Chiefs, custom and the state in Samoa and Vanuatu: hybridity as a tool for assessing governance in complex polities

by
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# Table of Contents

### Abstract

- xi

### Acknowledgements

- xiii

### Statement of originality

- xv

### Acronyms

- xvii

## Chapter 1 Introduction

1.1 Introduction

- 1

1.2 The context

- 2

1.3 Governance

- 3

1.3.1 Defining governance

- 3

1.3.2 Governance in the Pacific

- 5

1.4 Chapter outline

- 11

1.5 Methodology

- 14

1.6 Terms and language

- 17

1.7 Conclusion

- 19

## Chapter 2 Chiefship in the Pacific

2.1 Introduction

- 20

2.2 Scholarship of chiefship

- 20

2.3 The authority of chiefs

- 24

2.4 Chiefs and external forces

- 27

2.5 Chiefs today

- 29

2.6 Conclusion

- 32

## Chapter 3 Fa‘amatai and Fa‘asamoa

3.1 Introduction

- 35

3.2 The Samoan context

- 35

3.3 Institutions of customary governance

- 36

3.3.1 Introduction

- 36

3.3.2 Matai

- 37

3.3.3 Village level institutions: the fono

- 40

3.3.4 District level institutions: Tūmua and Pule

- 40

3.3.5 National level institutions: The Tama’āiga

- 41

3.4 Response to external forces

- 42

3.4.1 Introduction

- 42

3.4.2 Christianity

- 43

3.4.3 Consular and Samoan interaction

- 47

3.4.4 Colonial administration

- 51

3.5 The authority of chiefs in Samoa today

- 54

3.5.1 Introduction

- 54

3.5.2 Fa‘asamoa

- 54
3.5.3 *Fa’amatai* 61
3.5.4 The proliferation of *matai* 68
3.5.5 *Matai* authority and the state: an introduction 71
3.6 Conclusion 73

**Chapter 4 Chiefs, Kastom and Governance in Vanuatu**

4.1 Introduction 76
4.2 Vanuatu in context 76
4.3 Institutions of customary governance 78
4.3.1 Introduction 78
4.3.2 The graded society 79
4.3.3 The ranked society 81
4.3.4 Chiefs in Vanuatu today 82
4.4 Response to external forces 83
4.4.1 Introduction 83
4.4.2 Christianity 84
4.4.3 Traders 86
4.4.4 The Anglo-French Condominium 88
4.5 The authority of chiefs in Vanuatu today 93
4.5.1 Introduction 93
4.5.2 *Kastom* 94
4.5.3 *Kastom* governance 96
4.5.4 Support for chiefly authority 101
4.5.5 Chiefly authority and the state: an introduction 104
4.6 Conclusion 107

**Chapter 5 The dominant paradigm of governance**

5.1 Introduction 108
5.2 State centred-governance 108
5.3 Assessing governance in the Pacific 112
5.4 Development and state-centred governance 114
5.5 Success of development assistance 116
5.6 Weak and fragile states 119
5.7 Conclusion 125

**Chapter 6 Hybridity**

6.1 Introduction 126
6.2 Hybridity 126
6.3 Conclusion 135

**Chapter 7 Political representation**

7.1 Introduction 137
7.2 Samoa 137
7.2.1 *Matai* and national level political institutions 137
7.2.1.1 *Tamaʻāiga* as representatives of the state 138
7.2.1.2 Suffrage and political candidature 141
7.2.2 *Matai* and local level political institutions 147
7.2.3 Links between central and village authorities 150
7.2.4 Opposition from *matai*: the *Tūmua* and *Pule* protest 152
7.3 Vanuatu 154
7.3.1 Introduction 154
7.3.2 National level political institutions: the *Malvatumauri* 155
7.3.3 Local level institutions 158
7.3.3.1 Decentralisation 158
7.3.3.2 The Port Vila Town Council of Chiefs 160
7.3.4 Links between central and village authorities 162
7.3.5 Opposition from chiefs 162
7.3.6 Chiefs’ involvement in national crises 163
7.4 Conclusion 164

**Chapter 8 Legal systems**

8.1 Introduction 166
8.2 Samoa 166
8.2.1 The legal system 166
8.2.2 Dispute resolution 169
8.2.3 Land tenure and dispute resolution 173
8.3 Vanuatu 175
8.3.1 The legal system 175
8.3.2 Dispute resolution 178
8.3.3 Chiefs’ councils and dispute resolution 183
8.3.3.1 Freshwater Council of Chiefs 183
8.3.4 Land tenure and dispute resolution 185
8.4 Conclusion 188

**Chapter 9 Social management and social protection**

9.1 Introduction 190
9.2 Samoa 190
9.2.1 Social control 190
9.2.2 Women 193
9.3 Vanuatu 199
9.3.1 Social control 199
9.3.2 *Kastom* communities 204
9.3.3 Women 206
9.4 Conclusion 212
Chapter 10 Conclusion
10.1 Introduction 213

10.2 The custom/state relationship 213
10.3 The next step 219
10.4 Conclusion 223

List of References 225

Appendices
A Extracts from the Constitution and Acts of Parliament relevant to chiefship in Samoa
B Extracts from the Constitution and Acts of Parliament relevant to chiefship in Vanuatu
C Glossary of terms and list of Pacific Island countries (Table 3)

Tables
1 Samoan Social and Administrative Groupings 58
2 Governance in the Pacific: Percentile Ranking 2009 113
3 The Pacific Island countries and their status before and after independence C9

Maps
1 Samoa 34
2 Vanuatu 75

Diagrams
1 Sociometric wheel as depicted by Aiono 56
2 Alternative depiction of village governance 56
Abstract

Pacific Island countries are complex polities in which multiple sources of authority operate in shared spaces. Under the dominant paradigm of governance, however, the state becomes the primary focus, rendering other sources of authority largely invisible to policy makers.

Through a detailed examination of chiefly systems and state governance in Samoa and Vanuatu, this thesis seeks to broaden the governance discourse to demonstrate that complex polities can draw legitimacy and resilience from sources other than the state. By employing a hybridist approach, the thesis discards the assumed state/custom hierarchy to reveal that custom and the state can, and already do, function in mutually beneficial ways. The thesis demonstrates that in both countries, the state is utilising custom to further its own purposes and, simultaneously, chiefs are shoring up their own authority by creating structures that can negotiate with the state. The thesis highlights that the nature of the custom/state relationship is dynamic, complex and context-specific. In addition, it shows that policy makers should not be reticent to engage with custom on the assumption that it is inherently incompatible with or separate from the state system. Rather, they should draw on the strengths of each system, and foster interaction between the two.
Acknowledgements

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The time that I spent in the Pacific Islands was enormously rewarding. Amongst the many people that made it memorable are: Henry Vira and the staff and associates of VANGO; Ralph Regenvanu; Roslyn Tor and staff at the Malvatumauri; Lai Sakita; Professor Don Paterson, Dr Miranda Forsyth and others at the University of the South Pacific in Port Vila and Suva; Professor Asofou So’o; and the people of Letui Village on Savaii. My thanks also go to the chiefs in Samoa and Vanuatu who allowed me to attend their meetings, and to the many people in Samoa, Vanuatu and Australia who agreed to be interviewed. Thanks especially to those who taught me about the joys of custom and kava.
Statement of originality

I declare that this thesis contains no material which has previously been submitted for a degree or diploma in any university and, to the best of my knowledge and belief, this thesis contains no material which has previously been published or written by another person, except when due reference is made in the text of the thesis.

Sarah Kernot
Date: 8/4/13
### Acronyms

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACPACS</td>
<td>Australian Centre for Peace and Conflict Studies</td>
</tr>
<tr>
<td>AusAID</td>
<td>Australian Agency for International Development</td>
</tr>
<tr>
<td>AFP</td>
<td>Australian Federal Police</td>
</tr>
<tr>
<td>CLTA</td>
<td>Customary Land Tribunal Act 2001</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
</tr>
<tr>
<td>DFID</td>
<td>Department for International Development</td>
</tr>
<tr>
<td>DPHG</td>
<td>Deutsche Handels und Plantagen-Gesellschaft der Südsee-Inseln zu Hamburg</td>
</tr>
<tr>
<td>DAC</td>
<td>Development Assistance Committee</td>
</tr>
<tr>
<td>HRPP</td>
<td>Human Rights Protection Party</td>
</tr>
<tr>
<td>LMS</td>
<td>London Missionary Society</td>
</tr>
<tr>
<td>MDGs</td>
<td>Millennium Development Goals</td>
</tr>
<tr>
<td>NHNP</td>
<td>New Hebrides National Party</td>
</tr>
<tr>
<td>NGO</td>
<td>non-governmental organisation</td>
</tr>
<tr>
<td>ODA</td>
<td>Official Development Assistance</td>
</tr>
<tr>
<td>OECD</td>
<td>Organisation for Economic Cooperation and Development</td>
</tr>
<tr>
<td>RAMSI</td>
<td>Regional Assistance Mission to Solomon Islands</td>
</tr>
<tr>
<td>VAGST</td>
<td>Value Added Goods and Services Tax</td>
</tr>
<tr>
<td>VMF</td>
<td>Vanuatu Mobile Force</td>
</tr>
<tr>
<td>VNPF</td>
<td>Vanuatu National Provident Fund</td>
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</tbody>
</table>
Chapter 1  Introduction

1.1  Introduction

Pacific Island countries\(^1\) are complex polities in which multiple sources of authority operate in shared spaces. Customary systems of governance that seek to uphold local values and practices function alongside the more recently introduced systems of the church and state. The dynamic relationship between these systems of governance results in hybrid polities whose strengths and weaknesses are determined by the reach and legitimacy of each system, as well as the interactions between them.

The persistence and strength of customary systems presents a challenge to development actors and others that take a state-centred approach to governance. Customary values do not always conform to the democratic aspirations of states and, because custom governance is perceived as functioning quite separately to the state, it is understood as having the potential to impede the effectiveness of the state. In the Pacific Islands, the difficult relationship between custom and introduced systems of authority is well recognised, and it is a problem that people have grappled with ever since Christian missionaries and colonial authorities arrived in the region. However, efforts to resolve tensions in the custom/state relationship have been largely unsatisfactory.

This thesis will examine governance in two Pacific Island nations, Samoa and Vanuatu, in order to broaden the governance discourse. In contrast to the state-centred approach that dominates the discourse, it takes a hybridist approach, giving recognition to the local, customary governance structures that operate alongside or in shared realms with those stemming from the modern, western model.\(^2\) This approach demonstrates that complex polities can draw legitimacy and resilience from sources other than the state. In doing this, the thesis, although not itself a legal thesis, presents and draws upon the current laws of both polities as data to show that hybridity is an existing reality. The thesis therefore proposes that an approach to governance that gives equal value to state and non-state governance systems can allow for new, effective and context-appropriate forms of governance to emerge.

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\(^1\) The Pacific Island countries with their pre and post independence status are listed in Appendix C.

The concept of hybridity is emerging as a significant influence in governance thinking, particularly in relation to Pacific Island countries. As an approach to governance, the concept of hybridity is still very much under development and the literature published to date is limited in its size and scope. The contribution of this thesis is to strengthen the discourse by developing what is still primarily a theoretical discussion to one that is backed by detailed examples of hybridity in practice. That is, the thesis examines custom and state governance in Samoa and Vanuatu and identifies specific areas where the two systems interact, creating areas of tension or complementarity. Through the lens of hybridity, the thesis reveals that the custom/state dichotomy is neither an accurate portrayal nor a helpful response to development challenges in the Pacific. The thesis highlights that the dominant understandings of governance restrict the development agenda by placing too much emphasis on the workings of government and too little on other legitimate sources of authority. By adopting a hybridist approach the thesis reveals that custom and the state can, and already do, function in mutually beneficial ways. In addition, if the dynamic nature of both systems is recognised and captured, there is potential for further positive negotiation between the two.

1.2 The context
The Pacific Island countries are amongst the poorest in Asia and the Pacific and they receive considerable attention from countries such as Australia and New Zealand which provide development assistance and financial support in diverse ways. Relative to the size of their populations, Pacific Island countries receive substantially more development assistance than any other region in the world - around four times as much as Africa and eighteen times as much as Asia. In spite of this attention, no Pacific Island country is on track to meet the Millennium Development Goals and, in some cases, progress towards reducing the number of people living in poverty is in reverse. Approximately 2.7 million people, or one third of the Pacific Island region’s population, live in poverty. Around 400,000 children do not attend school at all and seventy six percent of children do not finish primary school. Progress made in the 1990s to improve child health has stalled or deteriorated and gender inequities

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5 Ibid. p9.
6 Ibid. p1.
7 Ibid. p17.
8 Ibid. p20.
impede improvements to development outcomes. The global financial crisis served to highlight existing structural weaknesses in Pacific Island economies, resulting in sharp increases in the cost of essential food and household items. Pacific Island countries are increasingly feeling the impacts of climate change.

The primary response of donors to this situation is to further their efforts to increase the efficiency and effectiveness of Pacific Island governments. The theory behind this is straightforward – a competent government that is free of corruption will foster economic growth and deliver services such as health and education efficiently and equitably. Such a government will receive the support of its citizens who will pay taxes and further add to the government’s strength by demanding accountability and transparency. This approach of strengthening the institutions of central government is a logical one. However it is apparent that in the Pacific Island countries a range of factors impedes this approach. Geographic isolation and mostly small populations impact upon trade and economic growth. Service delivery is hindered by small economies and remote populations, and low levels of literacy result in limited capacity within the public and private sectors. A youth bulge, urban drift and high unemployment contribute to social unrest.

Compounding this difficult operating environment is the complexity of governance structures. The Pacific Island countries are young nation states. With the exception of Tonga which was never completely colonised, all have emerged from colonial administration within the past fifty years. States have been created along manufactured boundaries and, in Melanesia, a multitude of cultures have been grouped under the banners of only a few nations. Custom governance, which varies considerably across and within Pacific Island countries, retains its strength.

1.3 Governance

1.3.1 Defining governance

Much has been written about the meaning of ‘governance’ and a number of definitions have been proposed. Klijn identified four dominant definitions of governance: ‘governance as good governance’ gives emphasis to public administration; ‘governance as new public management’ gives emphasis to the role of governments; ‘governance as multilevel
governance or inter-governmental relations’ focuses on achieving results in environments with multiple actors; and ‘governance as network governance’ focuses on the interaction between organisations.\(^9\) As is highlighted by Klijn’s assessment, the common features in each of these definitions are governments and, in the case of the last, organisations. Within development theory and practice, this focus on governments is also dominant.

The World Bank is particularly influential in driving the governance agenda and so definitions put forward in World Bank policy documents are relevant to this thesis. These definitions vary, but one that is representative of the World Bank understanding is:

The traditions and institutions by which authority in a country is exercised. This includes (a) the process by which governments are selected, monitored and replaced; (b) the capacity of the government to effectively formulate and implement sound policies and; (c) the respect of citizens and the state for the institutions that govern economic and social interactions among them.\(^{10}\)

For the World Bank, this definition provides points of analysis that facilitate the assessment of governance. For example, the World Bank can identify and report against the processes by which citizens participate in the selection of their governments.\(^{11}\)

For the purposes of this thesis, this definition provides some useful components. It gives recognition to traditions and institutions and it incorporates ideas pertaining to the selection and effectiveness of leaders and to the legitimacy of social and economic institutions. Ultimately, however, this definition is unsatisfactory because of its focus on institutions of the state. Chapters 3 and 4 demonstrate that polities such as those in Samoa and Vanuatu are influenced by strong and complex systems of customary governance. As will be discussed further in Chapter 5, the dominant paradigm of governance represented by the definition above renders these legitimate systems of governance invisible.

Through its research and scholarship of public policy, The Brookings Institution has contributed to the discourse on governance and two definitions of relevance to this thesis


\(^{11}\) Ibid. p3.
have come out of this work. Keohane and Nye defined governance as ‘the processes and institutions, both formal and informal, that guide and restrain the collective activities of a group.’\(^{12}\) This definition has an appealing simplicity, but it has been developed with a multitude of governance activities in mind. Keohane and Nye presented a nine-cell matrix that identified three levels of governance - supranational, national and subnational – which operate in three sectors - private, governmental and third sector. They argued that, although the state is the most important actor in terms of global politics, there are other important actors such as non-governmental organisations, transnational corporations and local non-government actors that operate in other spaces. While this definition initially appears to have the capacity to simultaneously include both customary and state institutions, this thesis will reveal that the relationship between the two cannot be categorised as easily as the matrix suggests. As will demonstrated, customary systems can and do successfully bridge both state and non-state realms.

Also coming out of The Brookings Institution is Donahue who proposed that governance can be understood as ‘the rules and institutions for the authoritative organization of collective life.’\(^{13}\) Donahue’s emphasis is on accountability. That is, governance is about the legitimacy rather than the origins of the institutions that organise society. No preference or emphasis is given to any particular source of authority. Thus his definition can be applied equally well to institutions of custom, the state, the church, civil society or the private sector, each of which has a place in the governance of Pacific Island countries. It is this definition that has most relevance for governance as it is used in this thesis in relation to customary governance. However, also central to this thesis is the state-centred understanding of governance as represented by the World Bank definition above, for it is this definition that impacts upon development policy.

1.3.2 Governance in the Pacific

State-centred understandings of governance are characterised by aspirations of democracy, including transparency, participation and adherence to human rights and the rule of law. Frustrations directed at the lack of progress in achieving these standards in the Pacific assume


that governance fits within an established framework that does not accommodate customary practices. As such, efforts to emphasise cultural relativity are perceived and promoted as being in opposition to calls for universal standards of state-centred governance. Both points of view have political potency and have received strong support.

Shameem, former director of the Fiji Human Rights Commission (and later to garner much criticism for her support of the self-imposed Bainimarama government) suggested that:

if Australia thinks that colonisation by European powers should have brought the rest of the Pacific Islands up to speed on fundamentals such as democratic governance, open government, transparency and accountability and those other wonderfully esoteric terms of modern statehood, it should think again - the question is whether these trappings of modernity are desirable or required or even accepted as a standard of achievement - because there may be other equally admirable systems in existence which are preferred.¹⁴

But alongside opposing views of universalism and cultural relativity are calls to broaden the governance discourse and to explore deeper understandings of the ways in which governance requirements operate in the local context. Commentators from within the Pacific Island region or with long-standing associations with it are suggesting that continuing problems with state governance demonstrate a need for a better understanding of the ways that cultural factors impact upon the implementation and perception of governance. Efforts are being made to bridge the gap between universal standards and culturally entrenched systems. For example, the Australian National University has established the *State, Society and Governance in Melanesia Project* which aims to generate scholarship and dialogue as well as to link research with policy. The Pacific Institute of Advanced Studies in Development and Governance at the University of the South Pacific is also promoting research into this area. In 2006, the New Zealand Law Commission produced the report *Converging Currents: Custom and Human Rights in the Pacific* in an effort to further discussions and develop legislation that takes into account the ‘harmonisation of custom and human rights.’¹⁵ The Australian Centre for Peace and Conflict Studies (ACPACS) which is based at the University

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of Queensland conducted preliminary research in six countries in the Pacific Island region to look at the interaction of customary and introduced governance. It is this work that most influenced the academic discourse on hybridity.

Efforts such as these are timely and appropriate but the complexity of the problem provides much scope for further research. Fiji-based scholar, Huffer, claimed that there is a need to explore the relationship between Pacific thought and governance. Huffer suggested that Pacific ideals and philosophy are largely considered anachronistic and an impediment to development but she pointed to worrying signs of political instability, corruption and inefficiency within the civil service in the Pacific Island region as indicators that it may be time to re-evaluate the universality of the governance and development paradigms. Huffer suggested that too little analysis has been done on the causes and manifestations of corruption in the Pacific and called for ‘the promotion of Pacific political ethics as a way of dealing with corruption and wider malgovernance.’\(^{16}\) Similarly, Samoan scholars So’o, Fiti-Sinclair, Va’a and Lameta, suggested that traditional integrity systems are poorly understood.\(^ {17}\) Findlay, too, argued that in the Pacific Island region, there is an absence of discussion about:

> the contextual interaction and interdependence between customary social structures and modes of development, development and corruption, and corruption and customary social structures.\(^ {18}\)

He suggested that the impacts of custom and corruption on development are misrepresented and further, that more consideration should be given to ways that traditional structures of social control impact upon the commercial environment of cultures in transition.\(^ {19}\) Especially pertinent to this thesis is White’s assertion that, although there has been much research on traditional forms of leadership, decentralisation and the problems of the state, there is a lack of knowledge about the ways in which customary practices intersect with the state through government institutions.\(^ {20}\)

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\(^{16}\) Huffer, Elise, 2005, 'Governance, corruption and ethics in the Pacific' in *The Contemporary Pacific* 17 (1), 118.


\(^{19}\) Ibid. pp78-79.

The theme that consistently emerges from these observations is that there is a lack of clarity of the ways that development, governance and customary practices and values interact. Whilst the over-arching aims of development appear to be widely accepted as a worthy goal, efforts to impose universal standards of governance will continue to be frustrated by strongly rooted customary systems until pathways of negotiation between the two systems can successfully be identified and introduced into the policy dialogue.

In the Pacific Island region, the strength and reach of custom governance means that successful negotiation is an imperative. Rather than disappearing under the inevitable tide of modernity and globalisation, custom has adapted and accommodated new influences, demonstrating a robustness that signifies its relevance for the future. Importantly, states continue to rely on customary practices to identify and legitimise leaders and to maintain law and order. Custom in the Pacific appears in the legal system under the name of customary law, and includes the enforceable authority of chiefs, as well as customary principles and rules governing kinship relations, social control and land tenure. Such customary law co-exists with the formal law of states, giving rise to the concept of legal pluralism. Efforts are being made around the Pacific region to affirm the jurisdiction of custom. For example, in Fiji the interim government has drafted village by-laws partly with the intent of preserving Fijian identity by codifying such things as dress codes, preconditions on marriage and the authority of village leaders. In Solomon Islands, the government and the Regional Assistance Mission to Solomon Islands (RAMSI) have agreed to work towards giving greater recognition to traditional leaders. In Vanuatu, state legislation now formalises the role of chiefs in resolving land disputes.

Recent efforts to formalise chiefly authority within the jurisdiction of the state do not represent a change in thinking about the value of custom: as will be discussed further, the custom/state relationship has been a recurring theme in the Samoan polity over the last century; and in the 1990s, White observed that efforts being made at that time in Solomon Islands to ‘empower’ chiefs through the mechanisms of the state were just another example in

a pattern that had been recurring for more than a century. However, there are obstacles to
formalising chiefly authority. White suggested that the personalised nature of local forms of
authority in Melanesia make it resistant to the codification and formalisation required by the
state. In addition to concerns about the suitability of Pacific Island chiefs to take on duties
of the state, discussions around extending the jurisdiction of custom raise concerns that
custom will be used to justify such things as discrimination against women and youths and
the imposition of strict measures of social control. Customary land, over which chiefs have a
role in management, is a particularly sensitive issue, and measures taken by states to regulate
the use and registration of customary land are almost certainly going to be controversial.

This thesis examines these matters in Samoa and Vanuatu to develop a comprehensive
understanding of the ways that custom is manifested in the Pacific Island region today. This
analysis provides the basis for the examination of the custom/state relationship that employs
the tool of hybridity to identify those sources of authority that contribute to the legitimacy
and resilience of Pacific Island polities.

As noted above, and as will be discussed in more detail in Chapter 6, the discourse on
hybridity as it is used in this thesis was lead by scholars at the Australian Centre for Peace
and Conflict Studies. The ACPACS team aimed to reconceptualise ‘fragile states’ (discussed
further in Chapter 5) in order to give greater recognition to the strengths within those states. They argued that the accepted model of the modern statehood is false and that, in practice,
states are polities where multiple forms of governance co-exist. This thesis demonstrates
what such states can look like.

The ACPACS team, referred to in this thesis as Boege et al., defined hybrid states as those in
which:

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and Lamont Carl Lindstrom (eds), Chiefs Today: Traditional Pacific Leadership and the Postcolonial State
(Stanford University Press, Stanford, Calif.) pp251-252.
25 Ibid. p252.
26 Boege, Volker, Brown, Anne, Clements, Kevin and Nolan, Anna, 2008, On Hybrid Political Orders and
Emerging States: State Formation in the Context of ‘Fragility’, Berghof Research Center for Constructive
Hybrid Political Orders - Pacific Experiences, Occasional Paper: Clements, Kevin, Boege, Volker, Brown,
Anne, Foley, Wendy and Nolan, Anna, 2007, ‘State Building Reconsidered: The Role of Hybridity in the
Formation of Political Order’ in Political Science 59 (1), 45.
27 Boege, Brown, Clements and Nolan, States Emerging from Hybrid Political Orders - Pacific Experiences.
domains of contrasting patterns of power and authority combine elements of the western model and elements stemming from the local precolonial autocephalous traditions of governance and politics; governance is carried out by an ensemble of local, national and also often international actors and agencies.28

As will be demonstrated in Chapters 3 and 4, this definition applies to Samoa and Vanuatu for those countries are both modern democratic states in which customary governance systems continue to operate.

The recognition of hybrid systems is not new – as will be discussed in Chapter 6, the notion of hybridity has been used by legal scholars, political scientists, anthropologists and post-colonial theorists. However work such as that by Boege et al. and the World Bank29 demonstrates that hybridity has recently gained traction for scholars and policy-makers seeking to address complex problems of development and governance in Pacific Island polities. Importantly, this work recognises the beneficial role that customary institutions have in Pacific Island countries and it seeks to bring some balance to the discourse on the custom/state relationship. As noted by Dinnen et al. in their background report for the World Development Report 2011, it is unrealistic to view state and non-state institutions as discreet entities.30 The hybrid view recognises that they are enmeshed and, further, that they have the potential to be mutually beneficial. Critically, by rejecting the dominant view of the state/custom hierarchy which assumes that the state holds greater legitimacy, authority and influence than non-state institutions, the hybrid view offers the potential to look beyond the state in order to make improvements to governance. Such an approach allows resources to be directed to all actors that have the ability to make a useful contribution to governance. For scholars of the Pacific Islands, the hybrid view: recognises that customary institutions relieve social stresses; allows those not educated in western systems of government to participate in governance; and helps to connect national and local governance structures. In Pacific Island countries, where service delivery is inadequate, resources stretched, and the state often remote, such an approach has great relevance.

28 Boege, Brown, Clements and Nolan, States Emerging from Hybrid Political Orders - Pacific Experiences p5.
30 Ibid. p27.
This thesis demonstrates that hybridity is a useful tool for analysing complex polities where custom and the state are both influential. This thesis builds on the scholarship in this area by compiling a picture of what a hybrid state looks like in practice. That is, it provides a detailed analysis of specific aspects that make a state hybrid. It does this by identifying those sources of authority that are active in the areas of: political representation and decision making; legal systems; and social management and social protection. Drawing on the work of Boege et al., it examines the custom/state relationship within these areas in terms of: complementarity – where there is overlap and cooperation between state and customary institutions; and incompatibility – where there is conflict between the approaches of custom and the state.31

1.4 Chapter outline
This thesis is comprised of ten chapters which effectively form three parts. Commencing with an examination of chiefs and custom, the first part reflects the view that custom governance retains its relevance to the contemporary Pacific because it is understood to be a legitimate system that is able to adapt to new influences. The second part of the thesis, Chapters 5 and 6, shifts the discussion to state-centred governance and its implications for development theory and practice and introduces the concept of hybridity. Part three, Chapters 7 to 10, employs the tool of hybridity to examine the custom/state relationship arguing that a more comprehensive understanding of this dynamic can be utilised by policy-makers. This is especially pertinent to policy-makers working in the arena of international development who may be unfamiliar with the details of customary governance or uncomfortable with the idea of incorporating it into their work. The findings are also relevant to Pacific Islanders, particularly those who work in the public sector, who although familiar with customary practices are focussed on state processes and systems.

Chapter 2: Chiefship
This chapter recognises chiefs as a central feature of the contemporary Pacific Island region. Operating in diverse environments, chiefs play an important role in village and sometimes national governance and are potent symbols of custom. As a form of leadership, chiefship has been examined from different points of view. In the context of custom governance, chiefs may be the source of customary law and administer it. Understood by some scholars

31 Boege, Brown, Clements and Nolan, States Emerging from Hybrid Political Orders - Pacific Experiences.
as a pre-modern leadership style, chiefship has been explored as a feature of stratified societies on the cusp of achieving statehood. In addition, and as shown in this thesis, chiefship can be understood as a contemporary phenomenon that has developed, and continues to develop, under an array of influences.

Chapter 3: Samoa: Fa’amatai and fa’asamo
Through an examination of fa’amatai (the chiefly system) and fa’asamo (Samoan custom), the complexity and unique character of the Samoan social and political context is highlighted. This chapter shows that the authority of matai has clear early-Pacific origins and remained intact during the colonial period. Matai had a role in the development of the state structure, thereby reinforcing their authority in contemporary Samoa under the fa’amatai. Fa’asamo continues to dominate life in Samoa, playing an important role in social, political and economic interactions.

Chapter 4: Vanuatu: Chiefs and kastom governance
In contrast to Samoa, Vanuatu is a diverse, multi-cultural society. Characterised by small, remote communities, Vanuatu has developed strong local systems of governance which often have little interaction with the national state system. During the period of Christianisation and colonial rule, custom was undermined before re-emerging as kastom, a force of political opposition and an important feature of social, political and economic life in Vanuatu. Leadership styles, which vary across the archipelago, have demonstrated their ability to adapt to changing contexts. Chiefship in Vanuatu today is very much an outcome of the influences of Christian missionaries, colonial administrations, urbanisation, globalisation and the formation of the nation state.

Chapter 5: The dominant paradigm of governance
The dominant paradigm of governance poses a challenge to Pacific Island countries because it focuses on institutions of the state. Within this framework, custom governance is rendered invisible. Assessments of poor governance in the Pacific, as revealed through governance indicators promulgated by multi-lateral institutions, justify the approach taken by development actors and others that seek to influence change in the Pacific through the strengthening of state-centred, democratic practices. Frustrations directed at the lack of progress in this endeavour contribute, in part, to the discourse on fragile states.
Chapter 6: Hybridity

The focus of the governance discourse on institutions of the state does not further efforts to understand complex governance structures or to influence positive change. If customary governance were to be accommodated within the governance framework, a more comprehensive understanding of the custom/state relationship would allow for the strengths of both systems to be utilised. This chapter presents hybridity as an analytical tool that can be utilised to identify instances where more than one source of authority function in a shared space. The relationship is assessed in terms of complementarity, where areas of cooperation or overlap are evident, or incompatibility where conflicting approaches are evident. Such analysis identifies points of weakness and resilience within the polity that can be drawn upon by policy-makers.

Chapter 7: Political representation

This chapter begins the examination of the custom/state relationship, looking at the ways that both systems are represented at the national and local levels in Samoa and Vanuatu. A review of the constitutions and legislation of each country demonstrates that customary values and practices are recognised by the state in various ways and that chiefs have a role in putting this into effect. Conversely, to varying extents, chiefs now rely upon the state to legitimise their authority. In those realms where both systems are in operation, the relationship is assessed in terms of complementarity or incompatibility. The examination reveals that, on the issue of political representation and decision-making, the custom/state relationship in Samoa has high levels of complementarity. In Vanuatu, levels of complementarity exist, but the relationship is weaker.

Chapter 8: Legal systems

This chapter continues the examination of the custom/state relationship, focusing on justice and dispute resolution systems in Samoa and Vanuatu, including those pertaining to land tenure. The examination finds that in both Samoa and Vanuatu the custom and state systems each contribute to the legitimacy of the other. However the relationship in both countries is complex because complementarity and incompatibility exist simultaneously.
Chapter 9: Social management and social protection

Using the tool of hybridity, this chapter examines the ways that custom and the state deal with matters of social control and the status of women. The chapter finds that although custom and the state both operate in these areas, their responsibilities differ to some extent. Thus, while tension between the systems exists, in practice there is little evidence of incompatibility.

Chapter 10: Conclusion

Having examined custom governance, chiefly leadership and their relationship with the state, it is evident that custom should be considered within the governance framework. Rendering custom governance as either invisible or as a separate, unrelated matter is misleading and overlooks the true nature of polities such as those in Samoa and Vanuatu. Rather, the experiences of Samoa and Vanuatu demonstrate that, although areas of incompatibility exist, custom and the state can, and already do, function in ways that serve to benefit both systems. Furthermore, the dynamic nature of both systems means that opportunities for further cooperation can be identified. Building upon this relationship of cooperation has the potential to strengthen the polity as a whole.

1.5 Methodology

The research for this thesis, begun in 2006, is trans-disciplinary and predominantly literature based. The main schools of influence are development, law, political science and, to a lesser extent, anthropology, women's studies and history. This thesis is based primarily on existing English-language literature, including constitutions, acts of parliament, court cases, reports by governments and multi-lateral organisations, agreements, scholarly books and articles, theses, newspaper articles and websites. Omitted from consideration in this thesis is the Francophone material relevant to Vanuatu. The research published in English makes no distinction between the experiences of Francophone and Anglophone ni-Vanuatu and so there is nothing to indicate that any studies published in French might throw light on the issues under consideration. Furthermore, the nature and structure of the political and legal institutions of the state of Vanuatu were English in origin, and thus there exists little incentive for French academics to study relationships between state-based and custom-based systems in that country.
Original data was collected during field work in Samoa and Vanuatu (detailed below). The research is further informed by professional work in international development, including in the Pacific region, and visits to Fiji and Solomon Islands. During the research period I undertook part-time work in the Pacific section of Australian Red Cross and, in 2008, commenced full time employment in the Pacific branch at the Australian Agency for International Development (AusAID).

Field work was undertaken primarily in Vanuatu where I spent a total of about four months over three visits in 2006, 2007 and 2008. During these field trips to Vanuatu I collected data through interviews with: chiefs from local councils in Port Vila; representatives of the Malvatumauri National Council of Chiefs; academics at the University of the South Pacific; representatives from non-governmental organisations (NGOs); locally engaged AusAID staff; a representative of an island community group; and a prominent leader of the church. I also attended a meeting of chiefs and a community meeting facilitated by chiefs. Additional material was collected from the National Library and the University of the South Pacific library. Importantly this was an opportunity to contextualise my research. In 2007 I was based at the Vanuatu Association of NGOs (VANGO) which provided opportunities to engage in general conversation with ni-Vanuatu about custom, development, politics and life in Vanuatu. In 2008, my interviews were facilitated by the Vanuatu Cultural Centre and the Malvatumauri Council of Chiefs. The 2008 visit coincided with the national elections which provided an opportunity to observe the campaign strategies of leaders and would-be leaders and the response of the electorate and media.

In 2008 I spent a month in Samoa. Once again, this was an opportunity to gather data and to contextualise and discuss the research. In Samoa I met with academics at the National University of Samoa; one prominent church leader; government representatives; village-based chiefs; and representatives from local NGOs. Additional material was sourced from: the National University of Samoa; the Samoa Public Library; the Samoa Statistics Department; the Ministry of Women, Community and Social Development; and the Office of the Ombudsman. During this trip, I collected data from the matai registers held in the registry office of the Land and Titles Court. The registers are an original set of books which contain information on all registered titles. I was given access to the complete set of books and I recorded: the number of title-holders in each village; the number of title-holders whose
title was cancelled; the number of title-holders in each village that were female; and the date that the first female title-hold was registered. I draw upon this information in Chapter 9.2.2 in relation to the status of women in Samoa.

Interviews conducted during fieldwork were undertaken for the purpose of discussing matters raised in those sources. The interviews were opportunities to exchange ideas and to discuss my own observations as well as those in the literature. In some cases, interviewees were the authors of material that I intended to draw upon in the thesis, so the interviews were opportunities for further discussion on particular views or findings of those authors. The interviews were therefore not systematic or based on any particular format. They were not intended to fulfil the needs of an anthropological or scientific survey and the same questions were not necessarily presented to more than one person. Rather, the interviews were more responsive in nature.

Original data during fieldwork is included in the thesis. During the field trip to Vanuatu in 2008, I interviewed the Chairman of the Freshwater Council of Chiefs and the information from this interview is used in Chapter 8.3.3.1 which presents the council as an example of a contemporary chiefly structure. Information from an interview, also conducted in Vanuatu in 2008, with a representative of the Port Vila Town Council of Chiefs informs the discussion in Chapter 7.3.3.2 on chiefs’ councils that operate at the sub-national level.

Interviews undertaken during the course of the research were done in compliance with the ethics requirements of Monash University. In line with ethics guidelines, the nature and purpose of the research were explained to each respondent prior to the interview and all respondents were required to give their written consent to the interview. Respondents were also required to nominate whether they wished to retain anonymity or allow themselves to be identified. Some of the interviews were recorded on a digital dictaphone. In all such cases, respondents gave their permission for the interview to be recorded.

Samoa and Vanuatu were selected as the two case studies for this research because they provide a contrast of culture and chiefly styles, highlighting the diversity of custom within the Pacific. Samoa sits within the cultural region of Polynesia and is characterised by a hierarchical and autocratic customary system. Vanuatu is located in Melanesia and thus has a
mix of chiefly styles. The two countries contrast in many ways. Samoa has a homogenous culture and its population is geographically contained within two large and two small islands. Vanuatu is multicultural with a diversity of languages and customs and its population is dispersed across its broad archipelago. As will be demonstrated in Chapters 3 and 4, these differences provided unique strengths and weaknesses that were critical to shaping the polities that emerged during and after periods of foreign administration. Within this thesis, Samoa and Vanuatu are generally dealt with in alphabetical order.

Although this thesis was undertaken through the Monash Faculty of Law, it is not intended to be a legal thesis, nor does it target those with a special interest or qualifications in law. Rather, by employing a trans-disciplinary approach, the thesis is intended to be relevant for practitioners as well as scholars working in international development and the broad scope of areas associated with that field. The referencing style does not therefore follow legal conventions. It is instead based on styles commonly used in humanist fields of scholarship, while also allowing for references to legal documents such as acts of parliament and court cases.

1.6 Terms and language

Pacific Island countries
The term ‘Pacific Island countries’ refers to the fourteen independent and associated states located in the Pacific. These fourteen states, along with Australia and New Zealand, make up the membership of the Pacific Islands Forum. They are: Cook Islands; Federated States of Micronesia; Fiji Islands (referred to as Fiji); Kiribati; Marshall Islands; Nauru; Niue; Papua New Guinea; Samoa; Solomon Islands; Tonga; Tuvalu; Palau; and Vanuatu. Not included in this group are the French and American territories including: New Caledonia; French Polynesia; Wallis and Futuna; Guam; and American Samoa. A table summarising the pre and post-independence status of each Pacific Island country is included in Appendix C.

Tradition
The terms ‘tradition’ and ‘traditional leader’ are employed throughout this thesis. As will be discussed in further detail, chiefs and custom in the Pacific today do not perpetuate practices that have passed down, unchanged through generations. Rather, they are understood as a
product of time and place. The term ‘tradition’ is used in this thesis to indicate practices that embody or represent notions of the past.

**Kastom**

*Kastom* is a Bislama (Vanuatu Pidgin) term that can be translated simply as ‘custom.’ However, as will be discussed in Chapter 4, the term today carries political undertones. Custom in Vanuatu was denigrated during the period of colonisation, but in the lead up to independence *kastom* emerged as a source of pride. Within the literature and in government documents, both *kastom* and ‘custom’ are used, sometimes interchangeably, and no standard has yet emerged. Within this thesis, I have chosen to use *kastom* when referring specifically to Vanuatu. This is done in recognition of the political associations of the term. When referring to custom in more than one country, or when quoting directly, I have used the English word.

**Samoan macrons**

In some Samoan words, the vowel sound is extended as an exception to the normal equal stress, and this may be indicated in the written form by the use of a macron over the vowel, for example ā or ō. The use of macrons is inconsistent within the literature and no standard has yet emerged that can be applied to this thesis. However, there appears to be a general trend toward increasing the frequency with which macrons are used. This is likely a result of the ease with which technology now facilitates their use as well as a reflection of the use of indigenous language as an expression of pride. Acknowledging both these aspects, I have used the macron as it is commonly, but not consistently, applied in the recent literature that has emerged from Samoa. Exceptions to this are in the case of direct quotes where I have replicated the original source.

**Gender**

Chiefs in this thesis, as elsewhere, are generally referred to as male. This is because, although female chiefs do exist, they are few in number. Furthermore, as will be discussed elsewhere in the thesis, where women do achieve chiefly status it is rarely regarded as equal to that of their male counterparts.

Additional definitions of terms used in this thesis are included in Appendix C.
1.7 Conclusion
The Pacific Island countries are amongst the poorest in the world and efforts are being made by a range of actors to improve development outcomes. In recognition that the delivery of essential services is hindered by economic and geographical constraints and limited capacity within the public sector, the key strategy for development actors is to increase government efficiency. One component of this strategy is to improve the quality of state leadership by increasing the public demand for good governance at the state level.

Whilst this attention to the effectiveness of government is essential, established approaches to development are deficient in their failure to recognise the legitimacy, strength and value of customary systems. A singular focus on the institutions of the state suggests underlying assumptions that, either custom can and will eventually lose its strength and be subsumed within the state system, or that custom is irrelevant to development. However, custom has proven to be durable and well-able to adapt to changing environments and to accommodate new influences.

This situation in which two sources of authority operate in a shared space presents a challenge because the two do not always operate in compatible or complementary ways. Yet the state relies upon custom to fulfil many if its responsibilities and, conversely, custom relies upon the state to legitimise its authority in some contexts. A hybridity approach to the analysis of the custom/state relationship recognises the two systems as being of equal value. This allows for a more comprehensive understanding of this complex relationship so that the benefits of both systems can be harnessed by policy-makers.
Chapter 2  Chiefship in the Pacific

2.1  Introduction

Pacific Island countries are characterised by the interplay between their own systems of customary governance and their systems of state governance. The degree to which these two systems intersect is highly variable across the Pacific, determined over time by geographical, political, cultural and economic factors.

A variety of actors from both within and outside the Pacific influence the dynamic relationship between custom and the state. The motivations for influencing the custom/state relationship vary, as does the approach and the ability to make any lasting impact. Central players in this constant vying for influence are Pacific Island chiefs.

Chiefs are today a unique political phenomenon. Having successfully claimed the responsibility to represent and uphold custom, chiefs in the Pacific play an important role in village and sometimes national governance. This chapter examines the scholarship, nature and development of Pacific chiefship in order to further our understanding of the significance of chiefs in contemporary Pacific societies. It provides a prelude to the following detailed examinations of chiefly systems and customary governance in Samoa and Vanuatu.

2.2  Scholarship of chiefship

There is a considerable body of scholarship on the characteristics and political processes of chiefdoms from the Bronze Age through to European colonisation of the Pacific. Within this literature, a chiefdom is loosely defined as ‘a polity that organizes centrally a regional population in the thousands.’\(^1\) According to Service, chiefdoms have ‘centralized direction, hereditary hierarchical status arrangements with an aristocratic ethos, but no formal, legal apparatus of forceful repression.’\(^2\) Influenced by Service,\(^3\) Earle,\(^4\) and Kirch,\(^5\) this area of

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scholarship reflects now discarded notions of cultural evolution and considers that the ‘natural’ development of chiefdoms was abruptly altered by contact with European colonisers, traders and missionaries. An element of this was the notion that chiefdoms were pre-curors to the modern state. That is, the emergence of chiefdoms signified a growth in social complexity whereby a central hierarchy was established to coordinate economic, social and religious activities. According to Service, states emerged when governments were created out of the institutionalisation of the central leadership. Thus, according to this theory, chiefdoms laid the path for the ‘progression’ to statehood through their centralised hierarchy and stratification of society – the greater the stratification, the closer they were to achieving statehood. Sahlins, who applied this theory to the Pacific Islands region, pointed to the polities of Melanesia as ‘underdeveloped’ in comparison to the ‘developed’ polities of Polynesia. He argued that the Melanesian leadership style contributed to a lack of development through its volatility and its inability to promote production.

In contrast to this approach which considers chiefs as characters of history, present-day experiences of chiefship highlight the need to examine chiefship as a contemporary, diverse and dynamic phenomenon. Such work has been taken up by anthropologists, political

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7 Service, Primiti ve Social Organization: An Evolutionary Perspective pp143-144.


9 Service, Earle and Kirch considered that highly stratified chiefdoms such as the Zulu tribes in Southern Africa just prior to colonial rule and those that were in place in Polynesia at the point of European contact were societies at the threshold of statehood. They argued that chiefdoms allowed two separate classes to emerge – one which was concerned with honour, power and prestige and one which was concerned with making a living. The surplus that was required to maintain a stratified society allowed for economic exploitation to become sanctioned. In addition, the need to control people and production contributed to the emergence of political complexity as conflicts and alliances emerged. These dynamics of competition, management and control created conditions that eventually led to the creation of the state. (Earle, Chiefdoms in Archaeological and Ethnohistorical Perspective; Earle, How Chiefs Come to Power: The Political Economy in Prehistory; Goldman, Ancient Polynesian Society; Kirch, The evolution of the Polynesian chiefdoms pp36 & 257; Service, Origins of the State and Civilization: The Process of Cultural Evolution p112).


11 Ibid.
scientists and lawyers who have examined the impact of colonisation as well as current influences such as globalisation and the formation of the nation state in order to further our understanding of chiefship as a contemporary form of political leadership. Chiefs themselves are contributing to this body of work. Samoan scholar So’o, who holds several chiefly titles, has been particularly influential in this area, providing a rich examination of Samoa’s customary and state political systems. So’o recently lead a Commission of Inquiry into Samoa’s chiefly system, the details of which are still to be released. Other notable Samoan chiefs include Meleisea and, more recently, Tuimaleali’ifano, whose quite different perspectives of contemporary Pacific Island chiefship will be discussed further in the thesis.

Whilst it is the body of work on contemporary experiences of chiefship that has most relevance to this thesis, the work of Service and others concerned with past experiences of chiefship provide some useful insights into the nature of chiefship and so will be drawn upon in this chapter.

The term ‘chief,’ as it is used in this thesis, came in to general use in the eighteenth century when it was widely adopted by European travellers, missionaries and scholars who used it to describe the leaders of non-European, tribal societies such as those found at the time in Africa, the Pacific and the Americas. This chapter will focus on the Pacific Islands where traditional leaders have adopted the term ‘chief’ to describe themselves.

Powles described chiefship as ‘an office’ and a chief as ‘the head of a group to which the office belongs.’ A key feature of chiefship is that the relationship between the chief and the group is one founded in kinship and descent. The office of chief is usually appurtenant to the land in which the group has rights and which is administered by the chief. It is these kinship connections that clearly distinguish chiefs from other figures of authority such as monarchs, religious leaders, state politicians, or leaders from civil society. Kinship is an essential element of all chiefly societies because it forms the basis for systems of authority as well as social support. The ideology of kinship requires that chiefs must give of themselves and their resources and act in the best interests of the people. People show honour and respect to the chief by giving services, food and labour and the chief, in turn, is expected to give back to the people. This system of reciprocity theoretically ensures that the basic needs of all members of the community are met.

Chiefs in the Pacific Island countries are often referred to as ‘traditional leaders’ and this is appropriate in that chiefs do embody notions of the past. However the term is problematic for it opens the door to the anthropological predicaments of the ‘invention’ and defining of tradition. Chiefs have become potent symbols of tradition, custom and culture however they neither perpetuate nor represent a status quo. The chiefly systems that exist in the Pacific today do not replicate structures, roles or functions that existed in the past, but rather provide continuity with the past. As suggested by White, chiefship is ‘better regarded as an

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13 Powles has produced a considerable body of work on chiefship and customary law in the Pacific Islands. As a lawyer with a long association with the Pacific, Powles’ focus has been on Pacific legal systems and the ways in which the authority of chiefs and custom are recognised in these systems. Powles is cited throughout this thesis.
16 Wagner broke new ground with his examination of the way that anthropologists observe and understand foreign cultures and how the subjects of study respond. He suggested that anthropologists effectively ‘invent’ culture through observing contrasts between the observed culture and that of their own ‘invisible’ culture. The people being studied respond in turn by ‘inventing’ their own culture for the anthropologist (Wagner, Roy, 1981, The Invention of Culture (University of Chicago Press, Chicago). This was taken up by scholars such as Handler and Linnekin and Trilling who examined the notion of authenticity and the tendency to place higher value on practices and artefacts from the past (Handler, Richard, 1986, ‘Authenticity’ in Anthropology Today 2 (1), 2; Handler, Richard and Linnekin, Jocelyn, 1984, ‘Tradition, Genuine or Spurious’ in The Journal of American Folklore 97 (385), 273; Trilling, Lionel, 1972, Sincerity and Authenticity (Oxford University Press, London). In the Pacific, this idea was explored by, among others, Jolly who was concerned with presenting ‘invented traditions’ as having equal worth with ancient practices. (Jolly, 1992, ‘Specters of Inauthenticity’ in Contemporary Pacific 4 (1), 49).
adaptable model and set of practices than as an objective position with a fixed set of rights and duties.'

2.3 The authority of chiefs
As will be demonstrated in this thesis, the nature of chiefship in the Pacific region is highly variable. This is due in part to historical as well as geographical influences. The Pacific was the last region of the world to be inhabited by humans because the vast distances between islands presented a significant obstacle to exploration. Although Australia and New Guinea were inhabited at least forty thousand years ago, a seventy kilometre stretch of open water apparently prevented movement further into this part of the Pacific. It is estimated that people might have reached New Caledonia and Vanuatu about four thousand years ago. These people, now known as Melanesian, were of Australoid descent meaning that their heritage came from Australian Aborigines, the Highlands people of Papua New Guinea and Negritos from Malaysia and the Philippines. This movement into Melanesia was preceded about a thousand years earlier by a movement of people from Southeast Asia into the Pacific Island regions now known as Micronesia and Polynesia. With Mongoloid origins these people successfully travelled long distances in outrigger canoes. As will be discussed below, these long voyages into Micronesia and Polynesia were made possible by the hierarchical leadership structures which are still present today.

In 1963 Sahlins famously contrasted Melanesian and Polynesian leadership styles, dividing them into two types – chiefs and big-men. Although he was by no means the first anthropologist to study leadership in the Pacific, his paper Poor Man, Rich Man, Big-Man, Chief served to popularise the term ‘big-man.’ Sahlins examined the powers, rights and obligations as well as the personality traits of Pacific leaders. He observed that hierarchical societies such as those found in Polynesia are distinguished by genealogical ranking. The more powerful Polynesian chiefs are those chosen from the highest ranking families and they

17 White, The Discourse of Chiefs: Notes in a Melanesian Society p247.
19 Sahlins, Poor Man, Rich Man, Big-Man, Chief: Political Types in Melanesia and Polynesia.
20 Ibid.
21 Lindstrom, Lamont, 1981, ”'Big Man:' A Short Terminological History' in American Anthropologist 83 (4), 900 examines the evolution of the term ‘big man’ suggesting that it was introduced over time, mostly in response to the notion that ‘chief’ was inappropriate for leaders with limited authority. He notes that the term ‘big-man’ emerged in the 1930s and became popularised in the 1960s and 1970s. Sahlins was the first to use the term in the title of a paper, helping to cement the term into anthropological lexicon.
may have authority over large, permanent groups. Polynesian chiefs can reinforce their authority through ritual and the creation of wealth and can set themselves apart – they might have larger houses or take up political appointments reserved for the holders of chiefly titles. Sahlins contrasted this leadership style with the big-men of Melanesia, observing that big-men come from small, kinship-based groups and their status is achieved through their own personal achievements. Such leaders are respected, but they lack the same degree of authority and deference as leaders that gain their authority through inheritance, and must continually demonstrate their leadership qualities in order to retain their status. A big-man must possess skills in magic, speaking, gardening and, perhaps most importantly, in amassing and distributing wealth items so that he will become known for his generosity. In order to accumulate these items, a big-man must establish a loyal band of followers who feel obligated toward him. To garner their long-term support, he must promote the interests of the group rather than focus on his own welfare. The big-man thus becomes the focal point for conflict management, a role which retains its significance today. It is posited that in smaller, more isolated communities, such as those in Melanesia, leaders cannot be distant and so these societies become more egalitarian.

The egalitarian style of Melanesian leadership had previously been noted by European explorers of the region. For example, on his arrival at Tanna in Vanuatu Captain James Cook wrote:

They seem to have chiefs among them; at least some were pointed out to us by that title; but as I before observed, they appeared to have very little authority over the rest of the people... On several occasions I have seen the old men respected and obeyed. Our friend Paowang was so; and yet I never heard him called chief, and have many reasons to believe that he had not a right to any more authority than many of his neighbours, and few, if any were bound to obey him, or any other person in our neighbourhood.

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22 Sahlins, Poor Man, Rich Man, Big-Man, Chief: Political Types in Melanesia and Polynesia.
24 Sahlins, Poor Man, Rich Man, Big-Man, Chief: Political Types in Melanesia and Polynesia.
26 Cook, James, 1970, A Voyage Towards the South Pole, and Round the World: Performed in His Majesty's ships the Resolution and Adventure, In the Years, 1772, 1773, 1774, and 1775. In which is included Captain
As will be explored further throughout the thesis, these characteristics of the big-man are significant for contemporary chiefs in Vanuatu who are competing for authority within their own areas of influence.

The presentation of Polynesian and Melanesian styles of chiefship as two distinct categories has proven to be too rigid to reflect the diversity and complexity of chiefship - in Vanuatu and Solomon Islands, for example, both types of leadership exist and there is crossover between the two systems. Furthermore, the distinction breaks down when one considers the advantages under both systems enjoyed by the first-born son of a successful chief. In Melanesia, where wealth and the accumulation of goods are highly valued, the privileged upbringing and inherited wealth of a chief’s son may place him in as good a position as the young Polynesian who inherits a title without effort. However, for the purposes of this chapter, the terms ‘chief’ and ‘big-man’ do provide a useful point of analysis in the way that they represent alternative sources of power and authority.

It is also evident that the use of terms to describe Pacific Island leaders has been inconsistent over time. Lindstrom and White noted that in the five centuries of European observation of the Pacific, there has been a progression in terminology used to describe leaders – ‘kings’ were demoted first to ‘chiefs’ then again to ‘big-men’ and then their status rose back up to that of ‘chief.’ Some individuals successfully claimed for themselves the title of ‘king’ or ‘president.’27 However, traditional leaders, even in the so-called big-man societies, have adopted the title of ‘chief’ and, as such, chief is the term used in the chapters that follow.

Traditionally, the varying levels of stratification that existed across the Pacific influenced the ways that these communities functioned. This, in turn, reinforced the level of chiefly authority. For example, in the less stratified societies such as those in Vanuatu and Solomon Islands, production and consumption were controlled and kept within the domestic unit and so required only limited direction from leaders. In the more stratified societies, such as those in Samoa and Tonga, production and distribution of wealth were controlled by a central,

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Furneaux's Narrative of his Proceedings in the Adventure during the Separation of the Ships (Libraries Board of South Australia, London, Adelaide) p83.

chiefly authority.\textsuperscript{28} In the latter case, chiefs might co-ordinate the activities of several small communities. This ability of chiefs to mobilise labour allowed for the creation of a surplus of wealth and thus supported a class of people that was not driven by the over-riding concern for food. In addition, the mobilisation of labour and the creation of surplus allowed for the specialisation of craftsmanship. In stratified societies, canoe-building, stonemasonry and navigational skills, for example, could be supported by the chief’s surplus and utilised in such a way as to reinforce his authority. It was this ability to mobilise labour that had allowed Polynesians to build great sailing canoes and embark on long ocean voyages between the Pacific Islands. Craftsmen were also called upon to construct monuments and warriors were employed to conquer neighbouring villages.\textsuperscript{29} In this manner, the hierarchy was self-perpetuating.

In stratified societies there was a stronger link between chiefs and the supernatural and in pre-contact Polynesia chiefs served as sacred intermediaries between the people and the gods.\textsuperscript{30} This was evident in Hawaii for example where, at the time of first contact with Europeans, chiefs lived separately from the main population and commoners would prostrate themselves in their presence.\textsuperscript{31} This sanctity was more evident in stratified societies because the mobilisation of labour and the subsequent creation of surplus allowed ritual to emerge and be used to further reinforce the connection between chiefs and the supernatural. Ritual not only contributed to political authority, but it provided social integration through group activities such as chanting, dancing and praying.\textsuperscript{32} As will be discussed in Chapter 3.5.3, chiefs in Samoa today still possess a degree of mana (sacred power), which serves to reinforce their customary authority.

2.4 Chiefs and external forces

Drawing on White’s observation that chiefship is an ‘adaptable model,’ it is clear that the nature of chiefship in the Pacific has developed over a long period under a variety of

\textsuperscript{31} Earle, How Chiefs Come to Power: The Political Economy in Prehistory p45.
influences. Lindstrom and White showed how theories of evolutionary human development influenced perceptions of early European travellers to the Pacific. They referred to the work of nineteenth century missionary and anthropologist, Codrington, who made the observation that European visitors ‘carry with them the persuasion that savage people are always ruled by chiefs.’ These perceptions influenced the ways that Europeans related to local populations and sought out authority figures and this, in turn, impacted upon the way that chiefly authority developed. In various Pacific Island countries efforts were made to recognise the authority of chiefs and, in some cases, create a role for chiefs in the new orders of governance. This will be demonstrated in Chapter 3.4 which shows how foreign administrations in Samoa regarded chiefs as central players in national governance, ultimately working with chiefs as they secured a role for themselves in the state political system.

Existing leadership structures in the Pacific provided channels by which colonial authorities and missionaries could readily access communities. For example, as will be discussed in Chapter 3.4.2, the first Christian missionaries to work in Samoa used the authority of the chiefs to their benefit, seeking permission from chiefs to preach, teach or build houses. The missionaries realised early that once they got the backing of the chiefs, further support for their religious teaching would follow. Thus Samoan chiefs facilitated the introduction of the church, another source of authority that would become embedded within Pacific Island societies. In some instances chiefs became representatives of the state through the incorporation of newly introduced administrative tasks into their existing roles. In these instances chiefs became early examples of hybridity in practice, combining responsibilities from their local, pre-colonial systems with those of introduced systems.

There are a number of instances whereby the position that is today understood as that of chief was, in effect, created by colonisers. These have been noted in, for example, the Federated

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34 Macpherson, The Persistence of Chiefly Authority in Western Samoa p20.
States of Micronesia\textsuperscript{36} and Solomon Islands\textsuperscript{37} where colonial authorities designated a village headman. As will be discussed in Chapter 4.4.4, the position of chief in Vanuatu has, in part, emerged from the colonial creation of the administrative position of ‘assessor.’\textsuperscript{38} White argued that the notion of the paramount chief was a ‘creation of mission society.’\textsuperscript{39} 

In some instances colonial and missionary influences served to homogenise and enhance the status of traditional leadership. For example, in Fiji the leadership style that previously existed only in the eastern areas has come to dominate. This has been attributed to early contact by eastern Fijians with missionaries and traders in conjunction with the attitudes of British administrators who found that the hierarchical style suited to their own perceptions of leadership.\textsuperscript{40} The establishment of nation states and constitutions provided opportunities for traditional leaders to declare their authority and it is evident that, in some cases, chiefly leadership has ‘reasserted itself under post-colonial administrations.’\textsuperscript{41}

2.5 Chiefs today

Chiefs today draw their authority from custom and from the state. The Pacific Island countries have a rich diversity of custom and, as will be highlighted in Chapters 3 and 4, the authority of chiefs that is derived from custom varies considerably across the region. As noted above, the authority of chiefs can be autocratic, as in the case of stratified societies such as Samoa, or authority can be derived from community support for the decisions of chiefs, such as in some areas of Vanuatu. The recognition of chiefly authority by the state is also variable across the Pacific Island countries. In Tonga, Samoa and Fiji chiefs play an important role in national decision-making through their representation in government and their authority is reinforced through state legislation. In both Tonga and Fiji, however, the role of chiefs has recently been subjected to scrutiny: the democratic movement in Tonga sought to achieve a greater level of electoral participation by the people; while the military regime in Fiji has sought to increase its own influence. In other Pacific Island countries,

\textsuperscript{37} Keesing, Chiefs in a Chiefless Society: The Ideology of Modern Kwaio Politics.
\textsuperscript{39} White, The Discourse of Chiefs: Notes in a Melanesian Society p251.
\textsuperscript{40} Lawson, Chiefs, Politics, and the Power of Tradition in Contemporary Fiji p114.
\textsuperscript{41} Powles, Traditional Institutions in Pacific Constitutional Systems: Better Late or Never? p352.
chiefs are given some recognition through constitutions and other state legislation but their authority under the state is limited. However, as noted by Powles, when considering the authority of chiefs, it is equally important to look at those areas where chiefly authority is not provided for in constitutions or legislation. Powles argued that Pacific chiefs are generally free to operate at sub-national levels, particularly in the areas of land tenure and local government. This thesis will demonstrate what this means for local governance in Samoa (Chapters 7.2.2 and 8.3) and Vanuatu (Chapters 7.3.3 and 8.3).

