court of Appeal have now been examined and, with respect, it is submitted that it is deficient in that, first, the Court was wrong to conclude that the words of the Constitution yielded a clear answer to the problem before it, and, secondly, the justifications for and the use made of the historical material are far from compelling. More fundamentally, the Court failed to address the nature of the choice it had both as to the outcome of the matter before it and as to the mode of reasoning it could employ in order to arrive at that outcome. The fact that judges are often faced by such choices is incontrovertible. How should such choices be resolved? There is no mode of deductive (or ‘logical’) reasoning which can settle the choices, nor is there a single mode of non-deductive reasoning. But there are some general matters to be borne in mind.

At the outset, it should be recognised that,

[i]n judicial decision a purported reliance on mere logical argument from existing rules in a situation which really compels choice, is often an escape from the somewhat awful responsibility of interpreting the community to itself, a responsibility which judges in our system have always had.⁸²

In such cases, the discharge of that responsibility requires that,

the reasons for choice should emerge as searchingly as the imperfect human mind working under imperfect conditions, can achieve. If the search leads into areas which require acknowledgement of the general notions of justice and human needs that, too, should be frankly stated and elaborated.⁸³

In *Olomalu*, however, the Court of Appeal denied that it was faced with any such responsibility.

At the conclusion of its judgment, the Court acknowledged that there was a question as to ‘whether or not continuing to use the matai system as the main basis for elections to the Legislative Assembly is in the longterm interests of Western Samoa’. But, it said, these were ‘questions not of law, but of social and political policy: questions which, on our interpretation of the Constitution, are to be decided by Parliament, not by the courts’.⁸⁴ That Parliament was, in effect, the Legislative Assembly. This sort of sentiment may be found in many of the judgments of Pacific Island courts, but it does, with respect, misconceive both the nature of the constitutions and of the task of judicial review.

In the first place, the very nature of the language employed in the constitutions requires the courts to make assessments of social and political questions. A court cannot, for example, determine whether a law has violated the provision found in some form in all constitutions that there shall be ‘freedom of speech’ without coming to a view on how much of such freedom should be allowed in a democratic society. Secondly, as this essay has endeavoured to show, judges can choose between the various modes of interpretation, or can make choices within a particular mode. For example, in *Olomalu*, St. John C.J. chose to compare Article 15(1) to the United States Constitution, whereas the Court of Appeal came to an opposite result in the case by choosing to compare the fundamental rights provisions as a whole to the United Nations Universal Declaration of Human Rights. Neither choice was very accurate. Such choices cannot often be made by reference to the constitution or to some other rule governing the court, and ultimately, whether the judge is conscious of the matter or not, the choice is made by reference to the judge’s assessment of what should be the outcome.

82. Jacobs, *supra* n.52 at 429.

83. *Ibid.* at 428.

84. *Supra* n.4 at 293.

Thirdly, the mode of interpretation must be such as to enable the words of the constitution to change their meaning over time as the social, political, and economic circumstances of the country change. Although the Pacific Island constitutions may be amended (some more easily than others) to overcome the decision of a court given in the exercise of judicial review, a constitution which is amended frequently by the legislature may lose its legitimacy as a supreme law which purports to set forth rules and principles meant to have a reasonable degree of permanence. It is for this reason that the experience of countries such as the United States and of Australia reveals that the courts will, over time, change their views as to the meaning to be given to the constitution. Such changes reflect social change.⁸⁵

Thus, a court cannot and should not avoid what will often be difficult and sensitive questions of policy when it comes to interpret the constitution. The court should not approach those questions as if it were the legislature or the executive, but it can base its decision on principles which can be found in the constitution or which it may take as basic to the society. Reasoning from underlying principles to particular rules to be applied to a legal problem is a technique which has been a part of the Anglo-American judicial method for centuries. Following Dworkin, principles 'do not set out legal consequences that follow automatically when the conditions provided are met';⁸⁶ rather they provide reasons to adopt a particular rule. Principles may conflict, and when they do it is necessary to have regard to their relative weight and importance.⁸⁷

Where do principles come from? In Dworkin's view:

The origin of these as legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the [legal] profession and the public over time. Their continued power depends upon this sense of appropriateness . . . We argue for a particular principle by grappling with a whole set of shifting, developing and interacting standards (themselves principles rather than rules) about institutional responsibility, statutory interpretation, the persuasive force of various sorts of precedent, the relation of all these to contemporary moral practices, and hosts of other such standards.⁸⁸

In the case of the Pacific Island constitutions, the preambles often state social values that are taken to underly the constitutions, and the bills of rights provisions are of course a detailed statement of the individual's rights in relation to the state and to society.