The strength (or weakness) of chiefly authority today emanates, in part, from perceptions of the relationship between chiefs and those forces sometimes understood as external. As the custodians of custom and tradition, chiefs maintain strong links with the past and discussions around the empowerment of chiefs help to keep the forces of globalisation at bay. In many cases, chiefship is understood in opposition to Western values and practices that are perceived as threats - in particular, individualism and materialism. The politicisation of custom adds to the authority of chiefs and simultaneously helps to build a sense of national identity. As will be discussed in Chapter 4.4.2, this was particularly evident in Vanuatu where, in the lead up to independence, kastom became highly politicised.

In his discussion of the chief/state relationship in contemporary Melanesia, White noted that there have been a number of state initiatives in Solomon Islands that have attempted to empower chiefs and to provide a role for them in government. He cited the Local Courts Act and the Provincial Government Review Committee of 1986-87 as such examples. White pondered why these attempts had failed to politically empower chiefs, suggesting that the ambiguity and fluid nature of Melanesian chiefship renders it unsuitable for legal codification. White observed that within the polity of the Melanesian state, chiefs are 'symbolically potent but politically marginal.' It is evident that contemporary politics and business do present challenges for chiefly status. The obligations of kinship, in particular, raise the contentious issue of whether the institution of chiefship is well placed to be given greater authority within the formal state system. In a system based on reciprocity and kinship obligations it is almost impossible for a person who is simultaneously a chief and a

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43 White, The Discourse of Chiefs: Notes in a Melanesian Society p250.
44 Ibid. p252.
45 White, The Discourse of Chiefs: Notes in a Melanesian Society p246.
representative of the state, such as politician or public servant, to meet the obligations of both roles, for the two are likely to present conflicting needs. Reciprocity requires that a chief show preference to his kinship group, yet such demonstrations of preference diminish the office of the politician or public servant who is expected to retain neutrality. Thus, the office of chief is diminished if the chief/politician places his own interests or those of his constituency above those of his immediate followers and, conversely, the office of politician is diminished if the chief/politician places the interests of his immediate followers above those of his constituency. The dilemmas of the chief/politician relationship are discussed further in Chapter 7.2.1 as points of tension between custom and the state in Samoa.

The authority of chiefs today is challenged by a range of factors. For example, the sanctity once enjoyed by Polynesian chiefs may be diminished by participation in business activities or by Christianity which attributes spiritual powers to the church. Although people generally want their chiefs to comply with expectations of humility and modesty, people are demonstrating a preference for leadership qualities that chiefs do not necessarily possess. Chiefs in many places risk being side-lined from important decision-making processes and so would benefit from higher education and greater political and business acumen. For example, in the Federated States of Micronesia elected leaders can be younger, confrontational and more outspoken than chiefs and they are more likely to be fluent in English and to have been educated overseas. In Vanuatu, too, people have firmly expressed their desire to keep matters of custom separate from those of the state by giving very little support to customary chiefs who stand as political candidates. James argued that nobles in Tonga risk being relegated to ritual and ceremonial activities and so need to become better educated and more accomplished in commercial activities if they wish to retain their status.

The institution of chiefship, with its connections to the past and to custom, fosters a sense of local identity and slows down the forces of change. This can be beneficial for countries

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49 Pinsker, Traditional Leaders Today in the Federated States of Micronesia p180.
struggling with nation-building and the impacts of independence and de-colonisation. However it can also be used to the detriment of particular groups within society. The pro-democracy movement in Tonga, for example, has become frustrated by restrictions placed on the political and economic ambitions of commoners.52 As will be discussed further in Chapter 9, women have been especially critical of discourses which serve to reinforce women’s lack of participation in customary decision-making processes and, arguably, introduce or perpetuate notions of the customary authority of men.53 Criticisms such as these demonstrate that traditional leadership is now open to scrutiny at some level – a process which itself arguably emanates from external influences.

2.6 Conclusion

The scholarship of chiefship shows two distinct ways of approaching the subject. The study of pre-contact chiefdoms focuses on chiefs as they operated up to the point of contact with European settlers and colonisers, whilst the work on contemporary chiefship, which is central to this thesis, observes chiefs as they function today.

The scholarship on contemporary chiefs is influenced by anthropologists, lawyers and political scientists who are concerned with chiefs as a product of time and place. They reveal that although contemporary chiefs embody tradition, they do not perpetuate traditional leadership as it existed in the past. This is because chiefs today are an outcome of historical, social, economic and political global influences such as Christianisation, colonisation, modernisation and globalisation.

As representatives of custom, chiefs play a key role in village and, in some cases, national governance. This responsibility makes them central, if sometimes unwitting, players in ongoing attempts to reconcile custom and state systems of governance. The attributes that they bring to this task vary.

52 Ibid. p50.
53 For example, Naviti, Rita, 2003, 'Restorative justice and women in Vanuatu' in Sinclair Dinnen, Anita Jowitt and Tess Newton (eds), A kind of mending: Restorative Justice in the Pacific Islands (Pandanus Books, Research School of Pacific and Asian Studies, the Australian National University, Canberra); Tor, Roselyn and Toka, Anthea, 2004, Gender, Kastom and Domestic Violence: A research on the historical trend, extent and impact of domestic violence in Vanuatu (Department of Women's Affairs, Port Vila).
This thesis seeks to deepen our understanding of custom governance in order to further explore ways to negotiate paths between custom and state systems of governance. An understanding of chiefship is central to this endeavour, as is an understanding of the character and complexity of the environment in which chiefs operate and the systems that they represent. The following two chapters will explore in detail chiefs and custom governance in Samoa and Vanuatu.


Chapter 3  

Fa’amatai and Fa’asamo

3.1 Introduction

Samoa and Vanuatu can be understood as hybrid polities in which systems of governance combine elements stemming from local, pre-colonial traditions and elements of the western, state model. This chapter and the next discuss governance in Samoa and then Vanuatu through an examination of those local, pre-colonial traditions and institutions and the ways that they responded to the influences of Christianisation and foreign administration. These chapters examine the paths that these countries took over the past two centuries to demonstrate that, to varying degrees, custom was able to accommodate and influence the nature and shape of the states that were established in the mid-twentieth century. Custom remains a strong, robust and legitimate form of governance in the contemporary Pacific.

This chapter discusses the context, history and unique social and political structure of Samoa, providing a necessary prelude to chapters 7 to 9 which examine the relationship between the Samoan state and customary forms of governance.

3.2 The Samoan context

The Independent State of Samoa (formerly Western Samoa) shares its ancestry with the broad cultural Pacific grouping of Polynesia. It is comprised of four volcanic islands – Upolu, Savai’i, Manono and Apolima – and a further five islands complete the archipelago that now comprises Samoa and American Samoa. The population of around 181,000 is made up primarily of people of Samoan descent with only three percent of the population identifying as non-Samoan. The population is mostly rural with about twenty one percent living in the capital, Apia, located on the island of Upolu.¹

At independence in 1962, Samoa established a Westminster style parliamentary system with a Head of State, a Cabinet of Ministers and a Legislative Assembly. After a general election, the Head of State appoints as the Prime Minister the member of the Assembly who is chosen by it, and up to twelve members to be Cabinet Ministers who are chosen by the Prime

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Minister. Elections are held every five years and winners are decided primarily on a first-past-the-post principle. The unique character of Samoa’s political system in which chiefs play a key role is examined further below in 3.5.5 and Chapter 7.2.

In terms of development, Samoa rates well compared with other countries in the Pacific. It has high rates of literacy – almost 99 percent⁴ - and life expectancy has increased from around 60 years in 1980 to 72 years in 2010.⁵ In 2009, Samoa was assessed as being on track to meet four of the Millennium Development Goals (MDG2 – achieve universal primary education; MDG3 – promote gender equality; MDG5 – improve maternal health; and MDG7 – ensure environmental sustainability). It was tracking poorly on MDG1 – eradicate extreme poverty and hunger and is not expected to meet this goal by 2015.⁶

In 2006, the Government of Samoa took on the task of preparing the United Nations Development Programme’s National Human Development Report for Samoa. This was the first time that such a report had been written by the people being reported upon, and so it provided a unique opportunity for Samoans to consider and present their development in their own terms. The resulting report, Sustainable Livelihoods in a Changing Samoa, is testament to the strength of Samoa’s academic community, looking well beyond the standard raft of development issues such as access to health and education, economic growth and environmental sustainability. The report considers that culture, governance and religion are also essential contributors to development and so dedicates considerable attention to these features, providing a largely positive view of Samoa’s development status.

### 3.3. Institutions of customary governance

#### 3.3.1 Introduction

Samoa has clearly defined customary institutions that provide the foundations of political, economic and social life. It is the presence of these institutions within the context of a modern state that makes Samoa a hybrid polity and, as will be demonstrated, these

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⁷ AusAID, Tracking development and governance in the Pacific p62.
institutions contribute to the resilience and legitimacy of this polity. This section examines
the institutions of customary governance beginning at the family level and moving through
village, district and national level institutions.

Central to fa’asamoa (the Samoan way) is the landowning descent group, the ‘āiga, to which
all Samoans belong either through direct descent, marriage, adoption or residence. Each
‘āiga is represented by a matai (chief) who carries the name of its founding ancestor.
Reciprocally, it is the ‘āiga that makes decisions about succession to the title. The matai title
is appurtenant to the customary land held by the ‘āiga and so it is the matai that is responsible
for management of the land and for the well-being of each member of the ‘āiga. Thus
fa’amatai (the matai system) is central to Samoan life.

Matai can represent ‘āiga at all levels, from the family through to the village, district and
national levels. This section will examine each of these commencing at the family level.

3.3.2 Matai

Within a village, each household is primarily responsible for supporting itself and the matai
must ensure that this is achieved. The matai is responsible for administration of the land
appurtenant to the title, determining what crops will be cultivated and how land is to be
distributed. Samoans customarily require large amounts of resources for gifts, feasts and
rituals, so matai must ensure that these resources are available. The matai may settle internal
disputes, encourage religious participation, represent the family at village council meetings
and uphold family prestige. In some villages today matai also hold key roles in church
governance. 7

Matai can be either ali’i or tulafale. The ali’i, sometimes referred to as a high chief, is the
political and ritual head of an extended family network and, in the past, was sometimes head
of a territory that consisted of numerous villages that had been gained through victory in war.
Traditionally, the title of the ali’i was considered sacred and his victories evidence of the
mana (supernatural powers) attached to his name. 8 Today, ali’i ensure that the dignity of

7 So'o, Governance and rendered services  p165.
8 Meleisea, Malama and Schoeffel, Penelope (eds),1987, Lagaga: A Short History of Western Samoa
(University of the South Pacific, Suva, Fiji) p27; Meleisea, Malama, 1987, The Making of Modern Samoa:
Traditional Authority and Colonial Administration in the History of Western Samoa (Institute of Pacific Studies,
University of the South Pacific, Suva) p9; Tcherkezoff, Serge, 2000, The Samoan Category Matai (‘Chief’): A
their village is upheld and they make the more important decisions that affect the welfare of
the village.\textsuperscript{9}

Each ali’i has a tulāfale, often referred to as an orator or speaking chief. It is the task of the
tulāfale to support the ali’i, acting as his representative and speaking on his behalf. The role
of the tulāfale varies from village to village and can involve such things as holding the
genealogical knowledge, organising ceremonial distributions of food, house-building,
carrying messages and other roles generally considered to be below those expected of an
ali’i.\textsuperscript{10} So whilst the position of ali’i is associated with privilege, that of the tulāfale can be
quite onerous.\textsuperscript{11} However, the ali’i relies on the tulāfale to represent him favourably and so
ensures that the tulāfale is treated well. In some places the two positions are held by one
person - the tulāfale ali’i\textsuperscript{12} - and it is possible for one person to hold both an ali’i and a
tulāfale title simultaneously. The rankings of chiefs (discussed below) are linked to their	itles rather than individuals and are determined largely by lineage. As such, an ali’i may be
outranked by a tulāfale.\textsuperscript{13}

The three categories of ali’i, tulāfale and matai were, at one time, distinct but inter-related.
Ali’i and tulāfale were both matai but not all matai were ali’i or tulāfale. During European
colonisation, these distinct levels of authority became levelled. Tcherkézoff observed that
writings of the 1840s and 1850s used matai to describe family heads or specialists such as
tattooists whereas the terms ali’i and tulāfale were more commonly used to describe people
in positions of leadership above the village level. Toward the end of the nineteenth century
and into the early twentieth, the hierarchy of ali’i – tulāfale – matai merged into a single class
of matai which is now in two parts – matai with an ali’i title and matai with a tulāfale title.\textsuperscript{14}

Today, villages continue to have ali’i or tulāfale oriented polities - although they will have

\textsuperscript{9} So'o, Governance and rendered services p154.
\textsuperscript{10} Davidson, J. W., 1967, Samoa mo Samoa: The Emergence of the Independent State of Western Samoa
(Oxford University Press, Melbourne) p19; Freeman, Derek, 2006: reprint of 1948 publication, The Social
Structure of a Samoan Village Community (Target Oceania, Division of Pacific and Asian History, Research
School of Pacific and Asian Studies, Australian National University, Canberra) pp78-79; Meleisea and
Schoeffel Lagaga: A Short History of Western Samoa p27.
\textsuperscript{11} Freeman, The Social Structure of a Samoan Village Community pp78-79.
\textsuperscript{12} Davidson, Samoa mo Samoa: The Emergence of the Independent State of Western Samoa p19.
\textsuperscript{13} Meleisea, The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of
Western Samoa p8.
\textsuperscript{14} Tcherkezoff, The Samoan Category Matai ('Chief'): A Singularity in Polynesia? Historical and Etymological
Comparative Queries p177.
members of each - and this orientation will impact upon the attitudes and behaviour of the village.\textsuperscript{15} Tulāfale continue to have the role of orator and so will be the ones called upon to speak at public occasions.\textsuperscript{16}

Every matai title has a village to which it belongs and all titles within the village are ranked one against the other. Villages usually have one chief of superior rank, the ali’i matua, as well as a number of chiefs of high ranking. Rank is determined, in part, by the length of a matai’s family lineage and, for ali’i, its descent from the gods.\textsuperscript{17} Particular titles are linked to the founding of the village and so have higher rank.\textsuperscript{18} Rank can change over time as title holders make (or do not make) special achievements.\textsuperscript{19} Whilst an ‘āiga may have a number of matai titles linked to it, it gains its identity from the senior ranking titles.\textsuperscript{20} Rankings are recorded in the village fa’alupega which describes the historical and genealogical origins of senior titles. The fa’alupega, which is recited at meetings of chiefs’ (see fono below) and on special occasions, clearly accords each matai title a place in the social structure of a village and acts as a record of events, privileges and relationships.\textsuperscript{21} There are different fa’alupega for individual titles, groups of titles, for the nu’u (village – see Chapter 3.5.2), district and nation.\textsuperscript{22} The fa’alupega encourages people to observe their social roles in that it provides a way to check on unconventional practices.\textsuperscript{23} Any matai who attempts to change his status as prescribed in the fa’alupega risks severe punishment.\textsuperscript{24}

\textsuperscript{15} Tuimaleali’ifano, Morgan, 2000, ‘Talofa e ‘Aiga, ua ‘ai e lago le tofa! Village governance and development in Faleatai’ in Elise Huffer and Asfofo So’o (eds), Governance in Samoa: pulega i Samoa (Asia Pacific Press; Institute of Pacific Studies, University of the South Pacific, Canberra & Suva) p173.
\textsuperscript{16} For example, in 2008 I attended a village meeting of chiefs which was held to welcome a contingent from the Samoa Electoral Office which was visiting to take enrolments. I was informed that the meeting was held only because the contingent included a tulāfale and therefore had someone who could speak at the meeting. On a previous visit, the contingent had an ali’i representative so on that occasion, no formal welcome was organised.
\textsuperscript{17} Freeman, The Social Structure of a Samoan Village Community p77; Meleisea and Schoeffel Lagaga: A Short History of Western Samoa p27.
\textsuperscript{18} So'o, Democracy and Custom in Samoa: An Uneasy Alliance pp17-18.
\textsuperscript{19} Meleisea, The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa p8.
\textsuperscript{20} Ibid. p7.
\textsuperscript{22} Meleisea, The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa p2.
\textsuperscript{23} Iati, Iati, 2000, ‘The good governance agenda for civil society: implications for the fa’aSamoa’ in Elise Huffer and Asfofo So’o (eds), Governance in Samoa: Pulega i Samoa (Asia Pacific Press; Institute of Pacific Studies, University of the South Pacific, Suva) p75.
\textsuperscript{24} So'o, Democracy and Custom in Samoa: An Uneasy Alliance p18.
The authority of matai will be discussed further in section 3.5.3.

### 3.3.3 Village level institutions: the fono

Samoan villages are primarily autonomous and governed by the village fono, the council of matai that functions as the key decision-making body. Nearly all villages in Samoa have a fono and in the larger villages there may be more than one. The Village Profiles, compiled in 2004 by the Ministry of Women, Community and Social Development, list two hundred and forty two villages, some of which comprise two named sub-villages. Of these, two hundred and twenty two are governed by their own fono. One hundred and thirty eight villages with fono are on Upolu, eighty two are on Savai’i and there is one on each of Apolima and Manono. The twenty villages without fono are located around Apia where relatively new settlements have been established on mainly non-customary land.²⁵

Village fono fulfil three governing functions of a legislature, executive and judiciary. That is, the fono: regulates village conduct through by-laws; organises the village including the production of food; identifies offenders of crimes and misdemeanours; and sits in judgement of those offenders brought before them. The fono also approves the appointment of matai titles. Although traditional bodies, fono are recognised by the state, primarily through legal ‘space’ and by implication allowed in the Constitution, and more recently by the Village Fono Act.²⁶ As will be discussed further in relation to the mutually dependent relationship between custom and the state (see Chapter 7.2.2), fono are thus legitimised partly by the state. In addition, they are expected to abide by the laws of the state, but enforcement is weak to avoid confrontation. The jurisdiction of the fono is limited to those people who usually reside in the village and who render service to a matai of that village.²⁷

### 3.3.4 District level institutions: Tūmua and Pule

Samoan villages were traditionally divided into districts with clearly defined boundaries and political centres. In Western Samoa there were eleven, four of which were on the island of Upolu, six on the island of Savai’i and the eleventh incorporated the smaller islands of Manono and

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Apolima.\textsuperscript{28} Political cooperation existed between the districts particularly during times of war\textsuperscript{29} or in order to pay respect to high chiefs or gods.\textsuperscript{30} Within these districts were groupings of villages that shared common origins and so were represented by a dominant lineage.\textsuperscript{31}

Samoan politics were influenced by the \textit{Tūmua} and the \textit{Pule} which were orator groups that convened when an issue arose that involved the whole country. The \textit{Tūmua} represented the four political districts of Upolu and the \textit{Pule} represented the six districts from Savai’i. The term \textit{Tūmua ma Pule} refers to the structures and administrative procedures of a \textit{fono} that represents all eleven traditional districts.\textsuperscript{32} Alliances were sometimes made with different factions within these two groups, thus the national government, or \textit{mālo}, was more of a ‘political clique’ that represented one or more districts that had won in war.\textsuperscript{33} The \textit{mālo} (the dominant alliance) was opposed by the \textit{vāivāi} (the challenging alliance). The role of the \textit{Tūmua} and \textit{Pule} in recent political events is discussed in Chapter 7.2.4.

3.3.5 National level institutions: the \textit{Tama’āiga}

The Samoan archipelago was occupied by Tonga for a period of perhaps three hundred years between the tenth and thirteenth centuries.\textsuperscript{34} When the Tongans were expelled in around 1200AD, the rules of succession changed and chiefly titles became subjected to fierce competition.\textsuperscript{35}

Around the time that Christian missionaries arrived, the struggle for supremacy led to a series of civil wars between the main contenders, one from the Mālietoa dynasty and three from the

\begin{footnotes}
\footnotetext[28]{So’o, \textit{Samoa’s electoral system as it operates on the ground} p1.}
\footnotetext[29]{Va’a, Unasa Felise, 2000, ‘Local government in Samoa and the search for balance’ in Elise Huffer and Asofou So’o (eds), \textit{Governance in Samoa: pulega i Samoa} (Asia Pacific Press; Institute of Pacific Studies, University of the South Pacific, Canberra, Suva) p152.}
\footnotetext[30]{Meleisea and Schoeffel \textit{Lagaga: A Short History of Western Samoa} p29.}
\footnotetext[31]{Davidson, \textit{Samoa mo Samoa: The Emergence of the Independent State of Western Samoa} p24.}
\footnotetext[32]{So’o, Civil and political liberty: the case of Samoa’ p134.}
\footnotetext[33]{Davidson, \textit{Samoa mo Samoa: The Emergence of the Independent State of Western Samoa} p28; Va’a, Local government in Samoa and the search for balance p152.}
\footnotetext[34]{Commentators differ in their estimations of when the Tongan occupation occurred. Meleisea places occupation at around the sixteenth century, Goldman places occupation at around the thirteenth century, whilst Von Bülow places it at around the seventeenth century. In his assessment of the literature on the topic, Tuimaleali’ifano suggests that the period between 900 to 1200 AD is the most likely. (Goldman, \textit{Ancient Polynesian Society} p244; Meleisea, \textit{The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa} p11; Tuimaleali’ifano, Morgan, 2006, \textit{O Tama A ‘Aiga} (IPS Publications, University of the South Pacific, Suva) p7)\textsuperscript{35} \textit{Goldman, Ancient Polynesian Society} p249.}
\end{footnotes}
divided Sā Tupuā dynasty. These four dominant titles – Matā’afa, Tupua Tamasese, Tuimaleali’ifano and Mālietoa – came to be known collectively as the tama’āiga (sons of the families).36

Morgan Tuimaleali’ifano, who provided a personally-driven account of succession to the paramount titles, noted that the pursuit of the titles has changed little over time, although the processes of negotiation now occur in institutions such as the Land and Titles Court, the parliament and party politics.37 As will be discussed further, the tama’āiga retain their significance as key representatives of both custom and the state. The ways that these titles influence the contemporary polity and interact with the state will be examined in further detail in Chapter 7.

3.4 Response to external forces
3.4.1 Introduction
This section examines the history of Samoa highlighting the key influences that shaped the political structure of modern Samoa.

The early leadership structures that are still evident in Samoa today were crucial to settlement of the region. For it was the hierarchical leadership structures of early explorers that provided the authority required to enlist the support needed to embark on long ocean voyages. Samoans became renowned for their enormous double-hulled canoes capable of traveling long distances and transporting large numbers of people.

In the early period of Samoan settlement, traders from Tonga and refugees and immigrants from other islands continued to arrive, but contact with other regions was intermittent, allowing a cultural uniformity to spread across the Samoan archipelago.38 During the period of European exploration of the Pacific, limited contact was made with the European explorers Roggewein (1722) and Bougainville (1768), but no significant contact was made until the arrival of Lapérouse in 1787. This visit was marred by a series of incidents and misunderstandings which culminated in the massacre of twelve Europeans. Lapérouse described Samoa as productive and wealthy but he claimed that it was hostile and, as a result,

36 Tuimaleali’ifano, Titular disputes and national leadership in Samoa p2.  
37 Ibid. p3.  
38 Davidson, Samoa mo Samoa: The Emergence of the Independent State of Western Samoa p15.  

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although European traffic throughout the region increased, Samoa was avoided in favour of Tahiti, New Zealand and Hawaii. There were, however, occasional visits by whaling vessels, and a small number of seamen and escaped convicts successfully settled in the archipelago.

The governance of Samoa underwent a process of rapid change in the period that followed the arrival of Christian missionaries in 1830. The first seventy years of white settlement has been examined in great detail in companion texts by historians of Samoa, Davidson (Samoa mo Samoa) and Gilson (Samoa 1830 – 1900). Noted Samoan scholar, Meleisea has given an important Samoan perspective in The Making of Modern Samoa, as well as through his co-edited collection Lagaga: A Short History of Western Samoa. This period in Samoa’s history was particularly significant because it was characterised by attempts by colonial powers to gain national dominance over the inter-connected but largely autonomous villages.

3.4.2 Christianity
When John Williams from the London Missionary Society (LMS) arrived in Samoa in 1830, information about Christianity had already begun to penetrate the islands. Records from around this time are sketchy, but Gilson revealed that during this period – and possibly before the arrival of John Williams – influences of Christianity had filtered from other islands and resulted in the establishment of small sects.

Samoans clearly demonstrated a thirst for religious knowledge and, although they did not embrace Christianity lightly, their enthusiasm for it greatly assisted the work of the first missionaries. Williams was accompanied on his first trip by a Samoan chief, Faueā, who advised Williams on the best way to make contact and introduced him to the influential chief, Mālietoa Va’inupō. The missionaries happened to arrive soon after a period of war in which the powerful chief, Tamafaigā had been killed. This period of change in power offered an opportune moment for the missionaries to introduce their message of peace. Their efforts were supported by Faueā who suggested to Samoans that Christianity would bring material

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39 Gilson, Samoan 1830 to 1900: The Politics of a Multi-cultural Community pp65-67; Meleisea and Schoeffel Lagaga: A Short History of Western Samoa p45.
40 Davidson, Samoa mo Samoa: The Emergence of the Independent State of Western Samoa p32.
41 The London Missionary Society was a non-denominational Protestant society. Gilson, Samoan 1830 to 1900: The Politics of a Multi-cultural Community p74.
goods as well as an end to warfare. Mālietoa agreed to provide housing and protection for Williams and his missionaries and a quick end to the fighting in return for teachers who would instruct in reading, writing and worship. Mālietoa kept his promises and in 1835 the LMS sent two missionaries, followed quickly by seven more. Mālietoa (renamed Mālietoa Tavita after baptism) declared Christianity to be the new religion for Samoa. The LMS quickly grew towards self-government and financial independence and, in 1844, established the Malua Theological College.

In many respects Christianity represented a significant shift for Samoan belief because prior to its arrival, Samoans had been polytheists. Gods were of human and non-human origin and sanctity could be associated with chiefs, sisters, ancestral spirits and many aspects of life. Gilson posited that the Christian message appealed to Samoans in part because they observed a strong connection between Christianity and material goods such as weapons, tools, cloth and beads. In addition, fair skin was regarded as a sign of superior rank, and so European visitors held a level of authority. It is also believed by some that the arrival of the missionaries was the fulfilment of a prophecy in which Mālietoa would gain supremacy with help from the heavens. For some Samoans, the arrival of John Williams occurred in order to fulfil the prophecy rather than as a result of events in Europe.

The relationship between the missionaries and the matai became ‘symbiotic.’ The missionaries relied upon the matai to secure necessities such as food, land for church buildings and household labour. From the stance of the missions, the support of the matai was significant because once a matai was converted he would influence his entire ‘āiga. An important matai who had kinship connections throughout the country could quickly convert large numbers of people. At the higher levels, matai even had the capacity to raise funds for

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44 Gilson, *Samoan 1830 to 1900: The Politics of a Multi-cultural Community* p70.
45 Davidson, *Samoan mo Samoa: The Emergence of the Independent State of Western Samoa* p33.
47 Ibid. pp547-548. The College was originally named the Takamoa Theological College, but its name was changed soon after opening.
48 Meleisea and Schoeffel Lagaga: *A Short History of Western Samoa* p35.
49 Gilson, *Samoan 1830 to 1900: The Politics of a Multi-cultural Community* pp63, 72-73.
51 Macpherson, *The Persistence of Chiefly Authority in Western Samoa* p19.
the church. In return the matai used the presence of missionaries to build upon their own status. For the matai, the missionaries were a source of material goods as well as prestige. As such, support was strong even though the missionaries spoke out against customs such as polygyny and extra-marital sex and advocated for changes to such things as dress and hairstyles. The missions opened schools, some of which became leading centres for education and the attainment of social prestige.

During the various political changes that were to take place in Samoa, the churches remained neutral. The missionaries did, however, demonstrate support for the notion of foreign rule and, at times, church members acted as negotiators or mediators between Samoans and the authority of the day.

The position of faife’au Samoa (Protestant native pastor) was created enabling Samoan men to act as church representatives. By 1876 there were one hundred and seventy eight ordained faife’au. The faife’au are now well incorporated into village life. The faife’au, together with their wives, are expected to make a lifelong commitment to the village of their appointment and provide a focus for hospitality, education and protection. The faife’au are considered to be community leaders but they remain separate from the matai. They cannot hold a chiefly title and generally do not participate in the fono, but they have been incorporated into the fa’alupega and accorded equal rank with senior titleholders.

The church today plays a central role in everyday life. Such has been the success of Christianity in Samoa that it has been suggested that ‘it would be hard to find any other nation in the world where society and the churches are so closely interwoven.’ Today there are around twenty active Christian denominations. The Congregationalists have the strongest support with almost thirty five percent of the population however their numbers are in decline. Catholics, Methodists and Latter-day Saints each have support from between twelve and twenty percent of the population. The remaining denominations each have only a small

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52 Davidson, Samoa mo Samoa: The Emergence of the Independent State of Western Samoa pp33-35; Gilson, Samoa 1830 to 1900: The Politics of a Multi-cultural Community p96.
55 Tuimaleali‘ifano, Talofa e ‘Aiga, ua ‘ai e lago le tofa! Village governance and development in Falelatai p172.
56 Ernst, Samoa p547.
number of followers but their presence is keenly felt because of the high level of resistance from the four main denominations.

Although support for the church is strong, it is not without its detractors. The high rank accorded to men of the church ensures that clergy often live in the largest houses and receive the best food. This creates friction amongst some Samoans who perceive church leaders as corrupt. Critics of the church point to the stark contrast in living standards between that of church leaders and that of the people they serve. Church leaders may be given substantial gifts such as land, cars and trips to the Holy Land and church followers may give such things as crockery and linen whilst doing without themselves. One respondent, a respected community leader, suggested that pastors offer ‘a passport to heaven’ and so their followers feel that they have no choice but to keep giving. This same respondent recounted a visit she had made to a church-run school in which the students had no desks or chairs even though the village had given money for such facilities. Her claim that the pastor had taken the money for his own use highlights that church leaders are not above reproach.

Religion has also been blamed for contributing to violence, particularly when new denominations have been introduced and power relations have thus been challenged. Matai have actively attempted to restrict the spread of new denominations. For example, Va’a recounted two dramatic incidents in the late 1990s where people who broke from the religious norm in their village were faced with hostility. In one incident, a family that hosted bible meetings of the Brethren was banished from a village in which Methodism was the only denomination permitted by the matai. When the family refused to leave, there were threats to burn their house and five followers were roped to sticks and dumped by the road. In another incident, a man who attempted to introduce Mormonism into a Catholic village was banished. When he refused to leave he was given the highest traditional sentence – being baked in an oven. Preparations for the baking had begun when church leaders and the police intervened. Today, the introduction of new denominations continues to create tensions within villages. Such has been the concern around this matter that, in 2010, the Government of Samoa established a Commission of Inquiry to consider whether the Constitutional right

57 Ibid. p545.
58 Tuimaleali’ifano, O Tama A ‘Aiga p3.
to freedom of religion\textsuperscript{61} should be amended. Community consultations revealed that the matter of religious affiliation was conflated with the autonomy of village fono,\textsuperscript{62} thus two long-standing and sensitive matters were brought to the fore under one banner. The Committee recommended that the Constitution remain untouched,\textsuperscript{63} but that legislative measures should be taken to give greater recognition to communal collective rights and the role of village authorities. It recommended an amendment to the Village Fono Act 1990 requiring that, when considering the introduction of new religions to villages, matai consider only matters pertaining to the preservation of harmony rather than discriminatory or religious opposition. In addition, the Committee recommended the consideration of measures that would reveal village policies on new churches and religions, as well as greater public education on the right of religious freedom. Finally it suggested the establishment of a Religious Practices Commission.\textsuperscript{64} At the time of submission of this thesis, it was unclear whether any of these recommendations would be implemented. And, as will be discussed further in Chapters 7 and 8, community discussion and human rights-based litigation around the authority of village fono continue.

\subsection{Consular and Samoan interaction}

Once the missionaries had established a successful relationship with Samoans, traders also began to increase their contact. By 1839, Britain and the United States had appointed consuls to Samoa. Britain did not wish to make any sort of acquisition of Samoa as it saw neither political advantage for itself nor any advantage for Samoans, but it was concerned to protect its economic interests in the region. The United States was intent on furthering its efforts to ‘promote the advancement of commerce and civilization.’\textsuperscript{65}

The foreign powers asserted themselves early on but they demonstrated a level of concern for the welfare of Samoans as well as recognition of the authority of the chiefs. For example, in consultation with chiefs in Pago Pago and Apia, they developed a code of conduct that

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\item Ahdar, The Scope of the Right of Religious Freedom in Samoa; Polu, Law Commission awaits new Village Fono Act amendments.
\item Ahdar, The Scope of the Right of Religious Freedom in Samoa’ p16.
\item Gilson, Samoa 1830 to 1900: The Politics of a Multi-cultural Community  p146.
\end{itemize}
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regulated the sale of liquor, the movement of seamen and the payment of harbour fees, and the local *fono* were partly responsible for ensuring that the code was upheld. The maintenance of peace and order was also supported by regular visits from warships from Britain and the United States, and later, from Germany.

By the early 1850s Apia was feeling the impacts of the influx of settlers and sailors as well as Samoans visiting from other villages. The *fono* representing the area had lost some of its ability to control public order and there was a need for infrastructure such as roads and bridges. The Foreign Residents Society was formed and it worked with principal chiefs to address some of these issues. With the support of Samoans, new political institutions were established at the district and sub-district level. Codes of law were developed, judicial officers appointed and a poll tax was imposed, but they were only minimally effective. Missionaries and settlers believed there was a need to reorganise Samoan political structures in order to better suit the changing conditions, however any impetus from Samoans to establish a strong centralised government was countered when local interests were disadvantaged. Samoans were willing to work with a central government on matters such as health and education but on most matters, village authorities were not prepared to relinquish their authority.

By 1860, more than one hundred Europeans had settled permanently around Apia harbour. Hamburg established a consul in 1861 and by the late 1870s Germany, Great Britain and the United States had established treaties with Samoa that allowed them, among other things, to establish naval stations.

The constant vying for supremacy between the holders of the highest chiefly titles resulted in a series of wars during this period. One war raged inconclusively from 1848 – 1857 and was followed by the *faitasiga* war which lasted until 1873. These wars provided the opportunity for Europeans to purchase land in exchange for firearms. Prior to this period land

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68 Davidson, *Samoa mo Samoa: The Emergence of the Independent State of Western Samoa* pp39-42.
69 Ibid. p41.
71 Davidson, *Samoa mo Samoa: The Emergence of the Independent State of Western Samoa* p38.
72 Gilson, *Samoa 1830 to 1900: The Politics of a Multi-cultural Community* p250.
73 Davidson, *Samoa mo Samoa: The Emergence of the Independent State of Western Samoa* p60.
negotiations had been achieved through peaceful settlements, but during the war deals were
often made under dubious circumstances – land was either sold more than once or it was sold
by people without the appropriate authority.\textsuperscript{74} By the early 1870s, nearly half of Samoa was
claimed to have been alienated.\textsuperscript{75}

Perhaps partly in response to this, matai gathered in 1868 to discuss the formation of a central
government. The venture was unsuccessful, but it indicated recognition on the part of
Samoans that a centralised government was required to deal with outsiders and that political
unity would enhance personal security.\textsuperscript{76} This desire was furthered in 1873 when the
faitasiga war was finally declared a draw and the two rival parties came together to establish
a provisional government at Mulini’u, the peninsula near Apia which remained a Samoan
enclave after much of the municipality of Apia was sold to Europeans. The new government,
which had its own constitution, had upper and lower houses and matai representatives were
chosen by other matai using customary methods.\textsuperscript{77} The upper house, the Ta’imua had vested
authority in seven high-ranking chiefs. Its role was restricted so that it had no direct authority
over Samoans apart from those at Mulini’u and Apia Bay. Its main priority was the
settlement of Samoan disputes and the negotiation of laws and administrative procedures.
The lower house, the Faipule, consisted of around two hundred representatives, giving a
voice to districts and villages.\textsuperscript{78} In the creation of this institution, Samoans (or at least some
of the higher ranking matai and their key supporters) demonstrated their desire to establish a
national level body of chiefs to serve Samoa’s national interest and to determine its future.
However, the establishment of Mulini’u as the centre of Samoan government represented a
threat to the authority of village fono. As will be discussed further in Chapter 7, this tension
between central and village-based authority persists today and village fono continue to resist
attempts by the state to extend its influence into village decision-making processes.

In 1889, Germany, the United States and Britain reached agreement on joint jurisdiction
under the Berlin Act. The Act recognised Samoa as a fourth party, declaring that Samoa had

\textsuperscript{74} Gilson, Samoa 1830 to 1900: The Politics of a Multi-cultural Community pp271 -288; Davidson, Samoa mo
Samoa: The Emergence of the Independent State of Western Samoa p47.

\textsuperscript{75} Davidson, Samoa mo Samoa: The Emergence of the Independent State of Western Samoa pp45-46.

\textsuperscript{76} Ibid. p42; Tuimaleali’ifano, O Tama A ‘Aiga p12.

\textsuperscript{77} So'o, Asofou and Fraenkel, John, 2005, ‘The Role of Ballot Chiefs (Matai Palota) and Political Parties in
Samoan's Shift to Universal Suffrage’ in Commonwealth and Comparative Politics 43 (3), 333 p334.

\textsuperscript{78} Davidson, Samoa mo Samoa: The Emergence of the Independent State of Western Samoa pp47-53; Gilson,
Samoa 1830 to 1900: The Politics of a Multi-cultural Community pp291-305.
the right to elect a Chief or King who would become a joint signatory. The Act provided for the establishment of a Supreme Court and gave the Chief Justice – nominated by the three powers – authority over residents of Samoa and all four governments party to the Act. Gilson argued that the Act was oriented towards the interests of the European powers, largely ignoring Samoan affairs unless they impacted upon foreign concerns. However, two of the main provisions of the Act were the prohibition on further sale of Samoan land outside the municipality and the establishment of a Land Commission to investigate and evaluate all claims by Europeans to Samoan land, almost four thousand of them. Although an aim of the Commission was to preserve local land ownership, the Commission consisted of three foreigners and one Samoan adviser and its establishment was a clear impingement on the dominant realm of chiefly authority. Nevertheless, the Commission efficiently dealt with claims on around 1.7 million acres of land (more than twice the whole island group), quickly expediting the rejection of claims on the larger blocks of land and confirming customary ownership in all of Samoa but for 135,300 acres, or eight percent of the total. Davidson recorded that the Samoans reacted with fear and horror over the extent of land sales exposed by the Commission and, writing shortly after independence, he observed that Samoan leaders had ‘developed a repugnance to alienation that took such deep root that today the alienability of Samoan land is regarded as a cornerstone of custom.’ This protection of land ownership was critical to the on-going viability of the fa’amatai and social protection, as discussed further in Chapters 8.2.3 and 9.

Traditional rivalries continued and rifts in the government contributed to a period of warfare in which three powerful chiefs fought for titular supremacy. The foreign powers made efforts to resolve the situation and nominated Malietoa Laupepa as tupu (leader). This was accepted by Samoans although rivalries between the three contenders remained. In 1898, Malietoa Laupepa died and a dispute over leadership once again erupted into a civil war. This time the three foreign powers took temporary control of the country, appointing a new government that consisted of their three consuls.

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79 Gilson, Samoa 1830 to 1900: The Politics of a Multi-cultural Community pp407-408.
80 Meleisea, The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa pp43-44.
81 Gilson, Samoa 1830 to 1900: The Politics of a Multi-cultural Community pp407-408.
82 Davidson, Samoa mo Samoa: The Emergence of the Independent State of Western Samoa p46.
83 Ibid. p73.
3.4.4 Colonial administration

Samoa was partitioned so that in 1900 Germany established administrative control over the four islands in the western region, including the two largest and Apia, as a German Protectorate. The United States took control over the remaining five islands now known as American Samoa. Samoan leaders were not in agreement with the decision to partition the country and those in the German areas were not necessarily pleased with their new ruler. Thus, the will to manage their own affairs remained firmly intact.\(^{84}\)

Dr Wilhelm Solf was appointed by Germany as Governor of Western Samoa and he took a long-term approach to establishing German rule. Having made himself familiar with Samoan culture, Solf recognised local authorities and worked with them. But Solf’s long-term goal was to break down the authority of the government in Mulinu’u, allowing Samoan self-rule to apply only in villages and for the German Kaiser to be accepted as supreme ruler.\(^{85}\)

Samoans, on the other hand, wanted an ‘Ali‘i Sili (paramount chief) and recognised Matā‘afa Iosefa (Matā‘afa) as the supreme ruler, regarding Germany more as a ‘friendly protector.’ There was a notion that the Germans might withdraw once the Samoan government was acting more effectively.\(^{86}\)

Solf gradually instituted change, encouraging Matā‘afa and two other tama‘āiga (see 3.3.5) to establish a new executive council which came to be known as the Malo (now used as Samoan for ‘the Government’ or ‘state authority’). Then, in 1905, the Fono of Faipule now reduced to twenty seven representative members appointed by Solf himself was established.\(^{87}\)

Solf saw no place for the Tūmu‘a and Pule (see 3.3.4) in the German administration and gradually undermined their authority, thereby increasing the authority of sub-districts.\(^{88}\)

These changes were critical to the evolution of chiefship in Samoa because they ultimately brought the distinct categories of ali‘i and tulāfale to the same level, as discussed above.\(^{89}\)

The changes instituted by Solf were welcomed by those who served to benefit from the

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\(^{84}\) Gilson, Samoa 1830 to 1900: The Politics of a Multi-cultural Community p433.

\(^{85}\) Davidson, Samoa mo Samoa: The Emergence of the Independent State of Western Samoa p79; Thompson, Roger, 1994, ‘Britain, Germany, Australia, and New Zealand in Polynesia’ in K. R. Howe, Robert C. Kiste and Brij V. Lal (eds), Tides of History: The Pacific Islands in the Twentieth Century (Allen & Unwin, St. Leonards, N.S.W.) p73.

\(^{86}\) Davidson, Samoa mo Samoa: The Emergence of the Independent State of Western Samoa p79.

\(^{87}\) Ibid. pp79-81.

\(^{88}\) Ibid. pp83-84; Meleisea, The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa p64.

\(^{89}\) Tcherkezoff, The Samoan Category Matai (‘Chief’): A Singularity in Polynesia? Historical and Etymological Comparative Queries p160.
rebalancing of power. But 1907-08 saw strife and confrontation in response to the degradation of authority and respect for Samoan leadership under German rule.

By the outbreak of World War I, seeds of discontent had begun to emerge amongst the commercial community and Samoans had indicated their desire for increased involvement in the management of their own affairs. However, Samoa entered a new phase when New Zealand troops occupied the territory in August 1914.\textsuperscript{90} New Zealand had been closely monitoring the situation in Samoa for some time, repeatedly expressing concerns over German occupation. At the outbreak of the war, New Zealand quickly but peacefully took control. The military administration, which lasted until 1919, made few changes and was accepted reasonably well.\textsuperscript{91} At the conclusion of World War I, the Pacific territories that had been previously controlled by Germany became League of Nations mandates and, as part of this agreement, Samoa was granted to New Zealand. In 1920, the military administration was replaced by a civilian government which was enabled in 1922 by the Samoa Act (New Zealand) to be administered under the requirements of the League of Nations.

It has been suggested that New Zealand did not at that time bring much expertise to the ruling of Samoa.\textsuperscript{92} During the New Zealand Administration in 1918 a devastating influenza pandemic swept through many parts of the world, including the Pacific. In Samoa around twenty percent of the population died, including eighteen of the twenty four members of the Fono of Faipule.\textsuperscript{93} New Zealand was criticised for its poor handling of the epidemic\textsuperscript{94} and it then appointed Major General George Richardson, who had no knowledge of Polynesians, as Samoa’s first administrator. Richardson demonstrated concern for the protection of Samoan rights and so introduced progressive social and education policies. However, he was paternalistic and insensitive to Samoan customs. He attempted to reorganise villages and landholdings, he stripped some chiefs of their titles and he banned the exchange of fine mats.\textsuperscript{95} His authority was weakened by the O le Mau a Samoa movement which had formed

\textsuperscript{90} Davidson, Samoa mo Samoa: The Emergence of the Independent State of Western Samoa  p90.
\textsuperscript{91} Ibid. pp90-93.
\textsuperscript{92} Thompson, Britain, Germany, Australia, and New Zealand in Polynesia p78.
\textsuperscript{93} Davidson, Samoa mo Samoa: The Emergence of the Independent State of Western Samoa  p94. The progress of the church was also greatly disrupted by considerable loss of life amongst the clergy. Because of their work visiting the sick, the clergy were more susceptible to infection and the LMS lost twenty nine out of the thirty members on its Council of Elders Forman, The Island Churches of the South Pacific: Emergence in the Twentieth Century  pp24-25.
\textsuperscript{94} Davidson, Samoa mo Samoa: The Emergence of the Independent State of Western Samoa  p99.
\textsuperscript{95} Ibid. Thompson, Britain, Germany, Australia and New Zealand in Polynesia p78.
some years earlier to protest against the German administration and then re-emerged to protest against the New Zealand administration’s interventionist policies, ultimately calling for self-government. A new administrator was appointed but the initially peaceful Mau movement grew in strength and became violent, culminating in the death of eleven Samoans, including tama’aiga holder Tamasese, when New Zealand police fired upon a Mau protest.  

By the late 1930s, New Zealand had accepted a significant degree of Mau influence in local government, however the attitude prevailed that Samoans could not achieve independence until living standards and education were improved. The New Zealand administration imposed village rules on things such as quotas for food and cash crops, the collection of coconut beetle larvae, animal husbandry and village cleanliness. These rules were apparently accepted and effectively enforced by the village fono likely because they complemented existing customary practices and supported the authority of the fono.

Samoans themselves were gradually becoming more adept in their dealings with the administration and, through the Fono of Faipule, continued to push for greater representation in senior posts as well as training for young Samoans.

In 1946, following World War II, Samoa became a trusteeship of the United Nations. Under Chapter VII of the United Nations Charter, it continued to be administered by New Zealand but with the clear goal of working toward self-rule. Samoans were in favour of an ongoing association with a larger country and were not focussed on independence so much as self-government, the opportunity to make their own decisions and the reunion of the whole Samoan group of islands. Independence was finally realised in 1962 after a series of constitutional developments and public consultation. These included the creation of a Legislative Assembly (1947), two Constitutional Conventions (1954, 1960), the formation of

Fine mats hold great cultural significance and value in Samoa and are presented on special occasions such as weddings, funerals and conferral of matai titles. Fine mats represent more than monetary value – they are offered in recognition of qualities such as respect, gratitude, deference, obligation and so on. (Meleisea, Malama, 1992, *Change and adaptations in Western Samoa* (Macmillan Brown Centre for Pacific Studies, University of Canterbury, Christchurch) pp33-34.) Fine mats were traditionally made by the women of the village. A high quality fine mat, which is very soft and finely woven, may take 2-3 years to complete.  

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96 Davidson, *Samoa mo Samoa: The Emergence of the Independent State of Western Samoa* pp118-138.  
97 Thompson, *Britain, Germany, Australia, and New Zealand in Polynesia* p83.  
98 Meleisea, *The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa* p211.  
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a cabinet government (1959) and a plebiscite in which adult Samoans approved independence (1961).\(^{101}\)

In the course of formulating a new constitution, Samoans expressed their determination to incorporate their customs and traditions into the new government. The New Zealand and United Nations advisers were equally determined that the new system would be democratic, respectful of human rights, have a separation of legislative and judicial powers and be administered by an impartial bureaucracy. However, the foreign advisers also recognised that the system would only work if traditional systems were incorporated. When it was agreed that chiefs would secure a key role, including matai-only political suffrage as well as matai-only political candidature\(^{102}\) (discussed further in 7.2.1) the hybrid nature of Samoa’s political system was crystalised. The recognition of chiefly authority under the Constitution and statute is taken up below in 3.5.5.

### 3.5 The authority of chiefs in Samoa today

#### 3.5.1 Introduction

In Samoa today the authority of matai is legitimised by traditional values and institutions as well as by the values and institutions of the state. This section examines both these aspects beginning with a discussion on *fa’asamoa*. It demonstrates that governance in Samoa is dominated by two equally strong systems that co-exist yet which emanate from quite different sources. The relationship between the two will be examined in further detail in Chapters 7 to 9 which identify how the two systems operate in relationships of complementarity, incompatibility or a complex combination of both.

#### 3.5.2 *Fa’asamoa*

Samoans have developed a strong and clearly defined system of governance known as *fa’asamoa*, characterised by living under the leadership of a *matai* and occupying land under...

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\(^{101}\) New Zealand retained a relationship with the newly independent nation under the Treaty of Friendship in which it was agreed that it would consider Samoan requests for technical and administrative assistance and act as an agent for Samoa in international relations. (Davidson, *Samoa mo Samoa: The Emergence of the Independent State of Western Samoa* p416). New Zealand continues to have a close diplomatic relationship with Samoa reinforced through the provision of development funding – around NZ$15 million annually – and migration. The Samoan Quota Scheme allows 1,100 Samoans to be granted residence in New Zealand annually and there are currently more than 130,000 Samoans living in New Zealand. (New Zealand Department of Foreign Affairs and Trade, 2010, *Samoa*, at http://www.mfat.govt.nz/Countries/Pacific/Samoa.php, on 1 December 2010).

\(^{102}\) Meleisea, *The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa* pp210-211.
customary tenure. Fa‘asamoa is concerned particularly with the maintenance of the social, political and economic order. This order is fostered by a strict social structure founded on respect, reciprocity, association and obligation. According to fa’asamoa, every person in Samoa belongs to a particular status group and his or her relationships, duties and obligations are clearly established by this status. Underpinning the system are the principles of, amongst others, authority, power, joint decision-making, respect, consensus, love, compassion, care, dignity, wisdom and service. Legend has it that the fa‘asamoa emanated from the god Tagaloa who provided directions for organising life. The village fono is modelled on Tagaloa’s own legendary council. According to this philosophy, fa‘asamoa is positive and relevant, drawing wisdom from past experience and preserving core values.

Fa‘asamoa is structured around political units known as nu‘u. Nu‘u may be translated as village, but it more accurately indicates a political entity comprised of a group of extended families that have a shared history as well as their houses and lands. Fa‘asamoa places all adults in the nu‘u into associations where each has specific rights, privileges or obligations. Aiono, a strong advocate for women in fa‘asamoa, described the various groups within the nu‘u as comprising the ‘sociometric wheel.’ She depicted the wheel as follows:

103 Ibid. p212.
105 Kamu cited in Ibid. p313.
106 Meleisea and Schoeffel Lagaga: A Short History of Western Samoa 28; So'o, Democracy and Custom in Samoa: An Uneasy Alliance  p17.
The wheel emphasises that each group is self-contained but that they are interconnected and interdependent.

In his description of the system of village governance, a government official who dealt with matters of rural development drew me a similar depiction but focused only on the three groups representing the matai, the daughters of matai, and the untitled men as follows:

He described the matai as the decision makers while the daughters of matai and the untitled men are implementers. He too, highlighted the interconnected but autonomous nature of the groups noting that the matai interact with both other groups but that the daughters of matai and untitled men do not interact with each other. The work of both these groups should

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complement that of the *matai*. He also suggested that the wives of *matai* do not have a place in village governance because this would create a conflict of interest. The implications of this system for the status of women are discussed in Chapter 9.2.2.

The various social and administrative groupings have distinct characteristics and duties. From a reading of the literature, I have summarised these in the table below.
**Table 1**  Samoan Social and Administrative Groupings\(^{192}\)

<table>
<thead>
<tr>
<th>Social / Administrative group</th>
<th>Description</th>
<th>Duties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Matai</td>
<td>Chiefs</td>
<td>Custodians of land, family representatives. Matai must ensure that the village has an adequate supply of resources. This may involve such things as conducting inspections of crops or regulating fishing, hunting and harvesting.</td>
</tr>
<tr>
<td>Tamaitai</td>
<td>Daughters and sisters of matai</td>
<td>Originally considered sacred, the tamaitai are the highest-ranking women. They have particular authority on matters concerning family and land. The work of the tamaitai complements that of the fono a matai and arguably the tamaitai have (or had) equal status. When a daughter of a matai leaves her village to marry, she loses her status, but it is reinstated if she returns to live in the village.</td>
</tr>
<tr>
<td>'Aumāga</td>
<td>Group of untitled men</td>
<td>Socially, the 'aumāga is important because it contains potential matai. It has its own fono which is structured in the same way as the fono a matai. The ‘strength of the village,’ the 'aumāga provides much of the labour for the village and is in charge of government construction programs that affect the village. Along with the aualuma and tamaitai, they may also have responsibilities in government beautification programs. Traditionally in charge of defence and warfare, the aumāga today defend the village against detractors. Traditionally, the men spent time on agriculture, carpentry, hunting and fishing. Some were specialists in things such as boat-making, house-building, entertaining and tattooing. The young men were in charge of cooking. Young men are strongly encouraged to apply for membership of the ‘aumāga and most became members between the ages of 20 and 25. Membership requires an agreement to abide by the decisions of the ‘aumāga.</td>
</tr>
<tr>
<td>Faletua ma tausi</td>
<td>Wives of matai</td>
<td>These women support the matai and raise the family. Authority within the faletua ma tausi is dependent upon the ranking of the woman’s husband and the length of time that she has been living in the village. As they are not heirs to local titles, they have less authority within the village. However they have recognition as mothers of</td>
</tr>
</tbody>
</table>

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\(^{192}\) This table is a compilation of information taken from: Aiono Fana'afi le Tagaloa, 1986, 'Western Samoa: The Sacred Covenant' in Institute of Pacific Studies of the University of the South Pacific (eds), *Land Rights of Pacific Women* (Institute of Pacific Studies of the University of the South Pacific, Suva); Goldman, *Ancient Polynesian Society* ; Iati, *The good governance agenda for civil society: implications for the fa'aSamoa* ; So'o, *Civil and political liberty: the case of Samoa* Davidson, *Samoa mo Samoa: The Emergence of the Independent State of Western Samoa* ; Meleisea, *The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa* ; Fairbairn-Dunlop, Peggy, 2000, ‘Women’s NGOs within the new governance agenda: are they still based on alofa?’ in Elise Huffer and Asofou So'o (eds), *Governance in Samoa: pulega i Samoa* (Asia Pacific Press; Institute of Pacific Studies, University of the South Pacific, Canberra, Suva) pp99; Freeman, *The Social Structure of a Samoan Village Community* ; Aiono Fana'afi le Tagaloa, The Samoan Culture and Government; Huffer and So'o, *Beyond Governance in Samoa* ; So'o, Governance and rendered services.
| **Tamaiti** | Children and youths |
| **Other positions** |  |
| Fafine lāiti (literally junior wives) | Wives of untitled men |
| Also referred to as Avātaulele`a | These women come from outside and have the lowest status within the village. Their role is to serve their husband’s family and so their time is spent mostly on domestic duties. Since they come to the village from outside, they have no land rights within the village other than the use of their husband’s land for the duration of their lifetime. |
| Aualuma | Women living in their home village. |
| | The aualuma may be unmarried, widowed, separated or they may be married women whose husbands are living away from their home village. They have ceremonial and hospitality responsibilities. Traditionally they would represent the honour of the nu`u, receiving guests, attending to the taupou (see below), weaving fine mats and making tapa and oil. A high ranking maiden from the aualuma might march with the head of a party into war. Membership is encouraged but not compulsory. Women apply to become a member and admission requires ceremonial procedures. |
| Tama fafine | The group of sisters within an `āiga |
| | This group has extra sway on family decisions and men have a special responsibility toward their sisters and their sisters’ children. Traditionally, sisters have the power to curse brothers that do not fulfil their obligations. |
| Taupou | Virgin female |
| | The taupou was appointed to the household of the highest-ranking chief and considered to be the second-highest ranking person in the village. She was often the daughter of the chief or daughter of his sister. This position is no longer appointed, however there are still some older taupou. |
| Manaia | Heir apparent of the matai |
| | He acts as head of the young men and organises labour, cooking for the headman, cultivating taro, building roads etc. |
| Kalapu `o tama`ita`i | Women’s organisation |
| | This organisation comprises all members of the aualuma, faletua ma tausi and fafine lāiti |
| Faife`au | Minister of the church |
| | The faife`au are accorded equal rank with senior matai titleholders, but they remain separate. They cannot hold a chiefly title. Although they do not generally participate in the fono, they are usually incorporated into the fa`alupega. |
This clearly defined social structure theoretically provides for each person in the *nu'u*. As can be seen from the table, each member of the *nu'u* is obliged to fulfil services to the village through their association with a particular group. Overall, the system provides ‘security, purpose and pride’ because each member has an important function to fulfil and, in return, they are assured of being provided with basic necessities. Duties to the *nu'u* extend to the ‘āiga where membership also carries certain obligations, duties and rights. The ‘āiga provides physical, moral and financial support, the prestige of belonging to the group and access to land. In return, members are expected to support their kin as well as the interests of the group. Membership of the ‘āiga also carries the obligation of preserving the name of the founding ancestor. A person who has not participated satisfactorily, perhaps due to living elsewhere, may be excluded from decision-making and other group benefits.

Aiono presented a positive portrayal of *fa’asamoa*, emphasising its harmonious nature, and arguing that the system fosters inclusiveness, unity and adaptability. Although households operate individually and are largely self-sufficient, they depend on each other for certain things. Particular activities lend themselves to communal effort – for example fishing, the cultivation of ceremonial food or the construction of community buildings. Households therefore have community responsibilities which must be fulfilled or they risk expulsion or ostracism. And although higher ranking people are afforded special privileges, basic resources are theoretically available to all. Huffer and So’o, however, pointed to the opposing forces that exist within the system, especially those introduced by relatively recent events such as universal suffrage, colonisation and the cash economy. The ways that the presence of the state contributes to these tensions is discussed in further detail in Chapters 7 to 9.

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1 Keene cited in Huffer and So'o, Beyond Governance in Samoa p323.
2 Macpherson, Cluny and Macpherson, La’avasa, 2000, ‘Where theory meets practice: the limits of the good governance program’ in Elise Huffer and Asofou So'o (eds), Governance in Samoa: pulega i Samoa (Asia Pacific Press; Institute of Pacific Studies, University of the South Pacific, Canberra, Suva) p30.
3 Tcherkezoff, The Samoan Category Matai (‘Chief’): A Singularity in Polynesia? Historical and Etymological Comparative Queries p152.
4 Powles, Guy, 1986, ‘Legal Systems and Political Cultures: Competition for Dominance in Western Samoa’ in Peter Sack and Elizabeth Minchin (eds), Legal Pluralism: Proceedings of the Canberra Law Workshop VII (Law Department, Research School of Social Sciences, Australian National University, Canberra) p192.
5 Aiono Fana'aafi le Tagaloa, The Samoan Culture and Government.
7 Huffer and So'o, Beyond Governance in Samoa p321.
3.5.3 Fa'amatai

As highlighted in Aiono’s socio-metric wheel above, matai are the centrepiece of the fa’asamoa and there are a number of features of the fa’asamoa that reinforce their place in this order. This reinforcement of authority is pertinent to the role that matai have in the contemporary polity.

Fa’amatai, the chiefly system, is supported by respect for rank and power, both of which are continually reinforced through ceremony, ritual, reciprocity and obligation. Fa’aaloalo, or respect, usually means that a person will yield to the wishes of the person of higher rank and it is accompanied by the notion of tautua which means to serve. Thus, a person is required to respect and serve matai as well as those that have higher rank by way of age or social standing.8 Fa’aaloalo can be shown in a variety of ways. For example, particular cuts of meat or certain varieties of fish are reserved for the matai. Houses can be constructed in such a way as to reflect rank - the higher the rank, the higher the house platform or the greater the number of terraced set-backs incorporated.9 In the past, an ali’i had the right to reserve quantities of food which he might use for ceremonies or in times of scarcity. A high-ranking ali’i who held authority over a district would have a large household and entourage consisting of advisors, family members, officials and soldiers. Such an ali’i would require considerable support and so allied villages would take turns in supplying the necessary resources. The less loyal villages would only offer support when compelled to do so.10

Traditionally pule,11 or power, of a matai was derived from the mana (sacred powers) of his aristocratic past12 as well as his ability to win in battle.13 In his journal of 1832, the Christian

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8 Tautua provides the basis for So’o’s examination of custom governance in the Samoa National Human Development Report. So’o notes that there are four types of tautua – service to one’s family, village, church and the national government. Tautua to one’s family can be expressed through the strengthening of family bonds by means of reciprocity and through taking care of individual members. Tautua to the village may take the form of being an active member of a village organisation such as aualuma or it may be rendered through the provision of food and gifts at village functions. All Samoans can give to the church through contributions, but in some places, individual families are identified to render tautua at the beginning of each year. Tautua to the government can be expressed through participation in government instigated initiatives and through voting in general elections. (So’o, Governance and rendered services pp149-171.)
9 Gilson, Samoa 1830 to 1900: The Politics of a Multi-cultural Community pp11,13.
10 Va’a, Local government in Samoa and the search for balance p153.
11 Pule, which is demonstrated through the actions of matai, theoretically belongs to the ‘āiga and is to be exercised for its benefit. Pule is multi-dimensional and so can pertain to different aspects of village life such as the use of land and family property, acceptance of the matai onto the fono and so on. Samoan political scientist, Tuimaleali’ifano, demonstrated the significance of pule in contemporary village and national politics describing a case whereby the powerful ‘Āiga Taua’ana used its pule to influence its village’s voting preferences in a national election. Tuimaleali’ifano’s account highlights the level of political sway held by key families as well
missionary John Williams observed that although Samoans did not demonstrate as much deference to their chiefs as some other Pacific Islanders, there were a few chiefs who were considered sacred, ‘whose feet are kissed and after whom water is sprinkled and who also on certain occasions are fed by another person.’ Chiefship today continues to carry an element of mana as expressed in a popular Samoan song which claims that ‘God has chosen Samoa to be ruled by matai, because to them has his name been shared.’ However Salevao, Secretary-General of the Congregational Christian Church, has rejected any notion that the authority of matai is divinely sanctioned, emphasising instead that the function of matai is primarily that of trustee of the family estate.

Today the authority of the matai is dependent upon personal attributes as much as mana and inherited status. For example, in his assessment of the success and popularity of Matā’afa, Samoa’s first Prime Minister and a tama’āiga, Davidson recounted that Matā’afa:

had created in the minds of members an image of himself as a traditional Samoan leader. Eloquent and allusive in speech, confident but unaggressive in action, aloof but not unfriendly in manner, he had gained the respect of all and avoided close association with any group or faction. He was a leader who, like a good matai in his relations with his family, kept in sensitive touch with the feelings and opinions of those who had entrusted him with authority.

Generally it is preferred that matai titles go to the eldest male in the agnatic line – it may go from one brother to the next and then pass to a son. However this is not automatic especially if the person is living away from the village or has not shown the leadership qualities suggested above. It is customary for the previous holder to nominate a successor as the potential consequences of challenging traditional pule. The account also demonstrates the high level of significance placed on the maintenance of pule through the holding of public positions of authority and/or ceremony. (Huffer and So'o, Beyond Governance in Samoa p320; Tuimaleali‘ifano, O Tama A ‘Aiga pp109-119.)

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14 Moyle The Samoan Journals of John Williams 1830 and 1832 p238.
15 Lafoa‘i, Universal Suffrage in Western Samoa; A Political Review p70.
17 Davidson, Samoa mo Samoa: The Emergence of the Independent State of Western Samoa p365.
18 Gilson, Samoa 1830 to 1900: The Politics of a Multi-cultural Community p30.
and this is taken into consideration but ultimately the matai is chosen for his previous record in dealing with family matters in an amicable and effective manner. In some cases, a remote kinsman or even an unrelated man may be chosen if his appointment will potentially benefit the ‘āiga. Bestowal of titles is one area in which the state has intervened in customary processes, stipulating that only Samoans are eligible to hold a matai title. As will be discussed further in Chapter 8.2.3, the Land and Titles Court, an institution of the state, now has a significant role in resolving disputes over the bestowal of matai titles.

As indicated in 3.3.1 and 3.3.2, a matai title does not exist merely as appellation. It is associated permanently with an area of land that carries the same name. Under established custom – eroded to a degree today by the practices of creating and splitting titles (see 3.5.4) – the land and title are appurtenant to each other, and together they belong to the kinship group.

Matai appointments are made by the ‘āigapotopoto (family decision making council) which consists of titleholders and distinguished members such as church ministers and older people. All family members who are concerned with retaining their status will endeavour to participate in the selection process which, for some people, may require traveling from overseas. Appointments can often be contentious and titles can be left unfilled for long periods and, if consensus is not reached, taken to the Land and Titles Court. In her account of changes in the matai system, Schmidt described how the principal title in her family was left in abeyance for a period of thirty-six years as branches of the family fought for the title in the Court. In his personal account, So’o described how four of the seven titles held by him were contested in the Court.

In those instances where a young man is recognised as having leadership qualities, his family may attempt to bestow a title upon him at a relatively early age. If no titles are available, the fono can foster his abilities by seeking out a title for him. It is not uncommon for families to insist that family members who work in high profile or important positions accept a title, and

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19 Davidson, Samoa mo Samoa: The Emergence of the Independent State of Western Samoa pp 22-23.
21 So’o, Democracy and Custom in Samoa: An Uneasy Alliance p19.
22 Powles, Legal Systems and Political Cultures: Competition for Dominance in Western Samoa p194.
23 Schmidt, Namulau'ulu G. Netina Galo, 2007, 'Changes in the Matai System in the Last 50 Years: A personal experience’ in Asofou So'o (eds), Changes in the Matai System: O Suiga i le Fa'amatai (Centre for Samoan Studies, National University of Samoa, Apia) p159.
even people who have been reticent to accept the responsibilities of a title may finally bow to family pressure. So’o discussed some of these pressures from a personal viewpoint, identifying such things as: obligation to and respect for one’s family; concern over the ability of other potential candidates to fulfil their duties; having access to adequate resources to fulfil the obligations of the title; and providing a suitable level of authority so as to allow participation in certain functions.25

When a new matai is appointed, the obligations and privileges that come with the appointment are recognised by the fono as well as each member of the ‘āiga. The fono officially recognises membership of newly appointed matai in a ceremony of ritual, kava and feasting. Today, matai must also be registered with the Land and Titles Court,26 meaning that the authority of matai today is legitimised through both customary and state sources.

The reinforcing of authority27 through ceremony is demonstrated in the meetings of the village fono. Within the fono, rank is reinforced both through the recitation of the fa’alupega (see 3.3.2) and the adherence to a strict seating and speaking order. After a kava ceremony, the discussion proceeds in order of rank. The agenda is set by the tulafale who sits at the front of the meeting house, however an ali’i may occasionally raise another issue for discussion. When the views of the highest-ranking chiefs are in accord, a decision has been reached.28 It is not acceptable to disagree with a matai of a higher rank, however informal debate does allow matai of lower standing to state their position without necessarily indicating disagreement.29 In this manner, a level of consensus can be achieved before the highest-ranking chiefs make the final decisions. If a matai is absent from a meeting of the fono, he must accept any decisions that are made without his input. The ramifications of ranking are discussed further in Chapters 7 to 9 in relation to the way that recognition of rank manifests in the broader, contemporary polity.

27 It is important to note that authority and prestige are distinct characteristics. Thus a matai of high prestige does not necessarily have the authority to command. Tuimali’ifano’s account of a tama’āiga title holder who attempted to enter politics suggested that these two features are deliberately distinguished. The ‘āiga that swayed the vote in favour of the opposing candidate, believed that the title holder should retain his prestigious position in the council of deputies rather than take on a political role. (Norton, Robert, 1984, ‘Titles, Wealth and Faction: Electoral Politics in a Samoan Village’ in Oceania 55 (1), 100 p103; Tuimali’ifano, O Tama A ‘Aiga pp109-119.)
28 Gilson, Samoa 1830 to 1900: The Politics of a Multi-cultural Community pp20-21; So’o, Samoa’s electoral system as it operates on the ground p3.
29 Davidson, Samoa mo Samoa: The Emergence of the Independent State of Western Samoa pp19-20.
Although rank is continually reinforced, Samoans have developed methods for preventing the rise of oppressive or authoritarian leaders. The *matai* is recognised as the final authority, but family harmony is maintained through consultation and the consideration of individual needs. Meleisea argued that in spite of strict ranking, Samoan society is essentially egalitarian because each level of authority is countered. For example, women have more honour than their brothers, but because they move away from the village when they marry, they have less influence on daily affairs of the family. *Ali‘i* generally have more authority than *tulāfale* but *tulāfale* exercise greater authority in certain areas. Significantly, Meleisea argued that although people of high rank may be afforded special privileges and the authority to control land, no person is without access to food and important resources and the basic amenities are, in principle, the same for everyone. Here Meleisea was romanticising *fa’asamoa* to an extent as it is clearly evident that not all families, nor individual members of families, have equal access to even basic amenities.

Shore took a similar position to Meleisea, arguing that although Samoan chiefship is surrounded by pomp and ritual, chiefly authority is really ‘a complex fusion of aristocratic and populist ideologies.’ He pointed out that the authority of chiefs is limited by the consensual nature of decision-making processes. Shore too, noted that Samoans have a number of devices for undermining chiefly authority. For example, humour is one form of resistance to Samoan politeness and conformity. The *āiga* can reprimand or withdraw support and the *fono* can expel unpopular members. In 1832, Williams suggested that oppressive chiefs risked being beheaded and Davidson, too, suggested that although there had been individuals who had attempted to seek power and oppress, they were successful at this only in the short term. However, although much has been made of the ability to reprimand, undermine or withdraw support for *matai*, So’o has recently observed that today

30 Gilson, *Samoa 1830 to 1900: The Politics of a Multi-cultural Community* p16.
32 Ibid; Meleisea and Schoeffel Lagaga: *A Short History of Western Samoa* p26.
34 Ibid. p158.
35 Freeman, *The Social Structure of a Samoan Village Community* p75.
36 Ibid. p75.
37 Moyle *The Samoan Journals of John Williams 1830 and 1832* p239.
38 Davidson, *Samoa mo Samoa: The Emergence of the Independent State of Western Samoa* p30.
titles are usually held for life, even if the family is not happy with the *matai*.\(^{39}\) This observation has been consistent over time. For example, Gilson pointed out in 1970 that it was extremely difficult to take action against a high ranking chief\(^{40}\) and Powles noted in 1986 that there were few cases whereby titles had been removed, suggesting that it would be difficult to oust an incumbent who was determined to stay in office.\(^{41}\) This observation was supported by the 1975 finding that few families were aware of their rights when it comes to dealing with an ineffective *matai*.\(^{42}\)

Huffer and So’o noted the impact that modernity has had upon the power of *matai*. Looking at Aiono’s sociometric wheel (Diagram 1, see 3.5.2), they argued that universal suffrage (and presumably other factors such as independence gained through employment, international study opportunities and so forth) create openings in the circles through which youth, in particular, are pulled. In order to retain their authority and power, *matai* must keep these circles intact.\(^{43}\)

One way that the circles are kept intact is through the system of reciprocity whereby any gift or favour that is accepted must be returned at some time in the future. Gift-giving is a valuable tool for the re-distribution of wealth, theoretically ensuring that the basic needs of all families are met. More significantly, gift-giving makes important statements about relationships, commitments and obligations, and as the debt can be transferred from one person to another, reciprocity creates an intricate and wide-ranging network of alliances. For a *matai*, reciprocity is crucial because it reinforces his authority - a *matai*’s supporters provide him with items or resources that he requires and, in turn, provides them with the resources that they require. Support can come in the form of material or non-material goods. For example, for Samoans, historical knowledge can earn power\(^{44}\) and it is customarily the task of the *tulāfale* to keep the genealogical knowledge of the *ali’i*. He performs this duty in return for recognition of his own status.

\(^{39}\) So’o, *Democracy and Custom in Samoa: An Uneasy Alliance* p19.

\(^{40}\) Gilson, *Samoa 1830 to 1900: The Politics of a Multi-cultural Community* p21.

\(^{41}\) Powles, *Legal Systems and Political Cultures: Competition for Dominance in Western Samoa* p195.


\(^{43}\) Huffer and So’o, *Beyond Governance in Samoa* p321.

\(^{44}\) Meleisea and Schoeffel *Lagaga: A Short History of Western Samoa* pvi.
The obligations and expectations that reciprocity places upon people can make the system burdensome and this is felt particularly by matai. Today’s cash economy places a considerable burden upon matai. Tuimaleali’ifano was unequivocal in suggesting that the modern economic system is incompatible with the principle of collective rights and the reinforcement of authority through the redistribution of family resources. He claimed that reciprocity today creates unrealistic demands, arguing that matai may struggle to meet their own financial needs and so have little capacity to meet the expectations of the church and extended family. The new stresses created by the cash economy have arguably contributed to a lack of adherence to the principles of reciprocity. For example, Huffer and So’o noted that matai may now look after their own family interests by holding on to goods that they would formerly have distributed. The ability for individuals to have their wages paid into their own bank accounts means that greater privacy surrounds the accumulation of individual wealth and so people have more discretion over how they choose to distribute earnings.

So’o also commented on the burdensome nature of gift-giving, especially those gifts that now typify cultural ceremonies. (The pressures created by the controlling nature of the fa’asamoa are discussed further in Chapter 9.2.1.) However, reflecting his positive view of the fa’asamoa, he refrained from suggesting that the practice be halted because he believed that the negative aspects are tempered by the strengthening of family ties that result from it. Therefore, he called for a compromise in which gift-giving be retained but at more manageable levels.

The nature of reciprocity has influenced the way that fa’asamoa and fa’amatai have adapted to the contemporary context. For example, matai titles are given to people living away from the village, even overseas. This practice increases the reach of reciprocal obligations by increasing the number of people required to give to the ‘āiga. By including people that live in wealthier countries such as New Zealand, the United States and Australia, it has the added benefit of placing obligations upon people who have greater access to resources of financial value.

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45 Tuimaleali’ifano, O Tama A ‘Aiga ppxi, 118-119.
46 Huffer and So’o, Beyond Governance in Samoa p322.
47 So’o, Governance and rendered services p153.
Characteristics of fa’asamoa and fa’amatai such as reciprocity, reinforcement of authority and appointment of leaders all impact upon the nature of the Samoan polity. The way that these customary practices sit within the context of the state is discussed in Chapters 7 to 9.

3.5.4 The proliferation of matai

Since independence in 1962, the number of matai appointments has increased substantially, reflecting changing attitudes toward matai and raising concerns that chiefly authority is being undermined. Any diminution in the authority of matai has real potential to impact upon the strength of the polity and the way that it functions.

The proliferation of matai has been enabled in part by the practice of splitting titles between multiple holders as well as by the ability for one person to hold multiple titles. In some cases, old titles have been resurrected or new, non-traditional names created. Although the practice of title splitting has always existed,\(^{48}\) it became more common in the 1930s and 1940s as the population grew.\(^{49}\) After independence the number of appointments to matai titles grew at a far greater rate than the population. For example, less than twenty years after independence the number of matai titles had risen by 150.6 percent whereas the population had risen by only 36.8 percent.\(^{50}\) By the mid-1980s most titles had been split, the average title having about thirteen holders.\(^{51}\) The trend of title splitting continues unabated. For example, in 2008 the matai registers showed one title that had been split on sixteen different occasions, bringing the total number of holders to the one title to 238. Titles are also being given to children as young as eight years of age.\(^{52}\)

\(^{48}\) Traditionally, new titles were created only on special occasions when a particular person was being honoured. Some involved the allocation of land and a house site but others were bestowed purely as honorary titles and were not connected to land. On rare occasions, high ranking matai conferred titles as recognition of special service, breaking with the tradition of matai being selected by the ‘aiga. Committee for Review of Matai Titles Customary Land and the Land and Titles Court, Report on Matai Titles, Customary Land and the Land and Titles Court pp19, 41.


\(^{50}\) So'o and Fraenkel, The Role of Ballot Chiefs (Matai Palota) and Political Parties in Samoa’s Shift to Universal Suffrage p342.

\(^{51}\) Meleisea, The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa p203. Norton notes that in cases where a title is split multiple times, effective authority is held by only one or possibly a few co-holders. Norton, Titles, Wealth and Faction: Electoral Politics in a Samoan Village p102.

\(^{52}\) Land and Titles Court, Matai Registers (Government of Samoa, Apia).
A range of factors has contributed to this proliferation. Foremost is voting rights because prior to 1990, only mātai were permitted to vote. During the period of limited suffrage, aspiring candidates would arrange the grant of titles in exchange for votes, establishing the phenomenon of the mātai pālota (ballot chief). It was anticipated that the introduction of equal voting rights would slow the rate of mātai growth, but when universal suffrage was introduced in 1990, the rate of appointments to mātai titles did not slow down.

Also significant to mātai proliferation were population growth and changes to social structures. During the 1970s and 1980s, there was a rise in the number of households because families were choosing to divide into smaller units. As the population grew, land was sub-divided among more branches of the family and therefore new title-holders were required. Thus, although the Land and Titles Court considered splitting to be detrimental to the mātai system, it allowed title-sharing and splitting in order to resolve village disputes. Other contributing factors have been identified such as prestige, the need to meet the aspirations of young men, recognition of community achievements, the building of alliances, and the increasing incidence of mātai moving away from their village resulting in a need for someone remaining in the village to take on the role, in particular to manage the land appurtenant to the title. In addition, acquiring a title meant that men in non-traditional roles, such as businessmen or civil servants, could gain some power within the customary order.

The proliferation of mātai, particularly the practice of splitting of titles have been described as ‘abuses of the system’ and ‘contrary to custom’ and raised concerns that the status of mātai titles would become devalued. Efforts have been made to keep titles in check. In 1969 amending legislation gave the Registrar of Land and Titles the power to de-register titles that were deemed contrary to Samoan custom and tradition. Under this new power, around two

53 So'o and Fraenkel, The Role of Ballot Chiefs (Matai Palota) and Political Parties in Samoa's Shift to Universal Suffrage p342.
54 Ibid. p351.
55 Meleisea, Malama, 2000, 'Governance, development and leadership in Polynesia: a microstudy from Samoa' in Elise Huffer and Asofou So'o (eds), Governance in Samoa: pulega i Samoa (Asia Pacific Press; Institute of Pacific Studies, University of the South Pacific, Canberra, Suva) pp191-192.
57 Ibid.; So'o and Fraenkel, The Role of Ballot Chiefs (Matai Palota) and Political Parties in Samoa's Shift to Universal Suffrage pp343-348.
59 Land and Titles Protection Amendment Act 1969.
thousand titles were de-registered, most of which were obviously inappropriate – some were held by teenagers and others had been created in the names of birds and flowers. A 1975 review of the Land and Titles legislation concluded that matai proliferation was harmful to the land as well as the economy, diminished respect for village administration and hindered the effectiveness of village councils. This view was later reiterated by Meleisea who added that changes to social ordering resulted in an unwillingness for matai to fulfil their communal responsibilities. But in 1978 demonstrations were held when moves were made to deregister a further 1,500 titles that were deemed uncustomary because they were held by more than six people. The protest resulted in the restoration of cancelled titles and the placement of limitations on registrar’s powers.

Aiono as well as So’o and Fraenkel have argued that devaluation has not occurred. Aiono argued that proliferation is simply a ‘special reaction’ to the changes imposed on traditional decision-making processes. In 2005 So’o and Fraenkel suggested that leadership rankings are still clear with older matai being recognized over younger matai and deference going to those matai that live within the village.

In 2010, So’o agreed to head a Commission of Inquiry into the bestowal of titles. The Commission was established on the grounds that the number of titles being bestowed has ‘devalued’ the matai system. At the time this thesis was submitted, the findings of the Commission had been submitted to the Prime Minister and were with Cabinet for approval before public release. However, perhaps partly as a result of his findings, So’o has recently spoken out against the ‘irresponsible’ bestowal of titles, claiming that in some cases the

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61 Meleisea, The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa p234; Meleisea, Governance, development and leadership in Polynesia: a microstudy from Samoa p196.
64 Aiono Fana'afi le Tagaloa, The Samoan Culture and Government p130.
65 So'o and Fraenkel, The Role of Ballot Chiefs (Matai Palota) and Political Parties in Samoa's Shift to Universal Suffrage p345.
selection of matai holders is a ‘reckless process’ with some people treating it as ‘a method of making money.’

3.5.5 Matai authority and the state: an introduction

In addition to their traditional role in fa’asamoa, matai are assured a key role in the functioning of the state through recognition in Samoa’s Constitution and various laws. (Extracts are collected in Appendix A.) As such, the authority of matai is sourced from both fa’asamoa and the modern state. This section begins the examination of the relationship between custom and the state by giving an overview of the state structure and the ways in which matai and custom are recognised by the state. This discussion will be explored in more depth in Chapters 7 to 9 which examine the ways that these two sources operate simultaneously in common realms, and identify the ways in which the hybrid nature of the Samoan state can contribute to the resilience and effectiveness of the polity.

As noted above in 3.2, Samoa established a Westminster style parliamentary system at independence in 1962. However, the Samoan political system is very much a reflection of the customary system from which it emerged. Electoral constituencies are based on traditional district divisions and the legislative assembly is occupied by matai.

As noted by Meleisea:

The Constitution provided something for everyone: a matai franchise and traditional land tenure for the traditionalist; parliamentary democracy, an independent Public service, equality and freedom of conscience under law for the modernists; and individual suffrage for those formerly classed as ‘Europeans’. It gave Samoa a form of government which assumed that traditionalist institutions based on hierarchies governed by collective personal and family loyalties and expediency could live side by side with a legal system

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based upon a set of abstract principles of justice whose primary premise was the rights of the individual.\textsuperscript{70}

Of key consideration in the establishment of the new state were the \textit{tama'āiga} (see 3.3.5) and the \textit{Tūmua} and \textit{Pule} (see 3.3.4). The influence of \textit{tama'āiga} within the contemporary polity is discussed in Chapter 7.2.1.1. The \textit{Tūmua} and \textit{Pule} had traditionally held the authority to bestow paramount titles and it was argued by some that they should thus have a role in deciding upon the Head of State. However, the authority of \textit{Tūmua} and \textit{Pule} was not ultimately recognised in the Constitution.

In addition to stipulating that only \textit{matai} were eligible to stand as parliamentary candidates, the Electoral Act of 1963 specified that only \textit{matai} could vote. \textit{Matai}-only franchise had considerable support because it was regarded by many to reflect customary practises in the way that it took into consideration factors such as age, rank and experience.\textsuperscript{71} However, as discussed further in Chapter 7.2.1.2, a 1990 plebiscite narrowly favoured the introduction of universal suffrage.

There are a number of articles in the Constitution as well as laws that pertain to the authority of \textit{matai} and customary land. These articles and laws establish a role for \textit{matai} within the state system, determining eligibility to hold \textit{matai} titles,\textsuperscript{72} establishing rules and procedures for the management of customary land,\textsuperscript{73} and formalising the roles and responsibilities of village \textit{fono}.\textsuperscript{74} Whilst these laws give state legitimacy to the authority of \textit{matai}, they also serve to limit chiefly authority, for \textit{matai} are subject to the laws of the state and, in their roles in village and national governance, must ensure that the laws of the state are upheld. As far

\textsuperscript{70} Meleisea, \textit{The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa} pp211-212.
\textsuperscript{71} So'o and Fraenkel, \textit{The Role of Ballot Chiefs (Matai Palota) and Political Parties in Samoa's Shift to Universal Suffrage} pp337-338.
as the process of the law is concerned, the state has claimed final authority in matters
previously the domain of custom. However, in relation to customary land and matai titles,
the law applied is still customary law and not the common law or the law of the state. The
Constitution makes this clear and the Land and Titles Court Act establishes that this court can
apply only custom and the law relating to custom, and has the exclusive right to do so.  

The laws of the state also protect the authority of matai in the way that they regulate the use
of titles thereby minimising the ways in which degradation of matai authority might occur.
For example, the use of matai titles is restricted so that titles cannot be used as trademarks or
by non-rightful holders. A name that resembles a matai title cannot be given to a child at
birth.

The relationship between matai and the state as determined by some of these laws will be
examined in greater detail in Chapters 7 to 9 which identify points of complementarity and
incompatibility between these sources of authority.

3.6 Conclusion
Samoans have developed a strong and clearly defined system of governance characterised by
living under the leadership of a matai and occupying land under customary tenure. The
strong social structures within this system are supported through ritual, ceremony, reciprocity
and obligation, ensuring that the system is self-supporting. During the period of direct
foreign influence various actors, including missionaries, commercial settlers and German and
New Zealand administrations, attempted to make changes to the system. However, in the
process of establishing itself as an independent state, Samoa developed a unique system of
government able to accommodate both a Westminster style of government and a strong
chiefly system. Ultimately, in spite of 130 years of attempts by various foreign powers to
transform Samoan social organisation, the system remains largely intact.

The hybrid political system now in operation in Samoa has performed relatively well.
Samoa has a stable government, high rates of literacy and a medium level of development,

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making it one of the higher performing Pacific Island countries. As the expectations and aspirations of Samoa’s citizens change, and as the growing diaspora adds to the exchange of ideas between Samoa and other cultures, successful paths of negotiation between state and customary principles will need to be fostered in order to ensure that the inevitable tensions between the two systems do not have a negative impact and that the benefits of both systems can be capitalised upon.

Samoa is not unique in this regard. The next chapter examines customary governance in Vanuatu and reveals that Vanuatu’s various systems of customary governance have also responded to internal and external forces in their own ways. The experience of colonisation and democratisation in the Pacific could not have been pre-determined and ultimately each country developed its own unique expression of a Pacific Island polity.
Chapter 4  Chiefs, *Kastom* and Governance in Vanuatu

4.1 Introduction
This chapter, which examines chiefship and *kastom* in Vanuatu, highlights the diversity of culture and governance in the Pacific. In contrast to the hierarchical and homogenous nature of Samoa, Vanuatu has more egalitarian social structures that function in a multi-cultural context. Although both countries experienced periods of European administration, the contrasting nature of indigenous governance structures ensured that the interaction with foreign authorities in both places was very different. Thus the impacts of these experiences produced different results for the shape of the contemporary polity. This chapter examines the structure of chiefship and *kastom* and the ways that they responded to the influences of Christianisation, foreign rule and the creation of the nation state.

As with the previous chapter on Samoa, this chapter provides background to Chapters 7 to 9 which discuss in further detail the relationship between *kastom* and the state.

4.2 Vanuatu in context
The Republic of Vanuatu is a place of contrast. Scattered across an archipelago of more than eighty islands, most of which are mountainous and volcanic in origin, Vanuatu’s population of around 234,000\(^1\) is characterised by diversity. The bulk of the population lives in rural and often remote communities spread over at least sixty five of the islands and separated by geographical barriers as well as by culture. Vanuatu is multi-cultural with an estimated eighty one indigenous languages still actively spoken today and an additional seventeen languages declining in use.\(^2\) There are three official languages – Bislama (pidgin), English and French\(^3\) - and many people are multi-lingual speaking at least one indigenous language as well as Bislama plus English and/or French. The majority of the population are of Melanesian descent with only 1.5 percent of the population descending from European, Asian or other Pacific Island cultural groups.

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2. Lynch, John and Crowley, Terry, 2001, *Languages of Vanuatu* (Pacific Linguistics, Research School of Pacific and Asian Studies, Australian National University, Canberra) p4. Lynch and Crowley assert that at least eight additional languages have become extinct.
At independence, Vanuatu was established as a republic, describing itself as a ‘sovereign democratic state’\(^4\) with a fifty two member Parliament. Elections are held every four years with the next scheduled for 2012. The President is the Head of State and is elected by an electoral college for a period of five years.\(^5\) The Prime Minister is elected by Members of Parliament and the executive consists of a Council of Ministers appointed by him.\(^6\) Vanuatu’s parliamentary system allows for members of minority parties, or even independents, to be elected as Prime Minister. The systems of government and law are discussed further in Chapters 7.3 and 8.3.

Vanuatu is considered to have a medium level of development and is placed toward the lower end of the United Nation’s Human Development Index. This ranking reflects the relatively high levels of poverty experienced by much of the population. In real terms this means that, especially in rural areas, people have limited access to health and education services, improved sanitation, improved water sources, transport and other essential services. In 2009, Vanuatu was assessed as being on track to meet only three of the Millennium Development Goals: MDG1 - eradicate extreme poverty; MDG3: - promote gender equality; and MDG4 - reduce child mortality. Progress toward improving maternal mortality rates was deteriorating.\(^7\) This portrayal of poverty in Vanuatu is countered to an extent by the local focus on almost universal rights to land as well as the abundance of food that is available from the natural environment. The ‘subsistence affluence’ that can be found in rural areas is, however, accompanied by limited access to the cash economy and a reliance on imported foods.

Contributing to the diversity of Vanuatu are the foreign-owned resorts, homes and businesses that attract tourists and foreign investors. The majority of these present as a wealthy contrast to the local population and, although Vanuatu relies on foreign investment and tourism for economic growth, increasing levels of foreign speculation exacerbate existing tensions over land.

\(^{7}\) AusAID, Tracking development and governance in the Pacific p62.
Life experiences of ni-Vanuatu\(^8\) vary considerably from place to place as well as over time. Today, over seventy five percent of the population remains rural however the population is quite mobile and people from rural areas commonly spend long periods of time staying with relatives in town. Urban drift is resulting in a steady increase in the size of the few urban centres. Over the last decade the capital, Port Vila, has risen in population from around 29,300 to around 44,000.\(^9\) This places demands upon services and housing and creates challenges for customary practices that were developed to meet the demands of small, subsistence communities.

4.3 Institutions of customary governance

4.3.1 Introduction

This section begins the examination of chiefs and their role in Vanuatu society through an exploration of the chiefly systems that form the foundations of customary governance in Vanuatu. As discussed in Chapter 2.3, customary leadership in Vanuatu, as in other places in Melanesia, is often classified within the ‘big-man’ style of leadership. Unlike the hierarchical and hereditary nature of Samoa’s *fa’amatai*, chiefship in Vanuatu is generally characterised as more egalitarian because big-men traditionally earned their title through pig sacrifice, gifts of food and by personal attribute, rather than through hereditary lines. Big-men hold positions of authority and they can acquire prestige, but their power is limited. This categorisation, however, is simplistic and belies the complexity of leadership styles found in Vanuatu in both the past and the present. For leadership in Vanuatu is acquired and held by a variety of means, adding to the complexity of custom governance as well as its interaction with other forms of governance.

Given the complex nature of chiefship in Vanuatu, it is important to determine who chiefs are. The term chief or *jif* is now well entrenched in Vanuatu, but its definition is vague. Bolton described Vanuatu chiefs as ‘men who have achieved status in local terms, but especially for those men acknowledged by their community as a leader, no matter how that

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\(^8\) The term Ni-Vanuatu is used to denote a citizen or someone coming from Vanuatu. It is derived from the French *né*, meaning born.

leadership was negotiated. Paterson identified the defining characteristic of chiefship as the entitlement ‘to exercise powers of social control’ over members of his community.

A detailed examination of the variety of leadership styles found throughout Vanuatu was conducted by cultural geographer, Bonnemaison. He divided the country into four cultural areas and described the different styles of leadership found in each, applying the term ‘big-man’ only to those islands in the northern-most part of Vanuatu. He described the northern system as one of grade-taking with a big-man hierarchy and the north western islands system as one of grade-taking with a ‘religion-type’ hierarchy. He described the system in the central region as a ‘Polynesian’ style of chieftainship and the system of the southern islands as a title system. Forsyth also provided an analysis of leadership styles that were practiced in Vanuatu during the period from first contact with Europeans to independence. Whilst the diversity and adaptability of traditional leadership in Vanuatu is evident, it is possible to describe two broad categories of society - the graded society and the ranked society. These are examined below.

4.3.2 The graded society
The graded hierarchy was in place in the north and northern-central islands when Europeans made first contact although it is likely that it was relatively new to the archipelago at that time.

This system, which Bonnemaison suggested is as complicated ‘as humanly possible,’ requires aspirants to pass a series of tests, which progressively become more complex and demanding, in order to enhance their status. Both men and women are eligible to participate in grade-taking but, although a high-ranking woman may have more status than a low-ranking male, it

12 Bonnemaison, Joel, 1996, ‘Graded Societies and Societies Based on Title: Forms and Rites of Traditional Power in Vanuatu’ in J Bonnemaison, C Kauffman, K Huffman and D Tryon (eds), Arts of Vanuatu (University of Hawai’i Press, Honolulu) p201.
14 Bonnemaison, Graded Societies and Societies Based on Title: Forms and Rites of Traditional Power in Vanuatu p210.
15 Ibid. p200.
is primarily a male ritual. Jolly, who made a detailed study of grade-taking on Pentecost, observed that grade-taking requires three actors: the grade-takers themselves; the sponsors who are responsible for conferring the title; and, supporters who must supply the pigs (preferably intersexes or tusked boars) and other ritual items.

These rituals are based on factors that are partly elective and partly hereditary for, although all men are theoretically eligible to strive for the highest levels, those from wealthier families or with a strong support base that can provide the necessary ritual items, are at an advantage. Those men that achieve the highest levels must have the personal attributes required of a good leader – they must be respected, successful in economic and personal relations and good at public speaking. The men that reached the highest grades were traditionally considered to have sacred qualities - they could communicate directly with the ancestors and may have set themselves apart from the rest of the community. High-ranking men have the authority to set their own laws and to make new traditions, however their authority is not unlimited as it is also dependent upon their own personal charisma.

In these societies there are also alternative means of achieving status - men have done so by demonstrating skills in warfare, sorcery, exchange or oratory, or by participating in secret societies that hold magical powers.

In the past, grade-taking ceremonies in some places were begun by the parents of a child before it was born. These preliminary grades continued through childhood and into adolescence when aspirants would then move on to participate in adult ceremonies. The frequency of these practices has declined - in Pentecost, childhood grades have reduced in number from as many as fifteen in pre-colonial times to only around two today.

16 Drawing on a range of anthropological sources, Jolly observed that in some places, women participate in secret women-only ceremonies, whilst in other places the ceremony is attached to the male structure. In South Pentecost, where the latter occurs, the women’s rituals are shorter and less significant than the men’s. Women’s titles are conferred by men and they rely on male sponsors. A woman’s own status will be enhanced through grade-taking, but they cannot achieve the higher status that is available to men. (Jolly, Margaret, 1994, Women of the Place: Kastom, Colonialism, and Gender in Vanuatu (Harwood Academic Publishers, Chur, Switzerland and Philadelphia) pp184-187).
17 Ibid. p178.
18 Bonnemaison, Graded Societies and Societies Based on Title: Forms and Rites of Traditional Power in Vanuatu pp200-203.
19 Jolly, Women of the Place: Kastom, Colonialism, and Gender in Vanuatu  p226.
20 Ibid. p182.
21 Ibid. p182.
When Europeans first arrived in Vanuatu, people were able to recall a time in the not too
distant past when the graded society did not exist. This time was remembered as being
marked by warfare, famine and fear. The introduction of the graded society, it was said,
resulted in a new era of peace whereby emphasis was placed on group harmony through
exchange and cooperation rather than individual prowess gained through warfare and
sorcery.  

4.3.3 The ranked society

The competition for leadership that is characteristic of the graded society contrasts with the
hereditary nature of the ranked society found in the southern islands. Here, chiefly titles
share many of the characteristics of Samoa’s *matai*, including that of being handed down
through generations, usually passing from father to eldest son.

Ranked societies consist of three classes: the chief; his core support group; and, commoners.
The chief sits at the head of an ordered set of titles which each owes its allegiance to him.
Thus, when a man receives a chiefly title, he automatically acquires obligations, rights and a
network of alliances. Rankings are also linked with land holdings but, in some instances,
status is inversely related to control over land. That is, the higher a man’s status, the less
control he has over land. In this way peace is promoted because power is not linked with
territory and so warfare effectively becomes pointless.

Oral traditions suggest that the principles of the ranked society were established in around
1000AD by legendary hero, chief Roy Mata, placing the establishment of ranked societies
before that of graded societies.

Bonnemaison related a perception that both graded and ranked societies brought peace to the
islands, but the accuracy of this perception is unclear. Colonial observations that warfare was
endemic in Vanuatu prior to the arrival of missionaries are consistent with the numerous
observations made for other regions of the Pacific. However, it has also been noted that

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22 Bonnemaison, Graded Societies and Societies Based on Title: Forms and Rites of Traditional Power in
23 Ibid. pp212-214.
24 Ibid. p212.
25 For example, Earle, Chiefdoms in Archaeological and Ethnohistorical Perspective’ : Hogbin, H. Ian and
Wedgwood, Camilla, 1953, ‘Local Grouping in Melanesia’ in *Oceania* 23 (4), 241; James, Rank and Leadership
these observations are based on accounts from ethnographers that arrived more than one hundred years after first contact with Europeans. It is likely that much of the violence that occurred during this hundred years was an outcome of the new pressures associated with European contact, such as the introduction of new diseases which triggered accusations of sorcery and an increase in the severity of violence due to the introduction of guns. It is likely that much of the violence that occurred during this hundred years was an outcome of the new pressures associated with European contact, such as the introduction of new diseases which triggered accusations of sorcery and an increase in the severity of violence due to the introduction of guns. Nevertheless, it is significant that ni-Vanuatu today commonly attribute community harmony to the presence of chiefs and the strength of *kastom*.

### 4.3.4 Chiefs in Vanuatu today

Since independence in 1980 chiefs have proliferated, leading Lindstrom to claim in 1997 that almost any man of ability and ambition may call himself a chief in some contexts. My discussions with ni-Vanuatu led me to question this last claim, although it was generally agreed that any man has the potential to call himself a chief.

There are now a variety of chiefly types in Vanuatu. For example, there are ‘custom’ chiefs, ‘non-custom’ chiefs, ‘paramount’ chiefs, ‘community’ chiefs, ‘blood-line’ chiefs, ‘elected’ chiefs (and some men are chiefs only ‘in their own kitchens’). Because Vanuatu’s population is mobile, a man may assume chiefly status whilst living in town, but this status may not be recognised on his home island. Furthermore, there is now a practice of conferring politicians and other men of high standing with chiefly titles. These titles are theoretically honorific, however it appears that the ability of non-custom chiefs to exercise chiefly powers is not questioned to any extent. Anecdotal evidence also suggests that there is a growing emphasis on blood-line as a requirement for recognition.

Vanuatu does not have a system for registering chiefs, so the exact number of chiefs is not known. Using the rule of thumb of one chief per village, in the mid 1990s it was estimated that there were at least 2,200 chiefs. However, the term ‘chief’ can be used to indicate a group of men with authority, so it would appear that the rule of one chief per

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26 Forsyth, Leadership structures and dispute systems in Vanuatu from first contact to Independence pp69-70.
27 Lindstrom, Chiefs in Vanuatu Today p211.
29 Lindstrom, Chiefs in Vanuatu Today p220.
village is applying this use of the term – chiefs and spokesmen of all ranks are being counted as one. In the past, there were areas that had neither chiefs nor graded society and today there may still be villages without chiefs.

4.4 Response to external forces

4.4.1 Introduction

Vanuatu has been inhabited for about four thousand years, but it is the period since European settlement that most clearly shaped modern chiefship. This period saw the arrival of Christian missionaries in the 1830s, the arrival of traders in the 1840s and the establishment of joint administration by Britain and France in 1907. Moves toward independence gained momentum in the 1970s and the Republic of Vanuatu was established in 1980.

The colonial period in Vanuatu has been described as ‘one of the bloodiest and most difficult efforts in the Pacific.’ This description gives some indication of the level to which customary structures were challenged as well as the ability of those structures to maintain strength during the inevitable transformations of the economic, religious and political landscapes. The systems of authority in place at the time that missionaries and traders arrived in Vanuatu came to be appreciated by the Europeans over time, but even though some Europeans demonstrated support for local leadership, Christianity and colonisation inevitably altered local structures. Of particular significance was the shift in the authority of the big-man which resulted in the emergence of the contemporary chief.

The three key influences on customary structures during this period were Christianity, private traders and consortiums, and the Anglo-French Condominium. The impact of each of these on customary governance is examined below.

31 The first European to explore the region was Spaniard Pedro Fernández de Quirós, who was responsible for the naming of Espiritu Santo in 1606. The French explorer, de Bougainville sailed through in 1768 and Britain’s James Cook charted the archipelago in 1774 giving the entire group of islands the name of New Hebrides. (Strathern, Andrew and Stewart, Pamela J., 2002, ‘Vanuatu’ in Andrew Strathern, Pamela J. Stewart, Laurence M. Carucci, Lin Poyer, Richard Feinberg and Cluny Macpherson (eds), Oceania: An Introduction to the Cultures and Identities of Pacific Islanders (Carolina Academic Press, Durham, N.C.) p25).
32 Bunge and Cooke Oceania, a regional study p235.
4.4.2 Christianity

When missionaries arrived in the archipelago in 1839, ni-Vanuatu were living in tribes of seventy to three hundred people and held territories of a few square kilometres. Although these tribes shared rituals, traditions and economic practices, they were not politically united. They had no religious centres or unified corporate activities and, in contrast to Samoa, alliances across the archipelago were weak and there was no common language. This made the task of introducing new ideas more difficult, and although Christianity is now a driving force in Vanuatu, it did not take hold as easily or peacefully as it did in Samoa.

People were suspicious of strangers and were initially hostile, leading to such a strong response by some missionaries that Regenvanu described the period as one of ‘psychological warfare.’ In one especially bleak episode in 1848, warships were sent to bomb villages when locals resisted the efforts of a Canadian Presbyterian missionary. There were also incidents where medicines were withheld from the dying if they refused to convert. However, in spite of these setbacks and the difficulty that the diversity of language presented to the translation of religious literature, by the mid-1850s some locals had agreed to be trained as church leaders, some reaching the level of deacon. These people became influential in allowing Christianity to take root.

Although some attempts were made by foreigners to recognise local authority, the work of missionaries de-valued customary practices thereby undermining customary authorities. Practices that were notably different came to be expressed by ni-Vanuatu in opposition - for example clothed/naked, Christian/non-Christian. As has been the experience of other colonised peoples, these expressions of opposition resulted in customary practices taking on an inferior status. In opposition to skul (school), kastom was associated with a ‘time of

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33 Christians made first contact in the archipelago in 1606 when, in a misguided attempt to introduce Christianity, Spanish explorers kidnapped three boys from Espiritu Santo with the intention of sending them to Mexico to train them as interpreters for a Catholic mission. (Lange, Island Ministers: Indigenous Leadership in Nineteenth Century Pacific Islands Christianity p247.
34 Hogbin and Wedgwood, Local Grouping in Melanesia p242.
35 Ibid. p252.
37 Bunge and Cooke Oceania, a regional study p236.
38 Regenvanu, The Changing Face of "Custom" in Vanuatu; Bunge and Cooke Oceania, a regional study p236.
40 Lange, Island Ministers: Indigenous Leadership in Nineteenth Century Pacific Islands Christianity p252.
darkness.’ Skul represented education as well as religious, economic and political ways of life that were promoted by missionaries and expatriates as morally and practically superior, whilst kastom was regarded as inferior. A distancing from the graded system was evident, for example, when eating classes were dismantled and men from the highest class began to cook and eat with men from the lowest classes as well as with women and children. Such a change shortened the distance between chiefs and their followers. Christian converts came to be favoured over hereditary leaders and practices which supported the status of men, such as pig-killing, kava drinking and secret societies, were targeted by missionaries as being negative. The highest office became that of missionary, a position that was unobtainable by local men. The Presbyterians were particularly controlling, restricting customary practices and establishing their own systems of government and law enforcement. For example, in the late nineteenth century, Presbyterian missionaries in central Vanuatu regrouped hamlets into larger villages, giving authority to a single chief who ruled with the assistance of church elders. Such efforts introduced a new construction of authority and in this way missionaries disempowered rather than supported local forms of authority.

This undermining of local leadership meant that, when pro-active locals took control of the communication, interpretation and implementation of Christian knowledge, Christian beliefs, practices and leadership structures were able to gain in strength. Support for Christianity continued to increase and by 1930, Anglicans, Roman Catholics, the Church of Christ, Presbyterians and Seventh Day Adventists were all active and almost half the population had converted to Christianity. Melanesian values such as kinship and community obligation,

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42 Bolton, Lissant, 2003, Unfolding the Moon: Enacting Women's Kastom in Vanuatu (University of Hawaii Press, Honolulu) p11; Jolly, Margaret, 1982, 'Birds and Banyans of South Pentecost: Kastom in Anti-colonial Struggle' in Mankind 13 (4), 338 p339. Bolton charts the work done by the Vanuatu Cultural Centre, highlighting the ways that levels of awareness of kastom have been raised through radio programs and festivals. In particular, she demonstrates the ways that women participate in kastom, arguing that kastom had previously been portrayed as the preserve of men.


45 Rubinstein, Knowledge and Political Process on Malo p143.

46 Forman, The Island Churches of the South Pacific: Emergence in the Twentieth Century pp45-46.


caring and sharing aligned quite easily with those of Christianity\textsuperscript{49} and Christianity slowly became indigenised and utilised for more traditional requirements.

Over time the missions became very active in the community, establishing services that neither the customary authorities nor the Anglo-French Condominium government provided. The missions opened schools, dispensaries and hospitals. The Catholics provided nurses for the three French government hospitals and the Presbyterians printed literature in over thirty languages. Although few of the teachers were trained and there were no secondary schools, these church-instigated services were vital.\textsuperscript{50}

Local perceptions of Christianity came to be crucial when the push for independence emerged in the 1960s and 1970s. Due to the heavy involvement of the missions in education (and the corresponding lack of state involvement) nearly all indigenous leaders at that time were Christian.\textsuperscript{51} Although Christianity had successfully diminished the regard for \textit{kastom}, during this period indigenous church/political leaders were successful in reversing this stance. By replacing the view that Christianity and \textit{kastom} were in opposition with the view that Christianity and \textit{kastom} were in accord\textsuperscript{52} they served to elevate the status of \textit{kastom} and customary authorities.

\textbf{4.4.3 Traders}

In the 1840s, at around the same time that missionaries were venturing into the islands, commercial players, particularly from Britain and France, began to establish themselves in Vanuatu. As a result, the local economy was transformed. Business negotiations between ni-Vanuatu and Europeans resulted in items such as tools, beads and tobacco being exchanged for the use of land.\textsuperscript{53} Subsistence farming was replaced in some areas by cash crops when

\textsuperscript{49} Keesing, Kastom in Melanesia: An Overview p300.
\textsuperscript{50} Forman, \textit{The Island Churches of the South Pacific: Emergence in the Twentieth Century} pp47-48.
\textsuperscript{52} Ibid. p161; Keesing, Kastom in Melanesia: An Overview p300; Lindstrom, Leftamap Kastom: The Political History of Tradition on Tanna, Vanuatu p323.

Such a transformation placed new pressures on customary authorities which were, ultimately, responsible for ensuring that local economies were functioning smoothly. In addition to reducing the reliance on subsistence farming, the new focus on cash diminished the value of items such as pigs, tusks, mats and shells which customary leaders accumulated to shore up their status.

The relationships between the indigenous population and Europeans as well as between British and French settlers were never easy and disputes, particularly over land, became commonplace. Land was an especially contentious issue largely because land tenure arrangements were not clearly understood or honoured by both sides. It is generally agreed that in pre-contact Vanuatu it was not possible to sell land. It could be given as a gift, a practice that was later extended to non-indigenous people,\footnote{Paterson, Don, 2005, *Indigenous Tribunals for Settlement of Disputes About Customary Land in Vanuatu - Some Issues Outstanding* Conference Paper presented at International Conference on Peace, Justice and Reconciliation in the Asia-Pacific Region, Australian Centre for Peace and Conflict Studies, University of Queensland 31 March - 3 April p14.} but in general, agreements pertaining to the use of land were understood by ni-Vanuatu as temporary or lasting only for the lifetime of the receiving individual. This practice was not clearly understood by foreigners who believed they were buying exclusive rights to land, and so when Europeans began settling in the islands, they set in motion an ongoing pattern of land tenure disputes.\footnote{Van Trease, Howard, 1984, 'The History of Land Alienation' in Peter Larmour (eds), *Land Tenure in Vanuatu* (Institute of Pacific Studies, University of the South Pacific and University of the South Pacific Extension Centre, Suva, Fiji) pp19-20; Van Trease, *The Politics of Land in Vanuatu*.}

In addition to these arrangements being poorly understood by both sides, deals were made under very dubious circumstances and payments were sometimes trivial in comparison to the actual value, often determined by the value of a loan rather than a sale.\footnote{Farran, Sue, 2002, 'Land in Vanuatu: Moving Forward, Looking Backward' in *Revue Juridique Polynesienne* 2, 213 p215; Van Trease, *The Politics of Land in Vanuatu* pp15, 27.}

By the early twentieth century an individual company, Compagnie Caledonie des Nouvelles Hebrides, had made claims on a significant proportion of the total land area.\footnote{Van Trease, The History of Land Alienation p18.} Accounts of
the amount of land alienated vary, but it is evident that perhaps as much as fifty percent of land came to be foreign owned. Paterson assessed that only twenty percent of land was alienated, but he argued that this represented around half of workable land since foreigners had acquired much of the flat, open areas of land close to settlements. Exacerbating the problems of land alienation were the inappropriate allocations made by colonisers who did not appreciate that the local practice of shifting cultivation meant that people required more land than they would use at any one time. As such, locals were allocated plots that were too small to sustain them. In an attempt to slow the rate of land alienation, missions began acquiring land and placing it in trust for ni-Vanuatu.

4.4.4 The Anglo-French Condominium
Colonial efforts to supersede local authority were crystallised when Britain and France established joint administration of the Anglo-French Condominium of the New Hebrides in 1907. However, although undermined, customary structures continued to function and hold relevance in communities throughout the archipelago. And although the joint approach to colonisation meant that the diverse collection of islands and cultures had become one administrative entity for the first time, as had been the case before colonisation, there was little sense of unity. Competition continued to exist not only between indigenous communities, but between the two administrations as well. This competition was evident in the opposing attitudes that Britain and France had to the colony and its inhabitants. Britain was reluctant to take on new colonies and demonstrated some concern for protecting the interests of the indigenous population while asserting Britain’s sphere of influence in the Pacific. France, on the other hand, was concerned with French settlement of the islands and the protection of its own nationals while it pursued broad claims to neighbouring island groups such as Wallis and Futuna and New Caledonia. It did not try to curb the excesses of

Initially there was no system for legalising land claims - British nationals could register their claims in Fiji and French nationals could register theirs in Noumea, but there were no legal guarantees of ownership. In 1906, a convention came into force allowing for registration of land titles and establishing a set of procedures for dealing with land claims. However, this convention primarily allowed for European claims, disadvantaging ni-Vanuatu. (Ibid, pp18,20.)

63 Convention between the United Kingdom and France Concerning the New Hebrides, 1906., www.paclii.org
its nationals but rather supported the position that the ‘civilised’ nations would inevitably dominate the world. This rivalry between British and French interests extended to the churches - the Anglican and Presbyterian missions aligned themselves with the British administration whilst the Catholic missions aligned themselves with the French. Divisions between the two camps were reinforced by arrangements that resulted in two completely separate structures of administration.65

One of the key tasks of the Condominium was to resolve the matter of land and it chose to do this in a variety of ways. Disputes between ni-Vanuatu remained subject to customary mechanisms: conciliation, whereby disputants would call upon leaders of the community to assist them in coming to a mutually satisfactory agreement; a chiefly decision whereby a chief or chiefs would determine the outcome; or physical force such as fighting, burning of houses or plundering of gardens – such force would continue until one party yielded. If no agreement could be reached, a dispute would continue, sometimes for generations.66 The Condominium government introduced some additional methods which took land, one of the key concerns of customary governance, outside the direct control of customary authorities. The Joint Court, established in 1906, had the authority to make final judgements which were recorded by a registrar of land titles.67 It was used mostly by Europeans against other Europeans or by Europeans against locals.68 Six Native Courts had the jurisdiction to deal with all civil matters involving only indigenous people. Resident agents, who administered the four Administrative Districts, were sometimes called upon to assist with dispute resolution even though they did not have the formal powers to do so.69 Land continues to be a source of conflict in Vanuatu and, as will be discussed in Chapter 8.3.4, customary dispute resolutions continue to operate along with mechanisms more recently introduced by the state.

Soon after the Anglo-French Condominium was established, it created positions of local authority. In those places where there were no chiefs, such as in south Pentecost, the

68 Ibid. p3.
government appointed them\(^{70}\) and in other places, the position of assessor was established. These created positions provided a direct link between the colonial authorities and the people, facilitating the restructuring of legal systems and allowing laws of the British and French authorities to be administered. Initially the task of the assessors was to advise on cases brought to the Native Courts, but their duties later expanded such that they had the authority to settle minor disputes.\(^{71}\) Assessors were generally chosen for their literacy skills and their ability to speak either English or French, but the more ambitious used their externally recognised authority to lay claims on chiefly titles. In some places, locals managed to resist attempts to appoint assessors, however in others, assessors were accepted and sometimes regarded as beneficial. Unlike locally recognised leaders, assessors had the legal authority to mediate in conflicts between groups that recognised different systems of kastom governance. As such, their involvement in dispute resolution was sanctioned by local leaders.\(^{72}\)

Government-appointed chiefs were generally high-ranking, influential men and sometimes well-respected church leaders, although Jolly points out that it was the lesser ranking men that were later appointed.\(^{73}\) The task of these chiefs was to negotiate in dealings between their communities and the government. In order to successfully fulfil the requirements of the government, a chief theoretically needed some education, knowledge of the Native Criminal Code and the ability to act in a neutral manner when exercising his functions.\(^{74}\)

Philibert pointed to the introduction of these new appointments as contributing to a decline in chiefly authority. He noted that the responsibility for maintaining law and order was diminished and that government agents were given the authority to request that a chief be replaced once he became old or sick. The chief’s task became more complex and difficult as his followers expected him to find ways for them to participate in the national economy whilst simultaneously maintaining community autonomy.\(^{75}\) Thus, in the century prior to independence, the structure of chiefly authority changed radically. The reciprocal

\(^{70}\) Jolly, *Women of the Place: Kastom, Colonialism, and Gender in Vanuatu* p49; Philibert, Will Success Spoil a Middleman? The Case of Etapang, Central Vanuatu pp194-195.


\(^{72}\) Rodman, Gaps, Bridges and Levels of Law: Middlemen as Mediators in a Vanuatu Society pp72-74.

\(^{73}\) Jolly, *Women of the Place: Kastom, Colonialism, and Gender in Vanuatu* pp49.

\(^{74}\) Philibert, Will Success Spoil a Middleman? The Case of Etapang, Central Vanuatu pp195-196.

\(^{75}\) Ibid. pp194-198.
relationship that was established between local leaders and administrators and missions, allowed men who had been nominated by external authorities to gain some credibility in their communities as chiefs. Men who had been appointed by the government as chiefs or assessors, or been appointed by the church as Elders, were able to cultivate leadership status.

The recognition of chiefly authority was altered once again when a Representative Assembly was established by the Condominium government in 1974, formalising chiefship as a distinct category. The Assembly represented special interest groups within the community, including four chiefs who were to represent kastom. Bolton identified this as a key moment for chiefly authority because, for the first time, chiefs were acting above the local level. More significant, she asserted, was the conflation of chiefs and kastom. Chiefs became spokesmen for kastom in non-traditional contexts and, furthermore, they were selected by the non-customary process of election. Bolton stated that:

this new role for chiefs as representing kastom significantly, and subtly, underlines the identification of chiefs as traditional leaders – not as a matter of European perception, but of local practice.  

The establishment of the Representative Assembly was followed by the formation of the National Council of Chiefs, later to become the Malvatumauri, in 1977. The council ‘formalised the existence of chiefs throughout the archipelago’ and provided chiefs with a role as advisors of kastom. The Malvatumauri is now an important focal point for chiefs and it has demonstrated its influence as a negotiator and arbiter for the community and in community/state relations. The role of the Malvatumauri and its relationship with the state is discussed further in 4.5.5 below and in Chapter 7.3.1.

Although ni-Vanuatu accepted or conceded to some aspects of foreign intervention, political protests had been staged by ni-Vanuatu as early as 1905. The Protestant Church was also politically active and was especially critical of French treatment of the indigenous population. It had been instrumental in the creation of the Anglo-French Condominium, viewing it as a way to halt unscrupulous land deals and improve the working conditions of indigenous labourers. After the Condominium was established and conditions did not improve, the

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76 Bolton, Chief Willie Bongmatur Maldo and the Incorporation of Chiefs into the Vanuatu State p5.
77 Bolton, Chief Willie Bongmatur Maldo and the Incorporation of Chiefs into the Vanuatu State p9.
78 Bunge and Cooke Oceania, a regional study p237.
churches advocated for British annexation. The General Assembly of the Australian Presbyterian Church campaigned so strongly that at one point it gathered 40,000 signatures for a petition calling for an end to the Condominium. They were unsuccessful in ending French rule, but managed to persuade the British to stay.\textsuperscript{79}

Anti-colonial and anti-Christian movements emerged in 1940 when the John Frum Movement called for a return to customary practices, but the gaoling of the movement’s leaders by the Condominium government helped keep overt advocacy for kastom at bay for a time.\textsuperscript{80} It was not until the 1960s when the consequences of land ownership began to be fully appreciated that political opposition from ni-Vanuatu mounted, spearheading discussions of independence. By this time, ni-Vanuatu had been exposed to an influx of previously unknown material goods, especially during the Second World War when American military personnel were based in the region.\textsuperscript{81} Ni-Vanuatu were keen to reap some of the benefits of development for themselves. It was also in the 1960s and 1970s that Britain began to push for independence. France remained reluctant to concede its authority partly, it would appear, because the Pacific region was useful for nuclear testing. Instead it made efforts to strengthen its foothold by increasing the level of services, attempting to make French the dominant language, and placating locals by returning tracts of land.\textsuperscript{82} But by this time there were significant forces amongst local opposition. Chief Jimmy Stevens led the Nagriamel movement on the island of Espiritu Santo, advocating for a confederation of independent states with a more traditional style of leadership.\textsuperscript{83} Also pushing for change was the small band of ni-Vanuatu who had gone overseas to study and who had simultaneously gained a new level of appreciation of their own statelessness. For people such as Walter Lini and Grace Molissa, who were both to become important political figures, this status was symbolically signified by their lack of a passport – a situation that clearly distinguished them

\textsuperscript{79} Forman, \textit{The Island Churches of the South Pacific: Emergence in the Twentieth Century} p48.
\textsuperscript{80} Lindstrom, Leftamap Kastom: The Political History of Tradition on Tanna, Vanuatu p323.
\textsuperscript{81} The excesses of consumption by American WWII military personnel are still evident in Vanuatu today. On the island of Efate there is a beach that still has remnants of Coca-Cola bottles that were imported in huge numbers. In Espiritu Santo, Million-Dollar Point has been so-named because of the enormous quantities of equipment and food that were dumped by the American military when they departed.
\textsuperscript{82} Van Trease, The Colonial Origins of Vanuatu Politics pp14-20.
from students from other countries. On his return to Vanuatu, Walter Lini took up the position of head of the New Hebrides Cultural Association which soon became a nationalist political party, the Vanua’aku Pati.

In 1975, the Vanua’aku Pati won all the elected seats in the newly established Representative Assembly and a timetable for independence was negotiated. As with many of the Pacific Island countries, the process of making the Constitution was consultative. The Council of Ministers, which consisted of five ministers from each of the two major political parties, established a Constitutional Planning Committee represented by political parties, chiefs, women and churches. Decisions of the Committee were made by consensus. The Committee prepared the Constitution, but the process was influenced by foreign advisers, and changes were imposed at a constitutional conference organised by the British and French authorities. The Constitution was enacted in 1979 through an Exchange of Letters between Britain and France.

The period leading up to independence was marred by further political struggle, particularly that led by Jimmy Stevens who claimed that Espiritu Santo was itself independent. Protesters in Tanna also demanded political autonomy and led a fatal attack on a government station.

The Vanua’aku Pati was re-elected in 1979 and Vanuatu gained independence in July 1980, but it was in a period of turmoil that the people of Vanuatu were faced with the difficult task of establishing a unified nation state. The systems of government and law of the new state are outlined in 4.2 above and in Chapter 8.3.

4.5 The authority of chiefs in Vanuatu today

4.5.1 Introduction

As has been demonstrated above, chiefship in Vanuatu today is the outcome of a diversity of influences. It was transformed by the colonial past and continues to adapt to the modern, globalised environment in which it functions today. The outcome of this process of change impacts upon the way that chiefs exercise their authority, determining their jurisdiction and

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84 Observation made to author in 2008 by the wife of a long-term ni-Vanuatu politician.
85 Strathern and Stewart, Vanuatu p25.
legitimacy. Chiefs in Vanuatu today derive their authority from two sources: kastom and the state. These two domains are examined below.

4.5.2 Kastom

Chiefs have successfully claimed the right to represent and preside over kastom and it is kastom that provides a key source of authority for chiefs. But like chiefship itself, kastom has undergone a series of changes since colonisation to adapt to the contemporary context.

The study of kastom and the role of chiefs in Vanuatu differs markedly from the studies of fa’asamoa and fa’amatai. The key differences perhaps emanate from the origins of the drivers of the discourse. Samoans have demonstrated a thirst for examining and writing about their own culture whereas published studies of kastom are predominantly authored by foreigners. Samoa has produced an active community of academics whose examinations of fa’asamoa and fa’amatai are largely influenced by political science. The published research on kastom in Vanuatu has largely been driven by anthropologists and lawyers who together have generated a large body of work, particularly since the lifting of the research moratorium in 1994.\(^88\) One notable indigenous voice on kastom is Ralph Regenvanu\(^89\) who has been active in discussions of kastom through his work with the Vanuatu Cultural Centre and, more recently, through his work as a politician.