It is suggested that it is appropriate and indeed desirable that the judges should explicitly resort to such principles to justify a decision on constitutional review. This process is not essentially different from the manner in which the common law has developed. Common lawyers have no difficulty working with principles as broad as that which presumes that property shall not be taken without compensation. Other kinds of social values can be employed in the same manner.

Custom and the constitution

The application of principles may be difficult because they can conflict. An instance of considerable difficulty is posed by the question whether a broad constitutional provision is subject to or on the other hand overrides custom. The general question of the role of custom in the legal systems of the Pacific Island states has not yet received from the courts a very

85. Cf. the comments of Windeyer J. in *Victoria v. Commonwealth (The Payroll Tax case)* (1971) 122 C.L.R. 353 at 396, concerning the reason for the High Court of Australia's decision in *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129.

86. R. Dworkin, *Taking Rights Seriously* (1977), at 22.

87. *Ibid.* at 25-27.

88. *Ibid.* at 40.

clear answer in any of them. Some of the constitutions provide that custom should be recognised as an integral component of the body of the laws, and to some extent this is true of the Constitution of Western Samoa (see above). There remains nevertheless the question of how custom is to be reconciled with the other laws, and, in particular, with the constitution.

Several judges have pointed out that there is a tension on the one hand between the aim of the constitution to create both a nation state and to protect the individual in that state, and, on the other, the focus of customary law on the powers of those who control village level communities and who may wish to subject an individual to those powers. On the whole, it would seem that the judges lean in favour of the protection of the individual and thereby they refuse to recognise the powers of the village leaders or of others who feel compelled to adhere to village obligations.⁸⁹ In *Olomalu*, St. John C.J. considered an argument made by the Attorney-General 'that the unique nature of Samoan culture should bear heavily in favour of the validity of [sections 16 and 19]'. His Honour found that while specific areas of custom had been preserved, (such as the *matai* system by Article 100), custom generally had not.

Indeed the notion of national government and custom are not easily reconcilable . . . The framers had to cater for both facets. They left Samoan culture where it always had been, on the land and in family organisation, but they super-imposed on that culture a national government . . .

St. John C.J. did not take his analysis much further than this, perhaps because he had earlier declared that the words of the Constitution should prevail irrespective of the consequences of their enforcement on custom (or indeed in any respect).

An analysis of the relationship between custom and suffrage could perhaps have been taken further. Writing in 1967, Davidson observed that,

For many years villages have been creating additional *matai* in order to increase their influence in elections . . . The Samoans, like all conservatives, run the risk of retaining the form of traditional institutions when their spirit and purpose have disappeared and, in doing so, of failing to satisfy contemporary demands.⁹⁰

The abuse of *matai* titles in this way has persisted, and a judge could well have taken judicial notice of these matters.

Principled decision-making requires these matters to be addressed specifically and comprehensively, and by so doing, the legitimacy of the decision will be the greater. It is not only a matter of the aesthetics of judicial reasoning on constitutional review. To come back to the point made earlier, the kind of justification offered by courts for decisions on review relates to the legitimacy of the exercise of the function of review. A principled mode of interpretation will not yield an easy answer in many cases, and in particular it will be difficult to apply in those cases, of which *Olomalu* was one, where the court must 'interpret the community to itself.' It offers no simple palliative, but this mode may serve not only to educate the public about the constitution but also to foster an acceptance by them of the authority of the constitutional court.

To return to the situation in *Olomalu*, it must be acknowledged that there was no obvious answer to the problem. A judge concerned to interpret the Constitution as a document that would endure and adapt to the pace of social change in Western Samoa should, it is submitted, have found that Article 15(1), modified by Article 15(4), did control the suffrage.

89. See Bayne, *supra* n.1, for an analysis of *Tariu Tuivaiti v. Sila Famalaga* (Unreported, Supreme Court of Western Samoa, 17 December 1980). Other illustrative cases are *Federated States of Micronesia v. Mudory* (Unreported, Supreme Court of the Federal States of Micronesia, Criminal Case No. 1981-512), and *Acting Public Prosecutor v. Uname Aumane*. [1981] P.N.G.L.R. 510.