An important foundation for the study of kastom was laid in 1982 with the publication of a special issue of Mankind. Lindstrom, Jolly, Tonkinson, Keesing and Larcom, building on their earlier work, each made contributions to this collection. In her doctoral thesis on kastom in contemporary Vanuatu, anthropologist Rousseau provided a review of the key anthropological literature produced since this publication, highlighting three approaches which she referred to as: ‘kastom as practice, kastom as objectification and kastom as assertion of difference.’\(^90\) Forsyth also examined the literature on kastom, arguing that kastom covers two distinct categories: the material and ceremonial aspects which include

\(^88\) The nine year moratorium which was imposed in 1985 largely prevented research by expatriates. During this period, however, important work on the documentation of kastom continued to be carried out by the Vanuatu Cultural Centre fieldworkers. See Bolton, *Unfolding the Moon: Enacting Women’s Kastom in Vanuatu*


practices such as kava drinking and mat weaving as well as rituals and traditional knowledge; and, *kastom* as a way of life.\(^91\)

In spite of the plethora of literature on *kastom*, a definition that fully incorporates the multiple usages of *kastom* has not yet been produced.\(^92\) But as noted by Lindstrom, although no-one agrees on the meaning of *kastom*, it is a symbol understood by all.\(^93\) Keesing argued that it is the very lack of definition that gives *kastom* its power – ‘it can mean (almost) all things to all people.’\(^94\) Tonkinson agreed, claiming that *kastom*’s ‘utility as a rallying point depends heavily on its confinement to an ideological level, indivisible and unexamined.’\(^95\)

*Kastom* is distinct from culture in the way that it offers a choice – ni-Vanuatu can choose to operate within the sphere of *kastom* or the sphere of ‘not-*kastom*’ and the choice will be determined by the intended outcome.\(^96\) Almost all ni-Vanuatu demonstrate their link with *kastom* by speaking an indigenous language, participating in customary ceremonies and living in communities governed according to customary principles.\(^97\) But in the globalised context of Vanuatu, the spheres of *kastom* and not-*kastom* can easily become blurred. Lindstrom recalled that at independence the Constitution was signed on a stone on which a pig had been killed\(^98\) sending a clear signal that the newly created state had not divorced itself from customary values. Lindstrom also described the differences between *kastom* and ‘modern’ circumcision ceremonies, noting that calico, which is presented as a gift in *kastom* ceremonies, has been redefined as a *kastom* object. Tonkinson noted that string bands have come to be regarded as distinctly ni-Vanuatu, yet their guitars and ukuleles originate from elsewhere.\(^99\) In 2007, Prime Minister Ham Lini held a reconciliation ceremony with Deputy Prime Minister Edward Natapai to forgive him for organising a series of motions of no confidence in 2004. The ceremony involved the payment of the highest *kastom* fine of ten

\(^92\) Bolton, *Chief Willie Bongmatur Maldo and the Incorporation of Chiefs into the Vanuatu State* 1; Rousseau, *The Achievement of Simultaneity: Kastom in Contemporary Vanuatu* p23.
\(^98\) Lindstrom, *Chiefs in Vanuatu Today* p222.
tusked pigs, kava and food and was performed in traditional dress at the Chiefs’ Nakamal. Although both men hold chiefly titles, the act of forgiveness pertained directly to their positions within the state system of parliament. In cases such as these, it is likely to be the invocation of *kastom* that takes on the greater significance. That is, reconciliation between the two political parties was less significant than the legitimacy that was afforded the men through the demonstration of *kastom*.

The positive aspects of the revival of *kastom* that occurred in the 1970s are tempered to an extent by the tendency, particularly of ni-Vanuatu, to romanticise *kastom* - it allows people to believe themselves to be something which they are not. As noted by Lindstrom, *kastom* represents an endeavour to ‘reformulate social groups by revising and recycling group charter myths. It is an attempt to read the present in terms of the past by writing the past in terms of the present.’ The tendency to romanticise *kastom* can sometimes be observed in the literature. For example, in his report on the Customary Land Tribunal process (discussed in Chapter 8.3.3.4), ni-Vanuatu author Joel Simo stated without any qualification that *kastom* law ‘efficiently resolves land disputes because it ensures peace and community harmony.’

In an alternative report, expatriate Paterson provided a contrasting point of view, asserting that traditional methods of dispute resolution include the use of physical force (including the burning of houses and plundering of gardens) to expel a party from land. He claimed that unresolved disputes may simmer for generations. The romanticisation of *kastom* is unhelpful in the way that it reinforces the ‘subsistence affluence’ perspective which takes the view that all ni-Vanuatu are guaranteed access to land, food and other basic necessities. This perspective tends to overlook instances where social protection (discussed in Chapter 9) is inadequate.

### 4.5.3 Kastom governance

Operating in the domain of *kastom*, chiefs in Vanuatu are guided in their decisions by principles that apply to the particular systems of governance that operate in their own

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communities. For ni-Vanuatu, *kastom* governance is understood as a rigorous system or, more accurately, a set of systems. Each language group, or even clan within that group, may have its own distinct system of governance and as such, there are countless systems currently in operation. However as a system, *kastom* governance is largely undocumented and rarely discussed in detail outside the local communities to which it pertains.

It appears that the term ‘*kastom* governance’ has only recently entered the discourse, likely influenced by the popularisation of governance in the global development discourse. As noted by a member of the Malvatumauri, *kastom* is not generally perceived as a system of governance and chiefs themselves are only beginning to explore the meaning and implications of *kastom* governance. This process has been facilitated by the *Kastom Governance Partnership* with the Australian Centre for Peace and Conflict Studies. The partnership aims to explore issues surrounding *kastom* governance, peace-building and development processes.  

*Kastom* governance has been approached in the literature in various ways, each exploring different aspects of governance. Chiefly authority has been studied by linguists and anthropologists such as Lindstrom, 105 Bonnemaison 106 and Bolton, 107 who have discussed social organisation, power structures and the evolving nature of chiefship in Vanuatu. Chiefly authority has also been discussed by women’s rights advocates who have spotlighted practices that effectively remove women from decision-making processes. 108 Forsyth 109 and

106 Bonnemaison, J, 1984, 'Social and Cultural Aspects of Land Tenure' in Peter Larmour (eds), *Land Tenure in Vanuatu* (Institute of Pacific Studies, University of the South Pacific and University of the South Pacific Extension Centre, Suva, Fiji); Bonnemaison, Graded Societies and Societies Based on Title: Forms and Rites of Traditional Power in Vanuatu.
107 Bolton, *Chief Willie Bongmatur Maldo and the Incorporation of Chiefs into the Vanuatu State*.
Paterson\textsuperscript{110} have taken a legal pluralist approach, exploring the relationship between the formal state and customary systems of justice and arguing a case for more linkages between the two. White identified a need to develop a greater understanding of systems of governance in Melanesia and the implications of these for development.\textsuperscript{111} Drawing upon these sources, the key features that are common to systems of *kastom* governance can be identified.

*Kastom* governance is concerned with codes of conduct, ethics and values, aiming to maintain harmony, unity and cooperation. According to *kastom* there is a way of doing things and there are consequences for doing or not doing them. *Kastom* does not assess what ought to be, but rather is concerned with how people act and are bound to act according to the laws of cause and effect.\textsuperscript{112} The principle concern of *kastom* governance is management of the environment and the people that live within it. It governs the production, use and management of resources, incorporating roles and responsibilities within the community, as well as modes of behaviour and self-management. More specifically *kastom* governance pertains to: the regulation of kinship relationships; prohibitions such as theft, assault or access to certain areas; protection of the environment; and, respect.\textsuperscript{113}

Underlying *kastom* governance is the connection to place. It is understood very much as an ‘on-the-ground’ system, connected with land and therefore unique to a particular group of people that inhabit that place. This group may be a community, or a tribe or clan within a larger community. Whilst there are commonalities between systems, specific practices may not be applicable outside that community. Further, if a group moves to a place where a system already exists, they must observe the practices of that new place.

Different systems of governance may give emphasis to different aspects of life. For example, my field research in Vanuatu included discussions on the meaning of *kastom* governance with members of the Malvatumaui as well as local chiefs and community leaders in Port Vila. These respondents had either participated in or were aware of discussions of *kastom*.


\textsuperscript{111} White, *Indigenous Governance in Melanesia*.


\textsuperscript{113} Forsyth, *A Bird that Flies with Two Wings: Kastom and State Justice Systems in Vanuatu* p110.
governance that were being generated in part by the *Kastom Governance Partnership*. As such, they had already given some consideration to the meaning of *kastom* as well as their willingness (or not) to share their knowledge with others. Some of these respondents described the system of governance that operates in the community from which they originated.

One community leader from the island of Ambae described the system in his community as consisting of three pillars that provide the foundations for modes of behaviour and, importantly, self-management. The three pillars are concepts that incorporate notions of:

- *Rongo Rongo Huri*: Obedience, listening and humility
- *Olo Olo*: Respect
- *Tambe Tambe Leo*: Honouring expectations - honouring what the community expects of you and honouring your own place within the community.

From these pillars come other concepts such as love, the need to express good things about others, and the benefits of helping others. The three pillars of governance are an inbuilt system for managing one’s self and one’s community. They provide purpose and should be applied to everything that a person does - they can be recalled when dealing with other people or when faced with important decisions. This system of *kastom* governance reminds people to give thought to their own particular circumstances and to consider how their choices will impact upon their own lives.

A community activist and political adviser from the island of Tanna described the system of governance operating in his community as giving emphasis to communication and resource management. The system, known as *Kiribunga*, has two primary kinship-based networks – *Namruke* and *Kawiameta*. Each of these networks has a chief and other positions of authority. A third network, *Fana*, comes from intermarriage between the networks. Within the networks people have specific responsibilities for management of the environment and production. For example, people may have responsibility for controlling the weather, caring for the land or cultivating crops. The networks are also responsible for arranging communications between villages on the island, particularly for important events such as marriages or other ceremonies.
Central to *kastom* governance is chiefly authority and its relationship of reciprocal support with the community. This arrangement of reciprocity between the chief, his council and the community is essential to the functioning of the system and is maintained in a variety of ways:

- Consensus decision-making
- Respect
- Fulfilment of obligations to one’s self and one’s community, tribe or clan
- Fulfilment of needs - the community augments the authority of the chief and his council and, in return, the chief and his council ensures that the material, spiritual and environmental needs of the community are met.

Respect is one of the key elements of *kastom* governance. It is ‘the cornerstone of the *kastom* system and the glue that holds society together.’ In a survey of forty-six indigenous languages, Bolton found that there were at least two words for respect in each. Each word had a slightly different meaning, referring to different aspects and understandings of respect. Respect encompasses a range of behaviours and involves:

- living harmoniously and peacefully with others; looking after community and family members and the environment; observing social norms; participating in and supporting cultural practices; acting with appropriate behaviour; and
- honouring and obeying community leaders and also various kinship relations.

Respect is demonstrated by both chiefs and communities by, amongst other things, listening and obedience. The concepts of listening and obedience are so closely aligned that in some indigenous languages they are inseparable, having one word to incorporate both. Narokobi discussed the importance of obedience, suggesting that Melanesians are conditioned to obey rather than make conscious decisions to obey. Perceptions of loss of respect are discussed in 4.5.4 below.

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114 Ibid. p115.
Land is integral to ni-Vanuatu existence and identity and so is firmly tied to kastom. Traditionally, land tenure systems in Vanuatu varied considerably from place to place as well as across time, however all systems were based on either patrilineal or matrilineal lines of descent. In patrilineal systems, rights passed down the male line, usually from father to son. In matrilineal systems, women held rights to land but it was managed by male kin, usually uncles and brothers. In some areas, a chief was regarded as the owner of land even though it was occupied by a community. In others, portions of land were held by individuals for their lifetime but reverted back to the community upon their death. Systems were generally flexible, allowing decisions to be made according to current social and political circumstances. Chiefs play an important role in the maintenance, use and protection of land and under both the kastom and state systems, chiefs have a role in the management of land disputes. This aspect of chiefly authority will be discussed further in Chapter 8.3.4 as one example of chiefs and the state operating in a relationship of mutual dependency.

### 4.5.4 Support for chiefly authority

In 1982, Tonkinson speculated that ‘the reinvention of kastom by vested interests could result in chiefs being accorded far more power and influence than they ever enjoyed in times long past.’ Although the National Council of Chiefs (Organisation) Act 1985 and its successor the 2006 Act (discussed further in Chapter 7.3) have done little to increase their formal powers, chiefs receive considerable support for their role as the arbiters of peace. As keepers of kastom, chiefs maintain links with place and preserve practices which enhance a sense of national identity.

However support for chiefs does not go unquestioned and it wavers when chiefs are seen to abuse their authority, misrepresent kastom, or make decisions that are not in line with contemporary thinking. The authority of chiefs, particularly under kastom which is uncodified, is sometimes unclear and so vulnerable to grabs for power. Some examples of

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119 On occasion, communities would relocate because of natural disasters or to maximise food production. Further, within groups, boundaries were not always clearly defined but open to renegotiation. Farran recounts that at one time on the island of Gaua there was a shortage of men – a situation which, according to some, resulted from witchcraft and cannibalism. In that instance, land tenure changed from a patrilineal system to a matrilineal one, reverting back when the number of men increased. Adding to this sort of flexibility was the understanding that decisions made by one generation did not necessarily apply to succeeding generations - decisions could be challenged or renegotiated in time. (Van Trease, *The Politics of Land in Vanuatu* p4; Farran, *Land in Vanuatu: Moving Forward, Looking Backward* pp216-218).

chiefs overstepping their powers are given in Chapter 9 in the discussion of social management in hybrid polities.

Forsyth argued that sources of power that were previously available to chiefs have disappeared. She suggested that chiefs have lost the abilities to use force, to build prestige through their knowledge of the supernatural, and to control community land. Outside those few powers granted them by the state, their authority is now dependent upon one requirement - respect.\(^{121}\) As noted above, respect is a key element of *kastom* governance, however there appears to be a general consensus that levels of respect for chiefs have diminished or even been lost. This perceived loss is understood as being manifest in such things as wrong-doers refusing to follow chiefly orders to pay *kastom* fines or do community work and by people refusing to attend *kastom* meetings.\(^{122}\) Chiefs may lay blame for this on factors such as the cash economy, education and generational change however, the behaviour of chiefs themselves has also been criticised. For example, Regenvanu claimed that chiefs are re-defining *kastom* and, in doing so, are further marginalising women and youth.\(^{123}\) People are wary of chiefly bias in decision-making and are drawing attention to issues of conflict of interest. Forsyth postulated that, as chiefs no longer set themselves apart from the community, they have lost much of their ‘mystique’ and left themselves more open to scrutiny. As such, they can easily be caught out if they break their own laws, or if they appear to be lazy or greedy.\(^{124}\)

Adding to these problems is the confusion that has developed over chiefly titles. In the absence of a register of chiefs or an agreed method for formal recognition, gaining consensus on those who hold authority can be difficult. For example, Forsyth pointed to chiefs as being responsible for spearheading the 2007 riots in Port Vila in which three people were killed. Reports indicate that a community meeting served to aggravate the already tense situation and chiefs at that meeting were accused of inciting mob violence.\(^{125}\) However, participants at the meeting have also claimed that the men responsible for inciting the crowd were


\(^{122}\) Ibid. pp116-117.


\(^{125}\) Ibid. p118.
community leaders, referred to as chiefs, but not recognised as ‘custom chiefs.’ This suggests that confusion over chiefly authority can, in some instances, serve to further diminish the respect, and therefore authority, accorded to chiefs.

The authority of chiefs is further confused by its complex nature which may not be fully understood outside the specific context in which it developed. For example, leadership qualities are not always linked with rank, a feature that Jolly observed in South Pentecost where low ranking men utilised their oratorical skills to achieve considerable influence whilst high ranking men held little political sway – the highest ranking man was respected for his ceremonial knowledge but played little part in community decision-making. In practice, a range of authority figures influence people’s lives through kinship connections, church groups and community associations based on island affiliation. Each of these plays a role in influencing day-to-day decision-making processes and, as such, the legitimacy of chiefly authority is dependent on its relationship with competing power factions.

Maintaining support is particularly complicated in urban environments such as Port Vila and Luganville. *Kastom* retains an inherent link with the rural experience which carries positive connotations. In contrast, the urban experience is perceived as negative and one in which ‘bad kastom’ such as sorcery is allowed to continue. Within popular culture, there are few positive representations of life in town. Rather films and radio soap operas highlight urban living as an opportunity for personal downfall and a contributor to social problems such as domestic violence, crime and poverty. As a result of such attitudes, ni-Vanuatu maintain a very strong rhetoric of connection to their ‘home’ island. For example, in her 2000 study of urban permanence in the Port Vila settlement of Blacksands, Nautong Mecartney found that of all the Blacksands residents who identified as Tannese, more than half had been born on the island of Efate. Nautong Mecartney noted that she herself was born in Port Vila, yet the National Census Office considers her to be Erromangan because that is the home island of her father.

127 Jolly, Women of the Place: Kastom, Colonialism, and Gender in Vanuatu p231.
128 Bolton, Unfolding the Moon: Enacting Women’s Kastom in Vanuatu p158.
130 Nautong Mecartney, Sarah Anne, 2000, Blacksands Settlement: a case for urban permanence in Vanuatu, Masters Thesis (Department of Geosciences, Division of Geography, University of Sydney, Sydney) p78.
This connection of *kastom* with the rural experience places great pressure upon community leaders. Nautong Mecartney observed that politicians feel a ‘moral obligation’ to encourage urban residents to return to a rural, ‘productive’ lifestyle rather than struggle in town.\(^\text{131}\)

Chiefs are faced with the task of maintaining respect when *kastom* is constantly challenged by the aspirations, expectations and opportunities of the modern, urban environment. In addition, in those communities where residents come from different islands, chiefs must find ways for their own systems and structures of *kastom* governance to function alongside those from other places. Chiefs in Port Vila have demonstrated that they are willing to take on these challenges. One such example is the establishment of chiefs’ councils to deal with issues that arise within urban communities. These councils will be discussed in Chapter 7.3 below as examples of structures that contribute to social management in hybrid polities.

### 4.5.5 Chiefly authority and the state: an introduction

As noted in 4.2 above, Vanuatu was established at independence as a republic with a Westminster style of government. Unlike Samoa, chiefs in Vanuatu are not guaranteed a formal role in state politics. It is *kastom* governance that remains as the primary source from which chiefly authority is derived. However, the state does also recognise chiefs and customary law, creating a hybrid polity in which multiple sources of authority function in a shared space. The nature of this polity differs considerably from that of Samoa, particularly in the ways that the authority of chiefs is recognised at the national level and the roles that chiefs have, or do not have, as politicians. These will be discussed in greater detail in Chapter 7 which examines political representation.

The revitalisation and politicisation of *kastom* in the 1970s offered a prime opportunity for chiefs to (re)assert their authority. As noted above, the Representative Assembly in 1974 established chiefs as representatives of *kastom* and the establishment of the Malvatumauri in 1976 provided a role for chiefs as advisors of *kastom*.\(^\text{132}\) The Constitution established at independence in 1980 required that Parliament ‘provide for the organisation of the National Council of Chiefs and in particular for the role of chiefs at the village, island and district level.’\(^\text{133}\) Since independence, various laws have been introduced that recognise customary

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\(^{131}\) Ibid. p68.
\(^{132}\) Bolton, *Chief Willie Bongmatur Maldo and the Incorporation of Chiefs into the Vanuatu State* pp5-9.
law and provide a role for chiefs within the functioning of the state. The Leadership Code Act 1998 recognised members of the National Council of Chiefs as leaders and stated that chiefs should ‘maintain their customary role in connection with the conduct of leaders.’134 The recognition of chiefs by the state and their roles at the national, provincial and local levels will be discussed in more detail in Chapters 7.3 and 8.3.

The number of laws that refer to chiefs and that recommend that chiefs be consulted demonstrates the degree to which chiefly authority is recognised as being of significance, including within the realm of the state. (Extracts from some of these Acts are included in Appendix B.) Nevertheless, the authority provided to chiefs by the state remains limited. Significantly, although at independence the Constitution stated that ‘customary law shall continue to have effect as part of the law of the Republic of Vanuatu,’135 when customary law has been found to be in conflict with other provisions of the Constitution or Acts of Parliament, it has not been upheld136 (see Chapter 8.3). Furthermore, the primary role given to chiefs is that of adviser and measures have been taken to keep the roles of senior chiefs separate from those of Members of Parliament and other senior offices. For example, members of the Malvatumauri cannot be Members of Parliament137 or members of the Electoral or Public Service Commissions.138 Matters surrounding the role and authority of the Malvatumauri are discussed further in Chapter 7.3.2.

Chiefs in Vanuatu can choose to run for parliament but they have had limited success in this endeavour partly because there is a perception that kastom and politics should remain separate. In some respects this separation has worked to the advantage of chiefs because neither the government nor the parliamentary system itself is held in high regard by the people of Vanuatu and so the status of chiefs is not tainted by association with the government. Morgan’s view that Melanesians in general regard the government with antagonism and suspicion139 is clearly evident in Vanuatu. Morgan described the attitude

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136 Corrin, Jennifer and Paterson, Don, 2011, Introduction to South Pacific Law (Palgrave Macmillan, South Yarra, Australia) p49.
toward the government as ‘ambivalence,’ but Rousseau went further, describing the attitude as ‘the demonisation of politics.’ Rousseau argued that the government is regarded as ‘remote’ and ‘disappointing’ while the parliamentary system is perceived as ‘divisive’ and therefore at odds with kastom. Douglas pointed out that for many ni-Vanuatu the state has little to offer. She asserted that for people in rural areas, the state ‘is present but as an aggravation, and an absence.’ She suggested that in urban areas, men can potentially benefit from the state through their involvement in politics and administration, but for women in urban areas, the state does little to live up to its commitment to offer equality and protection from violence.

Negative attitudes towards the parliamentary system are justified by the lack of cohesion in parliament as well as the poor performance of past governments. The 2008 election saw a vote for change with corruption emerging as a major theme of the election. At least sixteen of the older, long-term politicians were voted out whilst about twenty new candidates won seats. However, under the leadership of Edward Natapei, instability returned. After seven votes of no-confidence and a brief spell of being unseated on a technicality, Natapei was finally ousted in December 2010 whilst attending a United Nations conference in Mexico. Through 2011, parliament was further weakened by the constant vying for power between three key players - Natapei, Sato Kilman and Serge Vohor. The Prime Ministership and ministerial line-up changed four times in the first half of 2011 allowing no time for the discussion, formulation and implementation of long-term policies. These problems of instability in leadership are exacerbated by a lack of training and resources available to politicians and the small number of sitting days.

In contrast to the government and parliament, chiefs are regarded as ‘on-the-ground.’ Easily accessible and able to respond quickly to local issues, chiefs offer a relevance that is absent from the parliamentary system.

140 Ibid. p2.
141 Rousseau, The Achievement of Simultaneity: Kastom in Contemporary Vanuatu p72.
142 Rousseau, The Achievement of Simultaneity: Kastom in Contemporary Vanuatu p75.
143 Douglas, Bronwen 2000, Weak States and Other Nationalisms: Emerging Melanesian Paradigms Discussion Paper No. 00/3 (State, Society and Governance in Melanesia, Australian National University) p7.
144 Manassah, Kiery, 2008, ‘Change in the air?’, Vanuatu Daily Post, (Port Vila) 9 September, 4.
4.6 Conclusion

As in Samoa, chiefship as it exists in Vanuatu today is an outcome of the response of local institutions to colonisation, Christianity and the establishment of the nation state. In pre-colonial times, leadership was characterised by the big-man style, but hierarchy within communities and the authority accorded to chiefs varied from place to place, reflecting the multitude of governance systems that existed across the archipelago. Today, chiefs and their advisors represent the focal point for systems of *kastom* governance.

The Malvatumauri and other chiefs’ councils have been given a degree of authority in the Constitution and various Acts of Parliament, but the influence of these councils is limited by a lack of resources and clear purpose. The more significant role for chiefs still lies at the village level where they maintain a key role in the maintenance of law and order. Chiefs possess widespread support and the reification of *kastom* has assured them a position of authority, at least for now. This support is reinforced by community concerns over the possibility of violence, as has occurred in Solomon Islands and to a lesser extent in Vanuatu, which highlight chiefly significance as the keepers of the peace.

Since becoming an independent, democratic state in 1980, Vanuatu has struggled to develop a fully effective government and economy. The geographic isolation of many communities presents a substantial impediment to the delivery of essential services, and relatively low levels of literacy and a large subsistence economy contribute to a continuing reliance on foreign aid. Vanuatu’s economy has demonstrated a level of robustness in recent years and poverty levels have decreased but the nature of democratic politics and government remains very much a foreign imposition for much of the population. National unity is challenged by islandism and the remoteness of communities, and government accountability is challenged by the personalised nature of authority.

It is in this complex environment where local meets national and tradition meets modernity that chiefs and *kastom* continue to vie for recognition and relevance.
Chapter 5  

The dominant paradigm of governance

5.1  Introduction

As has been shown in the preceding chapters, Samoa and Vanuatu have complex systems of governance that have developed over time and that continue to change as new influences and attitudes emerge. Whilst these systems, like those in other Pacific Island countries, have proven to be durable and adaptable, they are inevitably challenged by alternative forms of governance. In Pacific Island countries, as elsewhere, it is the state that now claims to be the highest source of authority and it is the state that has primary responsibility for decision-making at the national level. The state thereby presents as a threat to customary authority by undermining local leadership as well as customary decision-making processes. Nevertheless, customary systems have retained their resilience, posing a challenge to Pacific Island countries which must find a way to accommodate two strong, but quite different forms of governance.

State-centred governance is widely understood to be a major contributor to social and economic well-being and is thus a key factor in development theory and practice. This chapter explores the ways in which this dominant paradigm of governance is used by key global institutions, including in making assessments of governance. Assessments of state-centred governance serve to highlight weaknesses in government systems, including those of Pacific Island countries, contributing to the discourse on weak states. However they simultaneously overlook the strengths of customary systems.

5.2  State centred-governance

Governance today is dominated by the state-centred model, characterised by ‘the ability of the state to enforce collectively binding decisions, ultimately through coercive means, via its monopoly over the means of violence.’¹ In addition to the state-centred model, governance is characterised by the aspirations of states to uphold the ideals of democracy and human rights. Today around 115 of the world’s nearly 200 countries, with over half the world’s population, have universal suffrage for competitive multiparty elections.² This represents a substantial shift in the

nature of governance over the last century, for in 1900 very few countries in the world would have been classified as representative democracies by today’s standards.

This shift in governance has been accompanied by dramatic changes in the way that people live, changing community expectations around things such as housing, employment and access to services. The inconsistencies with which the advantages of modernisation have become available on a global level raises questions around the ways that governance systems impact upon the ability of countries, communities or individuals to improve their own standards of living. Such questions are the concern of institutions such as the United Nations and World Bank that understand governance as critical to efforts to reduce poverty and global inequities.

In order to more clearly articulate and encourage the implementation of their governance agendas, these institutions have developed frameworks for assessing governance. For example, the World Bank has identified six indicators of governance:

1. voice and accountability – measures the extent to which a country’s citizens are able to participate in selecting their government, as well as freedom of expression, freedom of association, and a free media;
2. political stability and absence of violence – measures the perceptions of the likelihood that the government will be destabilised or overthrown by unconstitutional or violent means, including domestic violence and terrorism;
3. government effectiveness - measures the quality of public services, the quality of the civil service and the degree of its independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government’s commitment to such policies;
4. regulatory quality - measures the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development;
5. rule of law - measures the extent to which agents have confidence in and abide by the rules of society, in particular the quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and violence; and
6. *control of corruption* - measures the extent to which public power is exercised for private gain, including petty and grand forms of corruption, as well as “capture” of the state by elites and private interests.\(^3\)

The World Bank does not claim these to be indicators of any particular form of governance, but the indicators reiterate and reinforce the common understanding that governance is inseparable from the operations of the state. For example, the World Bank is concerned with the selection and stability of governments as well as the effectiveness of government policies, institutions and law enforcement mechanisms. Common features emerge if we look at the governance indicators above and the representative definition of governance as presented in Chapter 1:

The traditions and institutions by which authority in a country is exercised. This includes (a) the process by which governments are selected, monitored and replaced; (b) the capacity of the government to effectively formulate and implement sound policies and; (c) the respect of citizens and the state for the institutions that govern economic and social interactions among them.\(^4\)

The promulgation of the link between governance and the operations of the state by dominant global players such as the World Bank establishes a framework within which issues of governance are addressed. This state-centred approach presents a problem for custom governance, for within this framework, custom governance is absent and thereby rendered invisible.

The tendency for assessments of governance to focus on institutions of the state is perhaps not surprising because state institutions are regarded as neutral and they possess characteristics that are measurable. In contrast, other forms such as custom governance are associated with culture and are therefore apt to be perceived as emotional and intangible. As noted by Fukuyama, the design and management of organisations (or in the case of states, institutions) is the aspect most suited to formalisation and therefore the aspect most likely to be subjected to transfer across cultural boundaries.\(^5\) As such, government institutions more readily become targets of change. In addition, if one looks at the performance of government institutions, it is possible to measure the performance of states, as demonstrated by the World Bank’s governance indicators. The capacity

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of the state is important because a states’ claim on sovereignty is determined by its ability to exercise authority within its own territory.\(^6\)

This state-centred approach plays out in the international arena when countries that provide development assistance focus on the fostering of state institutions through such things as capacity building of the public service, support for regulatory reform, provision of electoral observers or civic education programs that focus on the duties and obligations of politicians. In the Pacific, the contributions of Australia and New Zealand to state-focused efforts are clearly evident, for example, in the support they provide to the Regional Assistance Mission to Solomon Islands (RAMSI).\(^7\) Once order was restored in Solomon Islands, RAMSI focused its attention almost solely on strengthening state institutions such as the Royal Solomon Islands Police Force, the Ministry of Finance and Treasury, law and justice institutions and the public service. Although only incremental improvements to state functions in Solomon Islands have been achieved, through their on-going support to RAMSI, Australia and New Zealand are reiterating their belief that the policy of state-building remains valid and they continue to use this approach in other countries targeted by development programs.

This focus on institutions of the state presents a challenge to Pacific Island polities because the assessments of the state which result from this approach have little, if any, relevance to custom governance. As such, misconceptions about custom governance, its relationship to the state, and its role in contemporary society can readily arise. For example, the World Bank’s fourth indicator of regulatory quality is concerned with the state’s role in developing the private sector. The performance of the private sector is not traditionally within the realm of custom governance, but this does not necessarily mean that custom governance does not impact upon the private sector or that it does not have an interest in its development. A danger with the state-centred assumptions that surround discussions of governance is that, in those cases where the stated indicators of governance are absent, it is easy to conclude that governance itself is absent. For example, because custom governance in Samoa and Vanuatu does not use the language of human rights, it can distance itself from concerns of freedom of expression or freedom of association (indicator 1). Nor is it concerned with the rule of law (indicator 5). However, as was demonstrated in Chapters

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\(^{7}\) In 2003, following a period of ethnic tension and civil unrest, the countries of the Pacific Islands Forum established a combined intervention to help the Solomon Islands Government restore law and order. The Regional Assistance Mission has three arms: defence; policing; and development.
3 and 4, the absence of these concerns does not equate to an absence of governance. Nor does it indicate that custom governance is incompatible with or unable to adhere to the norms of human rights. Ultimately, custom governance is absent from this framework of governance, thereby ensuring that it will receive little consideration in governance policy-making.

The negative consequences of this state-centred approach have been noted by scholars of the Pacific Islands. Of relevance to this thesis is the work of Huffer who, in collaboration with Pacific Islanders including So’o, Molisa and Qalo, has called for a new way of thinking about governance in the Pacific. Huffer’s concern resulted partly from what she saw as a lack of transparency by the drivers of the governance agenda, who for her are donor countries and multilateral organisations. She argued that understandings of governance are influenced predominantly by western thought and that because the World Bank has been the key influence, governance has taken on ‘a distinctly institutional and economic flavour.’ Huffer has sought to further our understanding of Pacific Island governance in order to influence the emergence of a Pacific political thought that is grounded in local culture. This thesis seeks to extend the work of Huffer and her collaborators by furthering our understanding of the way that custom governance operates in the realm of the modern state. In doing so, it seeks to broaden our understanding of governance in order that the paradigm of governance be extended to give equal value to both state and custom systems.

5.3 Assessing governance in the Pacific

The dominant paradigm, as represented above, assesses governance in Pacific Island countries and many other small island developing states as poor. The following table shows a World Bank assessment of governance drawing on data collected by survey institutes, think tanks, NGOs and international organisations. The table presents an assessment of governance in the Pacific Island countries as well as one country from each region outside the Pacific that is represented in the
Small Island Developing States Network. The table also includes New Zealand because of its cultural connections and geographical similarities with the Pacific Island countries.

### Table 2 Governance in the Pacific: Percentile Ranking 2009

<table>
<thead>
<tr>
<th>Country (Region)</th>
<th>Voice and Accountability</th>
<th>Political Stability / No violence</th>
<th>Rule of Law</th>
<th>Control of Corruption</th>
<th>Government Effectiveness</th>
<th>Regulatory Quality</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bahrain (West Asia)</td>
<td>25</td>
<td>41</td>
<td>64</td>
<td>65</td>
<td>69</td>
<td>74</td>
</tr>
<tr>
<td>Belize (Central America)</td>
<td>69</td>
<td>47</td>
<td>44</td>
<td>57</td>
<td>41</td>
<td>34</td>
</tr>
<tr>
<td>Cape Verde (West Africa)</td>
<td>72</td>
<td>76</td>
<td>64</td>
<td>73</td>
<td>55</td>
<td>53</td>
</tr>
<tr>
<td>Cook I.</td>
<td>36</td>
<td>93</td>
<td>25</td>
<td>33</td>
<td>15</td>
<td>19</td>
</tr>
<tr>
<td>Fiji</td>
<td>28</td>
<td>37</td>
<td>24</td>
<td>26</td>
<td>18</td>
<td>20</td>
</tr>
<tr>
<td>Guyana (Sth America)</td>
<td>52</td>
<td>27</td>
<td>33</td>
<td>35</td>
<td>47</td>
<td>28</td>
</tr>
<tr>
<td>Jamaica (Caribbean)</td>
<td>63</td>
<td>33</td>
<td>37</td>
<td>40</td>
<td>59</td>
<td>59</td>
</tr>
<tr>
<td>Kiribati</td>
<td>69</td>
<td>97</td>
<td>60</td>
<td>55</td>
<td>27</td>
<td>8</td>
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<tr>
<td>Maldives (Sth Central Asia)</td>
<td>44</td>
<td>39</td>
<td>53</td>
<td>30</td>
<td>42</td>
<td>37</td>
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<tr>
<td>Malta (Sth Europe)</td>
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<td>86</td>
<td>91</td>
<td>79</td>
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<td>89</td>
</tr>
<tr>
<td>Marshall I.</td>
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<td>98</td>
<td>46</td>
<td>44</td>
<td>4</td>
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<tr>
<td>Mauritius (East Africa)</td>
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<td>68</td>
<td>80</td>
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<td>76</td>
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<tr>
<td>Micronesia</td>
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<td>94</td>
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<td>55</td>
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<td>Nauru</td>
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<td>New Zealand</td>
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<td>98</td>
<td>70</td>
<td>43</td>
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</tr>
<tr>
<td>PNG</td>
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<td>26</td>
<td>17</td>
<td>4</td>
<td>22</td>
<td>32</td>
</tr>
<tr>
<td>Sao Tome &amp; Principe (Mid-Africa)</td>
<td>55</td>
<td>53</td>
<td>27</td>
<td>42</td>
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<td>Samoa</td>
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<td>68</td>
<td>61</td>
<td>56</td>
<td>45</td>
</tr>
<tr>
<td>Singapore (Sth-East Asia)</td>
<td>34</td>
<td>90</td>
<td>92</td>
<td>99</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>Solomon I.</td>
<td>55</td>
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<td>54</td>
<td>29</td>
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<td>29</td>
</tr>
<tr>
<td>Tuvalu</td>
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<td>97</td>
<td>83</td>
<td>53</td>
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<td>15</td>
</tr>
<tr>
<td>Vanuatu</td>
<td>68</td>
<td>93</td>
<td>63</td>
<td>69</td>
<td>45</td>
<td>25</td>
</tr>
</tbody>
</table>

Source: World Bank

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11 The Small Islands Developing States Network (SIDSNet) is a membership of 51 states that seeks to facilitate the implementation of internationally agreed development goals. SIDSNet is operated by the United Nations Department of Economic and Social Affairs. Small Island Developing States Network, website, at http://www.sidsnet.org/5.html, on 11 September 2011.
According to this assessment, none of the Pacific Island countries rates well on all governance indicators. Some - for example Papua New Guinea, Solomon Islands and Fiji - rate poorly on all indicators. Others – for example Kiribati, Tuvalu and Marshall Islands – rate well on some indicators but very poorly on others. However, when compared to other small island states, the Pacific Island countries do not stand out as exceptional. Amongst the countries listed here, only New Zealand rates consistently well (85 and above) on all indicators.

Commentators from outside the Pacific have been unequivocal in their criticism of Pacific governance, openly expressing their frustrations at continuing governance ‘failure’ and laying blame on Pacific Island governments. Gareth Evans, former Head of the International Crisis Group and former Australian Minister for Foreign Affairs, stated that ‘we’ve tried to be helpful in an environment where the leaderships of those countries simply haven’t been prepared to help themselves.’ Evans suggested that Pacific islanders have had a ‘rough deal’ from their leaders and that they deserve better.\(^\text{13}\) In his role as Australia’s Minister for Foreign Affairs, Alexander Downer wrote an open letter to the people of Solomon Islands accusing their Prime Minister of undermining and obstructing RAMSI. In its assessment of progress toward the Millennium Development Goals in the Pacific, AusAID points to governance as the key impediment, suggesting that Pacific Island governments do not manage their resources as effectively as necessary and that better informed communities would demand more effective and accountable government.\(^\text{14}\)

### 5.4 Development and state-centred governance

A powerful response to perceived governance failure is the attempt by the international community, particularly members of the Organisation for Economic Cooperation and Development (OECD), to bring about change through the fostering of democratic institutions and values. One way that this is achieved is through the provision of development assistance.

An underlying philosophy of modern development theory and practice is that peace amongst nations is mutually beneficial and that in order to achieve this peace, social and economic stability


\(^\text{13}\) Australian Broadcasting Commission, Pacific Beat Interview with Gareth Evans, 20 December 2006.

\(^\text{14}\) AusAID, *Tracking development and governance in the Pacific* p2.
must be achieved within each state.\textsuperscript{15} This philosophy is encapsulated in Article 55 of the United Nations Charter which states:

\begin{quote}
With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
\begin{enumerate}
\item higher standards of living, full employment, and conditions of economic and social progress and development;
\item solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
\item universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.
\end{enumerate}
\end{quote}

Article 55 points to a number of key areas that form the foundation of this philosophy: self-determination; economic and social progress; development; human rights; and fundamental freedoms. Article 55 places obligations upon individual members of the United Nations to uphold human rights and to promote economic and social progress\textsuperscript{16} and the provision of development funding is one method by which states commonly meet this obligation.\textsuperscript{17}

The provision of development assistance is a key influence on the relationships between countries. Governance is now such an integral part of development policy that major donors are openly expressing their demands for ‘improved’ governance in return for continuing support. This is

\textsuperscript{15} The modern approach to international development began after World War II, marked by US President Truman’s inaugural speech in 1949 which called on the industrialised nations to make the benefits of science and industrial progress ‘available for the improvement and growth of underdeveloped areas.’ Truman claimed that ‘only by helping the least fortunate of its members to help themselves can the human family achieve the decent, satisfying life that is the right of all people.’ (Truman, Harry S, 1949 \textit{Inaugural Address by Harry S. Truman}, www.trumanlibrary.org/calendar/viewpapers.php?pid=1030) The scale and complexity of the United Nations’ work in facilitating the recovery of Europe after WWII triggered a substantial expansion in the funding and expertise made available for cross-border development assistance.


\textsuperscript{17} Almost all countries in the world are now either recipients or donors of development funding. The Organisation for Economic Cooperation and Development has established the Development Assistance Committee (DAC) which has a membership of states that provide financial assistance to developing countries. This assistance comes in the form of humanitarian assistance, debt-forgiveness or funding for projects, programs and technical assistance. DAC now has twenty four members which provide Official Development Assistance (ODA) to more than one hundred and fifty states and territories. Additional development assistance is provided by non-DAC members such as Hungary and Turkey. (Organisation for Economic Cooperation and Development, 2011, \textit{website}, at www.oecd.org, on 20 December 2011.)
evident, for example, in the ‘Partnerships for Development’ that the Australian Government has signed with some Pacific Island countries. In committing itself to a Partnership with Australia, the government of Vanuatu, for example, agreed to ‘improve civil and economic governance arrangements, including the rule of law, sound macroeconomic policy and management of public resources, including … improved transparency and accountability.’\textsuperscript{18} The government of Samoa has made similar commitments.\textsuperscript{19} In return for making such commitments, the governments of Vanuatu and Samoa are assured of continuing assistance from Australia and, with the knowledge of which sectors this funding will be directed towards, they can plan more strategically and into the longer term.

These efforts to improve governance reflect the dominant paradigm of governance, focusing on mechanisms of the state and effectively ignoring customary systems and processes. This implies a perception amongst donors that customary systems are irrelevant to development efforts, or perhaps an assumption that customary systems are weak or fading. It also indicates that Pacific Island governments are unwilling, unable, or do not see any benefit to bringing the issue of customary structures and processes to the donor/recipient dialogue. As will be demonstrated in Chapters 7 to 9, there are many instances whereby custom and the state function in ways that are mutually beneficial or even mutually dependent. Custom governance is a key influence in governance in Pacific Island countries and therefore it should be a key consideration in efforts to improve governance, even in those instances where the focus is on the performance of the state. Importantly, this thesis will demonstrate that custom and the state already interact in a number of ways. As such, in some instances governance initiatives do not necessarily need to distinguish between custom-focused and state-focused approaches as there will be instances whereby one initiative can give equal attention to both systems simultaneously. Furthermore, there may be instances where it is not feasible to focus on one system without giving attention to the other.

5.5 \textbf{Success of development assistance}

The amount of funding allocated to development assistance is substantial and increasing. In 2008, the twenty five members of the OECD’s Development Assistance Committee (DAC) provided Official Development Assistance of almost US$120 billion, representing an average 0.31 percent


of the Gross National Income of member states. In 2009, the Pacific Island countries received US$1,647 million with Papua New Guinea and Solomon Islands as the highest recipients (25 percent and 13 percent respectively).

The true impacts of development assistance are difficult to assess, partly because data is limited. However, indicators such as the United Nations Human Development Index show progress on many fronts. It is claimed that between 2002 and 2005, progress toward decreasing the incidence of poverty was greater than in any other period in history, in part because of the reduced rates of poverty in China. In 2011, UNICEF and the World Health Organisation claimed that child mortality rates have declined substantially over the last decade. They estimated that 12,000 fewer children around the world die each day than in 1990. Nevertheless the level of achievements in relation to the amount of funding injected is continually being questioned by donors, recipients and civil society alike and efforts are being made by all these actors to improve development outcomes.

Central to this thesis is the way that these renewed efforts perpetuate and reinforce the existing strategy of improving development effectiveness through mechanisms of the state. For example, in 2005 and 2008 donors and recipients endorsed the Paris Declaration on Aid Effectiveness and Accra Agenda for Action. Among other things, these agreements commit donor countries to aligning their assistance with the strategies and systems of the governments of recipient countries and to helping strengthen the capacity of recipient governments to prepare their own national development plans. More recently, members of the Pacific Islands Forum endorsed the Cairns Compact on Strengthening Development Coordination in the Pacific which extended the general principles outlined in the Paris Declaration and Accra Agenda for Action into the relationships between donors and recipients in the Pacific. Under these agreements Pacific Island countries

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20 Organisation for Economic Cooperation and Development, 2009, Table 1 - DAC Members’ Net Official Development Assistance in 2009, at http://www.oecd.org/document/9/0,3746,en_2649_34447_1893129_1_1_1_1,00.html, on 17 September 2011. The United Nations has set a target of 0.7% of GNI and five DAC member states have already reached or exceeded this amount while others have specified a timeframe for meeting the target.
will attempt to improve government effectiveness, efficiency, mutual accountability and transparency.

With the introduction and widespread acceptance of the Paris Declaration and Accra Agenda for Action, the methods for providing assistance have been given clearer direction. However, by including a focus on partner government priorities and systems, the principles maintain and reinforce attention on the mechanisms of the state. As such, even as development policy and theory continues to be refined, it remains informed by the idea that state-centred governance is central to improving development outcomes.

Development practitioners and policy makers well recognize the importance of local ownership to the success of development initiatives. The experiences of Samoa and Vanuatu suggest that colonial administrations as well as the writers of constitutions in the Pacific were keenly aware of the significance of local leadership and customary values. However, ultimately, local leaders were expected to adopt and fit into the mould of the modern state, and customary values were sidelined in favour of the state-centred model with its aspirations of democracy and human rights. There was an expectation that the Pacific Islands should step into statehood even though local ownership of the rudimentary foundations of statehood was largely absent.

It is evident that substantial impediments to state-building persist and donors as well as recipient governments are increasingly looking at ways to broaden their approach by including informal institutions in development strategies. This is evident, for example, in Solomon Islands and Afghanistan where efforts are being made to strengthen customary dispute resolution mechanisms. The World Bank’s *Justice for the Poor* program is researching ways in which local governance systems can influence access to justice in select countries in the Pacific and Africa. However, ad hoc efforts such as these remain overshadowed by the attention that is given to state systems and institutions. Significantly, as will be highlighted in Chapters 7 to 9, in countries such as Samoa and Vanuatu there are multiple areas in which customary and state governance mechanisms operate simultaneously in shared spaces, creating many openings for initiatives that work with both customary and state actors. But, as demonstrated in Chapters 3 and

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4, custom governance systems are highly variable, and are specific to time and place. As such, if initiatives that work with customary systems are to increase in scope and number, it is important that they are carefully designed to suit the specific contexts in which they are being delivered. This reinforces the need for the social, political and legal situations in each particular context to be well understood by all actors operating in the space.

5.6 Weak and fragile states

The accepted norm of statehood is now that of a ‘liberal constitutional democracy based on an industrialised market economy’ and there is an expectation that states will eventually develop to the point where they comply with this model. In line with this thinking, governance and legal reform scholars Ghani et al. presented a model of the modern state. Referring to Weber’s assessment, and in line with the ‘essence’ of statehood as identified by Borzel and Risse (see 5.2), they identified one criterion of statehood – the legitimate monopoly on the means of violence. They prescribed ten functions for contemporary sovereign states: a legitimate monopoly on the means of violence; administrative control; sound management of public finances; investment in human capital; the creation of citizenship rights and duties; provision of infrastructure; regulation of market formation; management of the assets of the state; effective public borrowing and management of international relations; and, maintenance of the rule of law.

The model of the state as presented by Ghani et al. and as practiced by members of the OECD, is now understood as the norm to which all states should aspire and any states that deviate from this model are perceived as being somehow lesser. It is this line of thinking that lead to the discourse on ‘weak’ or ‘fragile’ states.

The United Kingdom’s Department for International Development (DFID) defined fragile states as those where ‘the government cannot or will not deliver core functions to the majority of its people, including the poor.’ It identified situations where the term ‘fragile state’ can be applied, including:

- Collapsed states - such as Somalia

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• States in conflict or recovering from conflict - such as Afghanistan, Sudan, Nepal, Democratic Republic of Congo and Angola
• States where governments are strong but are not committed to poverty reduction – such as Burma and Zimbabwe
• Gradually improving states (with occasional setbacks) - such as Ethiopia and Yemen
• States where development has stopped or is in decline – such as Cote d’Ivoire. 

The concept of state fragility is especially pertinent to this thesis because the Pacific region has been identified as one which contains fragile states and so international relationships in the region are informed and influenced by this framework. In 2005, DFID listed forty six states that it regarded as fragile, five of which were Pacific Island countries – Kiribati, Papua New Guinea, Solomon Islands, Tonga and Vanuatu. Although not all Pacific Island countries have been categorised as ‘fragile’ by organisations such as DFID, governance indicators like those listed in Table 2 reveal that states across the Pacific can be assessed as performing inadequately. Perceptions of state weakness are reinforced by outbreaks of violence that have occurred in Solomon Islands, Papua New Guinea, Vanuatu and Tonga in recent years and the coups in Fiji which resulted in it being governed by a self-imposed military regime. Such is the perceived level of fragility in Australia’s closest neighbours that the region has been dubbed by political commentators as the ‘arc of instability.’

For Pacific Island polities, perceptions of weakness are simplistic, particularly given that the focus on mechanisms of the state overlooks, and in doing so undermines, other systems and institutions that are in operation. Furthermore, the very idea of weak and fragile states is disputed on the grounds that it carries an implication that ‘strong’ states, as represented by the OECD model, are the norm. This implication is historically incorrect and crude, overlooking the context in which modern statehood emerged. For example, the principle that countries are separate and equal sovereign states is relatively recent, established primarily by the Peace of Westphalia in 1648. The norm of non-intervention, which re-affirmed the authority of the state, emerged in the mid-

31 Department for International Development, 2005, Why we need to work more effectively in fragile states (Department for International Development, London).
eighteenth century but was often ignored.³² After World War I, the League of Nations sought to emphasise it, but it wasn’t until the mid-twentieth century that sovereignty was given pre-eminent weight when the newly established United Nations put emphasis on sovereignty and human rights as the two pillars of international law - with greater weight being given to the former.³³

The high number of instances whereby states have demonstrated a lack of ability or a lack of will to provide for their citizens justifies the questioning of the representation of strong states as the norm. Even with the widely ratified framework of the United Nations in place, the ability of states to demonstrate their strength, and thereby uphold their claims of sovereignty, has been challenged over such things as economic mismanagement, self-imposed rule or abuse of citizens. The United Nations Human Development Indicators demonstrate that there are numerous states that have a chronic inability to provide their citizens with security or other basic necessities. Furthermore, some states have blatantly flouted human rights conventions.

Scholars of the Pacific have voiced their objections to the idea of the fragile state. In calling for a more sophisticated approach to state fragility, critics have sought to give greater recognition to the particular complexities and political characteristics of state failure and state-building.³⁴ For the Pacific Island countries, Boege et al.’s recognition of the historical complexities surrounding independence is pertinent. Their distinction between declarations of independence and formations of statehood³⁵ are applicable to countries such as Samoa where the autonomy sought by political elites resulted in the creation of an independent state and all that that implies. Such situations contribute to states recognised as sovereign by the international community but whose status is not fully recognised or understood by their own citizens, who may be more concerned with shoring up local rather than national authority. When thinking about strengthening the capacity of

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³³ Rodley, N.S., 1992, 'Collective intervention to protect human rights and civilian populations: the legal framework.' in N.S. Rodley (eds), To Loose the Bands of Wickedness (Brassey's, London).
³⁵ Boege, Brown, Clements and Nolan, States Emerging from Hybrid Political Orders - Pacific Experiences p2.
polities, it is a mistake, then, to focus only on the state because domestic actors themselves may not be working in a state-centred framework.

Some scholars of the Pacific have attempted to refute the fragile states discourse by focusing on the positive aspects of Pacific governance. For example, Mellor and Jabes suggested that the degree of governance challenges faced by Pacific Island countries make it ‘hard to avoid a negative tone’ and so felt the need to ‘stress that there are healthy institutions and honest, dedicated politicians and public servants’ in all Pacific Island countries.\(^{36}\) Morgan argued that Vanuatu challenges the concept of the ‘arc of instability’ because, in spite of the volatility of politics in Vanuatu, the country has not suffered from unchecked lawlessness or ethnic violence.\(^{37}\) Whilst violence in some countries has certainly been disruptive and damaging, within those particular countries not all regions have experienced violence. Even when conditions in Papua New Guinea and Solomon Islands have been at their worst, many provinces remained untouched. Communities that remain peaceful during violent periods are too often portrayed as being exceptional rather than being acknowledged by their quantity and significance.\(^{38}\) However, in spite of attempts such as these to question the concept of fragility and to emphasise some strengths of the Pacific, the reality of regional instability has not been contested with much conviction. Although the title of the collection, *Arc of Instability*?\(^{39}\) suggests that the notion of the arc is questionable, the book does little to support such a claim. With the exception of Regan’s chapter on the Bougainville peace processes which, he argued, both contributed to and challenged the notion,\(^{40}\) the collection highlights the volatility of the region. This is encapsulated in Reilly’s opening statement that ‘weak governance, widespread corruption, economic mismanagement, rising crime, and violent conflicts are undermining the stability of the island nations of the South

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\(^{39}\) May, Ronald James (eds),2003, *'Arc of Instability'? Melanesia in the Early 2000s* (State Society and Governance in Melanesia, Australian National University and Macmillan Brown Centre for Pacific Studies, University of Canterbury, Canberra and Christchurch).

Pacific.’ Since Reilly’s statement was penned there have been a coup in Fiji, violent protests against the government in Tonga and Solomon Islands and a riot in Vanuatu, demonstrating that volatility does exist in some Pacific Island countries. In the cases of Papua New Guinea and Solomon Islands where some communities remained peaceful during periods of widespread violence, it may have been the very weakness of the state and its associated lack of reach that allowed certain communities to remain untouched by violence. The fragile states discourse is not incorrect in the way that it labels some states as being weaker than others. However it oversimplifies a very complex issue and the benefits of this over-simplification are not clear.

Disagreement as to which countries are included in the arc, along with a general level of ignorance of the diversity of the Pacific region, means that all Pacific Island countries risk being perceived by outsiders as fragile or weak. In the current environment in which the ‘war on terror’ has shifted the perception of fragility from one of humanitarian concern to one of security risk, generalisations can easily lead to misunderstandings and heightened perceptions of threat. Dupont pertinently argued that the threat of the ‘arc of crisis’ is overemphasised, misrepresented and used to rationalise poor defence strategy. Similarly, Dinnen argued that the focus on the security threat posed by fragile states has been useful in garnering public support for intervention. His observation of the emotive nature of the language employed to build support is demonstrated by authors such as Ghani et al. who argued that:

> From their breeding grounds in the territories of failing or fragile states, these networks of violence utilize the assets of globalization to undermine the confidence that citizens of developed countries have in their governments’ ability to protect their cherished freedoms and daily routines.

Fukuyama also resorted to the emotive in his claim that:

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41 Reilly, Benjamin, 2003, 'Islands of Neglect' in Ronald James May (eds), 'Arc of Instability'? Melanesia in the Early 2000s (State Society and Governance in Melanesia, Australian National University and Macmillan Brown Centre for Pacific Studies, University of Canterbury, Canberra and Christchurch) p63.
42 There is some disagreement as to which countries constitute the arc. In the collection Australia's Arc of Instability, the arc stretches from Indonesia to Tonga however it is argued that it fades east of Fiji. Rumley, Dennis, Forbes, Vivian Louis and Griffin, C. C. M., 2006, Australia's Arc of Instability: The Political and Cultural Dynamics of Regional Security (Springer, Dordrecht, The Netherlands).
43 Dinnen, A Comment on State-building in Solomon Islands p256.
45 Dinnen, A Comment on State-building in Solomon Islands p257.
46 Ghani, Carnahan and Lockhart, Stability, State-building and Development Assistance: an outside perspective.
Weak or failing states commit human rights abuses, provoke humanitarian disasters, drive massive waves of immigration, and attack their neighbours. Since September 11 it has also been clear that they shelter international terrorists...  

Descriptions such as these are misleading. None of the Pacific Island countries classified as fragile has provoked a humanitarian disaster, triggered waves of refugees, attacked its neighbours or threatened the freedoms of people in developed countries. In some of these countries there have been instances of human rights abuse and conflict, but the nature and extent of these must be kept in perspective and should not be equated with the situation in all fragile states. That is, the outcome of fragility in Vanuatu, for example, is vastly different to the outcome of fragility as experienced in Afghanistan. This thesis highlights that each individual polity brings its own complexity which determines the way that it operates internally as well as the way that it responds to outside influences.

There is an increasing awareness amongst aid donors that recipient countries take offence at being labelled as fragile and so donors now tend to refrain from publically naming specific countries. (An exception to this is the World Bank, which continues to publish a list of fragile ‘situations.’) Nevertheless, the notion of the fragile state remains strong and continues to inform donor policy. The OECD, for example, has developed policy to guide donor countries that engage with fragile states. The key approach recommended by the OECD is to contribute to state-building - that is, ‘to help national reformers to build effective, legitimate, and resilient state institutions, capable of engaging productively with their people to promote sustained development.’

Improvements to state mechanisms would undoubtedly bring benefits to some Pacific Island countries. For example, politics in Vanuatu is impeded by, among other things, a lack of clear and consistent policy and continual threats to leadership, making government decision-making inefficient and cumbersome. In countries such as Solomon Islands, fragmentation across government means that departmental responsibilities are not clear. In many countries in the Pacific, corruption and a poor regulatory environment present obstacles to growth in the private sector. Above all, improvements to efficiency and effectiveness in government are imperative for

47 Fukuyama, State-building: Governance and World Order in the Twenty-first Century p125.
increased accessibility to basic health and education services. Nevertheless, the focus on the state as perpetuated by the fragile states discourse clearly obscures the impact - both positive and negative - that customary systems are having on development outcomes. Furthermore, it reduces the likelihood that customary institutions will be recognised as worthwhile or valid development partners.

5.7 Conclusion
The dominant paradigm of state-centred governance poses a challenge to Pacific Island countries. The policies of major global actors such as the World Bank as well as donors and recipients of development assistance are informed by the state-centred model. As a result, assessments of governance that focus on the capacity and performance of state institutions result in consistently poor ratings across the Pacific Islands, contributing to the fragile states discourse. Calls for improved state governance emanate from both within and outside the Pacific.

Pacific Island polities are complex, characterised by the presence of multiple legitimate systems of governance which often operate in shared spaces. The fragile states discourse does not further our efforts to understand complex governance structures like those in the Pacific, or to influence positive change. Rather, within the framework of the dominant paradigm of state-centred governance, custom governance is rendered invisible. The relevance of customary governance to complex polities should not be overlooked. By rendering custom governance invisible and thereby undermining it, development efforts which focus on the state risk diminishing the overall strength of the polity. Thus, customary systems are a vital consideration for policy-makers.

The complexity and diversity of Pacific Island polities highlights the need to properly identify and understand the political, legal and social situations in each particular context. Such an understanding will allow Pacific Islands governments as well as donors of development assistance to ensure that customary systems are given due consideration when designing development plans. The next chapter introduces hybridity as a tool for incorporating custom governance as an equal player in the governance discourse, opening up the possibility that the strengths of both systems can be drawn upon by policy makers to build the strength of complex polities such those in Samoa and Vanuatu.
Chapter 6  Hybridity

6.1 Introduction

The dominant paradigm of state-centred governance presents a challenge to Pacific Island polities because, within that framework, customary governance is overlooked and thereby undermined. Customary governance thus stands alone as a distinct and often poorly understood form of governance that has no place within state-centred governance discussions. Nevertheless, it is apparent that customary values and practices retain the strength to impact upon the governance agenda.

Assessments of governance in Pacific Island countries indicate that significant weaknesses exist in state capacity. These assessments are validated by poor development outcomes that signify ineffective and inequitable delivery of health, education and other essential services. Efforts are being made by Pacific Island governments as well as donors of development assistance to address these shortcomings. However, by maintaining a focus on state institutions, customary institutions are often overlooked and their strengths and contributions remain largely unrecognised and untapped. In addition, assumptions are made about the ways that custom inhibits development. As such, there is a clear need to improve our understandings of the ways that custom impacts upon contemporary polities.

This chapter proposes that a re-conceptualisation of the framework that informs development policy is required if the situation in the Pacific is to be properly understood. It presents hybridity as an analytical tool that allows us to look beyond the state-centred framework in order to allow for a more comprehensive understanding of social, political and legal constructions in the Pacific. Hybridity provides a method whereby differences can be explored without being portrayed or understood as fitting within a hierarchy. This chapter proposes that if governance is viewed in ways other than through the lens of the state, new avenues for exploration by policy makers will be revealed.

6.2 Hybridity

The concept of hybridity as discussed in this thesis was put forward by scholars at the Australian Centre for Peace and Conflict Studies (ACPACS). The ACPACS team,\(^1\) referred to in this thesis

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\(^1\) The team was led by Kevin Clements with Volker Boege, Anne Brown, Wendy Foley and Anna Nolan.
as Boege et al., proposed that the fragile states discourse (see Chapter 5.6) emphasises the weakness of states and that there is a need to reconceptualise the fragile state in terms of the strengths that can be harnessed from within. In this way, they suggested, ‘new forms of sustainable statehood’ may emerge from processes that combine the positive features of the institutions of modern states, civil society and custom. The purpose of their endeavour was not to discount the value of state-building, but to propose an alternative approach.