90. Davidson, *supra* n.5 at 426. See also Powles, *supra* n.3, *passim*.

But that would not have been the end of the matter. A judge who felt that it was not appropriate at that stage of history for a court to decide that universal suffrage was required might have decided either that the question was in the circumstances too 'political' for decision by the court, or that Article 15(4) and thereby Article 15(1) did not at that time operate in respect of the suffrage. A judge who felt that the time was appropriate for judicial decision could have relied on Article 15(4). It cannot be denied that the choice would have been difficult. In early 1981 the Parliament had rejected the recommendation of a report of a committee (headed by the holder of one of the highest *matai* titles) that while only *matais* should be candidates for election, the voting should be by universal suffrage.⁹¹ But it is just such choices that constitutional courts are required to make.

The latter was the course taken by St. John C.J., although by a mode of reasoning which did not pay a great deal of attention to community values. Having taken this course, St. John C.J. was required to address the question of the nature of the remedy he should award. This question is crucial to the efficacy of constitutional review, and this essay will conclude with a comment on the course taken by St. John C.J.

Remedies and judicial restraint

Whatever the judges may say to the contrary, it is inevitable that their decisions in matters of high political controversy will often lead to a public perception that they are making political decisions. Judges may take account of such reactions at the same time as they pursue a principled interpretation of the constitution by developing principles for the exercise of restraint in the use of the power of constitutional review.

To 'minimise friction between the branches of government',⁹² the United States Supreme Court has by a variety of techniques attempted to avoid ruling on constitutional issues. This experience suggests that a timely use of such techniques may well preserve the utility of judicial review. Much must be left to the judges, for too close a restriction of the power of review could compromise their function. The courts however might address themselves to the questions of when constitutional issues can be raised, (doctrines of standing, ripeness and mootness), how these issues should be raised, (procedural requirements to require a clear showing of standing and of the precise issues raised); doctrines concerning referral of constitutional issues to the higher courts from lower courts or other bodies, and whether or not there are some issues which are not fit for judicial resolution, (doctrine of political questions). The courts also possess discretion in the award of remedies. It is beyond the scope of this essay to analyse these questions closely, but it is suggested that such seemingly technical questions are at the heart of the efficacy of constitutional review.

It is suggested that St. John C.J. did not address himself sufficiently to these questions in *Olomalu*. His Honour found that sections 16 and 19 of the *Electoral Act* 1963 were invalid, but added that '[t]his decision does not invalidate any previous election conducted pursuant to the Act; it speaks only to the future'.

The finding that previous elections were not affected reflects on awareness that constitutional rulings should not be such as to disrupt the political system to the point where an impasse results, and in similar cases in New Zealand (*Simpson v. Attorney-General*⁹³) and in Australia, (*Victoria v. Commonwealth*,⁹⁴ *Attorney-General for N.S.W.; (ex rel McKellar) v. Commonwealth*⁹⁵) the courts have found ways of preserving

91. See *Samoan Times*, 27 February 1981.

92. G. Gunther, 'The Constitution of Ghana – An American's Impressions and Comparisons', (1971) 8 *University of Ghana Law Journal*, 32.

93. [1955] N.Z.L.R. 271.

94. (1975) 134 C.L.R. 81.

95. (1977) 12 A.L.R. 129.

elections that took place according to laws that were invalid. But St. John C.J.'s finding that future by-elections might not be conducted according to the Act could have created severe difficulties, for there were pending at the time of his decision a large number of election petitions challenging the return of particular Members of Parliament. If some of these petitions had been successful, by-elections would have been required. Although under the Constitution the new Parliament might have met to amend the Electoral Act, the political difficulties in bringing this about would have been immense. It is not, with respect, a sufficient answer to say, as did St. John C.J., that '[t]he consequences following from giving effect to the provision [of the Constitution] are not the concern of the Court in making its decision'.

It is legitimate for judges to take into account the stability of the constitutional system as a whole, and to tailor the remedies they award so as to avoid impasse.⁹⁶

96. See the cases cited above at n.93, and n.95. In another case, the High Court of Australia was able to accommodate the problem that by-elections, or extraordinary general elections, might not be able to be conducted on new constitutionally required boundaries; see *Attorney-General for Australia (ex rel. McKinlay) v. Commonwealth* (1975) 135 C.L.R.1.