In their series of three papers Boege et al. presented the notion of hybrid states which they understood to be:

domains of contrasting patterns of power and authority [which] combine elements of the western model and elements stemming from the local precolonial autocephalous traditions of governance and politics; governance is carried out by an ensemble of local, national and also often international actors and agencies.

ACPACS team Boege at al. argued, and this thesis agrees, that in the Pacific as well as other regions of the world, hybrid states are the dominant model. This is relevant to development theory and practice because traditional institutions are given little importance in current development thinking which focuses on state-building as key to improving development outcomes. However, as demonstrated in the earlier chapters on chiefs and custom governance in Samoa and Vanuatu, non-state actors can, and should, be perceived as legitimate and effective in today’s geopolitical landscape. In polities such as these, customary institutions continue their role in the provision of social protection and the maintenance of law and order. In situations where government resources are insufficient and incapable of stretching to their outreaches, customary institutions may be the only providers of such services.

As suggested by the ACPACS team, if hybridity were to be more explicitly recognised by legislators, development actors, politicians and customary leaders as a legitimate feature of

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5 Boege, Brown, Clements and Nolan, *States Emerging from Hybrid Political Orders - Pacific Experiences* p5.
6 Ibid. p9.
modern statehood, perhaps the relationship between custom and the state could be managed better by each of these actors and development gains could be increased. If hybridity were to be regarded as a potential way to harness strength rather than as a characteristic of fragility, new ways of thinking about management within these states could arise.

Boege et al. approached hybridity through comparative research in Vanuatu, Papua New Guinea, Bougainville, Solomon Islands, Tonga and East Timor. Their methodology was to identify three realms of governance – state, custom and civil society – and analyse each of these in terms of their contributions to thematic areas identified as crucial for political order: political economy; order and security; social needs and service delivery; law and justice; leadership and representation; participation and inclusion; and identities and citizenship. They then assessed these contributions according to capacity, effectiveness and legitimacy and discussed the interactions between the three realms in terms of:

- **Substitution**: the identification of functional equivalents of the state outside state institutions;
- **Complementarity**: the identification of areas of overlap and (intentional or unintentional) cooperation of state, customary and civil society institutions;
- **Incompatibility**: the identification of customary approaches that conflict with state and/or civil society approaches.\(^7\)

Boege et al. concluded that there are no areas of substitution, large areas of complementarity and limited areas of incompatibility.

Reiterating the ACPACS team’s assertion that hybridity is a feature of Pacific Island polities this thesis demonstrates that hybridity can be employed as an analytical tool with which to further our understanding of social, political and legal constructions in the Pacific. Using Samoa and Vanuatu as case studies, this thesis identifies which governance institutions are operating in different realms within each polity, and in doing so, highlights that custom can be utilised by policy-makers as a source of strength for the polity. It concurs with Boege et al.’s conclusion that there are no areas of substitution, large areas of complementarity and limited areas of incompatibility.

\(^7\) Boege, Brown, Clements and Nolan, *States Emerging from Hybrid Political Orders - Pacific Experiences*. 128
Boege et al. were not the first to employ the term ‘hybridity,’ nor the first to explore the concept of dual forces working in one space. The difference in their approach is the use of hybridity as a tool for analysing complex polities. The approach of Boege et al. follows that of other scholars who, under various schools of thought, have examined complex systems of governance. According to legal anthropologist Rouland investigations into several systems operating in a society began in the early 1900s. Rouland claimed that this work was instigated by legal scholar and political scientist, Van Vollenhoven, and later advanced by anthropologists such as Mauss and Malinowski.\(^8\)

The term ‘hybridity’ was employed by post-colonial theorist Bhabha to break from the coloniser/colonised or first world/third world dichotomies, instead demonstrating that one cannot exist without the other – that there is mutuality in the relationship. Bhabha used the term to describe the ‘Third Space’ that sits between the polarities.\(^9\) Pertinent to this thesis is Bhabha’s assertion that hybridity allows for an exploration of difference that avoids an assumed hierarchy, in this case a hierarchy whereby one form of governance is understood as being superior or preferable to another.

Post-development theorist Escobar employed the notion of hybridity to explore ‘cultural (re)creation.’\(^10\) Escobar was interested in the way that development is a construction of power – that is, it determines how people are represented and identified. For Escobar, the concept of development says as much about the consumption and materialism of the first world as it says about poverty in the third world. He claimed that ‘development is the last and failed attempt to complete the Enlightenment in Asia, Africa and Latin America.’\(^11\) Escobar’s views, although extreme, were useful for bringing attention to failed attempts at development and the critical need for better-informed policy-making. He used hybridity as a tool to look beyond the fusion of tradition with modernity in order to create ‘an opening toward the invention of new languages.’\(^12\)

For this thesis, the invention of new language begins with employing hybridity to question the dominant governance discourse.

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\(^11\) Ibid. p221.
\(^12\) Ibid. p219.
Picking up on the work of Bhabha and Escobar, and reflecting that of Jolly (below), Schech and Haggis argued that hybridity helps to demonstrate how western perspectives of the third world tend to present practices as either traditional or modern rather than as contemporary constructs. They argued that because of this, traditions are seen as distinctly non-western or as oppressive.\(^{13}\) Reinforcing the point made above that hybridity avoids an assumed hierarchy, Schech and Haggis claimed that the hybridity thesis ‘offsets cultural imperialism’ by giving people in the third world the agency to ‘resist, adapt, and appropriate’ modernity into their own contexts.\(^{14}\) The following chapters will demonstrate ways in which customary practices are being utilised by modern state systems with the results that unique, culturally relevant structures and systems are now contributing to the legitimacy of Pacific Island polities.

In the field of law, hybridity is understood in terms of legal pluralism - ‘the multiplicity of forms of law present within any social field.’\(^{15}\) In the Pacific, custom law and its relationship with state law have been examined from a range of perspectives by Powles, Corrin and Brown.\(^{16-18}\) (In 1980, Powles utilised the term ‘hybrid’ to describe the highest Tongan chiefly title which, ultimately, became that of monarch.\(^{19}\) ) Legal pluralism in the Pacific has been examined in detail by Forsyth who looked at the role of kastom in criminal justice in Vanuatu and, building on this, developed an approach to taking legal pluralism from the theoretical to the practical.\(^{20}\)


\(^{14}\) Ibid. p216.

\(^{15}\) Rouland, *Legal Anthropology* p51.


\(^{19}\) Powles, Law and Authority in Pacific Island Decision Making p53.

\(^{20}\) Forsyth, *A Bird that Flies with Two Wings: Kastom and State Justice Systems in Vanuatu*, Forsyth, Leadership structures and dispute systems in Vanuatu from first contact to Independence; Forsyth, *Beyond Case Law: Kastom*
argued that the study of legal pluralism is useful in the way that it allows legal scholars to look beyond legal systems of the state. In doing so, she argued, legal pluralism allows scholars to recognise that not only can customary law perform the same work as state law, but that sometimes it can be more effective.21 Corrin examined legal pluralism in her article ‘Moving beyond the hierarchical approach to legal pluralism in the South Pacific.’22 In that article, Corrin drew upon case studies from Solomon Islands to highlight the tensions that can arise when legal pluralism is applied in practice. Both Forsyth and Corrin observed that the recognition of custom by the state in Pacific jurisdictions has not necessarily served to give equal status to each. Rather, they argued, and this thesis concurs, that custom is at risk of being undermined when state laws allow for the decisions of chiefs to be over-ridden by the decisions made in state courts.23 Corrin took the view that, although legal pluralism is present in Pacific Island countries, there exists an assumed hierarchy whereby the common law takes precedence over customary law which is recognised only within the framework and understanding of state law.24 In his examination of the relationship between customary law and state law in Solomon Islands and Vanuatu, Brown also took the stance that there is a hierarchical approach. In fact, Brown went so far as to say that there is a ‘general posture taken by the higher echelons of the Vanuatu judiciary since Independence, restating the implicit assumption that the only rule of law worth its salt is one embossed with the seal of an overseas pedigree.’25 For Corrin, this situation places legal pluralism firmly within the ‘confines of post-colonial theory.’26 In accord with this thesis, Corrin argued that the tendency to view customary law and state law as a dichotomy is misleading. Further, by obscuring the complexity of the relationship, this dichotomous view hinders efforts to develop and implement a contemporary, culturally appropriate legal environment.27 The tendency to identify dichotomies in Pacific Island cultures, has also been taken up by anthropologists such as Jolly who sought to break away from the traditional/modern dichotomy, instead presenting contemporary practices as a blend of the old and the new.28

21 Forsyth, How to ‘Do’ Legal Pluralism p4.
24 Corrin, ‘Moving beyond the hierarchical approach to legal pluralism in the South Pacific’ p23.
25 Brown, Reconciling Customary Law and Received Law in Melanesia: the Post-Independence Experience in Solomon Islands and Vanuatu p84.
26 Corrin, ‘Moving beyond the hierarchical approach to legal pluralism in the South Pacific’ p23.
27 Corrin, ‘Moving beyond the hierarchical approach to legal pluralism in the South Pacific’ p23.
28 Jolly, Specters of Inauthenticity.
The study of legal pluralism has clear links with hybridity and the proposition of this thesis that development policy should look beyond state-centred frameworks. For in Pacific Island countries, customary law is central to alternative frameworks. Further, this thesis concurs with the views of both Corrin and Forsyth that there is room for greater accommodation of custom law in Pacific legal systems, but that a far greater understanding of the complexities of the interaction between customary law and state law is required if this is to be achieved. Corrin has suggested that legal pluralism should be drawn upon more by development practitioners. She argued that, because aid programs in the Pacific have an emphasis on governance, they lend themselves to a focus on legal pluralism. However, while donors can fund activities such as research and legislative drafting, in practice donors have little influence over the passing of legislation, the decisions of state courts or the actions of customary leaders. Perhaps partly because of this, the governance programming of donors focuses primarily on other, more benign areas such as public financial management, public sector reform and police training. So while the study of legal pluralism is of great relevance to governance in Pacific Island countries, a broader perspective is required if practical outcomes are to be achieved from developing a greater understanding of the custom/state relationship. In order to inform the practical application of these learnings, this thesis thus moves beyond the field of law and into the broader realms of governance and authority.

The notion of ‘transplant’ is also of relevance to this thesis. In legal scholarship, transplant theory examines the effect of taking a legal system from one place and putting it into practice in another. During the period of colonisation, entire systems based on the English common law, French civil law and German civil law were established in countries in Africa, Asia and the Pacific. More recently, legal transplant has been practiced by legal practitioners and policy makers working in developing countries or collapsed states such as the former Soviet Union. Samoa and Vanuatu are examples of legal transplant because their legal systems are based on those of colonising

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29 Corrin, Moving beyond the hierarchical approach to legal pluralism in the South Pacific; Forsyth, How to ‘Do’ Legal Pluralism’; Forsyth, A Bird that Flies with Two Wings: Kastom and State Justice Systems in Vanuatu.
30 Corrin, Moving beyond the hierarchical approach to legal pluralism in the South Pacific p46.
powers, and certain laws made by those powers remain in effect\textsuperscript{33} (the legal systems of Samoa and Vanuatu are discussed further in Chapter 8.2.1 and 8.3.1). In their study of thirty nine countries that had been subjected to legal transplant, Berkowitz et al. found that only eleven countries had been ‘receptive.’ They concluded that, in order for legal institutions to be effective, law needs to develop through a participatory process of trial and error within the country in which it is being applied.\textsuperscript{34} While none of the Pacific Island countries were included in the study by Berkowitz et al., it is apparent that the mismatch between pre-existing systems and imported ones identified in the study was also experienced in Samoa and Vanuatu. The observations offered by scholars of transplant theory highlight the difficulties associated with transferring legal systems between cultures and, as such, transplant theory has the potential to provide insights for scholars of law in Pacific Island countries. However, while transplant theory can further our understanding of complex polities, it has little to offer to the practical application of governance policy.

Working in the field of public sector policy, Pacific scholar Larmour examined the transfer of institutions, including legal institutions, from one place to another. Larmour’s interest was, among other things, in identifying and documenting the origins and processes of transfer and exploring the reasons why some transfers were more successful than others. Larmour observed that this process of transfer resulted in the creation of hybrid institutions.\textsuperscript{35} More recently, the World Bank picked up on the notion of hybridity in the background paper to the World Development Report 2011, identifying examples of hybrid institutions in Melanesia.\textsuperscript{36} Such examinations allow for a more nuanced interpretation of the material presented by scholars such as Huffer\textsuperscript{37} who have sought to further our understanding of Pacific governance and the various ways that it is perceived, portrayed and utilised.

In their explorations of complex polities and legal pluralism, these scholars revealed the possibility that hybridity provides a way to reconceptualise the management of contemporary polities through the recognition of customary practices. Hybridity has proven to be a useful tool.

\textsuperscript{34} Berkowitz, Pistor and Richard, The Transplant Effect.
\textsuperscript{35} Larmour, Peter, 2005, Foreign Flowers: Institutional Transfer and Good Governance in the Pacific Islands (University of Hawai‘i Press, Honolulu).
\textsuperscript{37} Huffer and So'o, Beyond Governance in Samoa; Huffer, Governance, corruption and ethics in the Pacific; Huffer and Qalo, Have We Been Thinking Upside Down? The Contemporary Emergence of Pacific Theoretical Thought; Huffer and So'o, Consensus versus dissent: Democracy, pluralism and governance in Samoa’, Huffer and Molisa, Governance in Vanuatu: In Search of the Nakamal Way.
for analysing problems related to the ways that customary practices are constructed, operate and influence contemporary contexts. And, as demonstrated by scholars in various fields of Pacific studies, the Pacific provides a rich ground for such examinations.

The utility of hybridity as employed by Boege et al. has not yet been assessed to any great extent. In 2009, Hofmann provided a response to Boege et al.’s analysis of hybridity in relation to state-building in Timor-Leste. Hofmann questioned the use of the term ‘hybrid political order,’ arguing that in conflict-affected situations such as Afghanistan and Timor-Leste the existence of traditional institutions does not equate with order. Hofmann concluded that the introduction of a new term to describe fragile states will not change approaches to peacebuilding. Also in 2009, Kraushaar and Lambach assessed the concept of hybrid political orders as new and underdeveloped but having considerable potential to add value to analysis of political order in developing states. They determined that the concept has the benefits of: extending the focus of analysis beyond that of the state; and not being burdened with assumptions about the ways in which formal and informal political structures do, or should, interact. Unlike Hofmann, who focussed on peacebuilding in a polity with long-standing political fractures, this thesis is concerned with polities in which customary institutions do function and provide order. In fact, an intention of this thesis is to reinforce the value that such order brings to the polities being studied. As such, this thesis supports the conclusion of Kraushaar and Lambach that the concept of hybridity has potential to add value to the development discourse by shifting the focus away from the state and by being free of assumptions about the custom/state relationship.

In the current geo-political environment in which the performance of states is coming under intense scrutiny and efforts are being made to shore up the capacity of state institutions, it is timely to further explore Boege et al.’s proposition that hybridity be utilised to examine the management of complex polities. The nature of the custom/state relationship as identified by Boege et al. presents a useful starting point for such explorations. But just as Boege et al. were not the first to employ the term hybridity, nor were they the first to categorise the custom/state relationship. In their study of chiefs in the Pacific, Lindstrom and White identified three types of chief: those that represent the state; those that serve as mediators between the community and the

state; and those that stand in opposition to the state.\textsuperscript{40} Paterson also identified three categories in the relationship between \textit{kastom} and the state in Vanuatu. He saw the relationship in terms of: denial, either full or partial, where neither side recognises the authority of the other; one whereby neither side takes the other into account; or one of linkage whereby each side gives consideration to the other.\textsuperscript{41} The next three chapters will give specific examples of the ways in which the relationship between chiefs and states is manifest, and in doing so, will concur with the findings of Lindstrom and White as well as Paterson.

Paterson, Forsyth and Boege et al. have joined others in their calls to further identify and build on the strengths of successful linkages between custom and the state in Pacific Island countries. My intention, then, is to build on previous work by providing a more detailed analysis of the intersect between chiefs, custom and the state in Samoa and Vanuatu. As posited by Bhabha, and Schech and Haggis, a more context-specific understanding of the custom/state relationship opens up the possibility that mutual recognition of strengths within each system can replace an assumed hierarchy.

This thesis, then, expands on this exploration of the custom/state relationship, focusing on the relationships between chiefs, as the representatives of custom governance, and the state in Samoa and Vanuatu. Drawing on Boege et al.’s categorisations, the thesis examines the relationship in terms of complementarity and incompatibility. My own findings concur with Boege et al.’s conclusion that, while custom operates in areas where the state is absent, there are few, if any, areas of custom that serve as an equivalent of the state. As such, this thesis does not examine the category of substitution.

6.3 Conclusion

The rendering of custom as invisible within the democratic governance discourse does not further efforts to understand complex governance structures or to influence positive change. Rather, the discourse on weak and fragile states serves to further undermine customary values and practices by overlooking their strengths. However, custom and state governance can be understood in more nuanced ways that open up the possibility of building on the strengths of both systems. If

\textsuperscript{40} Lindstrom and White, Introduction: Chiefs Today p10.
\textsuperscript{41} Paterson, \textit{Issues facing Vanuatu in the second decade of the 21st Century}.  

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complex polities are understood as hybrid constructions in which characteristics from more than one system are already incorporated, clearer connections between the systems may be evident.

The idea of dual systems operating in a shared space is not new, however the persistence of custom in the Pacific points to the need to further our understanding of the ways in which custom impacts upon development. The next chapters will utilise the tool of hybridity to examine the relationship between custom and the state in Samoa and Vanuatu. It will do so by examining the three themes of: political representation and decision making; legal systems; and social management and social protection. Over three chapters, the thesis will examine which sources of authority are active in the relevant space and, in those cases where custom and another source of authority are both active, determine whether the relationship between the two can be understood as one of complementarity, incompatibility or a combination of the two. Areas of mutual dependency, signifying a relationship of strong compatibility, will also be highlighted. This approach reveals the complex and dynamic nature of the custom/state relationship and identifies points of strength and compatibility that can be drawn upon by policy-makers.
Chapter 7  Political representation

7.1  Introduction

As demonstrated in Chapters 3 and 4, Samoa and Vanuatu are both polities in which robust customary systems of governance operate alongside systems that were gradually introduced by colonial administrations and then more firmly established at independence. The effectiveness of these introduced systems is challenged in both countries. Substantial constraints are placed upon the state, including the small size of the economies, geographical barriers, poor government capacity, urbanisation and limited opportunities for trade. Customary systems also face challenges as they seek to adapt their principles and structures to the modern contexts in which they now function.

This chapter begins the examination of the relationship between custom and the state in Samoa and Vanuatu. It examines the political aspects of the custom/state relationship, identifying the ways in which both systems are represented and influence decision-making processes at the national and local levels. It also identifies the ways in which these arrangements can be understood in terms of hybridity. That is, in those spaces where custom and state authorities are both active, it determines whether the relationship between the two can be understood as one of complementarity, incompatibility or a combination of the two. In some respects, the relationship is characterised as one of mutual dependency, indicating very high levels of complementarity. The next two chapters will continue this discussion through examinations of legal systems and social management. Using this approach, the complex and dynamic nature of the custom/state relationship is revealed and points of complementarity that can be drawn upon by policy makers are identified.

7.2  Samoa

7.2.1  Matai and national level political institutions

As discussed in Chapter 3, Samoa’s customary system of governance establishes clearly defined decision-making structures that function at the local and national levels. At independence, the hybrid nature of the polity was firmly entrenched when matai were given key roles in the functioning of the Samoan state (See Chapter 3.5.5). As will be demonstrated, the hybrid nature
of the polity creates tension, however Samoa’s political system has shown that it can accommodate this tension and, furthermore, gain legitimacy through this accommodation.

**7.2.1.1 Tama’āiga as representatives of the state**

As noted previously (Chapter 3.3.5), Samoa has four chiefly titles, collectively known as the *tama’āiga*, that outrank all others. At independence, the four *tama’āiga* title-holders each received high level appointments: the holders of the Tamasese and Mālietoa titles were appointed as joint Heads of State under the Constitution; Matā’afa was chosen by Parliament in general election prior to independence as Samoa’s first Prime Minister; and Tuimaleali’ifano was represented in the role of Deputy Head of State in the Council of Deputies. The two joint Heads of State were given lifetime appointments and Malietoa Tanumafili II remained in office until his death in 2007, a period of forty five years. His joint Head of State, Tupua Tamasese Mea’ole died in 1963, not long after taking office. Now that both the initial holders have died, Parliament takes responsibility for electing a Head of State every five years. In 2007, when Parliament had its first opportunity to take on this task, it elected *tama’āiga* successor Tupua Tamasese Tufuga Efi (Tupuola Efi) to the position. This appointment has meant that, since independence, Samoa has continually had a *tama’āiga*, a customary leader, as Head of State.

As observed by Powles, the ‘rank and dignity’ of the *tama’āiga* are well suited to the ceremonial and formal duties of the offices of Head of State and Council of Deputies. In the case of Tupuola Efi, his popularity makes it likely that he will be repeatedly re-elected as Head of State until he chooses to give up the position. This is significant because, although there is no evidence that the Head of State has made significant use of the authority given to him by the Constitution, it must be noted that it provides for reconsideration. The Head of State has little legal power because, apart from his authority to instruct the Prime Minister to submit any Ministerial decision to Cabinet for consideration, he acts only on the advice of the Prime Minister or Cabinet. However, Articles 38-40 of the Constitution give the Head of State the authority to call a meeting of the Executive Council (where he presides with the Cabinet) for the purpose of reconsidering decisions made by the Cabinet. Such a meeting must be called within four days of the Cabinet decision being made. After such reconsideration, the Constitution does not empower the Head of State in

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2 Powles, Legal Systems and Political Cultures: Competition for Dominance in Western Samoa p199.
Executive Council ultimately to reverse the Cabinet decision, however, when the Head of State is also a tamaʿāiga, his customary influence would undoubtedly be felt.

This situation creates some tension in the custom/state relationship because, although the powers of the Head of State are limited, a leader selected in large because of his traditional status under custom is holding the most senior position of a democratic state. However, at the same time, the appointment of a tamaʿāiga to this senior position contributes to the strength of the polity because it provides legitimacy of leadership. Further, in contrast to Vanuatu where the Government is regarded very much as a foreign imposition (see Chapter 4.5.5), the customary influence of the Head of State adds to the legitimacy of Samoa’s Government. The tension in the relationship is tempered further because both state and customary leaders can be subject to scrutiny. This was demonstrated in 2010 when even Tupuola Efi’s stature and popularity were not enough to protect him from becoming embroiled in a dispute over the construction of a shelter attached to his residence in the village of Lufilufi. Although the dispute appears to have emanated from long-held tensions within the village, the status and behaviour of Tupuola Efi himself was subjected to intense public discussion.

In Samoa, the appointment of tamaʿāiga as state representatives is not accepted without question. While the appointment of Tupuola Efi as Head of State received widespread support, the idea that tamaʿāiga holders retain the position of Prime Minister has not been accepted as readily. Powles noted that when Prime Minister Mata’aafa died in office in 1975, objections were voiced at the swift appointment of tamaʿāiga holder Tupua Tamasese Lealofi IV as successor. Criticism was directed at the appointment of a tamaʿāiga by a tamaʿāiga to succeed a tamaʿāiga. This demonstrates that Samoans are well aware of the responsibilities of leaders and are wary of allowing them to take advantage of the authority awarded to them. However, the presence of tamaʿāiga undoubtedly makes senior positions less contestable. For example, as observed by So’o, once Matā’aafa became Prime Minister only the holder of another tamaʿāiga title could challenge the position. In 1962 the Working Committee for Self Government had predicted that:

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6 Powles, Legal Systems and Political Cultures: Competition for Dominance in Western Samoa pp199-200.
7 So'o, Samoa’s electoral system as it operates on the ground.
even if tama’āiga come to the legislative assembly as lesser titles, they still would be paid the respect due to them as tama’āiga and would thus be still appointed to some office such as Prime Minister and would undoubtedly hold these positions for life.  

As noted above, it is anticipated that Tupuola Efi will continue to be re-elected as Head of State until he chooses to relinquish the position, so the prediction of the Working Committee may well be fulfilled in this regard. However, appointments of non- tama’āiga holders to the position of Prime Minister demonstrate that the desire for tama’āiga to hold both senior positions in Parliament has waned. On this matter, tension in the custom/state relationship is gradually declining.

In some respects, it seems noteworthy that tama’āiga were appointed as Heads of State under the Constitution given that independence came at a time when the equality of human rights was high on the global political agenda. The architects of the Constitution recognised that there were a number of inherent difficulties within it, particularly the prohibition of discrimination or privilege on the grounds of inheritance. Meleisea posited that the drafters of the Constitution wrongly believed that future generations would find solutions to the problems within it and, perhaps more pertinently, assumed that traditional institutions would gradually disappear and so conflicts within the Constitution would eventually evaporate. However Powles noted that the drafters of the Constitution addressed some of the difficulties by, for example, prohibiting discrimination but allowing exceptions on the basis of tradition. In addition, the Constitution gives little explicit recognition of chiefship, allowing room for alterations to be made as the system changes. Article 15 of the Constitution requires ‘the progressive removal of any disability or restriction’ and ‘of any privilege or advantage’ that has been conferred because of descent, sex, language, religion, political or other opinion, social origin, place of birth or family status. In this manner, tensions in the custom/state relationship that are created by customary status may diminish over time if society’s values in this regard change.

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8 Working Committee Minutes cited in So'o, Samoa's electoral system as it operates on the ground.
Because of the role that tamaʻāiga have in the state system, the custom/state relationship is also influenced by the way that tamaʻāiga title-holders are appointed. Tamaʻāiga titles have always been subjected to long periods of dispute and in the past this was resolved through warfare. Today it is the norm for the Land and Titles Court to have the final say in who is to be appointed as a tamaʻāiga. As such, the tamaʻāiga titles, the highest titles bestowed under faʻasamoa, now draw their legitimacy largely from the state. In 1987 Meleisea noted that the Court had been responsible for deciding on succession to the tamaʻāiga titles every time that they had become vacant since 1912.13 Continuing this trend, a dispute over succession to the Malietoa title went before the Court in 2008 and an appeal was rejected by the Court in 2011. In that instance, the Court upheld its own 1939 ruling that determined which members of the family would have the authority to appoint the next successor.14 The reliance on the Land and Titles Court to bestow tamaʻāiga titles and the simultaneous reliance on tamaʻāiga to provide legitimacy to the position of Head of State places custom and the state in a relationship of mutual dependency because each now relies upon the other for recognition and authority.

7.2.1.2 Suffrage and political candidature

Faʻamatai influences the state political system in direct and indirect ways. In another departure from the human rights platform that was high on the global political agenda at the time Samoa gained independence, the original Electoral Act of 1963 gave only matai the eligibility to vote.15 From an equal rights perspective, this restriction on suffrage was discriminatory because of the inequality inherent within the faʻamatai which favours first born males. During the drafting of the Constitution, both the United Nations and New Zealand expressed concerns about restricted suffrage, but the conservative majority within the Working Committee believed that universal suffrage ‘could never be reconciled with Samoan custom.’16 A compromise was reached whereby suffrage would be determined by ordinary law rather than through the Constitution. It was envisaged that universal suffrage would be likely to occur eventually and that this compromise would facilitate the process.17

13 Meleisea, The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa p188.
16 Davidson, Samoa mo Samoa: The Emergence of the Independent State of Western Samoa p328.
17 Lafoa'i, Universal Suffrage in Western Samoa: A Political Review; So'o and Fraenkel, The Role of Ballot Chiefs (Matai Palota) and Political Parties in Samoa's Shift to Universal Suffrage p336.
Samoan support for matai-only suffrage was aptly explained by Ala’ilima and Ala’ilima in their 1966 analysis of voting practices:

a Samoan family thinks of itself as an organism with the chief as its head and the members as its arms and legs. The chief’s function is to regulate the internal life of the family, protect its dignity and make its political decisions. The members’ job is to give loyal support, not to offer independent opinions which might weaken the whole. In this way of thinking the family chief, not the individual, is the logical primary unit of politics. 18

Ala’ilima and Ala’ilima assessed that the initial decision to reject universal suffrage was unlikely to have been made out of ‘ignorance or duress’ but rather because of:

{quote}
genuine Samoan apprehension as to what might happen to the livelihood and dignity of the family if its arms and legs were suddenly free to operate independently of its head.19
{quote}

Norton’s assessment much later in 1984 was harsher. He claimed that the strongest opposition to universal suffrage came from matai who feared that it would damage their authority and dignity and that their power would be transferred to untitled, educated people. He quoted one chief who reflected that ‘only matai have the discipline and sense of shared dignity for this’ and suggested that this sentiment that was reinforced by a general ‘bland acceptance of inequality.’20 A plebiscite in 1990 resulted in the introduction of universal suffrage for all Samoan’s over the age of twenty one demonstrating a desire for change, but as discussed further below, voting practices remain under the influence of matai.

A key feature of Samoa’s political system is that, as noted in Chapter 3.5.5, under the Electoral Act 1963 only matai are eligible for political candidature. Until the 2011 General Election, candidates representing the individual voters roll were not required to hold matai titles.21 Under this system, matai and the national parliament function in a relationship of mutual dependency because the parliament relies upon matai for it to function and matai rely upon Parliament for national level representation.

\[\text{18} \quad \text{Ala’ilima, Fay C. and Ala’ilima, Vaia J., 1966, ’Consensus and Plurality in a Western Samoan Election Campaign’ in Human Organization 25 (3), 240 p252.}\]
\[\text{19} \quad \text{Ibid. p252.}\]
\[\text{20} \quad \text{Norton, Titles, Wealth and Faction: Electoral Politics in a Samoan Village pp103,115.}\]
\[\text{21} \quad \text{Electoral Act 1963, s5. See Appendix A:13 and note to s5.}\]
Fa’amatai also influences the nature of the political system in subtle ways. For example, even though it is increasingly the lower-ranking matai that become politicians, they remain under the influence of the high-ranking matai in the villages. As such, the higher-ranking matai retain a degree of influence in national politics even when they have no official position as elected leaders. Within Parliament itself, politicians are aware of their own rankings and so demonstrate deference appropriate to a customary setting. However, Samoan leaders are well aware of their roles and responsibilities so, although customary rankings are observed, this does not necessarily mean that decisions are always made in line with the wishes of higher-ranking matai. As such, little tension between custom and the state exists in this realm.

Fa’amatai is also evident in the selection of candidates and voting practices and in this area, greater tension exists. The parliamentary system was initially characterised by a traditional system of consensus whereby Members of Parliament were appointed through consensus at district meetings or, in some places, a system of rotation was applied. However a party system emerged as a result of increased competition for parliamentary seats. In 1961 only eighteen of the forty five members were elected through secret ballot, but by 1982 all seats were contested. It is evident that customary practices continue to influence voting practices. For example, people may feel obliged to vote in support of their matai or in line with the general consensus of their village. This was evident at the 2011 general election when high chiefs from Lepa agreed that the Prime Minister would continue to represent the constituency. When another matai from the constituency indicated a desire to run for office, it was reiterated that protocols of the village stated that anyone who contested the Prime Minister and subsequently lost in the elections would be banned from the village. Instances such as these reflect tension in the custom/state relationship, demonstrating that customary practices which conflict with principles of the state continue to persist in some areas and, furthermore, are openly supported.

Another matter that impacts upon the custom/state relationship in regards to political candidature is the practice of gift-giving and reciprocity. As noted in Chapter 3.5.3, gift-giving is an

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22 So'o, Samoa's electoral system as it operates on the ground pp6-7.
24 So'o, Samoa's electoral system as it operates on the ground p14.
important feature of fa’asamo for it re-distributes wealth and establishes obligations within relationships. When campaigning, political candidates may be tempted to provide gifts made under the guise of custom but with the real intention of influencing voting. While this practice may be understood as creating a dilemma for the custom/state relationship, Samoans have shown that they can clearly distinguish between customary gift-giving and the giving of gifts for the purpose of influencing voting behaviour. The Electoral Act provides clear restrictions on gift-giving during political campaigning and Samoans have demonstrated their willingness to ensure that the law is adhered to. Accusations of bribery are commonly brought before the Courts following elections and the Courts have not been reticent in disqualifying winning candidates found guilty of bribery. As such, while there is potential for tension in the custom/state relationship on the matter of gift-giving, in practice this tension is dealt with.

It is evident that the appointment of matai to the most senior positions of the state brings benefits and disadvantages. Ultimately, the practice of placing tama’āiga and matai into government positions presents a challenge to the principles of democracy because matai gain their title through a combination of inheritance, gender and family power as much as through personal qualities. In contrast, democratic governance theoretically renders all people equal, thereby making any adult citizen eligible to run for office. However it is also evident that in democracies, wealth and social standing can increase the likelihood of appointment to political office, effectively closing the gap between custom and state practices in this regard.

Supporters of the political model argue that the restriction of matai-only candidature is consistent with the ideals of democracy. For example, Tcherkezoff argued that through their appointment as family spokesperson, matai have already demonstrated their capacity to act in a representative manner. He claimed that matai are understood to be democratically chosen representatives and furthermore, they are equal to each other and therefore represent an egalitarian class of representatives similar to Western parliamentarians. Salevao, who was opposed to matai-only franchise, also argued strongly in favour of matai-only candidature. He emphasised that the matai system is underpinned by democratic principles:

28 Tcherkezoff, Serge, 2000, 'Are the Matai Out of Time? tradition and democracy: contemporary ambiguities and historical transformation of the concept of chief' in Elise Huffer and Asofou So'o (eds), Governance in Samoa: pulega i Samoa (Asia Pacific Press; Institute of Pacific Studies, University of the South Pacific, Canberra, Suva) p116.
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.\(^{29}\)

He argued further that *matai*-only candidature is ‘reasonable,’ culturally appropriate and perhaps even a ‘customary right.’\(^{30}\) Tcherkezoff and Salevao are not convincing in their arguments because, as discussed in Chapter 3, the ranking of *matai* is well embedded in *fa’amatai*. Furthermore, Tcherkezoff’s point that poor performing *matai* may readily be stripped of their titles and Salevao’s somewhat sentimental portrayal buy into the rhetoric rather than the reality of *fa’amatai*. Nevertheless, it is evident that the hybrid political model contributes to the legitimacy of the polity because the uniquely Samoan nature of the system is a source of pride in that it is distanced from foreign political models.\(^{31}\) There is little impetus within Samoa to change parliamentary candidature. And as the Samoan government is widely heralded as being one of the most stable and effective within the Pacific region, it is unlikely that significant pressure for change will come from outside. In this respect, hybridity is being accepted by Samoans and the international community as a suitable model for a modern state.

The performance of Samoa’s government has, at times, reflected the autocratic nature of Samoan chiefship. Under leadership of the Human Rights Protection Party (HRPP), Parliament has functioned without any effective opposition for a long period and has successfully passed some highly contentious bills. For example, Iati justifiably argued that it was improper for the government to extend the duration of its own parliamentary life by immediately bringing into effect a law that extended the period between elections from three to five years. He also criticised alterations to the Constitution that resulted in the position of Auditor General being brought under the control of the government rather than being kept politically neutral.\(^{32}\) More recently the HRPP ignored significant public opposition to introduce major changes such as a shift to left hand-drive and moving the international date-line such that Samoa joined New Zealand and Australia on the western side of the line but became separated from American Samoa which remained on the eastern side. Iati also claimed that controversy is a common feature - ‘corruption,


\(^{30}\) Ibid. p16.


allegations of corruption, inefficient government spending, and the odd challenge to a fistfight between MPs are not uncommon.\textsuperscript{33} So’o has also commented on Samoa’s political leadership, characterising leadership styles within government as either ‘weak and ineffective’ or so strong that they verge on dictatorship.\textsuperscript{34} But in spite of these shortcomings, Samoa has benefited from a stable political environment. Aside from a period of volatility in the 1970s, Samoan politics have been marked by consistent leadership. In addition to the long period served by the former Head of State, there has been stability in the role of Prime Minister. The first Prime Minister, Matā’afa Fiamē Faumuina Mulinu’ū II (Matā’afa), was elected in 1959 and was then unopposed in both the 1964 and 1967 elections.\textsuperscript{35} In the 1970s there was a quick succession of Prime Ministers and in 1982 a short period of uncertainty, but the emergence of a party system and, in particular, the HRPP saw stability return. The HRPP has been in office since 1982. Tofilau Eti Alesana served as Prime Minister for most of the period between 1982 and 1998 and the current Prime Minister, Tuilaepa Lopesoliai Sailele Malielegaoi, has been in office since then.

Political stability in Samoa can be attributed to a number of factors. As observed by So’o, the small size of the population contributes to the strength of family connections, dissuading Samoans from causing political upheaval. The HRPP has had quality leadership and policies and has worked effectively with important institutions such as the Public Service. Significant to this thesis is the observation made by So’o that the Constitution has successfully blended indigenous and introduced practices, allowing leaders to be respected for both their constitutional and chiefly rankings.\textsuperscript{36}

Ultimately, the success of any government can be assessed by its performance and its legitimacy for both its citizens and the global community of states. As noted in Chapter 3.2, Samoa rates well in development terms compared with other Pacific Island countries. Although some decisions of the government have been controversial, Samoa has not experienced the same level of political tension or been subjected to civil unrest and violence as experienced in neighbouring countries in recent years. The ability for fa’amatai to maintain its influence in the political decision-making processes of the state creates an interesting dynamic. The influence of tama’aiga, matai-only candidature, deference to rank in parliament, the autocratic nature of the

\textsuperscript{33} Ibid. p1.
\textsuperscript{34}So’o, \textit{The Evolution and Consolidation of the Samoan Governing System Since Independence in 1962} pp21-22.
\textsuperscript{35} Ibid. p3.
\textsuperscript{36} So’o, \textit{More Than 20 Years of Political Stability in Samoa under the Human Rights Protection Party} pp349-361.
parliament, and the consensual nature of selecting parliamentary candidates all suggest that the custom/state relationship is one of incompatibility because democratic systems generally function on principles of equal opportunity. However, it must be recognised that within any democratic system, an array of factors influence the selection of candidates and the relationships within parliament. As such, in this respect the level of incompatibility in the custom/state relationship is diminished. Ultimately, the complexity of the political context must be recognised. Because of its strong ties with customary institutions, the Samoan government is understood as culturally appropriate, representative and legitimate, revealing complementarity in the custom/state relationship.

7.2.2 Matai and local level political institutions

The introduction of universal suffrage in 1990 did not necessarily indicate a diminishing commitment to chieftaincy and that same year legislation was introduced to confirm and reinforce the power of chiefs at the local level. The Village Fono Act of 1990 was developed in order to:

validate and empower the exercise of power and authority by Village Fono in accordance with the custom and usage of their villages and to confirm or grant certain powers and to provide for incidental matters.\(^{37}\)

As with legislation pertaining to chiefs working at the national level, this Act placed the state and matai working at the village level in a relationship of mutual dependency. By requiring that village fono be registered with the Land and Titles Court\(^{38}\) the Act ensures that these customary institutions seek state recognition. By specifying those areas in which fono have authority, the Act regulates the powers of fono placing the fono into a position where they draw upon the state’s authority in order to fulfil some of their traditional responsibilities.\(^{39}\) Simultaneously, although courts may eventually override some decisions of the fono if they act in opposition to other legislation, this Act firmly entrenches the power of traditional authority in village governance. By leaving customary governance essentially untouched at the village level, the fono benefit the state by sharing its responsibilities. For example, the Act specifies that fono have the authority to establish rules pertaining to hygiene and to the use of land for economic purposes\(^{40}\) and it

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confirms that *fono* have the authority to impose fines, community work and other customary punishments.\(^{41}\)

In the first few years after its introduction, the Village Fono Act received some negative attention due to harsh penalties that were imposed by village *fono* and justified under the Act. In one incident in 1993, a man was shot dead and his house burned, reportedly under the instructions of senior *matai*. A few weeks later, a *matai* was banished for one hundred years for assisting in the political campaign of a candidate from another village.\(^{42}\) The severity of such punishments led to criticism that the Act gave *matai* unlimited authority to impose laws and punishments at their discretion. It raised fears that the authority of *matai* would be abused and that ‘barbaric’ punishments would be revived. It was even speculated that the potential impacts of the Act would lead to it being repealed.\(^{43}\)

Such fears emanate in part from Sections 3(3) and 5(1) of the Act which state respectively that:

> the past and future exercise of power and authority by every Village Fono with respect to the affairs of its village in accordance with the custom and usage of that village is hereby validated and empowered\(^{44}\)

and that the *fono* shall have authority on certain listed matters such as hygiene and development of village land even when ‘such powers may not in a particular village form part of its custom and usage.’\(^{45}\) It was feared that these effectively gave *fono* unlimited powers. However, Powles argued that, apart from those new powers pertaining to hygiene and development, the Act does not attempt to *increase* the traditional authority of *matai*.\(^{46}\) He pointed out that *fono* have authority to act only on certain defined matters within the jurisdiction of the village and that laws and punishments must be consistent with either customary law or with those newly defined within the Act.\(^{47}\) As will be discussed in Chapter 8.2.2, the two most significant provisions in the Village Fono Act are those that require that the formal courts must take into account punishments ordered

\(^{42}\) Lawson, *Tradition versus democracy in the South Pacific: Fiji, Tonga, and Western Samoa* p156.
\(^{43}\) Ibid. pp155-157.
\(^{46}\) Powles, *Chiefly Systems and Pacific Island Constitutions: Comparative Trends Relevant for Samoan Studies* p129.
\(^{47}\) Personal communication, 2008.
by the *fono* when deliberating on what penalty to impose in the case before them\(^{48}\) and that there is a right of appeal to the Land and Titles Court from the *fono*.\(^{49}\) The consequences of appealing – and the Court’s powers – are circumscribed by the fact that the Court may allow or dismiss an appeal, or refer the matter back to the *fono*, but it may not substitute its own penalty.\(^{50}\)

The Village Fono Act reflects a general consensus that communities in Samoa should maintain strong systems of local governance. The motivations for Government action in this area, however, are not always clear. The Government has recently outlined strategies that have potential to shore up village-based authority. A goal of the *Community Sector Plan 2009-2012* is ‘enhanced social and economic well-being of all communities grounded in strengthened local governance.’ Included in the strategies of this Plan are those to ‘strengthen the role of Ali’i and Faipule’ (chiefs and village councillors) and to ‘strengthen partnerships between government and traditional leaders, church leaders and community based organisations in support of community well-being.’\(^{51}\) The *Samoa Law and Justice Sector Plan 2008-2012* recognises that the authority of village *fono* is compromised when matters which have already been settled by the *fono* are then taken to the police. The strategy aims to ‘integrate or harmonize’ customary and community-based justice with the state system so as to clarify what recognition should be given to decisions of the *fono*.\(^{52}\) Such policies might be presented as a strengthening of customary authority, but it is not yet clear what the impact of these sector plans will be. Perhaps by drawing on both sources the customary element will inevitably be weakened. The activities listed in the Law and Justice Sector Plan are rather vague and predictable and do not suggest that there is any clear strategy for strengthening village authority beyond its current status. While state support for village *fono* placates advocates of *fa’amatai* and *fa’asamo*, it simultaneously allows the state to move into the territory of custom. While *matai* might welcome greater recognition from the state, they are unlikely to support ‘integration’ of custom if that results in a watering down of their authority. Village *fono* continue to rail against the state and to apply laws which they claim to be customary even when they conflict with the laws of the state. This matter is examined further in Chapter 8 which discusses legal systems in Samoa and Vanuatu.

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\(^{52}\) Law and Justice Sector, Undated, *Samoa Law and Justice Sector Plan 2008-2012* (Government of Samoa, Apia).
7.2.3 Links between central and village authorities

The strength of the relationship between local and central government has been a concern in Samoa since the colonial period and, over time, a series of measures have been instigated to manage the relationship. In 1873 the Samoan authorities created the offices of ta’ita’iitu - district administrators - and fa’amasino - tasked with imposing punishment on wrong-doers.\(^53\) The ta’ita’iitu was abolished in 1905 but the fa’amasino fesoasoani is now recognised as an assistant magistrate and is given limited jurisdiction under the District Courts Act 1969.\(^54\)

The offices of pulefa’ato’aga and pulenu’u were created by the German administration in the early 1900s as part of a re-ordering of the chiefly structure which diminished the influence of the central body but retained authority at the village level.\(^55\) Only matai were appointed to the positions. The pulefa’ato’aga worked under the Director of Agriculture and had responsibility for inspecting village plantations. The position was abolished in 1965 amid criticisms that it was held by old and ineffective matai who did little more than be entertained during their visits to villages.\(^56\) The pulenu’u is discussed further below as an important player in village governance.

The ongoing concern to strengthen the link between central, district and village government was evident in 1971 when the Government of Samoa established a committee to report on the offices of pulefa’ato’aga and pulenu’u. The report articulated fears that the culture of Samoa was under threat. It stated:

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\text{there has been, since 1945, a noticeable drift from this village-centred interest and loyalty to the individuality of the person...this development has accelerated and is accelerating at such a pace that in the foreseeable future the traditional social structure of the country will have become part of history if steps are not taken soon to rescue that basic strength now binding it and upon which reliance will have to be placed for}
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55 Davidson, Samoa mo Samoa: The Emergence of the Independent State of Western Samoa p80; Government of Samoa, 1971, Report of the committee appointed by cabinet to investigate and report upon the institutions of pulenu'u, pulefa'ato'aga and local government p4.
maintaining liaison and cooperation between Central Government and people in rural areas.  

Village-based authority was clearly regarded as central to the fa’asamoa and establishing the links between villages and central government were considered critical for the strength of the nation.

Today, the liaison between central government and villages is facilitated in part by the pulenu’u. Often referred to as mayors, pulenu’u are village-based representatives of the state that are appointed by village fono. Since its establishment, the office of the pulenu’u has been referred to in several enactments, the most relevant today being the Internal Affairs Act 1995 (amended in 2010, see below) which specifies a list of duties for the pulenu’u including: the preparation of births, deaths, and matai title certificates; prevention of vandalism; promotion of harmony and law and order; and ensuring a free flow of communication between matai and the Government. 
Pulenu’u are each paid a nominal fee of $500 per month for which they are expected to provide advice to the village fono on matters of state law.

Management of the pulenu’u is the responsibility of the Department of Women, Community and Development within the Ministry of Internal Affairs. This department has the task of ensuring that pulenu’u are well informed on all matters pertaining to state law. In order to achieve this, pulenu’u are required to attend meetings of the Department that are held monthly, one on the island of Upolu and one on the island of Savai’i. At these meetings, pulenu’u receive training and information pertaining to various government departments such as the Department of Justice and the Police.

The 1971 inquiry on the office of pulenu’u reported that only lower ranking matai were appointed as pulenu’u. Thus decisions affecting the village remained very much in the hands of the village fono. Whilst this would have suited the fono, it served to diminish the strength of the Government presence in villages. The influence of the office of pulenu’u was further compromised because candidates were generally poorly educated and not physically suited to this active position. 

57 Ibid. p3.
59 Interview with a representative of the Department of Women, Community and Development, 2008.
60 Interview with a representative of the Department of Women, Community and Development, 2008.
61 Government of Samoa, 1971, Report of the committee appointed by cabinet to investigate and report upon the institutions of pulenu'u, pulefa'ato'aga and local government p12.
in 2008, a representative from the Department of Women, Community and Development reported that *pulenu'u* today are high ranking *matai*.\(^{62}\) The interest of the Government in the *pulenu'u* was made evident in 2010 when amendments to the Internal Affairs Act changed the name of the *pulenu'u* to *sui-o-le-nu'u*. Although the definition did not change, this amendment was perceived by some as an attempt by the Government to assert its authority in village governance. The word *pulenu'u*, containing the words *pule* (power) and *nu'u* (village), can be translated as ‘boss of the village.’ *Sui-o-le-nu'u* is translated as ‘village representative,’ thereby representing a diminution of authority. The impact of this change may become evident over time, but the term *pulenu'u* is still widely employed.

The Department of Women, Community and Development assesses that the interaction between the villages, the *pulenu'u* and the Government works very well and that the arrangement contributes greatly to stability within Samoa.\(^{63}\) Community ownership of the *pulenu'u* is evident. For example, in 2009 the Government sacked a *pulenu'u* for rejecting plans to widen the road through his village. Discussions around the sacking demonstrated an attitude that, although the Government pays an allowance to the *pulenu'u*, they are appointed by the village and therefore their priority is to the village rather than the Government.\(^{64}\)

The position of *pulenu'u* is a hybrid one in the way that *pulenu'u* simultaneously represent custom and the state. *Pulenu'u* are *matai* and are appointed by village *fono*. However they are paid by the state and their duties are specified by an Act of Parliament. In this manner, *pulenu'u* represent a link that creates a relationship of mutual dependency between custom and the state.

### 7.2.4 Opposition from matai: the Tūmua and Pule protest

As demonstrated above, Samoa’s traditional political institutions have developed relationships of mutual dependency with the institutions of the state. However, it is also evident that incompatibility exists between custom and the state. This was clearly demonstrated in the 1994 protests by the Tūmua and Pule.

\(^{62}\) Interview with a representative of the Department of Women, Community and Development, 2008.  
\(^{63}\) Interview with a representative of the Department of Women, Community and Development, 2008.  
\(^{64}\) Ilalio, Marieta Heidi 2009, 'Is it appropriate for Govt to sack a village pulenu'u?', *Samoa Observer*, (Apia) 6 February, www.samoaoobserver.ws/index.php?view=article&id=4134%3Ais-it-appropriate-for&option=com_content.
As noted in Chapter 3.3.4, Tūmua and Pule is a customary coalition of tūlafale that represents the eleven traditional political districts of Samoa. The authority of Tūmua and Pule was undermined during colonisation by introduced structures of authority and, at independence, with the establishment of the national government. Its authority was dealt a final blow in 1990 when a move to introduce a second house of parliament was quashed. If introduced, this second house would have represented the districts traditionally represented by Tūmua and Pule. Tūmua and Pule is still in existence but it has little influence. In 1994 there was one notable exception in which Tūmua and Pule made considerable impact by organising a protest against the Government.

The protests were triggered by the introduction of a Value Added Goods and Services Tax (VAGST) that came into effect at the same time that the Price Board increased the cost of certain goods and services. This resulted in a substantial overnight increase in the cost of living – estimates range from twenty five to forty percent. These additional costs came on the back of hardship caused by three hurricanes, a decline in remittances from the diaspora and a taro disease that caused considerable damage to agriculture. Many people were unprepared for the sudden cost increases and there was already some discontent with the Government over perceptions of mismanagement of public funds and corruption. Tūmua re-emerged to instigate action against the Government. Tūmua - representing the four political districts in Upolu - gathered support in Upolu then met with Pule - representing the six districts on Savai’i. Together they set their objectives of abolishing the VAGST and forcing a change of government. Samoa’s current Head of State, Tui Ātua Tupua Tamasese Efi, was at the time leader of the opposition and he became the designated spokesman for Tūmua and Pule. The impact of his involvement has not been reported upon however his association with Tūmua and Pule undoubtedly served his own political interests as well as those of his party.

On 2 March 1994 a public demonstration was held and protesters marched about five kilometres to deliver a petition to then Prime Minister, Tofilau. It is unclear how many people marched as estimates range from five thousand to almost twenty thousand. When the Government

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65 So'o, Democracy and Custom in Samoa: An Uneasy Alliance p173.
66 Iati, Civil Society and Political Accountability in Samoa pp5-6; Ibid. p186.
67 Iati, Civil Society and Political Accountability in Samoa pp5-6.
68 So'o, Democracy and Custom in Samoa: An Uneasy Alliance p187.
69 Iati, Civil Society and Political Accountability in Samoa; So'o, Democracy and Custom in Samoa: An Uneasy Alliance p187.
responded by stating that the matter was under consideration, protesters settled in for a two-week vigil. On 5 March, the Government agreed to a compromise that resulted in a reduction to the taxes on thirty two basic commodities. This did not put an immediate end to the protest and Tūmua and Pule retained their focus on abolition of the VAGST. They were supported by the Catholic and Methodist churches as well as by restaurants, entertainers and local residents who provided food and accommodation.

The vigil finally abated but over the following months, Tūmua and Pule gathered signatures from 133,354 Samoans living in Samoa and overseas. The petition was presented to the Government on 11 March 1995 and was followed by another protest in which about thirty thousand people participated. The Government responded by ordering an investigation to validate the signatures on the petition. Its report concluded that the petition was invalid for a variety of reasons including that the majority of signatures were not signed personally. In addition to invalidating the petition, the Government pressed charges of sedition against the president of Tūmua and Pule however the charges were dismissed in court due to a lack of evidence.

Through their involvement in the VAGST protest, Tūmua and Pule demonstrated that their influence on matters of national significance had not waned entirely. Furthermore, despite the inactivity of Tūmua and Pule since independence, there was evidence of a residual sentiment that Tūmua and Pule had a responsibility to act in such situations. The traditional legitimacy of Tūmua and Pule did not completely sway public opinion and the Government was returned to power at the 1996 general election. However its participation in the protests revealed the underlying force of customary institutions and the real potential for customary institutions in Samoa to come into conflict with those of the state.

7.3 Vanuatu

7.3.1 Introduction

The role of chiefs in Vanuatu differs markedly from that of chiefs in Samoa. As discussed in Chapter 4, chiefs in Vanuatu have not traditionally operated at the national level. Unlike Samoa, where the office of tamaʻāiga and the alliances of Tūmua and Pule provided opportunities for chiefs to exercise their customary authority over large areas, applying a uniform understanding of

70Iati, Civil Society and Political Accountability in Samoa p8; So’o, Democracy and Custom in Samoa: An Uneasy Alliance p187.
custom across a mono-cultural society, leaders in Vanuatu are obliged by society’s subdivision into culturally diverse groups to operate primarily at the local level. As will be demonstrated, this impacts upon the kastom/state relationship. As in Samoa, Vanuatu’s Constitution and various Acts of Parliament establish some level of complementarity between the two systems, but ultimately the state is the key player in terms of decision-making at the national level (see also Chapter 4.2).

Nevertheless, as noted in Chapter 4.5.5, chiefs are recognised in numerous Acts of Parliament, including the Leadership Code, reflecting the degree to which chiefly authority is regarded as being of significance to the polity. The state gives chiefs responsibilities across a range of subjects. For example: under the Customary Land Tribunal Act (see Chapter 8.3.4) they are arbiters of disputes over customary land 71; chiefs have duties such as ensuring that births and customary marriages are registered 72; they can sit on Area Health Committees 73; and they are to be consulted on certain matters relating to national parks 74 and environmental management. 75

The following sections will examine institutions at the national and provincial levels that recognise chiefly authority within the realm of the state. While these institutions are of significance, Chapter 8 will demonstrate that it is at the local level that the legitimacy of chiefs is secured, in part because, in some areas, customary institutions continue to function effectively while the state has remained largely absent.

7.3.2 National level political institutions: the Malvatumauri

As noted previously, the politicisation of kastom that occurred in the lead up to independence provided an opportunity for chiefs to assert their authority in new ways. Chiefs were officially appointed as representatives of kastom when the Representative Assembly was established in 1974. 76 At independence in 1980, the Constitution recognised chiefs as advisers of kastom requiring that the Parliament provide for the organisation of a National Council of Chiefs (now the Malvatumauri) with the competence to discuss all matters relating to custom and tradition and the preservation and promotion of ni-Vanuatu culture and languages. The Council may be consulted

71 Customary Land Tribunal Act 2001 See Appendix B:15.
76 Bolton, Chief Willie Bongmatur Maldo and the Incorporation of Chiefs into the Vanuatu State pp5-9.
on any bill before Parliament, especially those relating to custom, language and tradition.\textsuperscript{77} It is the Malvatumauri that now represents chiefs and \textit{kastom} at the national level.

Although the Malvatumauri is comprised of ‘custom’ chiefs and is very much a symbol of \textit{kastom}, it is a hybrid institution in the way that it incorporates features of the institutions of traditional leadership with those of modern, western institutions. The composition of the Malvatumauri has been prescribed by law since 1985, by the National Council of Chiefs (Organisation) Act of that year and the expanded provisions of the National Council of Chiefs Act 2006 which specifies that the Council consist of thirty one chiefs representing the Island and Urban Councils of Chiefs.\textsuperscript{78} The original President, Willie Bongmatur, headed the Council for sixteen years but, under the 2006 Act, the Council now has a Chair who is elected by members of the Council at the first meeting of each new Council.\textsuperscript{79} The Council has an informal arrangement whereby the position of Chair operates on a rotational basis so that each province is represented in turn.\textsuperscript{80}

The Council receives funding from the government and has staff – a Chief Executive Officer, secretary and two support staff – who are civil servants. Under the Official Salaries Act, a salary is specified for the President and a daily rate is specified for each member of the Council.\textsuperscript{81} The Malvatumauri has an office in Port Vila and its large \textit{nakamal} (meeting place) has become a popular venue for community meetings and events.

In addition to its constitutional advisory role, the Malvatumauri has a primarily organisational function under the National Council of Chiefs Act which, without giving it extensive powers, requires it to facilitate the functioning of the Island and Urban Councils\textsuperscript{82} (discussed below). In 2004 the Malvatumauri developed its first (and only) corporate plan which articulated, for the first time, the Council’s values and objectives. In this plan, the Malvatumauri stated that its mission was to support chiefs, government and NGOs in their efforts to contribute to the welfare of the people.\textsuperscript{83}

\begin{flushleft}
\textsuperscript{80} Interview with representative of the Malvatumauri, 2007.
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Under the Constitution and various Acts of Parliament, the Malvatumauri is given a broad range of responsibilities, primarily pertaining to consultation. For example, the chair of the Malvatumauri must be consulted about the appointment of the Ombudsman\textsuperscript{84} and appointments to the Judicial Services Commission.\textsuperscript{85} The chair must sit on the Board of the National Parks\textsuperscript{86} and nominate a member for the Police Service Commission.\textsuperscript{87} The Council must be consulted on applications for trademarks involving indigenous culture.\textsuperscript{88} Members of the Malvatumauri also have entitlements. For example, the Chair is entitled to a diplomatic passport and members to official passports.\textsuperscript{89}

By specifying that the Malvatumauri can advise the government, it would appear that chiefs are assured a role within state decision-making processes. However, in practice this role is minimal. As noted, the Constitution does not require that the decisions of chiefs take precedence. The Constitution does require that the Malvatumauri be consulted on the implementation of specific articles in the Constitution pertaining to customary land ownership,\textsuperscript{90} but on no other matters does it require that the government call upon the Malvatumauri for advice. In a 2008 a representative of the Malvatumauri secretariat claimed that, up until that time, the Malvatumauri had never had any formal dialogue with government and it had never been consulted on any new bills.\textsuperscript{91} This claim appears to have overlooked discussions around the introduction and passing of expanded legislation in the form of the new National Council of Chiefs Act 2006, but it nevertheless indicates that there have been few formal discussions between the Malvatumauri and Parliament. In 2011, the Malvatumauri was consulted on the draft Traditional Knowledge and Cultural Expressions Bill.\textsuperscript{92} It seems appropriate that the Malvatumauri would be consulted on such a bill and it remains to be seen whether this consultation represents a strengthening of the Malvatumauri/Parliament relationship or whether it was a one-off instance.

\textsuperscript{85} Family Protection Act 2008, s7, PacLII, www.paclii.org/vu See Appendix B:18.
\textsuperscript{86} National Parks Act 1993, s4(1), PacLII, www.paclii.org/vu See Appendix B:25.
\textsuperscript{87} Police Act 2010, s9, PacLII, www.paclii.org/vu See Appendix B:30.
\textsuperscript{91} Interview with representative of the Malvatumauri, 2008.
There have only been a few occasions when the Malvatumauri has been consulted by the state courts: on one occasion the Malvatumauri was requested by chiefs in Pentecost to authorise a request to perform a customary ritual, the Nagol Jump, on Santo. When the matter ended up before the Supreme Court, the president of the Malvatumauri represented the defendants. Of significance to that case was the Chief Justice’s order that future decisions on the Nagol Jump would be made by the Malvatumauri. ³³ In another case that was brought before the Supreme Court, the advice of the Malvatumauri was sought by parents in dispute over custody of their child. In that instance the Malvatumauri was unable to provide a satisfactory answer, rather unhelpfully suggesting that the child should spend time with both parents even though the mother of the child was moving to France. The matter was ultimately taken to the state system for resolution. ³⁴ The Malvatumauri does, however, earn respect and anecdotal evidence indicates that it is consulted by the public on a wide range of matters.

Ultimately, the Malvatumauri is vulnerable to the whims of the government-of-the-day because, although the Constitution requires that the Council exist, there is no requirement that it receive the financial support required for it to be pro-active. As a result it has limited capacity for long-term planning and, due to the high costs of internal travel, it has difficulty in getting a quorum for meetings, further diminishing its ability to develop or influence public policy. The 2006 revisions to the National Council of Chiefs legislation were instigated by the Malvatumauri in a bid to increase chiefly authority within the state system. The draft initially put before Parliament was under-prepared and it may have been unconstitutional because it accorded chiefs authority reserved for the judiciary. Sections of the draft were quickly removed when it became apparent that they could be contentious ³⁵ and the result was a watered down version in which limitations to the authority of chiefs were reaffirmed. On this matter, a level of complementarity between kastom and the state is evident, but it is weak with the state retaining the balance of power.

7.3.3 Local level institutions

7.3.3.1 Decentralisation

At the provincial level, chiefs are represented in government as well as customary institutions recognised by the state. Government representation at the provincial level was secured under the

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Constitution which required that Vanuatu be divided into regions administered by Local Government Councils on which chiefs were to be represented.\textsuperscript{96} The Decentralisation Act, introduced in 1981, made provisions for the establishment of Local Government Regions and related matters, including the Local Government Councils. It provided for the representation of chiefs, along with women, youth and church representatives, on these Councils.\textsuperscript{97} As a separate system, the National Council of Chiefs Act formalised a role for chiefs in provincial level customary institutions by specifying the functions, management and membership of island and national-level chiefs’ councils.\textsuperscript{98} Chiefs’ councils at the District and Area levels are also recognised in various Acts. As noted above, these chiefs’ councils are customary in the sense that they represent \textit{kastom} rather than being traditional institutions.

In Vanuatu, as in other Pacific Island countries, the subject of local and regional authority was an important topic during constitutional discussions. As noted in 1985 by Yash Ghai, one of the constitutional advisers, chiefs have had an ambivalent attitude toward Local Government Councils. At the time the Constitution was written, tensions existed between councils and chiefs in some areas, but generally there was an agreement that chiefs and local councils fulfilled different roles – councils had a role in development while chiefs had a role in \textit{kastom} and culture.\textsuperscript{99} The subject of decentralisation continues to be a topic of contention in Vanuatu and elsewhere in Melanesia. This is partly a reflection of the strong sense of local rather than national identity, but also stems from the frustration caused by the lack of services to remote areas, perceptions of disparity in service delivery between islands, and the feeling that stronger local representation would serve local communities better.

In line with the Decentralisation Amendment Act 2000,\textsuperscript{100} a Decentralisation Review Commission was established in 2000 to review decentralisation policies and structures. After conducting consultations with leaders and representatives from the government and non-government sectors, the Review found a strong desire for local independence on some matters. The Review assessed that under the system in place at the time, too much control and too many resources were retained at the central government level and that people wanted a system that allowed chiefs and others at

\begin{footnotes}
\item[97] Decentralisation Act 1994, s7(1)(a), PacLII, www.paclii.org/vu See Appendix B:16.
\item[99] Ghai, Yash, 1985, 'Vanuatu' in Peter Larmour and Ropate Qalo (eds), \textit{Decentralisation in the South Pacific} (Institute of Pacific Studies and Institute of Social and Administrative Studies of the University of the South Pacific, Suva) p71.
\item[100] Decentralisation Act 1994, s31A, PacLII, www.paclii.org/vu See Appendix B:16, Note s31A.
\end{footnotes}
the grassroots to be able to make decisions about planning and development. This suggested a slight shift in emphasis from that reported in 1985 by Ghai whereby chiefs did not see a role for themselves in development. Among other things, the Review recommended that consideration be given to the inclusion of chiefs in the definitions of the Leadership Code and that councils establish systems for greater consultation with chiefs. Since the time of the Review, legislation pertaining to the role of chiefs has been developed or amended, however it is not clear that the status of chiefs operating at the local level has been significantly altered as a result. As noted in Chapter 4.5.5, the Leadership Code states that chiefs should ‘be able to maintain their customary role in connection with the conduct of leaders, so long as it does not conflict in any way with the principles of this code.’ This legislation reaffirms that chiefs have a role as customary leaders, but it does not change or strengthen their authority. For example, as members of Local Government Councils, chiefs can influence decisions made by those Councils. But as appointed rather than elected members, they are not eligible to vote at Council meetings and thus their influence is constrained. Further, members of the Malvatumauri and office holders of the District, Island and Area councils of chiefs - potentially the more influential chiefs - are not eligible for election or appointment to the Local Government Councils. Thus, although chiefs are given a role in local state institutions, their ability to influence decision-making is limited. Conversely, the institutions do not rely on input from chiefs to fulfil their function, indicating weak levels of complementarity in the kastom/state relationship on this matter.

7.3.3.2 The Port Vila Town Council of Chiefs
At the sub-national level and lower levels there are tiers of chiefs councils, some of which are organised under the National Council of Chiefs Act 2006 and some of which are bodies established by chiefs themselves without any sanction from the state.

In the 1990s it was recognised that communities in the urban centres of Port Vila and Luganville needed greater representation. The National Council of Chiefs Act 2006 specifies that two Urban Councils of Chiefs, one in Port Vila and one in Luganville, have the authority:

(a) to resolve dispute according to local custom;
(b) to prescribe the value of exchange of gift for a custom marriage;

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102 Ibid.
(c) to promote and encourage the use of custom and culture;
(d) to promote peace, stability and harmony;
(e) to promote and encourage sustainable social and economic development;
(f) to undertake such other functions as are conferred on them under this Act or any other Act. 106

The Port Vila Town Council of chiefs has had a turbulent history. Its members were appointed by the President of the Malvatumauri, but in 2007 Malvatumauri President, Paul Tahi, claimed that the Council was dissolved on the grounds that it was unable to do the work required of it by the Malvatumauri and that it did not represent the island communities of Port Vila. 107  A new council was established in May 2008 but this arrangement was contentious, with members of the original Port Vila Town Council claiming that Tahi had no authority to dissolve it. This claim was upheld by the Supreme Court 108 with the result that both councils continued to operate. The decision of the Malvatumauri to give recognition only to the second council in spite of the decision of the Supreme Court reveals some tension in the kastom/state relationship.

The twenty chiefs who sit on the second Port Vila Town Council all live in Port Vila, but they are elected on their respective home islands and each has the status of ‘custom’ chief. Each of these chiefs represents the people from their island who live in Port Vila. At the time of its formation, the intention was for the Council to meet twice yearly and for Council members to serve terms of five years, coinciding with the terms of the Malvatumauri membership. The government had indicated that the Council would receive funding however membership is likely to remain voluntary and resources limited. In line with the intention of the National Council of Chiefs Act, members of the council see their primary function as being one of advocacy. That is, the Council provides a point of representation, facilitating communication between people from different islands living in Port Vila and it provides an avenue for discussion of issues such as land, conflict and kastom. 109

When the National Council of Chiefs legislation was revised in 2006, the role of chiefs was formally expanded, signalling a further shift in the kastom/state relationship to one of increased

109 2008 interview with representative of the Port Vila Town Council.
complementarity. However, the functions accorded to the Island and Urban Councils are vague and the Councils are not obliged to ensure that these functions are fulfilled. Furthermore, the Councils have neither the capacity nor the resources (nor perhaps even the impetus) to fulfil all of these functions other than on an ad hoc basis. As with the Malvatumauri, the Island and Urban Councils rely on the support of the government and resources are severely restricted - they have no paid staff, no offices and no guarantee of funding. In their current form, the Island and Urban Councils cannot be expected to accomplish tasks such as the promotion of sustainable social and economic development in any systematic or effective manner. The authority given to these councils is thereby rendered almost meaningless. So although there is little tension, the kastom/state relationship is more one of neutrality.

7.3.4 Links between central and village authorities

Vanuatu does not have an equivalent of Samoa’s pulenu’u to provide a link between central and village-based authorities. The Island and Urban Councils should serve this role to an extent. But chiefs are looking for new ways to increase their political voice and so are establishing councils which are neither customary institutions nor the outcome of Acts of Parliament, but which are demonstrating some success at community level governance. The councils link local and state justice systems and provide a mechanism for chiefs to have a role in dispute resolution in urban environments. These councils will be discussed further in the next chapter as institutions that support dispute resolution in Vanuatu.

7.3.5 Opposition from chiefs

Chiefs in Vanuatu largely rely upon kastom as a source of authority. Limited recognition and interference by the state in combination with the remote geographical and political context in which villages operate autonomously, has to a large extent allowed chiefs and villages to determine their own modes of operating. In this environment, the relationship between chiefs and the state is mostly a positive one.

However, opposition from chiefs has been apparent through the persistent protests of chiefs against state laws. Some chiefs have been particularly concerned that restrictions to the enforcement of kastom law have served to diminish chiefly authority. As such, there have been
regular calls from chiefs and their supporters to give them greater authority over things such as movement, religion, marital disputes and dress codes. Some of these matters are now within the realm of state law and so, in advocating for greater control, chiefs are competing with the state, sometimes placing the kastom/state relationship in one of incompatibility. Chiefs are also engaging on matters of international significance, working well outside the local community setting. For example, in 2008 the Port Vila Town Council of Chiefs\(^\text{110}\) protested loudly when the Australian Federal Police (AFP) conducted a series of raids on Government of Vanuatu institutions in Port Vila as part of investigations into an alleged money-laundering scheme. It was the chiefs who claimed that the AFP had breached Vanuatu’s sovereignty and demanded that the Australian High Commission be closed. In statements to the press, the chiefs were highly critical of Australia’s presence in Vanuatu and the region, as well as Australia’s treatment of its own indigenous population. Chief Bule went so far as to claim that ‘Australia is striving to rubbish Vanuatu after successfully damaging Fiji, PNG and the Solomons.’\(^\text{111}\) In this instance, chiefs demonstrated an interest in stepping into areas which had largely been the responsibility of the state. However chiefs received little traction and so were largely unsuccessful on that occasion.

### 7.3.6 Chiefs’ involvement in national crises

There have been a few instances in recent years when chiefs have been able to utilise their unique authority and community standing to avert, diminish or respond to large-scale conflict. Boege and Forsyth identified four instances in which chiefs successfully contributed to the settlement of crises: the 1998 National Provident Fund riots; the 2002 stand-off between the Vanuatu police and the Vanuatu Mobile Force (VMF); the 2006 Port Vila prison escape (see Chapter 8.3.2); and the 2006 independence celebrations in Luganville.\(^\text{112}\) In each of these cases, chiefs played a key negotiating role that the state authorities were either unable or unwilling to take on.

In the case of the Vanuatu National Provident Fund (VNPF) an estimated five hundred people gathered at the VNPF building in protest when, in a period of public dissatisfaction with the government, an Ombudsman’s report linked senior politicians with alleged mismanagement of

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110 This was the original Port Vila Town Council of Chiefs, later to be rejected by the Malvatumauri. See 7.3.3.2.


national retirement funds. Chiefs have been credited with calming the crowd and persuading them to disperse so, although they were unsuccessful in preventing a spate of looting that followed, chiefs were recognised as having a key role in mitigating the violence. Boege and Forsyth noted that an element of folklore surrounds this incident and that it is likely that it was a combination of factors including the actions of police as well as chiefs that quelled the crowd. Nevertheless, Boege and Forsyth concluded that the commonly held belief that chiefs did indeed have such authority when the police did not is an important legacy that has been used by chiefs to emphasise their importance to security.

The stand-off between the Police and VMF aptly demonstrates the potential for customary and state processes to work together for a satisfactory solution. The saga began when fifteen members of the Police Services Commission were charged with ‘seditious conspiracy’ and it reached a climax about three weeks later when a heavily-armed VMF contingent laid siege to the central police station where the charged officers had congregated. A large crowd gathered at the station, threatening to riot should the VMF use force against the officers inside. While the government remained quiet, a group of chiefs persuaded the VMF to stand down. Over the next few days, chiefs arranged a reconciliation ceremony which was held at the Malvatamauri’s nakamal and attended by chiefs, police, the VMF, the Prime Minister and others. The chiefs, however, were under no illusion that the reconciliation ceremony would end the matter and supported the state processes that followed, including the eventual conviction of four officers. In this instance, the chiefs played an important role in diffusing the immediate tension and then allowing the state legal system to bring the conflict to an end, demonstrating cooperation between the two systems.

Through their efforts to diminish large-scale conflict, chiefs are supporting kastom’s focus on community harmony while simultaneously benefiting the state. In this manner chiefs are taking the kastom/state relationship into one of complementarity.

7.4 Conclusion

Samoa and Vanuatu present as very different polities with respect to political representation. Both countries are democratic states which recognise their Constitutions as the supreme law, however

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114 Kernot and Sakita, The role of chiefs in peacebuilding in Port Vila.
115 Boege and Forsyth, Customary conflict resolution in a state environment - cases from Vanuatu.
customary authorities are influential and, in Samoa, the custom/state relationship reveals high-levels of mutually dependency. In Vanuatu, levels of complementarity exist in the kastom/state relationship, but to a lesser extent.

In Samoa, the hybrid nature of the political structure contributes to the legitimacy of both custom and the state. At the national level, matai simultaneously represent custom and the state through their position as customary leaders and their participation in parliament. At the local level, customary authority has remained intact, supported by customary processes such as participation in village fono and by the state through Acts of Parliament. Samoa has also developed the position of pulenu’u – a hybrid structure in itself – which functions as a link between village and national government. This relationship of cooperation at national and local levels serves to strengthen the polity by increasing effectiveness of decision-making bodies. Tensions between the systems do exist and this has inevitably lead to opposition, but ultimately, Samoa has demonstrated that benefit can be gained from the mutually dependent nature of the custom/state relationship. Samoa’s government has been characterised by stability and is widely regarded as one of the most effective in the region and, simultaneously, fa’amatai and fa’asamoa are viewed favourably by Samoans as representative systems that continue to provide for the well-being of families and communities.

In Vanuatu, kastom and the state operate more independently of each other. The state does recognise chiefs and kastom to an extent and chiefs, in turn, are willing to participate in state processes. However, complementarity between the two is not strong and low levels of mutual dependency exist.

For policy makers, the stark differences between the polities of Samoa and Vanuatu highlight that a comprehensive understanding of local context is vital when thinking about issues of governance. Importantly, although Samoa’s political system reflects principles that appear to conflict with those of democratic state systems, a closer inspection reveals that pathways of negotiation between custom and the state can successfully be incorporated into decision-making structures and, furthermore, that these can add to the strength of the polity. Policy makers should not avoid custom on the assumption that it is inherently incompatible with the state, but rather draw on its strengths.
Chapter 8  Legal systems

8.1  Introduction
This chapter continues the discussion of hybridity, examining sources of authority active in the legal systems of Samoa and Vanuatu. In both countries, customary and formal legal systems function, often competing in the same spaces. However, as with the custom/state relationship in political systems, the apparently competing legal systems have found ways to complement one another. This is particularly so in dispute resolution where, in both countries, customary leaders facilitate accessible and culturally relevant systems that reduce the burden on formal justice systems. Chiefs are demonstrating that custom can be adapted in such a way as to make it appropriate and effective in the modern urban contexts in which it operates today. By examining these processes through the lens of hybridity, the complex and dynamic nature of the custom/state relationship in both polities once again reveals points of strength and complementarity that can be drawn upon by policy-makers.

8.2  Samoa
8.2.1  The legal system
At independence on 1 January 1962, the Constitution was brought into force as the supreme law of Samoa. Under the Constitution, existing laws were continued\(^1\) with the result that today the laws of Samoa comprise Acts of the Samoan Parliament as well as certain laws made by foreign authorities during de-colonisation, together with English common law and equity, and any custom and usage which has acquired the force of law.\(^2\)

The Constitution establishes a legal framework in which executive power is vested symbolically in the Head of State (see Chapter 7.2.1) and in fact in Cabinet (See Chapter 3.5.5). Legislative power is held by the Parliament which consists of a forty seven seat Legislative Assembly. The judicial branch consists of a tiered court system: the District Court; the Supreme Court; and the Court of Appeal. In the Land and Titles Court, Samoan Judges advise on all matters and the Court applies only customary law.

The state recognises the Constitution as the highest authority however the Constitution itself ensures that Samoa’s legal system is hybrid in nature. Recognition by the Constitution of matai titles and land to be held ‘in accordance with Samoan custom and usage’\(^3\) allows customary law and practices related to land tenure and matai titles to continue. Article 111 of the Constitution recognises customary law to the extent that it has ‘acquired the force of law...under the provisions of any Act or under a judgment of a Court of competent jurisdiction’\(^4\) which includes the Land and Titles Court that applies customary law under section 37 of the Land and Titles Act.\(^5\) Significantly, customary institutions continue to fulfil their traditional role of enforcing customary law and, in doing so, strengthen the state by contributing to its legitimacy and effectiveness. In return, the state gives recognition to customary law thereby adding to the legitimacy of customary authorities. In this manner, the relationship between custom and the state is mutually beneficial, demonstrating high levels of complementarity.

Evidence of the state’s practical acknowledgement of customary law as opposed to constitutional recognition in general terms, can be found in Samoa’s Village Fono Act 1990 which requires that the state’s criminal courts take into account in mitigation of sentence any penalty imposed by a village fono. Fono impose a range of penalties recognised by custom and the Act confirms that fono may require fines of money, fine mats, food or animals, or work on village land.\(^6\) The criminal courts are not limited in what they may consider when it comes to sentencing an offender and courts have taken this requirement further through recognition of ifoga as a mitigating factor in sentencing. An ifoga is an act of reconciliation whereby offenders and their āiga present gifts of fine mats and food and make speeches. It is a public act of self-abasement, regarded as the greatest loss of face that can be suffered voluntarily, and so is generally accepted by the injured party.

In a leading case concerning the recognition of ifoga, the Court of Appeal stated:

> As an institution for restoring relations among the wider family groups the purpose of ifoga overlaps with but does not supersede the court-based processes of the criminal law. Care must be taken by the Court to steer the narrow passage between

\(^3\) Constitution of the Independent State of Samoa,, See Appendix A:5.
disregarding *ifoga*’s valuable role as a contributor to reconciliation in Samoan society and ... placing such weight upon it as would permit preferential treatment of those whose families can compared with those who cannot perform *ifoga*.  

In this case, the āiga of a man accused of manslaughter presented the victim’s family with ten cattle, forty boxes of canned fish, a large pig, thirteen fine mats and $10,000. This payment was considered by both the recipients and the trial court as a demonstration of complete remorse and the court recognised acceptance of the *ifoga* as reconciliation between the two families. As a result, the length of the sentence was reduced.  

The Court of Appeal declined the Attorney-General’s appeal against the sentence after reviewing earlier cases and studies. These show that acceptance of *ifoga* as a mitigating factor is the norm. The recognition by the formal system of customary dispute resolution processes gives legitimacy to both systems, allowing each to support the other in a relationship that is mutually beneficial.

The formal and customary systems of justice have also demonstrated a capacity to work together through the drafting of village by-laws. In the mid-1980s the Fisheries Division of Samoa realised that village *fono* were playing an important role in marine conservation by placing restrictions on fishing techniques such as the use of explosives and chemicals that were harmful to fish stocks and the environment. But although the *fono* could impose rules on their own residents, they could not impose or enforce them on individuals from other communities. The Fisheries Act was developed in order to give legal recognition to rules formulated by village *fono* that pertain to the management and conservation of fishery resources. A process of consultation with the Fisheries Division and Office of the Attorney General ensures that the rules are in line with existing legislation and written in the proper form. They are then authorised by the Director of the Ministry of Agriculture, Forests, Fisheries and Meteorology before being gazetted by the Legislative Assembly. The rules are distributed to the *pulenu’u* (village representative, see 7.2.3) who has the responsibility of informing the relevant people in their village. Once the by-laws come into effect, village

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fono have the authority to enforce them, including by imposing fines on individuals who breach the law.\textsuperscript{10}

In this instance, both the customary and formal systems serve to benefit through cooperation. The protection of the fishing industry and the environment is important to both parties, but the village fono are in a far better position than the state to monitor and protect it. By utilising the village fono to enforce environmental regulations, one aspect of state responsibility is taken care of. By retaining their customary responsibility for the environment and by having the ability to enforce regulation, the authority of the fono is reinforced. As such, the relationship between custom and the state is complementary.

8.2.2 Dispute resolution

As heads of families, matai continue to fulfil their customary role in dispute resolution. By fulfilling this function, matai play a vital role in their extended families and communities and, importantly, they are assisting the state in areas where its capacity is limited. However, there are some fundamental ways in which customary processes of conflict resolution in Samoa are inconsistent with those required by the formal system.

For example, according to custom the severity of a crime is assessed in part by the rank of the victim in relation to that of the offender. That is, if a crime is committed against a person of high rank by a person of lower rank, the severity of the punishment is higher than if the rankings are equal.\textsuperscript{11} In terms of the Constitution, all persons are considered equal and no consideration is given to rank.\textsuperscript{12} In addition, according to custom, the actions of individuals are understood to reflect upon the group and as such the responsibility for crimes and misdemeanours is also shared by the group. Ultimately, the matai of a transgressor is held accountable.\textsuperscript{13} Today, the decisions of village fono often continue to reflect this notion of group responsibility.

The order of banishment is another that creates tensions in the custom/state relationship. Village fono or the Land and Titles Court will impose banishment from the village for serious

\textsuperscript{11} Meleisea, \textit{Change and adaptations in Western Samoa} p43.
\textsuperscript{13} Meleisea, \textit{The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa}.
misdemeanours or when authority is being undermined. In cases of minor misconduct or disobedience, a *fono* may impose the lesser sanction of ostracism whereby an individual is prohibited from participating in all community activities apart from attending Sunday church services. For serious crimes that disrupt the village, persistent unacceptable conduct, or for continual disregard for lesser penalties, troublemakers and in some cases their whole ‘āiga can be expelled and their movable property expropriated - houses may be demolished and burnt and all memory of existence may be wiped out. Because of Samoa’s extended family system, a banished family is never left without a place to live. They can retreat to a village in which they have relatives but they nevertheless face the task of establishing new houses and gardens and of serving the new village. In addition, an exiled *matai* will suffer a great loss of status.\(^{14}\) In most cases banishment is temporary and individuals and families can return to the village following reconciliation ceremonies.\(^{15}\) The duration of banishment is seldom specified and is dependent upon the length of time taken for the individual or family to express remorse and for the village to accept an apology. In some instances, a village may invite banished people to return. In extreme cases, *fono* may state that the punishment applies ‘forever,’ but even this does not necessarily indicate that no reconciliation can ever be made.\(^{16}\)

Colonial administrations attempted to prohibit banishment as disruptive\(^{17}\) but, although some individual villages stopped using the practice, it remains common across the country as a whole. In 1974, the then Chief Justice and President of the Land and Titles Court expressed his view that banishment was illegal on the grounds that it violates the rights to freedom of movement and residence as guaranteed in the Constitution.\(^{18}\) His Practice Order to Samoan Judges in the Land and Titles Court to stop issuing banishment orders\(^{19}\) was not adhered to and in 1995 the Court of Appeal, which provides the definitive view of the state, determined that the Land and Titles Court may make an order of banishment if there is adequate evidence that it is necessary for the preservation of harmony.\(^{20}\) The authority of *fono* to impose banishment without an order of the Land and Titles Court remains in doubt. In 2004, a justice of the Supreme Court found that the Village Fono Act does not give village *fono* the authority to remove any person from customary

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\(^{14}\) Ibid. p132.
\(^{15}\) Ibid. p115.
\(^{17}\) The administrations utilised the practice themselves, however, when they deported rebellious Samoans. Meleisea, *The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa* p133.
land, claiming that banishment was deliberately omitted from the Act. This latter assumption is unjustifiable because the Act does not purport to list all customary punishments and omission does not indicate a position. Significantly, the Supreme Court has since supported decisions made by fono to impose banishment. While Samoa’s judges continue to show disagreement on whether fono have the authority to impose banishment, the conflicts and tensions between custom and the state are being worked out in the state’s courts. Importantly, the state’s acceptance of banishment as a sanction indicates that the Samoan state can accommodate custom. This is also evident in Article 8 of the Constitution which pertains to the right of freedom from forced labour. The Article specifies that any work required by Samoan custom (as might be ordered by village fono) is not considered to be ‘forced labour.’

In spite of such instances of accommodation, each system continues to challenge the other, establishing a complex and dynamic relationship. For the fono, punishments serve as an effective reminder of village authority and in some cases the punishment is more important than the offence because it demonstrates the strength of the fono. Fono continue to authorise punishments as deemed appropriate under custom and, when called upon, the formal system challenges those decisions if they conflict with the laws of the state. This situation has led to fono defying government as a form of protest at the undermining of their authority. For example, in 2009 five high-ranking matai were found guilty by the Supreme Court for burning down a house that belonged to a judge of the Land and Titles Court because they were unhappy with a Court ruling on their decision to banish a member of the fono. Four of the five men were sentenced to over two years’ imprisonment and the fifth was given a two year probation and ordered to do 350 hours of community service. In this instance, the conflict between the custom and formal systems resulted in negative outcomes for both.

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22 For example, Police v Falemai [2010] WSSC 74, www.paclii.org/ws. A 1975 review on land and titles recommended that legislation on banishment be introduced. The draft proposal gave matai the authority to impose banishment, but only if certain requirements were met. This proposal was not accepted. Committee for Review of Matai Titles Customary Land and the Land and Titles Court, Report on Matai Titles, Customary Land and the Land and Titles Court p87.
When the 2004 case of banishment cited above was brought before the formal system, counsel for the defendants (the village fono) claimed that custom does not require that village fono give notice of a forthcoming hearing of the fono. Nor does it, they claimed, allow the accused to present a defence or to question witnesses. Justice Vaai determined that:

This is so gross a violation of the elementary principles of justice that the court cannot possibly support their action…the courts cannot lend their approval to any custom, however ancient, which denies to an accused person a right freely available to the lowliest member of a civilised Christian community.26

Once again, the two systems presented conflicting views. However it may also be argued that in the particular case cited above, the village fono were misrepresenting custom because custom does allow for representation - any accused person should have their matai present at a meeting of the fono. In this respect, fa’asamoa incorporates a principle that aligns with the democratic ideal of natural justice27 - that is, a person who will be affected by a court decision is given a fair and impartial trial. On this particular matter then, custom and formal systems demonstrate aspects of complementarity.

In 2007 and 2008 the Government introduced legislation in an attempt to shore up village based authority and thereby reduce the likelihood that disputes would be taken from the village to the formal court system.28 The Alternative Dispute Resolution Act 2007 recognises mediation and reconciliation as alternative dispute resolution procedures.29 The Young Offenders Act 2007 establishes a Youth Court which can authorise a range of sentencing options. One option is for the Court to direct that a pre-sentence meeting be convened and ‘conducted in accordance with Samoan custom and tradition.’ The Act states that, if approved by a probation officer, the meeting can be attended by any person including ‘any victim and members of the victim's family, the police, the probation service, village or church representatives, and members of the Young Person's family.’30 The Community Justice Act 2008 was introduced partly with the purpose of ‘providing opportunities for Samoan custom and tradition to be recognised in the sentencing, rehabilitation and reintegration of offenders’ and ‘ensuring that Samoan custom and tradition is

28 Law and Justice Sector, Samoa Law and Justice Sector Plan 2008-2012 p23.
integrated, where appropriate, in the community justice system. These three Acts of Parliament further demonstrate that the state can draw on the benefits and resources of custom. In this case, custom is continuing to function in its traditional domain, but its authority is reinforced by the state. In turn, the state benefits when disputes are resolved outside the formal judicial system. As such, the custom/state relationship is mutually beneficial and thus highly complementary.

8.2.3 Land tenure and dispute resolution

In Samoa, as in other Pacific Island countries, land management is fundamental to social protection (discussed in Chapter 9). As noted in Chapter 3.2, almost eighty percent of Samoans live in rural areas, relying on their land for sustenance and a place of residence. In contemporary Samoa where access to and use of land are impacted by factors such as foreign ownership, industry and urbanisation, successful land management is understood as critical to the preservation of Samoa’s social structure and way of life.

Customary land tenure systems, as exist in the Pacific, can present a challenge to the mechanisms of the state. Under customary systems, access to land stems from birth into a kinship group, and landholding units are groups based on kinship. Strong kinship connections result in fewer opportunities to develop or sell customary land which means fewer opportunities for the state to raise revenue through land taxes and to regulate the use of land. In addition, modern states can introduce mechanisms such as registration and formal defining of boundaries that assist in resolving disputes over land ownership and income. However, there are avenues by which issues pertaining to land tenure and land management can take the custom/state relationship into one of mutual dependency. This is evident in Samoa and, as will be shown below, in Vanuatu.

The significance of customary land to Samoa was recognised by non-customary authorities during the period of colonial rule. German and New Zealand administrators determined that there was a need to protect customary land and so they gradually introduced legislation that would restrict land sales to foreigners and manage customary land law: the Land and Titles Commission (renamed a Court in 1937, see Chapter 3.4.3) was established by the German administration in 1903 in order to facilitate the peaceful resolution of land and title disputes amongst Samoans; and

in 1934, the New Zealand administration established the Land and Titles Protection Ordinance in order to minimise interference from outside. Also linked to land tenure was the establishment in 1957 of the Register of Matai which allowed matai to register for the purpose of participating in future elections.\textsuperscript{34}

At independence the Constitution recognised matai titles, customary land tenure and the inalienability of customary land, and it reaffirmed the Land and Titles Court as having jurisdiction in relation to these matters.\textsuperscript{35} Since independence various pieces of legislation that deal with issues of land tenure - and therefore matai titles - have been introduced by successive Samoan governments. In the Land and Titles Protection Amendment 1969, described as the first legislation ‘to protect the matai system from abuse from within itself,’\textsuperscript{36} was primarily an attempt to curb the proliferation of matai titles (discussed in Chapter 3.5.4). By limiting the number of matai title holders, the number of people directly involved in land management was also limited. The Act was largely unsuccessful in reducing proliferation and so the matter of land and titles was subjected to extensive review in 1975. The result was the Land and Titles Act 1981. This Act perpetuates the 1934 Ordinance which confirmed the customary rights of matai as holders of land titles, requiring that matai be appointed according to custom and recognised in a traditional village ceremony. It also requires that matai be registered with the Land and Titles Court.\textsuperscript{37} The Land and Titles Act 1981 gave the Land and Titles Court exclusive jurisdiction ‘in all matters relating to Samoan names and titles’ including claims and disputes, obligations, registration and rights of succession.\textsuperscript{38} This Act confirmed that both matai and the state have a role in land management.

The authority of the Land and Titles Court is particularly significant for the custom/state relationship because, due to the uncodified nature of Samoan custom, the Court effectively has the authority to determine what is and what is not custom. In this way it ‘redefines and transforms custom.’\textsuperscript{39} Tuimaleali’ifano argued that it is the Court that has identified the criteria for chiefly succession and that these have been widely accepted.\textsuperscript{40} Corrin, too, argued that concepts of

\textsuperscript{34} Committee for Review of Matai Titles Customary Land and the Land and Titles Court, \textit{Report on Matai Titles, Customary Land and the Land and Titles Court} p17.
\textsuperscript{39} Tuimaleali’ifano, \textit{O Tama A ‘Aiga} p20.
\textsuperscript{40} The criteria are: ‘descent from a former titleholder; service to a former titleholder; residence in the village to which the title belongs; personal ability; and character.’ Ibid. p30.
customary law have unintentionally been altered as a result of common law terms being used in legislation and the operation of common law in the courts.\textsuperscript{41} In addition, the Court may overlook the validity of claims in order to minimise conflict and it may make ambiguous or contradictory rulings in order to be inclusive.\textsuperscript{42} Powles suggested that the registration of \textit{matai} titles and the introduction of dispute-resolution procedures (both functions of the Court) have ‘inhibited the natural processes’ which had previously resulted in a fluidity of political rankings and alliances.\textsuperscript{43} Meleisea went further by claiming that the Court has taken power away from traditional institutions by recognising the authority of an external source.\textsuperscript{44} That is, the Court has superseded the authority that previously resided with āiga and matai.

The inclusion of the Land and Titles Court in the Constitution and subsequent Acts of Parliament indicates that Samoans see benefits in court arbitration and the Court now has a long history of acceptance. As the record-keeper of \textit{matai} registrations and a vital arbiter of disputes over succession of titles, the Land and Titles Court, an institution of the state, now plays an important role in customary processes. The customary role of \textit{matai} now relies upon the Land and Titles Court for recognition of authority. In recognising \textit{matai} titles as appurtenant to land, the state simultaneously recognises the role that \textit{matai} and their āiga play in land tenure. In this manner, custom and the state function in a relationship of mutual dependency, indicating high levels of complementarity.

8.3 Vanuatu
8.3.1 The legal system
As in Samoa, the independence of Vanuatu on 30 July 1980 established the Constitution as the supreme law of the country. Also similar to Samoa, laws already in existence at independence were continued under the Constitution, with the result that the laws of Vanuatu comprise Acts of Parliament as well as certain laws made by the condominium authorities. These include: Joint Regulations which continue in force until repealed by the Vanuatu Parliament;\textsuperscript{45} and British and French laws in existence on 30 July 1980, including Acts of Parliament, subsidiary legislation and English common law and equity, which continue in force until repealed by the Vanuatu

\textsuperscript{41} Corrin, Customary Land and the Language of the Common Law.
\textsuperscript{42} Tuimaleali‘ifano, \textit{O Tama A Āiga} p20.
\textsuperscript{43} Powles, Legal Systems and Political Cultures: Competition for Dominance in Western Samoa p195.
\textsuperscript{44} Meleisea, \textit{Change and adaptations in Western Samoa} p41.
Parliament.\textsuperscript{46} The Constitution also states that ‘customary law shall continue to have effect as part of the law.’\textsuperscript{47}

Vanuatu’s Constitution establishes a legal framework in which executive power is vested in the Prime Minister and Council of Ministers.\textsuperscript{48} The President is the Head of State and ‘shall symbolise the unity of the nation’\textsuperscript{49} but his powers are few.\textsuperscript{50} The Executive Branch consists of the President, the Prime Minister and the Cabinet and legislative power is held by the fifty two seat Parliament. The judicial branch consists of: the Island Courts; the Magistrates’ Court; the Supreme Court; and the Court of Appeal. Customary land tribunals handle land disputes at the local level according to \textit{kastom}.\textsuperscript{51}

Founded on a combination of democracy and culture, the Constitution of Vanuatu reflects the surge of interest in national identity that occurred during the push for independence. The Constitution also reflects the success of the pro-independence Christian movement in achieving a synthesis of \textit{kastom} and Christianity\textsuperscript{52} stating that the Republic of Vanuatu is ‘founded on traditional Melanesian values, faith in God, and Christian Principles.’\textsuperscript{53} The Christian sentiment is echoed in the nation’s motto, \textit{long God yumi stanap} (before God we stand) and customary influence is evident in the flag which displays a boar’s tooth and crossed \textit{namele} leaves to symbolise a place of significance.

The Constitution of Vanuatu recognises duties as well as rights, an acknowledgement of \textit{kastom} through recognition of group values and obligations rather than simply rights and privileges of the individual.\textsuperscript{54} In Vanuatu these duties relate to: participation in the community and government; safeguarding of national wealth, resources and environment; finding useful employment and paying taxes and; respect for the Constitution, parents, children and other members of the community.\textsuperscript{55} Within the Pacific, only Papua New Guinea does something similar with its recognition of social obligations. The Constitution recognises customary law\textsuperscript{56} but as noted

\begin{footnotesize}
\begin{enumerate}
    \item Customary Land Tribunal Act 2001, See Appendix B:15.
    \item Tonkinson, National Identity and the Problem of Kastom in Vanuatu.
    \item Corrin Care, Unfinished constitutional business: Human rights in the Fijian Islands.
\end{enumerate}
\end{footnotesize}
previously, in practice customary law has not been upheld in those cases when it has been found to be in conflict with other provisions of the Constitution or Acts of Parliament.\textsuperscript{57} Furthermore, customary law decisions are called into question when placed into non-customary contexts.\textsuperscript{58}

There are two articles in the Constitution - Articles 47(1) and 95(2) – that state that \textit{kastom} should be taken into account ‘whenever’ and ‘wherever’ possible,\textsuperscript{59} however in both of these articles the reference to \textit{kastom} is ambiguous. Corrin and Paterson pointed out that the Constitution is the supreme law of Vanuatu\textsuperscript{60} therefore customary law must be subject to the provisions of the Constitution, including those relating to fundamental rights and freedoms. They suggested that these references to \textit{kastom} were perhaps ‘tacked on’ as an afterthought. They supported their argument by drawing on several decisions of the Supreme Court whereby child custody was determined by factors other than customary law.\textsuperscript{61}

Forsyth ascertained that there are suggestions within the Constitution that \textit{kastom} would gradually be given greater prominence in the legal system - the Constitution takes a pluralist approach, theoretically allowing for ‘integration’ between the two systems of law.\textsuperscript{62} This approach perhaps signalled an aspiration for the evolution of a new and distinct legal tradition\textsuperscript{63} however such a tradition has not emerged.\textsuperscript{64} This is perhaps partly due to the ‘distrust’ of customary law that was held by the drafters of the Constitution – Forsyth argued that they sought to modify customary law in such a way as to make it more suited to the modern state.\textsuperscript{65} Powles described the relationship between the two systems as a ‘stand off’ rather than a ‘stalemate’, noting that neither legal system has significantly altered the other.\textsuperscript{66} The limited interaction has resulted in a lack of synthesis or dependency but also little conflict.

In 2006, support for greater integration between the \textit{kastom} and formal systems was signalled at the Vanuatu Judiciary Conference. The conference, which provided a forum for discussion

\textsuperscript{57} Corrin and Paterson, \textit{Introduction to South Pacific Law} p49.
\textsuperscript{58} Powles, Common law at bay? The scope and status of customary law regimes in the Pacific.
\textsuperscript{61} Corrin and Paterson, \textit{Introduction to South Pacific Law} pp49-51.
\textsuperscript{62} Forsyth, Beyond Case Law: Kastom and Courts in Vanuatu.
\textsuperscript{63} Powles, Common law at bay? The scope and status of customary law regimes in the Pacific p62.
\textsuperscript{64} Forsyth pointed to a number of indicators of this lack of interaction. She cited the continuing reliance on overseas case law; the absence of \textit{kastom} processes such as mediation in state processes; the lack of acknowledgement of \textit{kastom} crimes or \textit{kastom} defences; the continuing use of outdated British legislation; and the inappropriate clothing still worn by barristers and judges in court proceedings. (Forsyth, Beyond Case Law: Kastom and Courts in Vanuatu p433).
\textsuperscript{65} Forsyth, Beyond Case Law: Kastom and Courts in Vanuatu p431.
\textsuperscript{66} Powles, Common law at bay? The scope and status of customary law regimes in the Pacific p78.
between chiefs, police and the judiciary, concluded that each group should work to increase their awareness of and relationship with representatives from the other system.67

8.3.2 Dispute resolution

The primary area in which chiefs in Vanuatu currently hold power and influence is that of dispute resolution. In this role the authority of chiefs is sanctioned by both kastom and the state. As will be discussed below, chiefs have a particular role in the formal system of managing disputes pertaining to land tenure, but chiefs also have state-sanctioned authority over a broader range of issues through their involvement in the Island Courts.

Article 52 of the Constitution states that Parliament shall ‘provide for the establishment of village or island courts with jurisdiction over customary and other matters and shall provide for the role of chiefs in such courts.’68 The Island Courts Act of 198369 resulted in the first of these Island Courts being established in 1984. The key feature of the courts is that they allow kastom to determine the adjudicators and the rules of evidence.70 When they were introduced they were regarded as a step toward the construction of a national cultural identity through the tool of legislation.71 A 1999 assessment of the Island Courts determined that they had proven to be unsuccessful with the courts suffering from lack of funding and personnel and a flawed structure.72 Not wanting to work so closely with the state, chiefs preferred to exercise their customary authority in the nakamal or nasara.73 Paterson later argued that the Courts suffered from a perceived lack of knowledge of kastom, a perceived failure to be impartial, and high fees.74 On this matter, efforts to close the gap between kastom and formal processes have had limited success, perpetuating a relationship that exhibits incompatibility.

However there have been instances of success because, as in Samoa (see 8.2.2), the Vanuatu formal justice system has demonstrated a capacity to recognise kastom. The Penal Code

70 Jowitt, Anita, 1999, Island Courts in Vanuatu (School of Law University of the South Pacific, Port Vila) p4.
(Amendment) Act 2006 was developed with the purpose of providing courts with a range of sentencing options other than imprisonment. While this strategy is also favoured today in Western countries, it aligns well with kastom because imprisonment is not a customary punishment. Under this Act, any compensation or reparation made under kastom must be considered by the courts as a mitigating factor when sentencing an offender. The Act also allows courts to promote reconciliation and encourage and facilitate settlements according to kastom. There are cases where this has been applied. For example, in a case brought before the Court of Appeal in 2011, a kastom reconciliation ceremony and settlement were recognised as mitigating factors, contributing to a twelve month reduction to a three year prison sentence. Also in 2011, kastom reconciliation ceremonies were used as mitigating factors in the sentencing of two men charged with having unlawful sexual intercourse with a minor.

Outside the realm of the formal system, chiefs in Vanuatu continue their long-held role of maintaining law and order at the village level. Although it is apparent that the village court system is pervasive, the extent to which it operates is not fully known. Because chiefs have no state-sanctioned authority, village court decisions have no official standing and so decisions of village courts are not recorded. As such, the kastom system continues to function at the grassroots and it is only when disputes are taken from the nakamal and brought to the notice of the formal system that it gains attention.

The kastom system of dispute resolution was studied in detail by Forsyth in her monograph, *A Bird that Flies with Two Wings: Kastom and State Justice Systems in Vanuatu*. Forsyth asserted that it is the kastom system that deals with the vast majority of conflicts in both rural and urban Vanuatu. Although the courts and judiciary in Vanuatu are respected and although the kastom system can be discriminatory, especially for women and youth, the kastom system is regarded as having greater relevance and legitimacy than the formal system. In line with Powles assertion that local courts have the benefits of being able to intervene early in a dispute, deal with whole families and wider groups, and attempt to address underlying causes, Forsyth determined that the kastom system is favoured for its focus on the restoration of relationships rather than the

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79 Powles, Guy, 1988, 'Law, Courts and Legal Services in Pacific Societies' in Guy Powles and Mere Pulea (eds), *Pacific Courts and Legal Systems* (University of the South Pacific in association with the Faculty of Law, Monash University, Suva and Melbourne) p24.
creation of winners and losers, as in the formal system. Forsyth stated that the kastom system reduces the burden placed on the formal system and, through its efficient handling of cases, prevents disputes from elevating to the level where they require state involvement. Rural communities in particular do not always have access to the mechanisms of the formal justice system - some islands do not have a police station and so, if the services of the police are required, villages must cover the cost of sending an officer to the island. The problem of insufficient state capacity is so great that Forsyth determined that it raises real doubts as to the state system’s ability to achieve justice.

The types of offences dealt with in village courts vary. The Juvenile Justice Project interviewed twenty six young offenders in Port Vila and found that chiefs in Port Vila preferred to refer serious cases to the formal system but were prepared to deal with minor crimes and misdemeanours. For example, chiefs dealt with matters such as drinking, fighting, parental disapproval of relationships, theft and disrespect. Cases pertaining to incest, rape, murder and shooting were all referred to the police. This finding concurred with Forsyth’s assessment that chiefs and police have an ‘informal policy’ whereby chiefs deal with minor offences and refer serious matters to the formal system.

In general, the police and chiefs demonstrate a willingness to cooperate - the police help to facilitate kastom processes and vice versa. For example, police in Port Vila have indicated a preference that young offenders should be dealt with by chiefs rather than police. Police may bring people to kastom meetings and they may attend meetings to help maintain order. Police also assist with enforcing orders made by the kastom system such as following up on late payments of kastom fines. In return, chiefs assist the police by, for example, locating defendants and witnesses. Forsyth recounted the 2006 incident in which twenty escaped prisoners sought assistance from the Malvatumauri to raise concerns about the poor conditions in the prison. The Malvatumauri held a peaceful march through town with the prisoners, held a kastom ceremony,

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80 Forsyth, A Bird that Flies with Two Wings: Kastom and State Justice Systems in Vanuatu p149.
81 Ibid. p141.
83 Forsyth, A Bird that Flies with Two Wings: Kastom and State Justice Systems in Vanuatu p183.
received an assurance from the authorities that the concerns would be taken up and then handed
the prisoners back to the police.\footnote{Forsyth, \textit{A Bird that Flies with Two Wings: Kastom and State Justice Systems in Vanuatu} pp154-155.}

Chiefly engagement in the justice system can be problematic for the formal system because the
\textit{kastom} system is, in many respects, at odds with the formal system and decisions of village courts
may be outside the bounds of state law. One practice that maintains a high profile in Vanuatu is
that whereby chiefs attempt to restrict movement by either preventing people from leaving their
island or by forcing trouble-makers in urban centres to return to their home island. This raises
similar issues to the practice of banishment in Samoa where chiefs are calling on their customary
authority to restrict movement (see 8.2.2). Chiefs in Vanuatu have complained that the
Constitutional provision for freedom of movement is ‘paralysing’ for chiefs and have advocated
for a ‘passport’ system that would give them the authority to restrict the movement of young
people to urban areas.\footnote{Rousseau, \textit{The Achievement of Simultaneity: Kastom in Contemporary Vanuatu}, p110.} The practice of restricting movement has acceptance within the
community and the police force\footnote{Garae, Police urge Tannese chiefs to fight crime; Wirrick, Parkinson, 2008, ‘Restricting the Freedom of Movement in Vanuatu: Custom in Conflict with Human Rights’ in \textit{Journal of South Pacific Law} 12 (1), 76.} and there is even a level of community support for amending
the freedom of movement provisions in the Constitution in order to recognise \textit{kastom} authority on
this matter.\footnote{Rousseau, Benedicta, \textit{Juvenile Justice Project} p92.} In the current environment where there is a prevailing perception that levels of
crime and misdemeanor are increasing whilst respect is simultaneously being lost, it seems likely
that chiefs will continue to impose this rule with or without any formal sanction from the state.
However, this issue raises problems of perception and knowledge of the law as much as problems
with the \textit{kastom}/state relationship. The Constitution states that freedoms are ‘subject to respect
for the rights and freedoms of others and to the legitimate public interest in defence, safety, public
order, welfare and health.’\footnote{Constitution of the Republic of Vanuatu 1980, Art 5(1), PacLII, www.paclii.org/vu See Appendix B:2.} Forsyth concluded that chiefs are not necessarily breaching the
Constitution when they impose restrictions on movement. However she argued that the common
\textit{perception} that restrictions are in breach of the law undermines both the state and \textit{kastom}. That is,
confidence in the state is diminished because people believe that it is hindering efforts to address
crime, and \textit{kastom} is undermined when people accuse chiefs of overstepping their authority.\footnote{Forsyth, \textit{A Bird that Flies with Two Wings: Kastom and State Justice Systems in Vanuatu} pp6 & 193.}

There have been instances where the conflict between \textit{kastom} and the right of freedom of
movement has been tested in the formal system, but these are few. For example, in 2005 three
men unsuccessfully claimed that their kidnapping of a man accused of committing black magic was in line with *kastom*. In sentencing the men, the Judge stated:

> I do not know if custom permits what these three did - but what they did is certainly against the law of the Republic of Vanuatu. It is true that the law of the Republic in this area has its roots in Western thinking and that in turn has its roots in Christian principles. But it is not correct that the laws of the Republic of Vanuatu are laws made by Westerners.\(^{91}\)

In 1993, two high status Tannese chiefs visiting Port Vila, attempted to reconcile a separated couple. The woman claimed that her husband had been physically abusive and that she wanted a divorce. The chiefs enlisted the help of police to force the woman to attend a community meeting to discuss reconciliation. When the woman refused to return to her husband, police once again complied with the chiefs’ request, taking the woman to her home, waiting for her to pack her bags and then taking her to the boat to Tanna. The matter was taken to the Supreme Court which found that, although the chiefs had acted according to *kastom*, the right to freedom of movement prevailed.\(^{92}\)

As noted by Brown,\(^{93}\) in this particular case the Judge went to some lengths to draw attention to the difficult relationship between the Constitution and Statutory Law on the one hand and *kastom* on the other. The Judge emphasised that the conflict was not between *kastom* and English or French Law, but rather between *kastom* and the laws of Vanuatu.\(^{94}\) It is perhaps this lack of clarity that discourages people from testing matters related to *kastom* in the state system.

A range of other problems exist in the *kastom*/state relationship in the area of dispute resolution. Because *kastom* is flexible, specific to place and focuses on the restoration of relationships, *kastom* decisions are not based on common law but can be determined by individual responses at any given moment. *Kastom* may prioritise the needs of individual members of a group rather than applying notions of equity and fairness as understood in the state system.\(^{95}\) Furthermore, it is apparent that chiefs do not always understand or recognise their responsibilities under state law.

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\(^{93}\) Brown, *Reconciling Customary Law and Received Law in Melanesia: the Post-Independence Experience in Solomon Islands and Vanuatu* p76.


\(^{95}\) Brown, *Reconciling Customary Law and Received Law in Melanesia: the Post-Independence Experience in Solomon Islands and Vanuatu* p211.
In a series of interviews with thirty-nine chiefs from fifteen islands, the *Juvenile Justice Project* found that just over half of respondents believed the power of the *kastom* courts to be unlimited.\(^{96}\) This failure to clearly delineate jurisdiction is a point of incompatibility between the two systems which leads to problems of: double jeopardy, whereby a person is punished twice for the same misdemeanour; and ‘forum shopping,’ whereby people take their matter to the system that is most likely to provide their preferred outcome.\(^{97}\) In addition, it is evident that there are gaps between the two systems. Forsyth found that in matters of domestic violence neither chiefs nor the state wish to deal with the matter and each refers cases to the other. As such, victims have no access to justice.\(^{98}\)

So the relationship between the *kastom* and formal systems of dispute resolution is complex. While *kastom* may be guided by principles and impose penalties that do not align with those of the formal system, it does benefit the state by making justice accessible, affordable and immediate. In the context of Vanuatu where the state is often distant, this benefit is substantial. As such, in terms of dispute resolution, the *kastom/state* relationship is simultaneously incompatible and complementary.

### 8.3.3 Chiefs’ councils and dispute resolution

Chiefs’ councils are emerging as important players in the area of dispute resolution, more formally bringing the processes noted above into the national arena. In Port Vila, chiefs’ councils are developing innovative ways of applying customary dispute resolution practices in the multicultural, urban environment. The Freshwater Town Council of Chiefs is a good example.

#### 8.3.3.1 Freshwater Council of Chiefs\(^{99}\)

Freshwater (also known by its Bislama name, *Freswota*) is a suburb of Port Vila which has about four thousand residents from different islands. Freshwater has six areas, each of which is represented by two, three or more chiefs. One chief from each area is chosen to sit on the Freshwater Council of Chiefs. These chiefs can be ‘non-custom’ chiefs which in this instance means that they are elected by the Freshwater community and so are recognised as chiefs in Port Vila, but they do not necessarily have any authority as chiefs on their home islands. The

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\(^{96}\) Rousseau, Benedicta, *Juvenile Justice Project* p56.  
\(^{98}\) Ibid.  
\(^{99}\) The following information was provided to the author by Ambong Thompson, Chairman of the Freshwater Council of Chiefs in an interview held in Port Vila in September 2009.
chiefs are also non-customary in the way that they do not represent their home island, but rather a mixed constituency.

The chiefs generally meet twice monthly and operate in conjunction with women, youth and church groups. A representative membership from each of these groups forms a council of twenty which meets once a month or more frequently if required. The function of the Council is to ensure the well-being of the community, which primarily means dealing with offences committed by Freshwater residents. The Council provides a mechanism by which to facilitate communication between the different island communities. As each island has its own system of governance, the Council has developed processes for allowing the systems to interact more effectively. For example, the authority of elected chiefs is theoretically recognised by all people in Freshwater, no matter what their island of origin. At the same time, island of origin is taken into account when determining penalties for misdemeanours. The Council deals with matters such as domestic violence, family disputes, youth problems, theft and adultery. In around 2002, the Council wrote a ‘constitution’ that specifies the processes for dealing with such misdemeanours.

According to the Chairman of the Council, the process for dispute resolution in Freshwater is as follows: if there is a problem in the community, it is initially dealt with at a domestic level or taken to Freshwater ‘area’ chiefs; if no resolution can be found, it is taken to the Freshwater Council; disputes that cannot be resolved at this level may be taken to the police or the Malvatumauri. Punishments are determined by island of origin and the relevant ‘custom chief’ will be consulted by the Council to determine the appropriate penalty. In this way, kastom is maintained, but the similarities between kastom systems mean that punishments do not necessarily vary significantly. The success of the Council in dealing with such matters has not been examined and, as noted above (8.3.2), victims of domestic violence, for example, have reported that chiefs have not always dealt with the matter satisfactorily raising the real possibility that such issues are present in Freshwater. Nevertheless, general support for such chiefs suggests that they have some level of success at dispute resolution. Furthermore, claims of the Council are supported by findings elsewhere. For example, according to the Council member interviewed, the Freshwater Council of Chiefs has fostered a relationship with the police that allows for

100 Interview with Ambong Thompson, Chairman of the Freshwater Council of Chiefs, September 2009.
102 Interview with Ambong Thompson, Chairman of the Freshwater Council of Chiefs, September 2009.
constructive dialogue. If a serious crime is committed, the Council will report it to the police. The police will deal with the person who committed the crime and the Council will follow through by dealing with the affected families. In this way the Council tries to maintain peace within the whole community. In some cases, police have agreed to requests that crimes be dealt with by the Council. In these instances, the Council will assess the case then report back to the police, giving them details of the Councils’ judgment. This claim is consistent with reports such as the Juvenile Justice Project and cases that appear before the courts.

This assessment of the Freshwater Council of Chiefs indicates that community leaders have been able to transfer customary relationships and responsibilities from the village environment into an urban one. This demonstrates considerable flexibility in a few key areas: kastom is being maintained in a contemporary, multi-cultural setting; chiefly status is being adapted to accommodate ‘non-custom’ chiefs; and, customary and formal justice systems are working side by side in a complementary manner.

Councils such as the one in Freshwater demonstrate that ni-Vanuatu are finding ways to adapt kastom in order to make it relevant for changing contexts. In resolving minor disputes they are potentially addressing tensions before they escalate to the level where the state might be expected to intervene. On those occasions when they impose penalties for misdemeanours recognised by the state as criminal offences, the kastom/state relationship has the potential to become one of incompatibility if chiefs impose penalties that are not in accordance with the laws of the state. But in those instances when they work with the formal system to resolve disputes, the Councils render the kastom/state relationship mutually dependent, highlighting the complex and dynamic nature of the relationship.

8.3.4 Land tenure and dispute resolution

As in Samoa, land in Vanuatu is integral to social protection (discussed in Chapter 9) and ni-Vanuatu stress the importance of keeping land within the group. Land is understood as the foundation of life for it is one’s ‘place’ - it provides subsistence, social status, control, power and knowledge. It is widely claimed that no person in Vanuatu is landless, however it is evident

103 The assertion that the relationship with police is a constructive one is consistent with the literature and other interviews conducted by the author.
104 Rousseau, Benedicta, Juvenile Justice Project pp94-96.
105 For example, Regenvanu, Land, Culture and Economic Empowerment in Vanuatu and Melanesia.
that there are a few groups of people in Vanuatu who do not own land. This is overcome partly by the practice of clans allowing others to use their land, a practice that comes from the belief that it is not morally acceptable to refuse a request to use land\textsuperscript{106} and the recognition that social ties are strengthened through land loans.

As in Samoa, land in Vanuatu is an area in which the relationship between \textit{kastom} and the state has developed a degree of mutual dependency. Land receives considerable attention in the Constitution, likely reflecting the contentious nature of land ownership at the time of independence. Significantly, the Constitution reinforces the linkages between land and \textit{kastom}: Articles 73 and 74 state that all land ‘belongs to the indigenous custom owners and their descendants’ and that ‘the rules of custom shall form the basis of ownership and use of land.’\textsuperscript{107} In this way, the state facilitates the social protection afforded by the communal nature of land tenure which ensures that the majority of ni-Vanuatu have access to sustenance, a place of residence and strong kinship connections.

Article 78(2) of the Constitution requires that the Government arrange for institutions or procedures that can resolve land disputes in a customary manner.\textsuperscript{108} Various attempts have been made to meet this requirement however the results have been mixed. The Island Courts described above were one such attempt, but almost every decision of the Island Courts relating to land ownership has been appealed to the Supreme Court.\textsuperscript{109} The Supreme Court itself is regarded as too expensive and it has relied on expatriate judges who do not fully understand \textit{kastom}.\textsuperscript{110} Furthermore, Paterson has argued that the process of hearing disputes in either the Island Courts or the Supreme Court is open to challenge on the grounds of being unconstitutional.\textsuperscript{111}

The situation was brought to a head in 1996 when the newly appointed Chief Justice determined that the Supreme Court did not have the resources to deal with land cases and, as such, no more cases would be heard. Nevertheless, cases continued to come in and a backlog of about two

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\textsuperscript{106} Bonnemaison, Social and Cultural Aspects of Land Tenure p2. \\
\textsuperscript{107} Constitution of the Republic of Vanuatu See Appendix B:12. \\
\textsuperscript{108} Constitution of the Republic of Vanuatu See Appendix B:12. \\
\textsuperscript{109} Paterson, \textit{Indigenous Tribunals for Settlement of Disputes About Customary Land in Vanuatu - Some Issues Outstanding} p5. \\
\textsuperscript{110} Ibid. p6. \\
\textsuperscript{111} Ibid. p6.
\end{flushleft}
hundred cases mounted. As a result, a consultative process was established to develop a solution, culminating in the Customary Land Tribunal Act 2001 (CLTA).

The CLTA aimed to introduce a culturally appropriate method for resolving disputes over customary landholdings. The CLTA calls for land disputes to be dealt with by a hierarchy of five tribunals beginning at the village level and, if unresolved, progressing through to the final, island-level tribunal. The CLTA is based on kastom in that it applies only to customary land and it requires a chief to facilitate dispute procedures. As such, the authority of chiefs in this decision-making process is now recognised by state law, creating a hybrid system of dispute resolution.

This apparent step-forward for state recognition of chiefly authority has, however, been tempered by mixed reactions to the CLTA. A 2005 review of the CLTA argued that, rather than enhancing chiefly authority, the Act serves to diminish the power of chiefs in the way that its procedures diverge from kastom. The review claimed that, according to kastom, decisions on land disputes cannot be appealed, that requirements that prohibit a chief from presiding over a tribunal if he is related to a rival claimant are inappropriate, and that, since chiefs and their elders already hold knowledge about customary boundaries, people from other villages should not be called in to participate. The report related fears that such procedures will remove long-held chiefly powers.

Furthermore, the procedures and outcomes follow state laws – for example, the tribunal system reflects introduced dispute resolution structures and, it was argued, claimants who do not win their case may now be removed from land, a solution not formerly practiced in Vanuatu. Paterson also noted some criticisms: that the Act more easily enables people to lease off their land, especially to foreigners, making it inaccessible to their children and descendents; that the procedures are too difficult to understand and implement; that some chiefs have reportedly refused to participate; and, there are concerns of bias.

In spite of these drawbacks, the CTLA demonstrates that the state and kastom systems can find points of negotiation in which each system utilises mechanisms of the other to mutual advantage.

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112 Ibid. p6.
113 Customary Land Tribunal Act 2001 See Appendix B:15.
115 Ibid. p31.
The CTLA is an instance of mutual dependency where, in this area of land dispute management, each system relies upon the other.  

### 8.4 Conclusion

Although issues such as freedom of movement and access to justice raise concerns as to the legitimacy of customary legal systems, it is apparent that complementarity between custom and the state can exist in this arena. In both Samoa and Vanuatu, customary law is recognised in the Constitution and it has been recognised by the state courts. In this manner, each system contributes to the legitimacy of the other. However the relationship in both countries is complex because complementarity and incompatibility can exist simultaneously. In Vanuatu, for example, the role of chiefs in dispute resolution is vital, especially in remote locations where the formal justice system has little reach. Thus, chiefs assist the state by continuing their traditional role in contributing to community harmony, but they may conflict with the state if they impose penalties that are inconsistent with state laws. The complex nature of the relationship is revealed in the absence of a clear delineation of jurisdiction which risks either double jeopardy, where people are punished twice for the same misdemeanour, or gaps, whereby neither chiefs nor the state wish to deal with a matter.

Land tenure in the Pacific remains largely in the domain of custom and in Samoa and Vanuatu the state reinforces this through constitutional recognition of customary land. However, land tenure is also an area in which custom and the state have entered into a relationship of mutual dependency, indicating high levels of complementarity. In Samoa this relationship was made particularly strong by the establishment of the Land and Titles Court which has responsibility for matai registration and arbitration of disputes over titles. In Vanuatu, the Customary Land Tribunal Act provides an example of the state giving recognition to customary processes that can be utilised for mutual benefit.

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117 Ongoing problems with land gave impetus to the 2006 Land Summit. The Summit was a significant event, attracting a great deal of community interest and involvement, and highlighting the level of community concern over land. Newspaper reports indicated heightened fears that land was becoming increasingly alienated by owners looking for short-term monetary gains and ignoring the long-term needs of future generations. These fears emanated from the escalation in the number of new leases being granted over customary land and the dividing of both new and old leases. Prices of land in some places doubled between 2005 and 2007. (Blake, Garry, 2007, ‘Latest Development in Vanuatu - Land Law’, Pacific Legal Network: PLN News, www.pln.com.au) The Summit resulted in a range of recommendations and efforts to implement these are ongoing.
The dynamic nature of the relationship is highlighted in Vanuatu where chiefs are demonstrating the flexible nature of *kastom* by establishing chiefs’ councils. These councils - hybrid structures in themselves – are forging links between tradition and modernity. By adapting to the contemporary context of Vanuatu, chiefs are finding ways to simultaneously shore up their own authority whilst creating structures that can negotiate with the state and thus foster the *kastom/state* relationship.
Chapter 9  
Social management and social protection

9.1  
Introduction
As shown in Chapters 3 and 4, custom in Samoa and Vanuatu provides systems and structures that aim to ensure that the essential needs of societies are met. Custom aims to provide social protection through guaranteed access for all to land, food, shelter, personal safety and social support. Systems of social management establish and enforce rules that aim to guarantee this social protection. In modern state systems, state authorities are also held responsible for ensuring that the needs of their citizens are met. Custom and the state are thereby placed in a situation whereby they operate in shared realms of responsibility. In Samoa and Vanuatu, custom and state systems have varying approaches and varying capacity to take on these tasks.

This chapter continues the examination of hybridity, discussing the ways that the customary and state systems in Samoa and Vanuatu contribute to social management and social protection. As with the legal and political systems, the custom and state social management systems operate in relationships of complementarity and incompatibility.

9.2  
Samoa
9.2.1  
Social control
As discussed in Chapter 3, fa‘asamoa requires strict adherence to a prescribed social order that centres on the authority of the matai. It is probably this characteristic that presents the greatest challenge to the acceptance of democratic principles, establishing points of incompatibility in the custom/state relationship.

So‘o has suggested that ‘civil and political liberties in the democratic sense are foreign concepts in Samoa’s cultural context, particularly in village governments.’\(^1\) Lawson concurred, arguing that the ‘thoroughgoing authoritarianism embedded in the fabric of fa‘amatai\(^2\) challenges democratic principles. However it is concurrently argued that fa‘asamoa is principally egalitarian in nature on the basis that matai are democratically chosen representatives.\(^3\) Former MP Leota Siaki discussed the question of democracy with Lawson for her monograph *Tradition versus democracy*

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in the South Pacific. Whilst Leota spoke in favour of increasing rights, he suggested that although the matai system is not democratic it is, nevertheless, justifiable. He argued that the system offers social protection in the face of outside forces, maintains law and order and protects land tenure. The hybridist position takes the view that the social protection offered by custom demonstrates some complementarity between custom and the state. Nevertheless, the methods by which social protection is sought highlight points of incompatibility in the broader custom/democracy relationship.

Fa’asamoa places a great deal of importance upon the maintenance of social order and the pressure to conform to this order is great. Children are taught from an early age that they must always act in the best interests of the ‘āiga and that their actions reflect the strength and character of the ‘āiga, the chief, the parents and the siblings. That is, individual actions always impact upon the welfare of the entire group. Macpherson and Macpherson noted that pre-Christian culture as well as Christian scriptures are drawn upon to reinforce the significance of the kin group and to emphasise that good and bad actions will be remembered well into the future – the actions of an individual can bring pride or shame to a family for generations. It is perhaps the extent to which poor behaviour is felt that has contributed to the controlling nature of chiefly authority.

Norton explored the authoritarian nature of fa’asamoa and chiefly authority, arguing that it is intensified by the continuous vying for power. Norton was blunt in his assessment of the nature of matai authority. He stated:

    The crux of the matter is not simply the stern patriarchy ... but its rivalrous segmentation and the way the rivalries among chiefs and among families give to domestic authority a taut and often violently impetuous quality unique in Polynesia….It is difficult to convey in an ethnographic account the intensity of a Samoan matai’s …conviction about the importance of his authority within his aiga

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4 Lawson, Tradition versus democracy in the South Pacific: Fiji, Tonga, and Western Samoa p153
5 Macpherson, Cluny and Macpherson, La’avasa, 1987, ‘Towards an explanation of recent trends in suicide in Western Samoa’ in Man 22, 305 p313.
6 Ibid. pp312-314.
7 Freeman also observed the constant rivalry between factions. Freeman, The Social Structure of a Samoan Village Community p105.
… and the unrelenting haughty severity with which he is inclined to assert it in everyday life.\(^8\)

The pressure to conform is perhaps particularly felt by adolescents who are expected to serve authority without question.\(^9\) For the ‘aumāga (untitled men), pressure is especially high because the group contains future chiefs.\(^10\) The impacts of social pressure have been discussed by Macpherson and Macpherson who examined adolescent suicide in Samoa. They determined that ‘altruistic’ suicide has likely always occurred in Samoa, triggered by the desire of individual offenders to spare their ‘āiga the shame of public scrutiny. The rise in apparent ‘anomic’ suicide, whereby the victim felt that they did not fit into their society, that occurred amongst young men during the 1970s and 1980s was, they theorise, attributable to the growing gap between opportunity and expectation. They noted that youth are taught that ‘service is the path to power: *o le ali i pule ole tautua,*’ however such expectations do not necessarily materialise in contemporary Samoa. In his response to the Macpherson’s article, Norton concurred stating that:

The incessant external jealousy and rivalry gives the aiga a most oppressive quality for its young members. The tyranny is endurable when there is an honourable course of service to follow in pursuit of reputation and perhaps eventually the chiefship itself, but can be unbearably claustrophobic and demeaning when such roles are lost.\(^11\)

In her examination of female suicide in Samoa, Fiti-Sinclair noted that the pressure on unwed women to retain their virginity is so strong that suicide is an option for young women who fall pregnant before marriage.\(^12\)

The autocratic nature of fa’asamoa along with the clearly defined roles and responsibilities raises questions around the way that it aligns with democratic ideals that espouse the freedom of the individual. The state does not have a significant role in determining the way that people conduct themselves within their family and communities - this is largely

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9 Macpherson and Macpherson, Towards an explanation of recent trends in suicide in Western Samoa p324.
10 Gilson, *Samoa 1830 to 1900: The Politics of a Multi-cultural Community* p23.
11 Norton, Chiefs, adolescent suicide and the transformation of chiefly authority in Western Samoa p760.
the domain of fa’asamo’a and it is only when breaches of the laws are brought to the attention of the state that it can intervene. Nevertheless, the state is clearly aware of the existence of these strict codes of conduct. For example, in 2004 the Ministry of Women, Community and Social Development published profiles of each village in Samoa. The profiles provided information on village demographics, services and infrastructure. Included in each profile is a list of ‘village rules.’ Although each village has its own particular set of rules, there are common trends across Samoa. All villages have rules pertaining to conduct, such as restrictions on women’s clothing, men’s hairstyles and consumption of alcohol. Many require church attendance and observance of the curfew. Whilst some of these rules are in line with laws of the state, such as prohibitions on theft, vandalism and use of marijuana, others are not. For example, the village of Fogatuli requires that everyone in the village attend Church and that no denominations other than Methodism are allowed. This conflicts with the Constitutional right of freedom of religion. The village of Patamea states that ‘village/family disputes on traditional land and matai titles should not be taken to the courts in Apia or Tuasivi but resolved at village/family levels.’ Under the Land and Titles Act, the Land and Titles Court has exclusive jurisdiction ‘in all claims and disputes between Samoans relating to customary land.’ This publication in government documents of the rules established by village fono shows that the state is aware of these rules, including those which appear to be in conflict with the laws of the state. It is therefore conceivable that these village rules may become a pressure point in the future for this hybrid polity.

9.2.2 Women
Adherence to the social order in Samoa creates particular challenges for the rights of women as understood within the democratic framework. Through the Constitution and other legislation, the women of Samoa have equal rights to those of men - Samoa was the first country in the Pacific to ratify the Convention on the Elimination of All Forms of Discrimination against Women

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13 Ministry of Women, Village Profiles of Savaii Island (Revised Edition); Ministry of Women, Village Profiles of Upolu Island (Revised Edition).
14 Ministry of Women, Village Profiles of Savaii Island (Revised Edition) p118.
17 Land and Titles Act 1981, s34, PacLII, www.paclii.org/ws See Appendix A:16
(CEDAW) and also the first to establish a separate Ministry of Women’s Affairs. The only country report submitted to CEDAW claims that:

In practice, Samoan women do enjoy equality and are not really conscious of gender barriers because they do not feel that discrimination is intrinsic in the system.

The report goes on to say:

Nevertheless there are practices which, while not intending to discriminate, have been tested in the courts and decided upon as discriminatory.

However, the report only finds one case from 1981 that supports this claim and a search of the PacLII database did not reveal any further cases.

According to fa’asamoa, the daughters and sisters of a village have prestige status and the feagaiga (sacred covenant) between a brother and sister ensures that this status is acknowledged. The feagaiga establishes different but complementary roles for men and women – men hold authority while women hold the family’s honour. However, the strict groupings within a Samoan nu’u mean that the status of a woman is very much dependent upon her age, marital status and the status of her husband. Looking once again to Aiono’s sociometric wheel (Chapter 3.5.2), it can be seen that fa’asamoa recognises daughters of matai and wives of matai. According to this depiction, women who move away from their village to marry untitled men have no place in fa’asamoa. Those women in the aualuma (the group of women born in the village) have their own meeting house, can socialise outside their homes and have traditionally gained prestige as the crafters of fine mats and other wealth items. In contrast, the fafine lāiti - junior wives - have the lowest status and no land rights within the village. They are more confined to their homes and the duty of serving their husband’s family. These strictly defined roles are shifting as urbanisation and economic changes create new expectations and practicalities but the principles of the fa’asamoa retain their strength.


19 Ibid. p41.

20 Ibid. p41.

21 For example, Fairbairn-Dunlop, Peggy (eds), 2003, Samoan Women: Widening Choices (Institute of Pacific Studies, University of the South Pacific and Samoa Association of Women Graduates, Apia); Schmidt, Changes in the Matai System in the Last 50 Years: A personal experience’ ; Va’a, Leatuaolevao Ruby, 2007, ‘Faleifi Fa’amatai: Changes in the 20th Century’ in Asoufou So'o (eds), Changes in the Matai System: O Suiga i le Fa'amatai (Centre for Samoan Studies, National University of Samoa, Apia).
Advocates of fa’amatai and fa’asamoa stress their egalitarian nature,\textsuperscript{22} however it is apparent that gender plays a part in the ability to attain a matai title. In his examination of various cases that have been determined by the Land and Titles Court, Meleisea confirmed that gender, along with age and genealogy, is considered of utmost importance for eligibility for matai titles.\textsuperscript{23} The small number of female matai is perhaps countered to an extent by the influence of the particular titles that they hold. In her assessment of the 1988 Electors Register, Aiono noted that when women do receive a title, it is often the most important title available\textsuperscript{24} perhaps contributing the belief by women that they are not significantly disadvantaged under fa’asamoa.

It is difficult to determine the number of female matai as the available data reveals enormous discrepancies. In 2003, the United Nations found that around five percent of matai titles were held by women\textsuperscript{25} yet the 2006 population and housing census found that around twenty percent of women claimed to hold a title.\textsuperscript{26} Because many people hold more than one title, the total number of female matai should be lower, rather than higher, than the number of titles held by women. In addition, the census did not include matai living overseas. As such, it is not straightforward to reconcile these figures. In 2008, the matai registers showed that 2,606 out of a total of 42,656 registered matai titles were held by women.\textsuperscript{27} This equates to around six percent, far less than indicated in the 2006 census but in line with those figures given by the United Nations. Within the 202 villages identified in the registers, the number of female registrations varied from zero to 159 (out of a total of 993 in that particular village). Eighteen villages had never had a female matai and in one village, the registration of its only ever female matai was cancelled by the Court.\textsuperscript{28} On one notable day in 1984, thirty seven women (and a few men) from one village registered for nine titles.\textsuperscript{29} Findings from the registers can only be considered approximate.

\textsuperscript{22} For example, Aiono Fana’afi le Tagaloa, The Samoan Culture and Government; Huffer and So’o, Beyond Governance in Samoa p324; Meleisea, The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa pp18-19.
\textsuperscript{23} Meleisea, The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa pp192-196.
\textsuperscript{24} Aiono Fana’afi le Tagaloa, The Samoan Culture and Government p137.
\textsuperscript{26} Samoa Bureau of Statistics, Samoa Population and Housing Census Report 2006 p22.
\textsuperscript{27} Land and Titles Court, Matai Registers.
\textsuperscript{28} Ibid.
\textsuperscript{29} Ibid.
because the registers are in poor condition and not always fully legible, nevertheless they are the most relevant tool for ascertaining this information.

Women are prevented from becoming chiefs by overt and subtle structural arrangements. There are villages in Samoa where women are explicitly banned from becoming chiefs and where the matter is not open to consideration. The lack of female involvement in higher decision-making is reinforced by women themselves because the notion of women’s subservience is embedded in the culture - men are perceived as the ‘makers of power’ whilst women provide guidance to the men. For example, Fa’amausili Tuilimu Solo Brown, the first woman to be appointed to Vice President of the Land and Titles Court, claimed equal rights as a holder of a matai title, arguing against the decision of her village fono to ban participation of women. Yet she advocated against equality in all circumstances, stating that ‘in a family, men and women are not equal. In a family the man is the head of the family.’ Clearly defined roles inhibit women’s chances for attaining matai titles and they are further impeded by the practice of leaving their village once they marry. However, there are cases whereby women are given permission to use a chiefly title for work purposes in Apia although these titles are not given any recognition or authority within the village and the women do not attend meetings of the fono.

The small number of women holding titles means that few women have the opportunity to hold influential positions of authority. For example, they cannot stand for parliament or participate in village fono, and their lack of titled status may inhibit their ability to succeed in business activities. They can and do play an important organisational role in the church, taking responsibility for such things as providing facilities for the pastor and maintaining the church grounds. Pastors’ wives are often in charge of Sunday School. However women are rarely involved in church governance or philosophical direction. Salevao, General Secretary of the Congregational Christian Church of Samoa, suggested that women would readily be accepted as ministers but few have expressed interest. 

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30 Interview with matai, Maualaivao Seiuli, held in Apia in August 2008.
31 Tcherkezoff, Are the Matai Out of Time? tradition and democracy: contemporary ambiguities and historical transformation of the concept of chief p128.
33 Author’s field notes.
34 Personal communication, August 2008.
There are certainly instances whereby women have been proactive and influential in the broader community and although they may be excluded from participating in higher-level decision-making bodies, women have an influential role in family life as well as in village governance. As discussed in Chapter 3.5.2, *fa’asamoa* assigns clear roles and responsibilities for different groups of people within a community. Most Samoan women belong to at least one village organisation and through this membership they have become key drivers in community development. The Village Profiles discussed in 9.2.1 above list Women’s Committees as a feature of each village. The roles assigned to the committees are: ‘to improve and maintain primary health care of families; to promote healthy homes and healthy village environments; and to support village development activities.’ Women’s groups contribute to fund-raising and implementation of projects such as the building of churches, schools and health centres. Amongst other things, they have been credited with maintaining the quality of water supplies, with encouraging the use of nutritious vegetables, and with promoting handicraft production. Particularly important have been the women’s health committees that work with the government. Since the 1920s these committees have been responsible for running village health clinics and, under the current arrangement, they organise regular visits from District Health Nurses who monitor health standards, especially those of women and children. This input from women has been attributed with the steady decline in the under-five mortality rate. Such is the significance placed on women’s role in the health committees that Fairbairn-Dunlop argued that the controversy surrounding an infant death highlighted that women are considered to have a duty to run the clinics for the benefit of the community. Women’s committees demonstrate how the traditional roles assigned under *fa’asamoa* are being called upon in the contemporary context to help meet current community expectations.

Although Samoan women are key drivers of community development, this work is largely invisible within the national development discourse. Prior to colonisation women’s groups had

35 See Fairbairn-Dunlop *Samoan Women: Widening Choices*.
38 Ibid. p69.
39 Fairbairn-Dunlop, Women’s NGOs within the new governance agenda: are they still based on *alofa*? p97. This argument is countered by concerns that the demands placed upon women through these community programs prevent women from fulfilling their responsibilities of caring for their children and families. (So'o, Governance and rendered services p169).
Considerable autonomy and influence, but this was either unrecognised or ignored by traders, missionaries and colonial administrators. Women’s groups became excluded from decision-making processes to the point where projects that clearly fall within the domain of women’s committees are developed without women’s consultation. Women’s achievements are viewed through the lens of fa’asamo’a which places greater significance upon the achievement of the ‘āiga than on that of the individual. This has the effect of denying the reality that women are now key contributors to family incomes. Women’s contribution to family finances is usually made in the informal sector through the sale of home-grown or home-produced items. Such goods are considered to be surplus rather than the product of a business activity and may even be unreported in economic surveys demonstrating the lack of value or recognition placed on women’s contribution to family resources. The Village Profiles noted above acknowledge Women’s Committees, thereby giving them some status. However the assigned roles are identical for each committee in Samoa, demonstrating that the authors were content to project a single, consistent model for the country. The reasons for this are not clear, but it may reflect a desire on the part of the Ministry of Women that Women’s Committees conform to a prescribed model with common objectives. If this is the case, women are being sidelined from the decision-making process of identifying and addressing the particular needs of their village.

Women are further disadvantaged by a cultural tolerance of violence as a means of resolving family disputes, a factor which has contributed to relatively high levels of domestic violence. A survey conducted by the World Health Organisation revealed that forty one percent of ever-partnered women had been subjected to violence by an intimate partner. Over half of these women had not revealed the abuse to anyone, primarily because they accepted it as ‘normal’ or not serious enough to mention. This cultural tolerance of violence means that neither the formal system nor custom have made strong attempts to curb the incidence of domestic violence. Neither women nor men are fully protected by customary or state law as there is no legislation that specifically prohibits domestic violence – although 2010 amendments to the Divorce and

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41 Ibid. p211.
Matrimonial Causes Ordinance 1961 define domestic violence and provide for the Supreme Court or its Registrar to make restraining orders. The problem of domestic violence is being addressed in part by the efforts of Mapusaga o Aiga and other NGOs as well as the police force. In addition, state courts have indicated that they will not tolerate violence perpetrated by men upon their wives and that men should not expect leniency for such acts. On the issue of domestic violence, the formal system is doing more to address the problem than customary institutions, indicating the potential for tension in the custom/state relationship.

It is evident that fa’asamoan places a high value upon women and that Samoan women do not perceive fa’asamoan or fa’amatai as being a substantial inhibitor to their participation in society. Nevertheless, women in Samoa play a lesser role in decision-making processes and their contributions to the family and community are not always valued as highly as those of men. However this situation does not necessarily indicate that, with regard to the status of women, the custom/state relationship is one of incompatibility. For the experiences of many other democratic countries demonstrate that equal recognition by the state is not enough to guarantee equal status. Although constitutions, laws and codes of practice in both private and public sectors may give equal recognition to women and men, it is evident that women in most democratic countries play a lesser role in key decision-making bodies. This is demonstrated through such things as the number of women represented in parliaments and the number of women in senior positions within the public service. Given these considerations, the status of women in Samoa places the custom/state relationship more as one of complementarity than incompatibility. That is, although both systems theoretically give equal status to women and men, in practice women are disadvantaged to a degree.

9.3 Vanuatu
9.3.1 Social control
Central to the values espoused by democratic states is the notion that individuals have particular rights and freedoms. The notion of freedom is not generally applied to kastom governance however kastom does offer certain freedoms in the way that it guarantees access to land, natural

resources, community and security. Such benefits are often perceived by ni-Vanuatu as being absent in Western cultures and so it is not surprising that they are tightly guarded in contemporary Vanuatu.

In an attempt to retain these benefits chiefs have, in some cases, tightened their control, further restricting the opportunities for individuals to make choices. This is particularly so for the control of women and youths. For example, Jolly recounted how men have attempted to restrict women’s contact with outside influences, ‘holding them tight’ in the village setting whilst men themselves have traveled and allowed themselves to be exposed to foreign values and ideas. Women have accused chiefs of placing the rights of men over those of women and of using kastom to maintain and reinforce gender inequalities, but contradictory rules are justified by claims that women who travel are at risk of becoming prostitutes. This attitude was reflected in Nautong Mecartney’s findings that young men living in the suburb of Blacksands had come to Port Vila for employment, education, to visit relatives or simply to experience the attractions of the city. In contrast, women visited town to seek medical assistance or to provide domestic help to a relative.

One issue that has caused controversy in recent years has been the attempts by chiefs to prohibit women from wearing trousers. Although the ruling is prevalent, chiefs do not appear to be representing the views of the majority and trousers continue to be worn by many women. At one point the ‘trousers issue’ became such a hotbed of contention that the Malvatumauri unsuccessfully attempted to ban them at a national level. The Young Women Speak report dedicates an entire section to the topic of trousers and their connection with respect. The report questioned why women’s trousers are considered to be disrespectful and concluded that they are perceived as: sexually alluring and therefore disrespectful to kastom and church leaders and husbands; men’s clothes and therefore disrespectful of gender divisions; and associated with ‘white man’ and therefore the loss of kastom. The report found that young women choose to wear

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49 Jolly, Women of the Place: Kastom, Colonialism, and Gender in Vanuatu pp88-89.
50 Nautong Mecartney, Blacksands Settlement: a case for urban permanence in Vanuatu p78.
51 Cummings, Maggie, 2002, Young Women Speak (Vanuatu Cultural Centre, Port Vila) p12.
trousers for their comfort, protection, practicality and style. In 2003, Regenvanu predicted that the ‘trousers issue’ was ‘too trivial’ to remain controversial for long but five years later a group of young men held a public protest in Port Vila, claiming that only men had the right to wear trousers or shorts and that it was unchristian for women to do so. The issue remains contentious. While this matter does appear to be trivial as asserted by Regenvanu, it highlights tensions in the kastom/state relationship in the way that prohibitions imposed by chiefs have the potential to impact upon the freedoms guaranteed in the Constitution. Relevant to this issue is the freedom of expression that is recognised by the Constitution for all persons ‘without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex.’

In the lead up to independence, concerns were raised about the freedoms that would be guaranteed under the Constitution. Constitutional adviser Yash Ghai asserted that attention of the constitutional drafters was directed at freedoms of movement and religion, protection of property and equal protection of the law, each of which was included in the Constitution. Freedom of movement was regarded as problematic because communities wanted to retain control over travel to and from their locality, fearing that loss of this control would erode their culture and value systems. Freedom of religion was considered potentially divisive because, although Christianity was firmly entrenched, the arrival of new sects or denominations had already resulted in clashes within communities. Concerns over property related to land and the fear that foreign-owned land would not be reclaimed or that indigenous titles would be passed on to the government. The right to equal protection of the law was questioned on the grounds that it would prevent action aimed at redressing the inequalities of the past which had been mostly racially related. Thirty years on, we can see that some of these concerns were justified in terms of the way that they have impacted upon kastom. For example, as discussed in Chapter 8.3.2, the right to freedom of movement is openly challenged by chiefs who attempt to control movement to and from villages.

Chiefs have demonstrated that they are not reticent to assert their authority and many are choosing to do so by developing their own rules. There are a number of examples of the codification of

52 Ibid.
56 Ibid. See AppendixB:2.
57 Ghai, The Making of Constitutions in the South Pacific Islands.
**kastom** including the *Custom Policy of the Malvatumauri*,\(^{58}\) the code of Tanna\(^{59}\) and various sets of rules formulated by individual village councils of chiefs. The practice of documenting local practices is contentious with people arguing strongly both for and against. It is generally agreed that **kastom** is flexible and readily able to adapt to changing circumstance,\(^{60}\) therefore codification is problematic in the way that it prevents change from occurring organically. Furthermore, although efforts to codify local laws may be perceived as codifying **kastom**, in many instances the issues being ruled upon do not sit within the traditional realm of **kastom**. The *Custom Policy of the Malvatumauri* and codified laws prepared in some villages, which reveal attempts by chiefs to formalise their authority and to control such things as women’s clothing, religion and movement to and from the village,\(^{61}\) are simply village rules rather than **kastom**. As such, chiefs are overstepping their authority if these rules are inconsistent with the laws of the state. Although the codification of **kastom** itself, as opposed to village by-laws may be problematic, the processes behind codification align with democratic principles, for democracy requires that transparent and consistent rules and systems of governance be established. Processes of codification provide an opportunity to discuss important community interests as well as an opening to modify particular aspects of **kastom**.\(^{62}\)

The impetus for chiefs to impose their control is partly driven by the emphasis that **kastom** places on respect for leadership. In **kastom** this respect is fostered, in part, by the protection of knowledge within an elite group. In Vanuatu, as in much of the Pacific, knowledge of **kastom** is understood as a source of status and power, so those who have knowledge may be reluctant to share it.\(^{63}\) As such, knowledge is connected with and maintains the social order.\(^{64}\) In the context

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60 In his Independence Address, Prime Minister Walter Lini noted the flexibility of **kastom** asserting that: It will be the responsibility of successive parliaments and governments as well as the chiefs to preserve our custom but not to preserve it blindly and without reference to change. For custom has always changed with people’s ideas and it must continue to do so. From now on the speed and the quality of the changes will be for us to decide together. (Lini, Walter, 1980, *Beyond Pandemonium: From the New Hebrides to Vanuatu* (Asia Pacific Books, Wellington). In some cases, **kastom** has deliberately been changed through exchange and purchase of songs, rituals and objects.\(^{65}\) For example, Tonkinson, National Identity and the Problem of Kastom in Vanuatu' ; Larcom, Joan, 1982, 'The Invention of Convention' in *Mankind* 13 (4), 330


62 Powles, Common law at bay? The scope and status of customary law regimes in the Pacific.

of Vanuatu as a modern democracy, the protection of knowledge can be viewed through the lenses of transparency and accountability. Perhaps because of the significance placed on the protection of knowledge, chiefs have demonstrated a reluctance to share information and thereby be transparent in their decision-making processes. For example, Newton Cain and Jowitt pointed out that there is no formal requirement for the Malvatumauri to publicly reveal its decisions or declarations and as such, information is released according to the discretion of the Council. The release of information has not been systematic and much is revealed through rumour and informal channels.65

Accompanying this lack of transparency is a lack of accountability. Chiefs have traditionally been understood as accountable because they have always been compelled to ensure that their communities are provided for - those leaders that do not effectively manage economic, social and environmental factors are likely to be replaced. However, this represents a narrow view of accountability and the contemporary understanding of accountability incorporates the ability for people to openly criticise or assess the actions and decisions of leaders.66 Under kastom, chiefs are immune from public criticism. It is commonly believed that the dignity of chiefs should always be maintained and there is a willingness to protect chiefs who have committed misdemeanours from being subjected to public scrutiny. However people do not always abide by this rule. Philibert recounted how young men in Etapang would on occasion gather drunkenly and shout obscenities at the chief and elders. Philibert understood such behaviour as being a form of public control as it forced issues, which often pertained to the morality of office holders, to be brought to the fore at council meetings.67 Similarly, Tonkinson told of a chief who attempted to revive kastom by importing an expert to advise on the construction of a new men’s house. The chief became the subject of much criticism, some of which was directed at the chief’s desire for personal prestige.68 These examples highlight that, as with any system of governance, the principles of kastom do not always align with its practice.

64 Rubinstein recounted how in some ni-Vanuatu societies knowledge was, in the past, linked with eating classes and so would only be disclosed in a strict order. In this manner, knowledge was ‘personalised and objectified’ and was an indicator of authority. Rubinstein, Knowledge and Political Process on Malo p142.  
67 Philibert, Will Success Spoil a Middleman? The Case of Etapang, Central Vanuatu p194.  
68 Tonkinson, National Identity and the Problem of Kastom in Vanuatu p311.
The *kastom/state* relationship is challenged by the tendency of chiefs to impose control. By codifying village laws, chiefs are potentially acting in ways that are incompatible with the laws of the state. However, there is some degree of complementarity in the way that this practice increases transparency and consistency in the application of the law. The tendency of chiefs to hold on to knowledge compromises the democratic requirements of transparency and accountability, taking the *kastom/state* relationship into one of incompatibility. Once again, the complexity of the *kastom/state* relationship is evident.

### 9.3.2 *Kastom* communities

One mechanism by which some ni-Vanuatu are attempting to control the security and well-being of their communities is through a rejection of modern life-styles. In Vanuatu today there are a number of communities, known as *kastom* communities, where ‘modern’ conveniences and practices have deliberately been avoided in favour or more ‘traditional’ ones. This may mean wearing traditional dress such as grass skirts for women and penis sheaths for men, living in traditional styles of housing and maintaining a reliance on subsistence agriculture. *Kastom* communities are not strictly traditional in the sense of maintaining practices that have remained unchanged for generations. Rather they are contemporary manifestations that draw heavily upon tradition. As noted by Jolly in her accounts of the Kwaio and Sa traditionalists, *kastom* communities do not reproduce the lives of their ancestors, for their actions are determined by colonial and contemporary influences.⁶⁹

In some instances, *kastom* communities have benefited from tourism and so these communities have perhaps maintained the outward manifestations of *kastom* partly for that purpose. But others maintain their adherence to *kastom* primarily for ideological reasons. There are, of course, many other communities in Vanuatu that continue to live subsistence lifestyles with few modern conveniences. The difference between these and *kastom* communities, is that the former do so because of the absence of services. The latter have made a considered choice to reject modernity.

One of the most noted and controversial examples of a *kastom* community is the Turaga Nation on the east coast of the island of Pentecost. The Turaga Nation is a subsistence-based community which has developed its own philosophies and responses to contemporary living. The key proponent of the Turaga Nation is Motarilavoa Hilda Lini, an ex-politician and one of the few

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⁶⁹ Jolly, *Women of the Place: Kastom, Colonialism, and Gender in Vanuatu* p250.
female chiefs in Vanuatu. As a member of the influential Lini family (which includes two former prime ministers and the wife of a former President), Hilda Lini has been outspoken on contemporary matters such as the pitfalls of Westernisation and modernisation. She has spoken persuasively at the local level as well as at high profile international fora such as the United Nations and so has generated a great deal of interest and some strong supporters. Partly under her guidance, the Turaga Nation has codified its own rules in a recently developed script. Each member of the community receives a wage in traditional wealth items such as pigs’ tusks, shells and mats\textsuperscript{70} and these can be deposited into a locally established bank. Vanuatu’s contemporary education system has been rejected in favour of a locally devised system which operates through a Turaga Nation school. The community has rejected some modern conveniences such as processed food and matches, but accepted others such as a refrigerator and a gas generator.\textsuperscript{71}

Extreme actions such as the rejection of modern medicine have attracted skepticism as well as supporters. Hilda Lini is regarded by her detractors as a cult leader but the Turaga Nation continues to provide an apparently functioning system of governance. Interestingly, although the Turaga Nation represents a clear departure from the path of modernisation, it does not reject all mechanisms of the international community. For example, Hilda Lini has called upon the United Nations to recognise the Turaga Nation and she claims that its governance system contributes to the achievement of the Millennium Development Goals.\textsuperscript{72} This seems like an unrealistic assessment given the isolation in which the community functions. Nevertheless, by employing the language of international agreements the Turaga Nation has acknowledged that participation in the international community has value.

As a movement, \textit{kastom} communities are a departure from the philosophies represented by the state in the way that they set themselves apart and subtly undermine the national system of governance. As such they are an example of incompatibility in the \textit{kastom}/\textit{state} relationship. Nevertheless, in the context of Vanuatu where state services are widely inaccessible, \textit{kastom} communities can contribute to the security and well-being of communities by ensuring that people have access to essential items such as food and land whilst also receiving an education. In this

manner the goals of *kastom* and the state align, highlighting that the complex nature of the *kastom/state* relationship means that aspects of complementarity and incompatibility can be present simultaneously in one space.

### 9.3.3 Women

Custom
misapplied
bastardised
murdered
a Frankenstein
corpse
conveniently
recalled
to intimidate
women

The equal status of women in Vanuatu is theoretically protected through legislation and various government commitments. The Constitution of Vanuatu specifies rights to which all people are entitled and, according to the Constitution, no person can be denied these rights on the grounds of sex. Three consecutive national development plans acknowledged the role of women in development and the Government of Vanuatu signalled a further assertion of women’s rights by ratifying CEDAW in 1995 and its Optional Protocol in 2006. The United Nations *Beijing Declaration and Platform of Action* was adopted by the Government of Vanuatu and local NGOs in 1996, formalising a commitment to integrate a gender perspective in all policies and programs. In 1997, the *Comprehensive Reform Program*, a Government initiative to strengthen public institutions, set nine benchmarks with actions to promote gender equity. The Government’s *Priorities and Action Agenda 2006-2015* establishes the objective of promoting gender equality and empowering women. However, in spite of these initiatives, women in Vanuatu continue to be disadvantaged in comparison to men. It is arguable that, the rights of women present the largest stumbling block for a synthesis between *kastom* and the state.

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The literature is littered with examples of the ways that the submissiveness of women in Vanuatu is manifested. In his description of traditional ranked eating classes in Malo, Rubinstein asserted that women ‘were generally considered by men to be an inferior life form.’ He went on to describe how men of particular standing could, in the past, be given sexual access to the ‘lesser’ wives of big-men.\(^77\) Tonkinson noted that in pre-colonial times, there was a practice of women walking on their knees if they were in the presence of certain male kin.\(^78\) Kenneth and Silas asserted that ‘in traditional culture, women were kept in the background and tended to be treated as ‘slaves’ rather than persons.’\(^79\) Menstruation and childbirth contributed to notions of danger and contamination, restricting women’s full participation in ceremonies and rituals.\(^80\) According to Maclancy, prior to colonisation life for women was especially difficult. A woman caught drinking kava was liable to being buried alive, widows were sometimes strangled, and suicide rates amongst women were higher than amongst men. Although women participated in grade-taking ceremonies, they were denied the opportunity to achieve the power, sacredness and place of honour in the after-life that was available to men.\(^81\) Jolly\(^82\) and Bolton\(^83\) have both

\(^77\) Rubinstein, 'Knowledge and Political Process on Malo' pp139-140.
\(^79\) Kenneth, Dorosthy and Silas, Henlyn, 1986, 'Vanuatu: Traditional diversity and modern uniformity' in University of the South Pacific Institute of Pacific Studies (eds), Land rights of Pacific women (Institute of Pacific Studies, University of the South Pacific, Suva) p69.
\(^80\) Ibid. p69.
\(^81\) MacClancy, To kill a bird with two stones: a short history of Vanuatu pp26, 32, 36.
\(^82\) In her monograph, Women of the Place, Jolly examined modes of production and reproduction in order to assess how men have successfully achieved domination. She revealed that through divisions of labour, unequal control over distribution and exchange, and men’s control over land, a hierarchy has been established. Men have achieved ‘access to if not rights over women’s labour, sexuality and fertility.’ Although women play an active role in perpetuating unequal practices, Jolly asserted that this does not negate the structure of male domination. She examined the impact of Christianity, arguing that during the colonial period, women in kastom communities played a more dominant role. Christianity sought to relegate women to the domestic sphere, and so the role of women became a marker of difference between kastom and skul. Colonisation introduced the cash economy and also took men away from their communities in order to work. The cash economy became the domain of men, allowing them to gain more control whilst the time that men spent away from the community with other men, fostered male solidarity. Jolly, Women of the Place: Kastom, Colonialism, and Gender in Vanuatu
\(^83\) In her monograph Unfolding the Moon, Bolton examined the relationship between women and kastom. Building on the work of commentators such as Larcom, Jolly and Strathern, Bolton argued that men have come to be associated with kastom whereas women have not. She suggested that this can be attributed to the notion that men are linked with culture whereas women are linked with nature. It has been further reinforced by the practice of associating kastom with tradeable material – the trade in songs, stories, sorcery skills and rituals that existed in pre-colonial Vanuatu came to define kastom and these items were largely the prerogative of men. Through her work with the Vanuatu Cultural Centre, Bolton explored women’s production and use of textiles to demonstrate that women, too, have kastom. Bolton reaffirmed the authority of women through her exploration of the relationship between women and land. She argued that whilst men may hold rights to land, women strengthen their relationship to place by bearing children to it. Bolton also examined the impact of missionaries and colonisers, arguing that the complexities of male/female dynamics were not appreciated. In particular, the spiritual dimensions of oppression were not understood. She suggested that male superiority was reinforced through the hierarchy of the church and government and that white settlers ‘established a formal inequality between women and all men, on the basis of a public/domestic
demonstrated how colonisation served to systematically disadvantage women further and entrench male domination.

Numerous examples demonstrate how this inferior status persists. Forsyth described respect as including practices such as prohibitions on women drinking kava. 84 Jolly argued that there is a double standard when it comes to extra-marital relationships - it is more difficult for women to divorce on the grounds that their husbands have been adulterous because women are supposed to tolerate their husband’s affairs. 85 In both patrilineal and matrilineal systems, women’s access to land (and therefore sustenance, a spiritual connection and social standing) is determined by their relationship to male kin – a woman who is not married or does not have male children is severely disadvantaged. 86 Few women in Vanuatu hold key positions in decision-making bodies - women are poorly represented in parliament and notably absent from high-ranking positions in the church, local councils and the public service. 87 Although women have historically participated in grade-taking ceremonies, in their 2004 report on domestic violence in Vanuatu, Tor and Toka could identify only one female chief in Vanuatu – Hilda Lini. 88 Anecdotal evidence suggests that there are at least two other female chiefs – one in Banks and one in the Shepherd Islands. Whatever the exact numbers, it is clearly apparent that their numbers are few.

The many examples above suggest that, in spite of remonstrations that kastom traditionally allowed for equality between the sexes, cultural practices allowed women to be disadvantaged in the past and discriminatory practices persist in various ways today.

The relationship between kastom and women is somewhat inconsistent. Some observers point to the respect that is shown to women in kastom and/or tradition. For example, Tor and Toka explained that:

In traditional society, women were highly regarded, and treated with respect. In most islands of Vanuatu, women had their own grade taking ceremonies that gave them

84 Forsyth, A Bird that Flies with Two Wings: Kastom and State Justice Systems in Vanuatu p132 footnote 112.
85 Jolly, Women of the Place: Kastom, Colonialism, and Gender in Vanuatu p123.
86 Kenneth and Silas, Vanuatu: Traditional diversity and modern uniformity.
87 Tor and Toka, Gender, Kastom and Domestic Violence: A research on the historical trend, extent and impact of domestic violence in Vanuatu; Government of Vanuatu, Priorities and Action Agenda 2006-2015: An Educated, Healthy and Wealthy Vanuatu.
88 Ibid. p25.
status and recognition. They could organize parts of an event or ceremony in the community, as a chief would. In places like North Ambrym and East Ambae, a man cannot advance in his grade taking unless his wife also rises in her ranks. Women had their work and men had theirs, women had their properties and possessions and men had theirs. In traditional societies, men and women were relatively equal.\textsuperscript{89}

Respect for women is theoretically reflected in community decision-making processes. For example, one respondent, a political advisor, explained how \textit{kastom} processes give equal voice to men and women. He explained that, according to \textit{kastom}, men attend meetings then discuss the proceedings with their wives. The wives give their opinion to their husbands who, in turn, report them back to the next meeting. In such a manner, according to my respondent, women are given equal say in all community decisions. This explanation seems unsatisfactory for a few reasons. First, it assumes that the husband attended and had a good understanding of the meeting. Second, it assumes effective communication between the husband and wife and that the husband will be willing and able to accurately relay her response. Third, it requires that no decision was reached at or prior to the initial meeting. Thus, whilst the two explanations above suggest that \textit{kastom} holds the \textit{possibility} of equality, in practice cultural factors inhibit women’s full participation in society.

It is evident that women’s lack of institutional representation in Vanuatu is partly due to the choices of women themselves – in general, they tend to avoid formal political responsibilities and positions of leadership. There have been some genuine attempts to integrate women into decision-making positions but with poor results. For example, in 2004 the SHEFA Provincial Council attempted to recruit seven women for its council of eighteen members, but was unsuccessful.\textsuperscript{90} From a reading of the literature, Douglas attributed this avoidance of public representation to shyness, a lack of skills, already large workloads, not wishing to break the ethos of egalitarianism and fear of gossip or sorcery.\textsuperscript{91} In 2006, a group of more than one hundred women attended Vanuatu’s First National Women’s Forum in order to discuss the Beijing Platform for Action. They identified seven principle reasons for the failure of the Gender Equity Policy to be implemented. These included: ‘traditional beliefs that a woman’s place is not as a leader’; ‘belief that custom laws need not be changed’; ‘continued belief in the inferiority of

\textsuperscript{89}Ibid. p15.
\textsuperscript{91} Douglas, Christian custom and the Church as structure in ‘weak states' in Melanesia p167.
women by women themselves as well as by men,’ and; ‘the idea that promoting women’s rights is incompatible with Christian principles.’ Tor and Toka also noted that there is a widely-held perception that ‘kastom has dictated that men are the decision makers and women play a supportive or submissive role.’

It is important to note that poor representation in the formal sector or in positions of authority does not necessarily equate with a total lack of influence. Whilst women may be largely confined to the domestic and local spheres, their participation in community activities provides them with a degree of agency and input. Douglas argued that the common tendency to portray activities such as sewing circles, prayer meetings and fellowship groups as banal is problematic in that it dismisses the choices made by women themselves. Such groups allow women to participate in the cash economy and to build solidarity, confidence and managerial skills. In some cases, church groups allow women to participate in quite radical programs and to make a significant (if mostly invisible) contribution to local governance. This point was made also by Corrin who noted that important tasks such as gardening were demeaned by Western influences.

It is argued that until institutions such as the Malvatumauri and churches elevate the position of women, they will persist in supporting the stereotyping of women that limits participation outside the home. Chiefs have indicated at least some level of support for lifting the status of women. For example, the Corporate Plan of the Malvatumauri of 2004 proposed that the Council take a more active role in promoting women’s kastom. The Vanuatu Women’s Centre has held workshops that target male community leaders, including chiefs. The Centre claims that these workshops which are designed to mobilise men to advocate for women in their communities have resulted from a shift in attitude that has seen men become much more receptive to the notion of supporting women’s issues. On the whole, however, the response of chiefs to claims of discrimination against women has been unsatisfactory for advocates of women’s rights and there is little indication that chiefs are prepared to accommodate substantial change. The Malvatumauri

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93 Tor and Toka, *Gender, Kastom and Domestic Violence: A research on the historical trend, extent and impact of domestic violence in Vanuatu* p11.
95 Corrin Care, Negotiating the Constitutional Conundrum: Balancing Cultural Identity with Principles of Gender Equality in Post-Colonial South Pacific Societies p51.
98 Interview with representative from Vanuatu Women’s Centre, 2007.
acknowledges that women have a role as chiefs, but it has indicated that it will not consider women as potential members for the Malvatumauri. More importantly, it would seem that many chiefs lack sympathy for the perspectives of women. For example, Rousseau recounted a workshop in which the topic of rape was explored. Suggestions that forced sex was not rape but kastom indicated that kastom presented an easy excuse for maintenance of the status quo.

There have been some instances where clashes between kastom and the rights of women have been brought before the state judicial system. One such case was the Public Prosecutor v Kota & Ors, discussed earlier (Chapter 8.3.2), in which a woman who, under the order of chiefs was forcibly returned to her husband, took her case to the Supreme Court. Another was the case of Noel v Toto in which several women challenged a chief’s claim over the income generated by land. They asserted that the chief was withholding their share of income on the basis that their rights to the land were determined by their husbands or brothers. The Supreme Court found that although kastom provides the basis for determining ownership of land, this must be subject to the fundamental rights recognised in the Constitution, including the equal rights of women.

The status of women in kastom is contentious and open to interpretation. However, it is clear that women in Vanuatu are disadvantaged in comparison to men and that kastom is used to justify this position. In this manner, tension exists in the kastom/state relationship. However once again, the kastom/state relationship on this issue is complex. The state’s attempts to raise the status of women have been largely symbolic rather than proactive and thus have been ineffective. Chiefs have also refrained from taking a proactive stance on this issue, indicating that kastom and the state are not in opposition in this regard. Further, unless discrimination of women results in a contravention of state law, the kastom/state relationship is in accord. It is important to note that under both kastom and formal systems, there exists some resistance to the subjugation of women. This resistance demonstrates that kastom and the state can both withstand self-criticism, indicating a degree of complementarity. Overall, both kastom and the state profess to respect the principle of equality, but neither actively attempts to achieve equality.

100 Interview with representative from the Malvatumauri, 2007.
9.4 Conclusion

Custom governance in Samoa and Vanuatu is concerned with ensuring that the basic needs of all people in the community are met. In both countries the state has responsibility for delivering services in health and education and ensuring that law and order are maintained. In this manner, custom and the state are both operating in the domain of social protection. Responsibilities differ to some extent in the way that fa’asamoa and kastom are present in the domestic realm whereas the state will mostly only intervene in domestic issues if the laws of the state are contravened.

Chiefs in Samoa and Vanuatu attempt to address social protection by maintaining a fairly tight rein. They endeavour to control such things as movement, religion and individual behaviour and often justify this control in the name of custom. In this respect, tension exists in the custom/state relationship because the state espouses freedom of the individual, freedoms which are guaranteed in the constitutions of both countries. However tension in the relationship does not always signify incompatibility because chiefs are not necessarily breaking the laws of the state when they control behaviour.

The status of women potentially creates the greatest obstacle for complementarity in the custom/state relationship because it is evident that in Samoa and Vanuatu, custom disadvantages women. However, the states’ principles of equality as articulated in the constitutions, legislation and other commitments are largely symbolic and in both countries little headway has been made in ensuring that women are represented in key decision-making bodies of the state. As such, while tension between the systems exists in principle, in practice there is little evidence of incompatibility.

The weak capacity of states in the Pacific is particularly evident in the area of service delivery. In Samoa and Vanuatu this manifests in development outcomes that are negatively impacted by limited access to quality services in health and education. In this manner, the governments of Samoa and Vanuatu are falling down in their responsibilities to provide social protection for all. Under the leadership of chiefs, customary institutions and processes contribute to the well-being of communities, ultimately ensuring that, for the most part, people have access to land as well as social support. With little incompatibility and some areas of high complementarity, there is an opportunity to build on the successes of customary institutions in their role of providing social protection.
Chapter 10 Conclusion

10.1 Introduction
Governance in the Pacific Islands is derived from multiple sources of authority. This thesis focuses on the authority of chiefs as expressed through local custom, and the state as expressed through legal frameworks and its participation in the global community of nation states. The intention of the thesis is to offer insights into the workings of each system with the aim of providing a better understanding of the relationship between them. In particular, it aims to highlight the complexity and relevance of custom in the contemporary setting in order to reinforce that custom is not only resilient in the face of external influences, but that it can be harnessed to add value to state systems and practices.

The relationship between the two systems of governance is not always an easy one as each brings its own set of ideologies, expectations and guiding principles. This thesis highlights the incompatibilities between customary and state systems of governance and identifies some of the ways that Pacific Islanders and development actors have responded to these competing influences. Importantly, the thesis also reveals substantial areas of complementarity, demonstrating that paths of negotiation between the two systems of governance can be found.

Ultimately, this leads to the question of whether such points of complementarity can be built upon or utilised more effectively in the broader landscapes of social and economic development.

10.2 The custom/state relationship
The relationship between the custom and state systems is not an equal one and precedence is determined largely by context. In remote villages in Vanuatu where the state has limited reach, it is easy to see how kastom maintains its significance as the most relevant form of governance. However, in the Supreme Court of Vanuatu the Constitution is the higher authority. In Pacific Island countries people live simultaneously under both systems of governance and, for much of the time, this is not problematic. However, this situation can be unsatisfactory over the long-term if one system serves to undermine and reduce the effectiveness of the other. Furthermore, the relationship is open to interpretation and in many situations it is not clear or agreed by all parties as to which source of authority should take precedence.
Custom in the Pacific Islands has withstood a range of influences including Christianisation and
the introduction of modern statehood. In both countries, custom has persisted and even dominated
in spite of efforts by opposing forces to undermine it. The resilience of custom is testament to the
relevance that it continues to hold. Custom brings with it a number of benefits including its
ability to adapt and respond as deemed appropriate at the time. Chiefs live and work at the
grassroots and so can quickly intervene as issues arise, preventing problems or conflicts from
escalating. Ideally, chiefs take a holistic approach to deliver an outcome that is in the best interests
of the whole community. Importantly, custom has in-built systems of social support which
theoretically ensure that no individual is left without land or basic necessities. These features
serve to reinforce the legitimacy of chiefs as customary leaders and custom as a viable form of
governance in contemporary society.

The authority of the state is a more recent phenomenon. As noted, the principle of sovereignty
was established primarily by the Peace of Westphalia in 1648 and consolidated under the
framework of the United Nations in the mid-twentieth century. States such as those in the Pacific
carry aspirations of democracy and human rights, requiring such things as meaningful
participation in political processes, and freedom of association and expression.

For Pacific Islanders, modernisation carries with it a range of issues that custom is not readily
equipped to address. Growing populations, modern economies and business transactions,
urbanisation, unemployment, and shifting responsibilities within families all create a need and a
desire to explore alternative modes of operating. The state provides one such alternative and
Pacific Islanders demonstrate their support for state systems through such things as participating
in elections, utilising the state justice system to resolve disputes and accessing state health and
education systems. In addition, overt support for democratic principles is demonstrated by NGOs
and women’s groups that regularly call upon their governments to uphold international human
rights commitments.

With both custom and the state offering benefits and receiving support, there is no end in sight to
this duopoly of governance. This could be considered problematic because, as demonstrated, the
two systems are perceived to be incompatible in some fundamental ways. In both Samoa and
Vanuatu, chiefs have imposed strict measures of social control that potentially counter the
freedoms guaranteed in their state constitutions. Women and youth have been particularly
disadvantaged by these measures. Customary attitudes toward leaders mean that the decisions of chiefs are not open to scrutiny or question, conflicting with state requirements of transparency and accountability. Customary land tenure systems prohibit transactions of land, limiting state revenue-raising opportunities whilst also diminishing reliance upon the state and thereby reducing self-perpetuating demands for good governance. Inevitably, these points of incompatibility have led to tension and conflict.

It is perhaps surprising that the structures of state governance in the Pacific are not stronger. State structures have been in place for some time, there is a strong push from both within and outside to uphold democratic practices, and the forces of modernisation and globalisation are immense. Nevertheless, Pacific Island states struggle to uphold the principles of governance as identified by institutions such as the World Bank (see Table 2, Chapter 5.3). According to these institutions, governance can be assessed by the degree to which it adheres to a set of indicators such as rule of law, government stability, transparency and control of corruption. On measuring the performance of Pacific Island governments, it is assessed that no Pacific Island countries rate well on all indicators and that some countries rate poorly on all indicators.¹ It is evident, however, that assessments such as these take a state-centred approach to governance. Within this framework custom is rendered invisible and therefore assessments overlook the benefits noted above that custom brings.

Incompatibility between custom and the state presents a challenge for development actors and others who aim to foster a system of governance capable of delivering basic services equitably and of participating in the global economy. The challenge requires a considered and well-informed approach to identify and harness opportunities for cooperation – to give recognition to the positive aspects of each system and to reinforce practices that provide benefit. Importantly, it requires a targeted and flexible approach that resists any attempt to apply an idealised model.

This thesis employs the tool of hybridity to begin this process. By identifying points of complementarity as well as incompatibility, it reveals that the custom/state relationship is not one of complete contrast. Rather the relationship is complex and dynamic. Significantly, there are a large number of areas where the two systems intersect, highlighting that issues that affect the state

are likely to affect custom and vice versa. The two systems do not necessarily work separately or in opposition and, as such, there is room for further negotiation between them.

The variable nature of governance in the Pacific demonstrates the importance of understanding context. In Samoa chiefship is characterised by its indelible connection with land and by its hierarchical and hereditary nature which, through a system of reciprocity and kinship connections, is self-reinforcing. Samoans have developed a clearly defined social structure with prescribed social and administrative groupings, theoretically ensuring that each person in the village is assured of basic necessities. In contemporary Samoa, chiefship is embedded within the state political system, contributing to a state that is in itself a hybrid structure. In Vanuatu chiefship and *kastom* is variable across the archipelago but they can generally be characterised by their egalitarian nature and connection to place. In contemporary Vanuatu, the authority of chiefs remains mostly outside that of the state. Samoa and Vanuatu have the similarity of being Pacific Island polities in which custom and the state influence the nature of governance. However their strikingly different customary systems have influenced the nature of their state systems in order to create two very different polities. These differences highlight that policy-makers must have a comprehensive understanding of the context in which they are working.

The custom/state relationship is complex. This is evident through, for example, customary dispute resolution processes in Samoa where consideration of rank as a determining factor in punishment is a customary feature that is inconsistent with the laws of the state. However, the customary requirement that an accused person be given a fair trial adheres to the state’s understanding of natural justice. In this instance, custom and the state are simultaneously in a relationship of complementarity and incompatibility. In Vanuatu, village authorities are codifying rules that are inconsistent with the freedoms guaranteed in the Constitution, such as restrictions on clothing and religious affiliation. Whilst the restrictions conflict with state law, the act of codification establishes transparent rules and allows for consistent enforcement. On this particular matter, custom and the state are once again in a relationship that is simultaneously complementary and incompatible.

The complexity of the custom/state relationship is also evident in the status of women. In Vanuatu the status of women in *kastom* is not clear, with people arguing both for and against the customary subjugation of women. It is evident that women have consistently been disadvantaged.
over time, that male domination was further entrenched during the colonial period, and that the inferior status of women persists today. Chiefs have refrained from taking any active stance on this matter and women continue to be discriminated against in the name of kastom. Under the Constitution, state legislation and international agreements, women in Vanuatu are given equal rights to men, indicating incompatibility in the custom/state relationship. However, the state has also neglected to take a proactive stance to ensure that guarantees of equality are upheld. In practice, kastom and the state are in accord on this issue.

The status of women also serves to highlight the dynamic nature of the custom/state relationship. In Vanuatu, people are questioning the subjugation of women in the name of kastom, demonstrating an understanding that the role of women is an outcome of relatively recent influences and that kastom itself can accommodate a degree of self-criticism. Significantly ni-Vanuatu generally agree that kastom can change, holding the possibility that kastom and the state can both progress gender equality.

In Samoa there is a high degree of mutual dependency in the custom/state relationship because the authority of matai is embedded within the state system. For example only matai are eligible for political candidature and tama’āiga (the highest ranking matai) were originally appointed as joint Heads of State. Matai rely upon the Land and Titles Court, an institution of the state, for recognition of authority and the state, in turn, relies upon matai and their āiga to manage land tenure by recognising matai titles as appurtenant to land. In Vanuatu, the level of mutual dependency is less, but there are areas such as resolution of land disputes whereby the state has given chiefs the authority to act as arbitrators, thereby shoring up chiefship as a source of authority.

In both countries there are areas of complementarity where each system serves to benefit the other. For example the women’s committees in Samoa contribute to development and social well-being, assisting the state to fulfil its role as a provider of essential services. The state courts of Samoa recognise the benefits of customary conflict resolution processes by using the ifoga as a mitigating factor in sentencing. In Vanuatu, the state is unable to maintain a strong presence in all areas and so relies upon chiefs to continue their role as arbitrators in processes of conflict resolution.
Importantly, chiefs in Samoa and Vanuatu are demonstrating that they have the ability and the desire to adapt to contemporary contexts. It is partly this ability that allows them to retain their authority today. Samoan matai have been especially active in exploring and analysing their own situation. The growing body of literature on matai, customary governance, contemporary politics, and the contributions of women in these arenas, much of which has been written by matai themselves, allows for rigorous discussion on the ways that matai can and do contribute to governance in Samoa today. Within this literature matai have demonstrated a capacity for critical self-analysis, while also articulating and emphasising the importance for Samoa of those governance structures that are based in tradition. Samoans have not indicated a desire to break from the hybrid political system under which their state operates. In addition, it appears likely that a tama’āiga will continue to occupy the position of Head of State for the foreseeable future. Significantly, this hybrid political structure is not generally perceived by Samoans to be at odds with democratic notions of equality, accountability or transparency. In Vanuatu, the position of chief is in itself a symbol of adaptation. For the position as it exists today is very much an outcome of influences that have emanated from within and outside Vanuatu over the past two centuries. In Vanuatu today, chiefs’ councils are widely accepted as legitimate fora for discussing and implementing kastom even though these councils are a relatively recent phenomena in the archipelago. The Malvatumauri, established in 1976 and recognised in the Constitution in 1980, gives chiefs and kastom representation at the national level. Councils such as the Freshwater Council of Chiefs, which prepared its own Constitution in 2002 (see Chapter 8.3.3.1), are allowing chiefs to apply kastom in multi-cultural, urban settings. Such hybrid structures allow leaders whose authority is derived from kastom to operate in contemporary settings, while also establishing a link between state and non-state systems of governance. These features of adaptability shown in Samoa and Vanuatu provide avenues for chiefs to continue to exert their authority moving forward.

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3 For example, Tuimalaele'iifano, O Tama A 'Aiga.Tuimalaele'iifano, O Tama A 'Aiga.

4 For example, So'o, Va'a, Lafotanoa and Boon Samoa National Human Development Report 2006.

10.3 The next step
By identifying specific points of contact which represent different facets of the relationship, the tool of hybridity highlights the complex nature of the custom/state dynamic. These points reveal that the relationship is neither static nor a complete dichotomy. Rather, positive interaction between the systems already exists, new interactions are being developed over time and points of complementarity and incompatibility function simultaneously. Furthermore, these aspects, in conjunction with the adaptability of custom, indicate that there is significant potential to develop further areas of complementarity.

The next step, then, is to seek ways to move these positive interactions into new areas or to consolidate and further develop the existing areas of cooperation. As noted, Pacific Island countries are not delivering well on development outcomes and Pacific governments struggle to provide social protection and essential services. With an active and effective grassroots system already in place, it seems prudent to look at ways that custom and governments can work together further on areas of mutual interest and mutual need such as service delivery, employment, social support, and law and order.

In order to progress negotiation between the systems, it is important to establish some ground rules. The governance agenda that dominates development thinking is, ultimately, about the functioning of states. Identifying markers of governance such as regulatory quality, control of corruption and government effectiveness are about governments not governance. In this line of thinking, the state is given precedence as a source of authority and customary governance has limited influence because customary processes fulfil a different role. Custom is about stewardship - it applies a holistic approach to deliver the outcome that is in the best interests of the community. This thesis aims to foster a better understanding of custom governance in order to level the playing field – to advocate for both systems of governance as equally legitimate and relevant sources of authority.

Effective and sustainable development requires ownership and it is neither appropriate nor useful for outsiders to formulate an agenda for change. However, it is appropriate and necessary for all development actors to examine their approach and identify areas where improvements can be made. The recommendation of this thesis is then, that policy-makers recognise the ways that
custom and the state already work together and explore ways to give greater recognition to customary leaders, ideologies and systems. If custom were to be given equal weight, the priorities for development assistance would likely be quite different from those currently in play. It will be up to local leaders to implement change, but donors, recipient governments and other policymakers can assist to facilitate the process. Custom currently stands at the periphery of development, and initiatives that seek to incorporate or utilise custom are generally an accompaniment to larger initiatives, token or regarded as of little importance. Until custom is understood as central to governance it will regarded as a hindrance rather than a useful resource. The development agenda needs to be examined to identify ways that customary leaders can be educated and empowered to participate as equal players.

Custom is not designed to deliver state services or to contribute to a modern, globalised economy. However, it can clearly assist the state by sharing responsibility and by reducing the burden placed upon it. For example, in Vanuatu in 2007 and 2008, kastom representatives worked together with the government to support the Year of the Traditional Economy. The initiative, facilitated by the Vanuatu Cultural Centre, Vanuatu Credit Union League and UNESCO and funded by the Japanese government, aimed to encourage people to use traditional wealth items in order to diminish the reliance on the cash economy while simultaneously benefiting those communities that continue to produce those items. People living in urban centres participated by giving traditional items as wedding gifts or by serving traditional foods at celebrations. The kastom economy initiative did not seek to strengthen the formal economy, however it did have the potential to contribute to national well-being through: the strengthening of the informal economy; a reduction on the reliance of costly, imported food items; a move toward healthier eating habits and thus a reduction in the need for health services; and through a celebration of national culture.

Customary practices have been successful in achieving environmental management, social cohesion, conflict management and economic management in subsistence communities. If Pacific Island governments and donors are willing to facilitate a greater attention to custom, chiefs and their supporters will need to demonstrate their abilities in these areas. Importantly, chiefs have shown themselves to be adaptable and they have utilised this asset for their benefit. In Samoa, matai are leaders in politics, the public sector and in business. In Vanuatu, chiefs are demonstrating their skills in innovation through such things as the formation of chiefs’ councils

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which have allowed chiefs to exercise their authority in a contemporary urban context. Ultimately chiefs have demonstrated their capacity to provide effective leadership.

The inclusion of custom as an equal player in the development agenda is not without risk. Even in relatively egalitarian societies such as Vanuatu, chiefs have shown that they are not impervious to overstating their power and they have attempted to claim or impose their authority in ways that do not align well with either custom or state-centred governance. Inherent incompatibilities are a challenge and practices that discriminate or disadvantage people in the name of custom cannot be supported. However custom is adaptable and well able to respond to changing circumstances and expectations. In addition, it is evident that many discriminatory practices, particularly those pertaining to women, have become exacerbated over time and because of outside influences. Custom and culture in the Pacific, as elsewhere in the world, should seek to overcome disadvantage and disempowerment.

If custom is to be considered an equal source of authority by those in the state arena, chiefs will need to be supported to mould their leadership skills to suit the contemporary context. Village-based chiefs in particular are currently disadvantaged by their lack of education, lack of resources and lack of familiarity with state processes. It is difficult for such people to make an impact in a system that is guided and largely dominated by relatively well-financed and well-educated individuals who represent national governments or multi-lateral organisations. Creating spaces where a range of voices can be heard and truly allowed to contribute is difficult, and persistence will be required, however, efforts are already being made in these areas. For example, in Samoa the sui-o-le-nu’u provide a link between village and state authorities, acting as a conduit for information. In Vanuatu, awareness-raising programs are run by NGOs such as Won Smolbag, Transparency International Vanuatu, Foundation of the Peoples of the South Pacific, the Vanuatu Women’s Centre and the Vanuatu Rural Development and Training Centres’ Association. These programs are mostly designed to examine social and governance issues such as the constitution, voting rights, domestic violence or the responsibilities of leaders. Some of these programs target chiefs and other community leaders. The Kastom Governance Partnership, run by the Australian Centre for Peace and Conflict Studies in partnership with the Malvatumauri, is exploring traditional leadership in the contemporary context of Vanuatu. Such efforts are to be commended however they are limited by, amongst other things, the absorptive capacity of their target
audience. That is, individual chiefs have limited capacity, drive and motivation to participate in such activities and to make use of newly acquired skills. Change will be incremental.

There is room for much further exploration into the ways that custom and the state can cooperate. The *Partnerships for Development*, which have been established between the Government of Australia and the governments of some of the Pacific Island countries, make a good framework for exploration. These Partnerships each identify specific priorities for development assistance and within each Priority Outcome there is the potential for custom to play an important role.

Samoa’s *Partnership for Development* identifies five Priority Outcomes: private sector growth and employment; improved health; improved education; improved governance; and climate change. Within the areas of focus identified under each Priority Outcome, custom has already demonstrated its suitability for addressing food security, health promotion and law and justice. Priority Outcome Five identifies the need to monitor the impacts of climate change on health, agriculture and food security, and the need to develop adaptation for vulnerable, coastal communities. In these areas, village councils and committees are ideally placed to play an important role.

Vanuatu’s *Partnership for Development* identifies four Priority Outcomes: improved education; improved health; improved infrastructure; and economic governance. It also flags future priority outcomes in the areas of: law and justice; land administration; and access to finance and agriculture. In the areas of focus currently being targeted, *kastom* authorities already have a role. For example, measures to control malaria and deliver vaccinations require participation on the part of communities and support from community leaders. But there is room to explore ways of increasing ownership of measures to improve health and education such as the construction and maintenance of facilities. If given the necessary resources, the Malvatumauri and island councils of chiefs, for example, could play a greater role in ensuring that facilities are of a satisfactory standard.

Among the areas targeted for both countries under the Partnerships is that to improve data collection. The Pacific region has a lack of reliable statistics and this is recognised as an impediment to tracking and improving development achievements. This is another area where

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7 AusAID, *Tracking development and governance in the Pacific* p77.
communities, under the guidance of chiefs, are well placed to contribute as they are in the position to establish baseline data and to monitor change.

Both Partnerships raise issues of vocation, both in terms of training and in terms of retention of teachers and health care professionals in communities. Issues of education and employment do not necessarily sit within the domain of custom, however they are recognised as important issues for communities. Chiefs and their councils could potentially get more directly involved in identifying and supporting individuals interested and suited to vocational training. The work of village groups, such as the women’s committees in Samoa, could be fostered and empowered to take greater ownership of the staffing of schools and health centres.

10.4 Conclusion

In complex polities like those of Samoa and Vanuatu, assessments of governance are deficient because, under the dominant paradigm of state-centred governance, customary governance is rendered invisible. While state-centred assessments highlight the weakness of the Pacific Island countries, an examination of custom governance reveals that strong governance systems are in place.

The hybridist approach to governance recognises that multiple sources of authority can and do operate in shared spaces. By removing an assumed hierarchy whereby one form of governance is regarded as superior to others, hybridity is a useful tool with which to assess the ways that different systems of governance interact. The analysis of Samoa and Vanuatu revealed that custom and the state interact in unexpected and sometimes inconsistent ways. Significantly, the degree to which they interact and influence each other reveals that neither system can be properly assessed without consideration of the other. It can be expected that a similar situation exists in other Pacific Island polities as well as other countries where indigenous systems are present.

For policy-makers, hybridity provides a useful tool for developing a comprehensive understanding of complex polities. Although both Samoa and Vanuatu are Pacific Island countries that share many similarities, the analysis of their governance systems revealed stark differences. These differences are critical, highlighting the need for policy-makers working in cross-cultural environments to properly understand the contexts in which they operate.
The level to which custom and state governance systems interact and complement each other demonstrates that policy-makers need not be reticent to engage with custom on the assumption that it is distant or incompatible with the state. Rather custom is operating in the same realms as the state and its strengths are there to be built upon.
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Appendix A

Extracts from the Constitution and Acts of Parliament relevant to chiefship in Samoa

Compiled by the author. Sourced from PacLII, www.paclii.org/ws

Note: In order to fit with the chronology of events described in the thesis, the year stated for each extract is usually the year in which the law was passed, and not the year of the current Consolidation of Statutes.

8. Alienation of Customary Land Act 1965
9. Alternative Dispute Resolution Act 2007
10. Births, Deaths and Marriages Registration Act 2002
12. District Courts Act 1969
12a. Divorce and Matrimonial Causes Ordinance 1961
13. Electoral Act 1963
14. Fisheries Act 1988
15. Internal Affairs Act 1995
16. Land and Titles Act 1981
17. Samoan Status Act 1963
18. Taking of Land Act 1964
19. Trade Marks Act 1972
20. Village Fono Act 1990
21. Young Offenders Act 2007

8. Freedom from forced labour - (1) No person shall be required to perform forced or compulsory labour.
   (2) For the purposes of this Article, the term "forced or compulsory labour" shall not include:
      (a) Any work required to be done in consequence of a sentence of a Court; or
      (b) Any service of a military character or, in the case of conscientious objectors, service exacted instead of compulsory military service; or
      (c) Any service exacted in case of an emergency or calamity threatening the life or well-being of the community; or
      (d) Any work or service which is required by Samoan custom or which forms part of normal civic obligations.

9. Right to a fair trial - (1) In the determination of his civil rights and obligations or of any charge against him for any offence, every person is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established under the law. Judgment shall be pronounced in public, but the public and representatives of news service may be excluded from all or part of the trial in the interests of morals, public order or national security, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice.
   (2) Nothing in clause (1) shall invalidate any law by reason only that it confers upon a tribunal, Minister or other authority power to determine questions arising in the administration of any law that affect or may affect the civil rights of any person.
   (3) Every person charged with an offence shall be presumed innocent until proved guilty according to law.
   (4) Every person charged with an offence has the following minimum rights:
      (a) To be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
      (b) To have adequate time and facilities for the preparation of his defence;
      (c) To defend himself in person or through legal assistance of his own choosing and, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
      (d) To examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
      (e) To have the free assistance of an interpreter, if any doubt exists as to whether he can understand or speak the language used in Court.
   (5) No person accused of any offence shall be compelled to be a witness against himself.

10. Rights concerning criminal law - (1) No person shall be convicted of an offence other than an offence defined by law.
    (2) No person shall be held guilty of any offence on account of any act or omission which did not constitute an offence at the time when it was committed; nor shall a heavier penalty be imposed than the one that was applicable at the time that the offence was committed.
    (3) No person who has been tried for any offence shall, after conviction or acquittal,
again be tried for that offence except:

(a) Where a retrial is ordered or conducted by a Court or judicial officer exercising a jurisdiction superior to that under which that person was acquitted or convicted; or

(b) In the case of a conviction entered in a trial conducted by a Judge or Judges of the Supreme Court, where a retrial is ordered by a Judge of that Court on an application made within 14 days of that conviction.

11. Freedom of religion - (1) Every person has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in a community with others, and, in public or private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.

(2) Nothing in clause (1) shall affect the operation of any existing law or prevent the State from making any law in so far as that existing law or the law so made imposes reasonable restrictions on the exercise of the right conferred under the provisions of that clause in the interests of national security or of public order, health or morals, or for protecting the rights and freedom of others, including their rights and freedom to observe and practice their religion without the unsolicited interference of members of other religions.

13. Rights regarding freedom of speech, assembly, association, movement and residence - (1) All citizens of Samoa shall have the right:

(a) To freedom of speech and expression;
(b) To assemble peaceably and without arms;
(c) To form associations or unions; and
(d) To move freely throughout Samoa and to reside in any part thereof.

(2) Nothing in subclause (a) of clause (1) shall affect the operation of any existing law or prevent the State from making any law in so far as that existing law or the law so made imposes reasonable restrictions on the exercise of the right conferred under the provisions of that subclause in the interests of national security, friendly relations with other States, or public order or morals, for protecting the privileges of the Legislative Assembly, for preventing the disclosure of information received in confidence, or for preventing contempt of Court, defamation or incitement to any offence.

(3) Nothing in subclauses (b) or (c) of clause (1) shall affect the operation of any existing law or prevent the State from making any law in so far as that existing law or the law so made imposes reasonable restrictions on the exercise of either or both of the rights conferred under the provisions of those subclauses in the interests of national security or public order, health or morals.

(4) Nothing in subclause (d) of clause (1) shall affect the operation of any existing law or prevent the State from making any law in so far as that existing law or the law so made imposes reasonable restrictions on the exercise of the right conferred under the provisions of that subclause in the interests of national security, the economic well-being of Samoa, or public order, health or morals, for detaining persons of unsound mind, for preventing any offence, for the arrest and trial of persons charged with offences, or for punishing offenders.

15. Freedom from discriminatory legislation - (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 this Article shall:
   (a) Prevent the prescription of qualifications for the service of 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.


18. Election of Head of State - (1) The Head of State shall be elected by the Legislative Assembly under the provisions of the First Schedule.
   (2) A person shall not be qualified to be elected to the office of Head of State:
      (a) If he is not a person qualified to be elected as a Member of Parliament; or
      (b) If he does not possess such other qualifications as the Legislative Assembly may determine from time to time by resolution; or
      (c) If he has previously been removed from the office of Head of State under the provisions of clause (2) of Article 21.
   (3) The validity of the election of the Head of State shall not be contested in any Court.

19. Term of office of Head of State - (1) Subject to the provisions of Articles 17 and 21, the Head of State shall hold office for a term of 5 years from the date on which he assumes the functions of his office:
   PROVIDED THAT, notwithstanding the expiry of his term, he shall continue to hold office until his successor assumes the functions of his office or for a period of 3 months, whichever is the shorter period.
   (2) Subject to the provisions of this Constitution, a person who holds, or who has held, office as Head of State, shall be eligible for re-election to that office.
   (3) An election to fill a vacancy in the office of Head of State caused by the death, resignation or removal of the Head of State or by the expiry of the term of his office shall be held under the provisions of the First Schedule, and, subject to the provisions of this Constitution, the person elected to that office shall hold office for a term of 5 years from the date on which he assumes the functions of his office.

31. Executive power –

(1) The executive power of Samoa shall vest in the Head of State and shall be exercised by him under the provisions of this Constitution.

(2) Nothing in clause (1) shall prevent Parliament from conferring by Act functions on authorities other than the Head of State.

32. Cabinet - (1) There shall be a Cabinet of Ministers, who shall have the general direction and control of the executive government of Samoa and shall be collectively responsible therefore to Parliament.

(2) Cabinet shall be appointed as follows:

(a) The Head of State shall appoint a Prime Minister to preside over Cabinet a Member of Parliament who commands the confidence of a majority of the Members of Parliament;

(b) The Head of State shall, acting on the advice of the Prime Minister, appoint not fewer than eight nor more than twelve other Members of Parliament to be Ministers;

(ba) The Head of State shall, acting on the advice of the Prime Minister, appoint one of the Ministers appointed under subclause (b) to be Deputy Prime Minister;

(c) If an appointment is to be made while the Legislative Assembly is dissolved, a person who was a Member of Parliament immediately before the Assembly was last dissolved may be appointed to be Prime Minister or a Minister;

(d) Appointments under the provisions of this clause shall be made by the Head of State by instrument under the Public Seal;

(e) The Head of State shall, acting on the advice of the Prime Minister, appoint another Member or Members of Parliament to be a Minister or Ministers as soon as possible after the number of Ministers falls below the number appointed pursuant to subclause (b) of this clause by reason of the office of any Minister or Ministers becoming vacant, so that the number of Ministers (in addition to the Prime Minister) shall be restored to the number appointed pursuant to subclause (b) of this clause as soon as possible.

37. Cabinet procedure - (1) Subject to the provisions of this Constitution, Cabinet may regulate its procedure (including the fixing of a quorum) in such manner as it thinks fit.

(2) There shall be a Secretary to Cabinet.

(3) Cabinet shall not be disqualified for the transaction of business by reason of any vacancy in the number of its members, and any proceedings of Cabinet shall be valid notwithstanding that some person who was not entitled to do so sat or voted in Cabinet or otherwise took part in the proceedings.

(4) It shall be the duty of the Prime Minister, if the Head of State so requires, to submit for the consideration of Cabinet any matter on which a decision has been taken by a Minister (including the Prime Minister) but which has not been considered by Cabinet.

(5) A decision of Cabinet shall be recorded in minutes which shall, under the hand of the Secretary to Cabinet, be communicated to the Secretary to the Head of State within 24 hours of the making of the decision.

(6) A decision of Cabinet shall not take effect except under the provisions of Article 38.

38. When decisions of Cabinet are to take effect - (1) A decision of Cabinet shall take
effect: 
(a) On its approval by the Head of State, acting in his discretion; or 
(b) On the expiry of 4 days after the date of the decision, unless a meeting of the 
Executive Council is sooner held under the provisions of Article 40; or 
(c) If the issue involved in the decision is, in the opinion of a majority of 
Ministers present and voting at the meeting at which the decision is taken, of 
extreme urgency, on the expiry of one day after the date of the decision, unless a 
meeting of the Executive Council is sooner held under the provisions of Article 
40; or 
(d) Under the provisions of Article 40.

(2) For the purposes of subclauses (b) and (c) of clause (1), the date of a decision of 
Cabinet shall be the date on which the minutes in which the decision is recorded are 
communicated to the Secretary to the Head of State under the provisions of clause (5) of 
Article 37.

(3) An instrument under the hand of the Secretary to Cabinet certifying that a decision 
of Cabinet has taken effect shall be conclusive evidence that that decision has taken 
effect.

39. Executive Council - (1) There shall be an Executive Council of Samoa, which shall 
consist of:
   (a) The Head of State;
   (b) The Prime Minister and Ministers holding office under the provisions of 
      Articles 32 and 33.

(2) Subject to the provisions of this Constitution, the Executive Council may regulate its 
procedure (including the fixing of a quorum) in such manner as it thinks fit.

(3) The Secretary to Cabinet shall be Clerk of the Executive Council.

40. Consideration of Cabinet decisions by Executive Council - (1) The Head of State, 
acting in his discretion, or the Prime Minister may summon a meeting of the Executive 
Council to consider any decision recorded in the minutes of a Cabinet meeting.

(2) If at a meeting of the Executive Council thus summoned the Head of State supports 
the decision concerned, that decision shall take effect as a decision of Cabinet.

(3) If at a meeting of the Executive Council thus summoned the Head of State opposes 
the decision concerned or requests any amendment thereto, Cabinet shall thereupon be 
summoned under the provisions of Article 36 and requested to reconsider that decision.

(4) If Cabinet after that reconsideration reaffirms its original decision or accepts the 
amendment requested by the Head of State, the original decision or the decision as so 
amended, as the case may be, shall forthwith take effect as a decision of Cabinet.

(5) If Cabinet after that reconsideration adopts a decision which incorporates an 
amendment to its original decision, other than an amendment requested by the Head of 
State under the provisions of clause (3), the decision as so amended shall operate as a 
new decision of Cabinet to which the provisions of clauses (5) and (6) of Article 37 
shall apply.

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

(a) One member elected for each of 41 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) Six additional members being one additional member elected for each of such 6 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.

60. Bills assented to become Acts of Parliament - (1) No bill shall become a law until the Head of State has given his assent thereto.

(2) Whenever a bill which has been passed by the Legislative Assembly is presented to the Head of State for his assent, he shall, acting on the advice of the Prime Minister, declare that he assents to the bill or that he refuses his assent to the bill.

(3) A law assented to by the Head of State as herein provided shall be known as an Act of Parliament and shall come into force either on the day on which it is assented to, or on any date (whether earlier or later than the date on which it is assented to) specified in that behalf in the Act.

63. Prorogation and dissolution of Legislative Assembly - (1) The Head of State may at any time, by notice published in the Samoa Gazette, prorogue the Legislative Assembly.

(2) If, at any time, the office of Prime Minister is vacant, the Head of State shall, by notice published in the Samoa Gazette, dissolve the Legislative Assembly as soon as he is satisfied, acting in his discretion, that a reasonable period has elapsed since that office was last vacated and that there is no Member of Parliament likely to command the confidence of a majority of the Members.

(3) The Head of State may at any time, by notice published in the Samoa Gazette, dissolve the Legislative Assembly, if he is advised by the Prime Minister to do so, but shall not be obliged to act in this respect in accordance with the advice of the Prime Minister unless he is satisfied, acting in his discretion, that, in tendering that advice, the Prime Minister commands the confidence of a majority of the Members of Parliament.

(4) The Head of State shall dissolve the Legislative Assembly at the expiry of 5 years from the date of the last preceding general election, if it has not been sooner dissolved.


100. Matai titles - A Matai title shall be held in accordance with Samoan custom and usage and with the law relating to Samoan custom and usage.

101. Land in Samoa - (1) All land in Samoa is customary land, freehold land or public land.

(2) Customary land means land held from Samoa in accordance with Samoan custom and usage and with the law relating to Samoan custom and usage.

(3) Freehold land means land held from Samoa for an estate in fee simple.

(4) Public land means land vested in Samoa being land that is free from customary title
and from any estate in fee simple.

102. No alienation of customary land - It shall not be lawful or competent for any person to make any alienation or disposition of customary land or of any interest in customary land, whether by way of sale, mortgage or otherwise howsoever, nor shall customary land or any interest therein be capable of being taken in execution or be assets for the payment of the debts of any person on his decease or insolvency:

Provided that an Act of Parliament may authorise:

(a) The granting of a lease or licence of any customary land or of any interest therein;
(b) The taking of any customary land or any interest therein for public purposes.

103. Land and Titles Court - There shall be a Land and Titles Court with such composition and with such jurisdiction in relation to Matai titles and customary land as may be provided by Act.


111. Interpretation - (1) In this Constitution, unless it is otherwise provided or the context otherwise requires:

"Law" being in force in 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 in so far as they are not excluded by any other law in force in Samoa, and any custom or usage which has acquired the force of law in Samoa or any part thereof under the provisions of any Act or under a judgment of a Court of competent jurisdiction.


114. Existing law to continue - Subject to the provisions of this Constitution:

(a) The existing law shall, until repealed by Act, continue in force on and after Independence Day;
(b) All rights, obligations and liabilities arising under the existing law shall continue to exist on and after Independence Day and shall be recognised, exercised and enforced accordingly; and
(c) Proceedings in respect of offences committed against the existing law may be instituted on and after Independence Day in that Court, established under the provisions of this Constitution, having the appropriate jurisdiction, and offenders shall be liable to the punishments provided by the existing law.
8. Alienation of Customary Land Act 1965

AN ACT to provide for the leasing and licensing of customary land for certain purposes.

Part I - Leasing and Licensing

3. Prohibiting some leases and licences - It shall not be lawful to lease or licence any customary land for any agricultural or pastoral purpose to any Samoan who is not for the time being holder of a Matai title.

4. Power to grant lease or licence - Subject to section 3 of this Act, the Minister, if in his or her opinion the grant of a lease or licence of any customary land or any interest therein is in accordance with Samoan custom and usage, the desires and interests of the beneficial owners of the land or interest therein and the public interest, may grant a lease or licence of that customary land or interest therein as trustee for such owners:

(a) For an authorised purpose approved by the Minister;
(b) If the authorised purpose so approved is a hotel or industrial purpose, for a term not exceeding 30 years, with or without a right or rights of renewal for a term or terms not exceeding an additional 30 years in the aggregate, as may be approved by the Minister;
(c) If the authorised purpose so approved is not a hotel or industrial purpose, for a term not exceeding 20 years with or without a right or rights of renewal for a term or terms not exceeding an additional 20 years in the aggregate, as may be approved by the Minister;
(d) For such rent or other consideration payable to the Chief Executive Officer, reviewable or not, and if reviewable at such intervals or on such occasions and in such way, as may be approved by the Minister.

5. Application to grant lease or licence - Wherever any Samoan claiming to be a beneficial owner of any customary land or of any interest therein desires that the Minister shall grant a lease or licence of such land or of any interest therein under the powers conferred by section 4, such Samoan shall make written application in that behalf to the Chief Executive Officer.

9. Alternative Dispute Resolution Act 2007

An Act to provide for the application of alternative dispute resolution procedures in civil and criminal cases in Samoa, and for related purposes.

Part III Mediation Procedures

7. Power of Courts to refer parties to mediation-(1) The Court may refer parties to a dispute to attend mediation prior to or during the hearing of any civil matter in dispute.
(2) Without limiting the generality of subsection (1), the Court may refer a matter to mediation if –

(a) there is considered a possibility of a settlement;
(b) the parties or party to a proceeding may not be able to meet the costs of the proceedings if it were to proceed; or
(c) both parties voluntarily agree to mediation.

Part V Reconciliation

15. Promotion of Reconciliation or conciliation-(1) In proceedings relating to an offence
to which this Part applies, a Court may, with the consent of the complainant, promote reconciliation or conciliation and encourage the settlement of the proceedings in an amicable way in such cases which are –

(a) substantially of a personal or private nature; and

(b) not aggravated in degree.

(2) The reconciliation or conciliation of any proceedings under this section may be on terms of payment of compensation or on other term approved by the Court, which may involve –

(a) the giving of an apology in any appropriate manner;

(b) the giving of a promise or undertaking not to re-offend, or to respect the rights and interests of any victim;

(c) mandatory attendance at any counselling or other program aimed at rehabilitation; or

(d) a promise or undertaking to alter any habits or conduct, such as the consumption of alcohol or the use of drugs.

(3) A Court shall only proceed in accordance with sub-section (2) if it is satisfied that it is in the interests of any aggrieved party to proceed in such a manner, and in any case involving domestic violence the Court shall ensure that the victim of the violence does not submit to any proceedings being undertaken in accordance with this section by reason of pressure being exerted in any form.

(4) Upon proceeding in accordance with this section the Court may then –

(a) order the proceedings to be stayed for a specified period of time upon the offender entering into any bond to comply with the terms imposed by the Court under subsection (2); or

(b) dismiss the proceedings.

(5) A proper record of every aspect of the outcome of the proceedings is to be made on the Court files and in the records of an accused person whose case has been dealt with in accordance with the procedures specified in this section.

(6) The procedures under this section may be applied in connection with any procedure of the Court which permits the involvement of traditional and community leaders in the determination of appropriate sentences.

(7) Regulations made under this Act may make provision in relation to any aspect of procedures aimed at promoting reconciliation or conciliation in accordance with this section, and may prescribe guidelines to be applied by the Courts in such proceedings.

10. Births, Deaths and Marriages Registration Act 2002

2. Interpretation

"prohibited name" means a name that in the Registrar’s opinion –

(a) May cause offence to a reasonable person; or

(b) Is unreasonably long; or

(c) Without adequate justification, is, includes, or resembles a mātai title or other official title or rank.

An Act to promote criminal justice by the provision of a community based justice system that fosters community based sentencing options and the rehabilitation and reintegration of offenders.

Part I Community Based Justice System

1. Short title and commencement-(1) This Act may be cited as the Community Justice Act 2008.

(2) This Act shall commence on the date of assent by the Head of State.

2. Purpose - The purpose of this Act is to administer and operate a community based justice system that will promote public safety and contribute towards the maintenance of a just society by:

(a) ensuring that sentences are administered in a fair and effective manner; and
(b) reducing re-offending by managing the rehabilitation of offenders and their reintegration into society; and
(c) providing useful and timely information to Courts and the Prisons Parole Board to assist them in determining decisions relating to the rehabilitation and reintegration of offenders and prisoners.
(d) providing opportunities for the community to participate in the rehabilitation and reintegration of offenders;
(e) providing opportunities for Samoan custom and tradition to be recognised in the sentencing, rehabilitation and reintegration of offenders;
(f) ensuring that Samoan custom and tradition is integrated, where appropriate, in the community justice system.

3. Objects of the Act - The principal objects of this Act are:

(a) the maintenance of public safety; and
(b) the consideration of victims' interests; and
(c) to ensure offenders undertaking sentences of supervision have access to rehabilitative and reintegration programmes; and
(d) to ensure the fair treatment of offenders undergoing sentences of supervision or community work; and
(e) to ensure offenders released on parole have access to rehabilitative and reintegration programmes; and
(f) for offenders as far as is reasonable and practicable in the circumstances and within the resources available, to be given access to activities that may contribute to their rehabilitation and reintegration into the community; and
(g) for Samoan custom and tradition, where appropriate, to be applied in the rehabilitation and reintegration of offenders.

Part II Community Based Sentencing

5. Purposes and Principles-(1) The purpose of this Part is to provide to a Court a range of sentencing options and means of dealing with offenders other than by imprisonment.

(2) Where an offender is convicted of an offence punishable by imprisonment, the Court when considering the sentence it should impose, must have regard to the desirability of keeping offenders in the community so far as that is practicable and consistent with the safety of the community.
6. Promotion of Custom and Tradition-(1) Notwithstanding this Act or any other law, a Court may in criminal cases promote, encourage and facilitate a settlement, according to Samoan custom and tradition of any proceedings for an offence on terms of payment of compensation or other terms approved by the Court, which may in the court's discretion reduce the sentence it would otherwise have imposed including ordering the discharge, with or without conviction, of the offender.

(2) A Court may order a pre-sentence report if it considers that this would assist it in making a determination under this section and such report may include a recommendation that the offender be diverted in accordance with section 11 on such conditions as it thinks fit.

7. Account to be taken of Compensation - Upon entering a conviction the Court must in determining the nature of the penalty to be imposed, take account of any compensation or reparation made or due by the offender under Samoan custom and tradition and if such has not yet been determined, may, if satisfied that it will not cause undue delay, postpone sentencing for such purpose.

8. Power to Impose Substituted or Alternative Penalty of Community Work to Fine-(1) Where in any Act, Regulation, Rule or Order, a penalty of a fine is provided for any offence without any alternative penalty the Court may in its discretion impose a sentence of community work in lieu or as an alternative penalty.

9. Power to Impose Substituted or Alternative Penalty of Community Work or Supervision to Imprisonment-(1) Where in any Act, Regulation, Rule or Order, a penalty of imprisonment is provided for any offence without any alternative penalty the Court may in its discretion impose a sentence of community work or supervision in lieu or as an alternative penalty.

10. Pre-Sentence Reports-(1) A probation officer will, when required by a Court to do so, provide a pre-sentence report to the Court reporting on the character and personal history of any person convicted of any offence punishable by imprisonment, with a view to assisting the Court in determining the most suitable method of dealing with his or her case, and may in any such report advise the Court whether the offender would be likely to respond satisfactorily to a sentence of supervision or community work and whether any conditions of supervision should be imposed or recommend another sentence.

(2) The pre-sentence report must advise the Court of any reconciliation process or reparation made under Samoan custom and tradition.

11. Diversion-(1) Where a person appearing before a Court:

(a) does not have a previous conviction; and
(b) intimates a plea of guilty,

the Court, if it does not consider the offending to be of a serious nature, in chambers or in open Court, instead of proceeding with the prosecution of the charge, refer the person charged to be considered for diversion under this section.

(2) Where the Court refers a person for diversion, the person charged will report within 24 hours to the probation service and a diversion agreement will be prepared by a probation officer.

(3) The diversion agreement will be signed by the probation officer and the person charged.

(4) The diversion agreement will include an acknowledgement of guilt and an undertaking by the person charged to complete any conditions contained in the
diversion agreement within the specified timeframe and will specify what will occur to
the person charged if the diversion agreement is not adhered to.
(5) The probation officer in preparing a diversion agreement may, where appropriate,
encourage and facilitate the person to undertake or attempt to undertake with the
complainant and the respective parties' families, reconciliation according to Samoan
custom and tradition.

Part III Supervision and Community Work

12. Sentence of Supervision-(1) A Court may sentence an offender to supervision if:
   (a) the offender is convicted of an offence punishable by imprisonment; or
   (b) the offender is convicted of an offence and the enactment prescribing the
       offence expressly provides that a community based sentence may be imposed on
       conviction; or
   (c) it sentences an offender to a term of imprisonment of not more than 12
       months and in such case the term of supervision imposed will commence on the
       offender's release from prison and must not exceed 12 months.

13. Guidance on use of Sentence of Supervision-(1) A Court may impose a sentence of
    supervision only if the Court is satisfied that a sentence of supervision would reduce the
    likelihood of further offending by the offender through the rehabilitation and
    reintegration of the offender.
(2) If a Court imposes a sentence of supervision in respect of each of 2 or more offences
    (whether on the same occasion or different occasions), the sentences must be served
    concurrently.

15. Standard Conditions of Sentence of Supervision-(1) If an offender is sentenced to
    supervision the following standard conditions apply:
   (a) the offender must report in person to a probation officer as soon as
       practicable and not later than 24 hours after the sentence is imposed; and
   (b) the offender must report to a probation officer as and when required to do so
       by a probation officer and must notify the probation officer of his or her place of
       residence; and
   (c) the offender must not move to a new place of residence without the prior
       written consent of a probation officer; and
   (d) the offender must take part in a rehabilitative and reintegrative needs
       assessment and/or programme if and when directed to do so by a probation
       officer; and
   (e) the offender must, where a probation officer directs that it is appropriate t
       do so, undertake or attempt to undertake with the complainant and the parties'
       respective families reconciliation in accordance with Samoan custom and
       tradition.

19. Sentence of Community Work-(1) A Court may sentence an offender to community
    work:
   (a) if the offender is convicted of an offence punishable by imprisonment; or
   (b) if the offender is convicted of an offence and the enactment prescribing the
       offence expressly provides that a community-based sentence may be imposed on
       conviction.
(2) The sentence may be for the number of hours, being not less that 40 or more than
    400 as the Court thinks fit.
25. Authorised Work for Person Sentenced to Community Work-(1) The type of work that an offender may be required to perform for the purposes of a sentence of community work is:

(a) work at or for any hospital or church or for any charitable, educational, cultural, or recreational institution or organisation; or
(b) work at or for any other institution or organisation for old, infirm, or disabled persons, or at the home of any old, infirm, or disabled person; or
(c) work on any land which is under the control or direction of the State, a village council or any public body.

12. District Courts Act 1969

6. Appointment of Fa'amasino Fesoasoani - The Head of State, acting on the advice of the Judicial Service Commission, may from time to time by warrant published in the Gazette and the Savali appoint fit and proper persons to be Fa'amasino Fesoasoani.

33. Civil jurisdiction - A Court presided over by a Fa'amasino Fesoasoani shall have civil jurisdiction:

(a) To hear and determine any action founded on contract or in tort where the debt, demand or damage, or the value of the chattels, claimed does not exceed the sum of $1,000;
(b) To hear and determine any action for the recovery of any penalty, expense, contribution or other like demand which is recoverable by virtue of any enactment for the time being in force in Samoa, if:
   (i) It is expressly provided by that or any other enactment that the action may be heard and determined by a District Court Judge; and
   (ii) The amount claimed in the action does not exceed the sum of $1,000:

Provided that for the purposes of paragraph (b) the expression "penalty" shall not include a fine to which any person is liable on conviction.

34. Extended jurisdiction - Any Fa'amasino Fesoasoani who has been granted extended jurisdiction in accordance with section 18 of this Act shall, in addition to the jurisdiction hereinbefore conferred, have power:

(a) To deal with matters up to a limit of $200 where by section 33 hereof a limit of $2,000 is prescribed;
(b) To make orders on judgment summonses in cases where the original judgment was for a sum of $200 or less.

38. Criminal Jurisdiction of all Fa'amasino Fesoasoani - Every Fa'amasino Fesoasoani is hereby empowered to exercise the jurisdiction conferred on District Court or any District Court Judge thereof in relation to any of the matters set out in section 39 of this Act:

Provided that the jurisdiction conferred by this section shall not extend to authority to impose a fine exceeding 10 penalty units or to impose a sentence of imprisonment in lieu of or in addition to a fine.

39. Matters covered by that criminal jurisdiction - Subject to section 38 of this Act, any Fa'amasino Fesoasoani may hear, determine and impose sentence in respect of any information which charges the accused with:

(a) Any offence the maximum penalty for which does not exceed one year's
imprisonment or a fine of 10 penalty units or both;
(b) The crime of theft, provided the value of the property stolen does not exceed the sum of $1,000.

40. Extended jurisdiction - Any Fa'amasino Fesoasoani who has been granted extended jurisdiction in accordance with section 18 of this Act shall, in addition to the jurisdiction hereinbefore conferred, have power:
(a) To impose terms of imprisonment not exceeding 6 months on any one charge in addition to or in lieu of any fine, or in default of payment of any fine, where such imprisonment is authorised by the enactment under which the information is laid or the charge is brought;
(b) To impose a fine not exceeding 10 penalty units.

12a. Divorce and Matrimonial Causes Ordinance 1961

26A. Interpretation – In this Part:
“aggrieved person” means a person who is the subject of domestic violence;
“domestic violence” means conduct that:
(a) causes physical, psychological or personal injury to a relevant person; or
(b) causes damage to the property of a relevant person; or
(c) is a threat, made to a relevant person, to do anything in relation to the relevant person or another relevant person that, if done, would fall under paragraph (a), or (b); or
(d) is harassing or offensive to a relevant person.

“relevant person” means a spouse or child of a person and includes a step child of that person.

26B. Application for a restraining order - (1) In any proceedings under this Ordinance, the Court or a Registrar may make such restraining orders as it considers appropriate.
(2) In deciding an application for a restraining order, the Court or Registrar must give primary consideration to the need to ensure that the aggrieved person, and any child at risk of exposure to domestic violence, is protected from such domestic violence.

26C. Restraining order - (1) A restraining order restrains the respondent from engaging in conduct that constitutes domestic violence in relation to the aggrieved person and may be subject to such conditions or restrictions as the Court or Registrar consider appropriate.
(2) Without limiting subsection (1), the restraining order may do 1 or more of the following:
(a) prohibit the person who is the subject of the order from being within a particular distance from the aggrieved person; or
(b) prohibit the person who is the subject of the order from contacting, harassing, threatening or intimidating the aggrieved person or a child of the aggrieved person; or
(c) state the conditions on which the person who is the subject of the order may -
   (i) be on particular premises; or
   (ii) be in a particular place; or
   (iii) approach or contact a particular person.
(3) If a person engages in conduct that contravenes a restraining order (including a condition of the order) the person commits an offence and is liable to imprisonment for a term not exceeding 12 months or to a fine not exceeding 20 penalty units or to both.

26D. Duration of restraining order - (1) A restraining order made by the Court remains in force for 2 years or such shorter period as is stated in the order.
(2) A restraining order made by a Registrar remains in force for 7 days or such shorter period as is stated in the order and any extension of that order may only be granted by the Court.
(3) However, the Court may make a restraining order that remains in force for longer than 2 years if satisfied that there are special or exceptional circumstances that justify the longer period.

26E. Intervention by Attorney-General - (1) The Attorney-General may intervene in, and contest or argue any question arising in:
   (a) any proceedings under this Ordinance where the Court requests the Attorney-General to do so or a matter arises that affects the public interest; or
   (b) any proceedings under this Ordinance for or in relation to an order relating to the welfare of a child.

(2) Where the Attorney-General intervenes in any proceedings, the Attorney-General shall be deemed to be a party to the proceedings with all the rights, duties and liabilities of a party.

13. Electoral Act 1963

Qualifications of members
5. Who may be candidates for election as Members - (1) Subject to the provisions of the Constitution and of this Act, any person who is registered as an elector of any constituency and is the holder of a matai title is qualified to be a candidate and to be elected as a Member of Parliament for that constituency, and any person who is registered as a voter on the individual voters' roll and is the holder of a matai title is qualified to be a candidate and to be elected as a Member of Parliament representing the individual voters, if in either case, as required by Article 45 of the Constitution, he or she:
   (a) Is a citizen of Samoa; and
   (b) Is not disqualified under the provisions of the Constitution or of any Act,

Provided that:
   (a) The requirement for a candidate registered in the individual voters' roll to hold a matai title shall only apply to the 2011 General Elections and any other elections thereafter;
   (b) A member of Parliament representing or who had represented the individual voters shall not be disqualified from being a Member of Parliament for not holding a matai title for any period leading up to the 2011 General Elections.

NOTE: Until the Electoral Amendment Act 2009, s5(1) of the Electoral Act did not require a candidate registered to represent the individual voters to hold a matai title.

(2) Any other person shall be disqualified for being a candidate for, or being elected as
A Member of Parliament.

(3) A person shall be disqualified as a candidate, or from election as a Member of Parliament representing a constituency, if he or she:

(a) Loses any qualification required to enable him or her to be registered as an elector of that constituency; or
(b) Has not resided in Samoa for a period equalling or exceeding three (3) years ending with the day on which the Nomination paper is lodged with the Commissioner; or
(c) Does not have a statutory declaration in Form 1A in the First Schedule from:
   (i) The Pulenuu of his or her village; or
   (ii) Any other person determined by the Commissioner, if the Commissioner is of the opinion that the Pulenuu is unable to, or cannot properly, provide the statutory declaration, that the candidate satisfies the three (3) year residential requirement in paragraph (b) and, unless the Commissioner is satisfied that the candidate is banished from his or her village, satisfies village service requirements.

(3A) For the purposes of this section:
"village service requirements" means the services a matai renders to his or her village in accordance with the customs of that particular village.

Registrations of electors

16. Qualifications of electors

(1) Subject to the provisions of the Constitution and of this Act every adult person shall be qualified to be an elector of a constituency if:

(a) He or she is a Samoa citizen; and
(b) His or her name does not appear on the individual voters roll.

(2) The constituency in which an elector shall be registered shall be determined according to the following provisions:

(a) If the elector is the holder of a Matai title he or she shall be registered in the constituency in respect of which the title exists or, if the elector is a plural title holder, he or she shall be registered in the constituency in respect of which one of those titles exists, as he or she may choose once between general elections;
(b) If the elector is not the holder of a Matai title, the elector shall be registered in:
   (i) The constituency in which the elector resides; or
   (ii) If the elector is the spouse or parent or child or brother or sister of a Matai and such elector chooses, the constituency in which such Matai is registered;
(c) Paragraph (b) shall not apply in respect of any Matai title acquired by a brother or sister of an elector from or through the spouse of such brother or sister.

NOTE: Until the 1990 Amendment Act introduced universal suffrage, s16(1) of the Electoral Act read –
Qualifications of electors – (1) Subject to the provisions of the Constitution and of this Act every adult person shall be qualified to be an elector of a constituency if:
(a) He is the holder of a Matai Title; and
(b) His name appears for the time being on the register of Matai.

Individual Voters

19. Qualifications of voters - (1) Subject to the provisions of the Constitution and of this Act every person shall be qualified to be an individual voter and to have his or her name entered on the individual voter's roll if the person is an adult citizen of Samoa and not disqualified as a candidate for election by virtue of any of the provisions of section 5, and if:

(a) His or her name was entered on the European electoral roll on the 30th day of November 1963; or
(b) He or she:
   (i) Is the child or grandchild of a parent whose name was entered on, or who if alive on the 30th day of November 1963, would have qualified to have his or her name entered on the European electoral roll on 30th day of November 1963; and
   (ii) Was unborn or had not attained the age of 21 years on the 30th day of November 1963; or
(c) He or she acquired citizenship of Samoa by naturalisation or by registration; or
(d) He or she acquired citizenship of Samoa by birth and is the child of a parent who is not a citizen of Samoa or of a parent who if alive at the date of the commencement of the Citizenship Act 1972 would not have automatically qualified to be a citizen of Samoa by virtue of any provision of that Act; or
(e) His or her spouse is registered as an individual voter.

(2) Despite subsection (1), no person registered as an elector is qualified to have his or her name entered on the individual voters' roll unless he or she is married to a person registered as an individual voter.

96. Bribery - (1) In this section the terms "elector" and "voter" include any person who has or claims to have a right to vote.
(2) Every person is guilty of a corrupt practice who commits the offence of bribery.
(3) Every person commits the offence of bribery who, directly or indirectly by himself or herself or by any other person on his or her behalf:
   (a) Gives any money or procures any office to or for any elector or voter, or to or for any other person on behalf of any elector or voter, or to or for any other person, in order to induce any elector or voter to vote or refrain from voting; or
   (b) Corruptly does any such act as aforesaid on account of any elector or voter having voted or refrained from voting; or
   (c) Makes any such gift or procurement as aforesaid to or for any person in order to induce that person to procure, or endeavour to procure, the return of any person at an election or the vote of any elector or voter, or who, upon or in consequence of any such gift or procurement as aforesaid, procures, or engages, promises, or endeavours to procure, the return of any person at any election or the vote of any elector or voter.
(4) For the purposes of this section:
   (a) References to giving money shall include references to giving, lending,
agreeing to give or lend, offering, promising, or promising to procure or
endeavour to procure, any money or valuable consideration;
(b) References to procuring any office shall include references to giving,
procuring, agreeing to give or procure or to endeavour to procure, any office,
place, or employment.

(5) Every person commits the offence of bribery who:
(a) Advances or pays or causes to be paid any money to or to the use of any
other person with the intent that that money or any part thereof shall be
expended in bribery at any election; or
(b) Knowingly pays or causes to be paid any money to any person in discharge
or repayment of any money wholly or in part expended in bribery at any
election.

(6) The foregoing provisions of this section shall not extend or be construed to extend to
any money paid or agreed to be paid for or on account of any legal expenses incurred in
good faith at or concerning an election.

(7) An elector or voter commits the offence of bribery if before or during an election he
or she directly or indirectly, by himself or herself or by any other person on his or her
behalf, receives, or agrees or contracts for, any money, gift, loan, or valuable
consideration, office, place, or employment for himself or herself or for any other
person for voting or agreeing to vote or for refraining or agreeing to refrain from voting.

(8) Every person commits the offence of bribery if after an election he or she directly or
indirectly, by himself or herself or by any other person on his or her behalf, receives any
money or valuable consideration on account of any person having voted or refrained
from voting or having induced any other person to vote or refrain from voting.

97. Treating - (1) Every person is guilty of a corrupt practice who commits the offence
of treating.

(2) Every person commits the offence of treating who corruptly by himself or herself or
by any other person on his or her behalf, either before, during, or after an election,
directly or indirectly gives or provides, or pays wholly or in part the expense of giving
or providing any food, drink, entertainment, or provision to or for any person:

(a) For the purpose of corruptly influencing that person or any other person to
vote or refrain from voting; or

(b) For the purpose of corruptly procuring himself or herself to be elected; or

(c) On account of that person or any other person having voted or refrained from
voting, or being about to vote or refrain from voting.

(3) Every elector and voter who corruptly accepts or takes any such food, drink,
entertainment, or provision also commits the offence of treating.

97A Conduct of "O'o" and "Momoli" – Despite the other provisions of this Act, the
traditional presentation of "O'o" and "Momoli" by a Member or Candidate for
Parliament or a person acting on behalf of such Member or Candidate shall not be
considered as treating or bribery or an illegal or corrupt activity or practice provided
that the presentation is made within the period commencing with the 180th day and
ending with the 90th day from expiry of the then Parliament at five (5) years from the
date of the last preceding General Elections.

97B. Conduct of "tautua faaaauu" - (1) Despite the other provisions of this Act, the
traditional service or assistance of "tautua faaaauu" by a Member of Parliament or a
person acting on behalf of such Member shall not be considered as treating or bribery or
an illegal or corrupt activity or practice, where the service or assistance is given before 90 days prior to the expiry of Parliament at five (5) years from the date of the last preceding General Elections or given after the close of Poll on polling day.

(2) For the purposes of this section, "tautua faaaauau" means the provision of service or assistance in any form or manner rendered or given to any person or organisation provided such service or assistance:

(a) Is considered to be culturally appropriate or expected;
(b) Is not excessive in the circumstances; and
(c) Is not a "O'o" or "Momoli".

(3) This section does not apply to the provision of service or assistance at a funeral or to the Member of Parliament's church minister.

14. Fisheries Act 1988

3. Purpose and scope of Act - (1) The purposes of this Act shall be:

(a) To promote the conservation, management and development of the fisheries of Samoa;
(b) To promote the exploration of the living resources of fishery waters;
(c) To promote marine scientific research; and
(d) To promote the protection and preservation of the marine environment.

(6) Notwithstanding any provision of the Village Fono Act 1990, a Village Fono may impose a penalty on every person who commits a breach of any by-law made under this section not exceeding the equivalent in value of 100 penalty units or the undertaking of up to 21 days work on village land or waters.

(7) In the event that a Village Fono imposes a penalty under subsection (6) the Director and the Attorney General shall take into account such penalty in exercising any prerogative to prosecute under subsection (5) and a Court shall take into account such penalty in mitigation of sentence.

(8) Any penalty imposed by a Village Fono under subsection (6) shall be subject to sections 9 and 11 of the Village Fono Act 1990.

15. Internal Affairs Act 1995

AN ACT to establish the Ministry of Internal Affairs and to provide for the promotion of the well being of villages, village authority, to provide for the appointment of Sui-o-le-nuu and Sui-ole-Malo and to provide for other matters relating to the culture and traditions of Samoa.

1. Short title and commencement - (1) This Act may be cited as the Internal Affairs Act 1995.
(2) This Act shall come into force on such date as shall be specified by the Head of State acting on the advice of Cabinet by Order.

2. Interpretation - In this Act unless the context otherwise requires:
"Alii ma Faipule" means the Alii ma Faipule existing by custom in each village.
"Local Government" includes the Government and administration of a village by its Fono.
"Sui-o-le-nuu" means a Sui-o-le-nuu appointed pursuant to section 14 of this Act.
"Sui-ole-Malo" means a Government representative appointed as a Sui-ole-Malo pursuant to section 14 of this Act.

3. Minister of Internal Affairs - There shall be a Minister of Internal Affairs who shall be appointed by the Prime Minister from time to time.

4. Ministry of Internal Affairs - There is hereby constituted and established a Ministry of the Government of Samoa to be known as the Ministry of Internal Affairs, which, under the control of the Minister, shall be charged with the administration of this Act.

14. Sui-o-le-nuu and Sui-ole-Malo - (1) The Minister acting on the advice of the Chief Executive Officer may from time to time for the purposes of this Act.
   (a) Appoint a Sui-o-le-nuu nominated by a village or villages;
   (b) Appoint representatives of the Government to be known as Sui-ole-Malo:

PROVIDED THAT where any village or villages fails or is unable to nominate a Sui-o-le-nuu within 3 months from the time of the vacancy there shall be appointed by Cabinet acting on the advice of the Chief Executive Officer a person to hold that office.

(2) Every Sui-o-le-nuu and Sui-ole-Malo shall be appointed for a term of 3 years but may be reappointed.

(3) Every Sui-o-le-nuu and Sui-ole-Malo may at any time resign his office by writing addressed to the Chief Executive Officer, and may be removed from office by the Minister, acting on the advice of the Chief Executive Officer, for disability, neglect of duty or misconduct:

PROVIDED THAT prior to advising the removal of any Sui-o-le-nuu the Chief Executive Officer shall consult the village or villages responsible for the nomination of that Sui-o-le-nuu.

(4) Nominations for the positions of Sui-o-le-nuu shall be submitted to the Minister through the Chief Executive Officer.

(5) When any Sui-o-le-nuu or Sui-ole-Malo is incapacitated by illness, absence from Samoa or other sufficient cause, the Minister upon the advice of the Chief Executive Officer may temporarily appoint another person to act in his or her place.

(6) Notice of every appointment, resignation, or removal made under this section (except for temporary appointments under subsection (5) of this section) shall be published as soon as practicable in the Savali.

15. Duties of Sui-o-le-nuu and Sui-ole-Malo - (1) It shall be the duty of each Sui-o-le-nuu and Sui-ole-Malo:
   (a) To promote harmony in his or her village;
   (b) To encourage the maintenance of law and order in his or her village;
   (c) To ensure the free flow of communication between the Alii ma Faipule of his or her village and the Government, and the Ministry;
   (d) To prepare the births, deaths, and matai title certificates in respect of the members of his or her village;
   (e) To encourage health and sanitation activities in his or her village;
   (f) To promote diligently, development projects that are economically viable as well as culturally and environmentally sensitive;
   (g) To ensure that access roads in and about his or her village are properly maintained;
   (h) To organise a traditional network in his village to prevent vandalism in respect of street lights, traffic lights, road signs, pipe lines, and village and public facilities;
(i) To report to the police the use by any person of dynamite or chemicals for fishing;
(j) To encourage village cleanliness and beautifications;
(k) To inform the Committee and the Council of new pests and diseases evident in or about his village;
(l) To assist government officials in conducting surveys, research, and debt collection in his or her village;
(m) To maintain records of village activities;
(n) To render at all times such assistance as the Government may need in the successful implementation and, completion of its projects either locally or nationally.

(2) In addition to the duties imposed upon them by subsection (1) of this section, Sui-o-le-nuu and Sui-ole-Malo shall perform:
(a) Any duties which may be imposed on them by regulations made under this Act or by any enactment, whether passed before or after this Act; and
(b) Any duties in accordance with any Government policy as may from time to time be defined or communicated to them by the Minister.

16. Salaries and Allowances of Sui-o-le-nuu and Sui-ole-Malo - Every Sui-o-le-nuu and Sui-ole-Malo shall be paid out of moneys appropriated by the Legislative Assembly such salary or allowances, and such travelling expenses and allowances and other allowances, as may be fixed by Cabinet acting on the advice of Minister.

16. Land and Titles Act 1981

2. Interpretation - In this Act, unless the context otherwise requires:
"Custom and usage" or "Samoan custom and usage" means the customs and usages of Samoa accepted as being in force at the relevant time and includes:
(a) The principles of custom usage accepted by the people of Samoa in general; and
(b) The customs and usages accepted as being in force in respect of a particular place or matter.

20. Definition of rightful holder - In this Part, where not inconsistent with the context, "rightful holder" means a person who:-
(a) Has been appointed the holder of a matai name or title by and in accordance with the customs and usages of the Samoan people, including appointment thereto in pursuance of a judgment of the Court, or of an interim order made under the provisions of this Act; and
(b) Has had the traditional ceremony of appointment in the village to which that name or title belongs, and
(c) Has been recognised as the rightful holder of the matai name or title in question, by the Registrar under subsection (5) of section 23 or by the Court under subsection (6) or (7) of that section 23.

22. Register of Matais - (1) There shall be kept in the Court by the Registrar a register to be called the Register of the Matais, and no entry shall be made or deleted from the Register except by the Registrar, or by his direction.
(2) There shall be entered in the Register, in accordance with the provisions of this Part, the names and titles of such persons as are from time to time the rightful holders of Samoan names or titles, together with such other particulars as may from time to time be rules, and if none, by the Registrar.

34. Jurisdiction of the Court - (1) The Court shall continue to have all the jurisdiction it exercised prior to this Act coming into force.

(2) In particular the Court shall have exclusive jurisdiction:

(a) In all matters relating to Samoan names and titles;

(b) To make orders or declarations in respect of Samoan names and titles as may be necessary to preserve or define the same, or the rights or obligations attaching to those names and titles in accordance with the customs and usages of the Samoan race and all laws in force in Western Samoa with reference to customs and usages;

(c) in all claims and disputes between Samoans relating to customary land, and the right of succession to property held in accordance with the customs and usages of the Samoan race.

(3) The Court shall also have the jurisdiction conferred by this Act.

37. Law to be applied - (1) In all matters before it the Court shall apply:

(a) Custom and usage;

(b) The law relating to custom and usage;

(c) This Act and any other enactment expressed to apply to the Court.

(2) Subject to subsection (1), the Court shall decide all matters in accordance with what it considers to be fair and just between the parties.

17. Samoan Status Act 1963

6. Eligibility to hold a matai title - Subject to section 7 hereof, no person other than a Samoan shall be eligible:

(a) To hold a matai title; or

(b) To hold the pule over any land; or

(c) To use any land as of right other than under any lease, licence or mortgage which may be permitted by any Act; or

(d) To participate in the rents or profits of any land other than under any lease, licence or mortgage which may be permitted by any Act; or

(e) To acquire any estate or interest in any land by virtue of any gift, devise or bequest, or otherwise than by virtue of any lease, licence or mortgage which may be permitted by any Act.

7. Status of matai titles already held by Europeans - Where at any time prior to the coming into force of this Act a matai title was validly conferred on a person who was a European at the date of conferment, and that title was made a complimentary honour by the operation of section 8 of the Samoan Status Ordinance 1934, and that person is still holding that title on the coming into force of this Act, he or she shall hold that title thereafter, notwithstanding the repeal of that Ordinance, as a complimentary honour only.

8. Offences - Except as provided in section 7, every person other than a Samoan who
permits a matai title to be conferred upon him or her, or uses a matai title in address, or permits himself or herself to be addressed by a matai title, or otherwise acts as the holder of a matai title, in breach of the provisions of section 6, commits an offence and is liable to a penalty not exceeding 1 penalty unit.

18. Taking of Land Act 1964

AN ACT to provide for the taking of land for public purposes and for the payment of compensation therefor and for stopping roads.

2. "Public purpose" includes aerodromes and adjuncts, public health, education, public recreation, the burial of the dead, forestry, production and distribution of electricity, provision of postal, telegraph, and telephone services, the control of coasts and rivers, the safeguarding of water, soil and forest resources, water supply, drainage, lighting, defence, the provision of public buildings, the provision of sites for townships, the provision of reserves for erosion control and water catchment, the provision of roads, wharves, harbours and all lawful purposes and functions of the Government of Samoa.

7. Empowering the taking of land - Customary land and freehold land required for any public purpose may be taken by the Head of State, acting on the advice of the Minister, under the provisions of this Act.

15. Lands to be taken by Proclamation - (1) If within the said period of 28 days no written notice of objection is received by the Chief Executive Officer, or if after due consideration of the objection or objections the Minister is of opinion that effect should be given to the proposal to take the land for the public purpose, and that no private injury will be done thereby for which due compensation is not provided by this Act, the Head of State, acting on the advice of the Minister, may by Proclamation, describing the land and stating the public purpose, take the land for the public purpose.

(2) On a day to be named in the Proclamation the land therein described shall, unless otherwise specially provided in this Act or in the Proclamation, become absolutely vested in Samoa, discharged from all mortgages, charges, claims, estates or interests of what kind so ever, for the public purpose stated in the Proclamation.

(3) The Proclamation shall be gazetted and publicly notified as soon as possible after it is made, but the Proclamation shall not be invalidated by any error, defect, or delay in publication.

15A. Disposal of claim to have the pule over customary land - If:

(a) Customary land has been taken by Proclamation; and

(b) The matai named in the survey plan of that land has not been determined by the Samoan Land and Titles Court to be the matai who has the pule over that land

25. Persons entitled to compensation, and for what payable - (1) Every person having any estate or interest in any land taken under this Act for any public purpose, or injuriously affected thereby, or suffering any damage from the exercise of any of the powers given by this Act, shall be entitled to a full and just compensation for the same from the Minister.

(1A) Notwithstanding subsection (1), where it is customary land which has been taken under this Act for any public purpose, or injuriously affected thereby, or suffering any damage from the exercise of any of the powers given by this Act, the Minister and the Court shall be entitled to proceed as if the matai who had the pule over that land at the relevant date is the only person so entitled to a full and just compensation from the
Minister and to be paid that compensation.

### 19. Trade Marks Act 1972

5 (3) A registrable trade mark must contain or consist of at least one of the following essential particulars:

- (a) The name of a company, individual or firm represented in a special or particular manner;
- (b) The signature of the applicant for registration or some predecessor in his or her business;
- (c) An invented word or invented words;
- (d) A word or words having no direct reference to the character or quality of the goods and not being, according to its ordinary signification, a geographical name, a matar title or a surname;
- (e) Any other distinctive mark, but a name, signature or word or words other than such as fall within the descriptions in paragraphs (a), (b), (c) and (d) shall not be registrable under the provisions of this paragraph except upon evidence of its distinctiveness.

### 20. Village Fono Act 1990

An Act to validate and empower the exercise of power and authority by Village Fono in accordance with the custom and usage of their villages and to confirm or grant certain powers and to provide for incidental matters.

3. Village Fono continue-

1. The Registrar shall compile and keep up to date a register of Village Fono in which shall be recorded the name of every village in which a Village Fono is functioning.

2. Every Village Fono in the exercise of any power or authority shall exercise the same in accordance with the custom and usage of that village.

3. The past and future exercise of power and authority by every Village Fono with respect to the affairs of its village in accordance with the custom and usage of that village is hereby validated and empowered.

4. In addition to the power and authority preserved or granted under this Act, every Village Fono shall have such other powers, authorities and functions as may be provided in any other Act.

5. A certificate under the hand of the Registrar to the effect that a Fono is entered on this register under this Act shall be prima facie evidence of the existence of such Fono.

4. Written records not required - No written record of any enquiry by a Village Fono into any allegation of village misconduct, or of any punishment imposed, need be kept and no person found by any Village Fono to have been guilty of village misconduct shall by reason only of that fact be deemed to be guilty of a crime or offence under any other enactment, nor except with the consent of that person shall evidence be given in any Court of the decision of the Village Fono or of any punishment imposed by it.

5. Powers of Village Fono relating to hygiene and economic development - (1) Every Village Fono shall in respect to its village have the powers set out in subsection (2) notwithstanding that such powers may not in a particular village form part of its custom.
and usage.

(2) The powers referred to in subsection (1) are:
   (a) the power to make rules for the maintenance of hygiene in the village;
   (b) the power to make rules governing the development and use of village land
       for the economic betterment of the village.
   (c) the power to direct any person or persons to do any work required to be done
       pursuant to rules made in accordance with the powers granted or preserved by
       paragraphs (a) and (b).

(3) Every person is guilty of village misconduct and may be punished by his Village
    Fono who fails to obey any rule or direction made or given in accordance with the
    powers granted or preserved by this section.

6. Punishments - Without limiting the power of Village Fono preserved by this Act to
    impose punishments for village misconduct the powers of every Village Fono to impose
    punishment in accordance with the custom and usage of its village shall be deemed to
    include the following powers of punishments:
       (a) the power to impose a fine in money, fine mats, animals or food; or partly in
           one or partly in others of those things;
       (b) the power to order the offender to undertake any work on village land.

7. Power of Delegation - A Village Fono may delegate to a committee of its members
    all or any of its powers.

8. Courts to take account of penalty imposed by Village Fono - Where punishment has
    been imposed by a Village Fono in respect of village misconduct by any person and that
    person is convicted by a Court of a crime or offence in respect of the same matter the
    Court shall take into account in mitigation of sentence the punishment imposed by that
    Village Fono.

9. Limitation of jurisdiction of Village Fono - The jurisdiction of any Village Fono shall
    not extend to include:
       (a) any person who does not ordinarily reside in its village; or
       (b) any person who not being a Matai of its village ordinarily resides in its
           village on Government, freehold, or leasehold land and is not liable in
           accordance with the custom and usage of that village to render tautua to a Matai
           of that village.

10. Exemption from Income Tax - The income of every Village Fono shall be wholly
    exempted from income tax.

11. Right of appeal - (1) Subject to the provisions of subsection (6), every person
    adversely affected by a decision of a Fono (including a decision as to punishment) shall
    have a right of appeal to the Court against such decision and the Court shall have
    jurisdiction to hear and determine the matter.
(2) Every appeal shall be commenced by a petition in accordance with section 44 of the
    Land and Titles Act 1981.
(3) Every appeal shall be commenced within one month of the date on which the
    decision was made, or within such further time as the Court may allow on application
    made either before or after the expiration of that month.
(4) Notwithstanding anything contained in the Land and Titles Act the Court shall have
    jurisdiction to hear and determine every appeal under this section.
(5) The Court may determine the appeal in one of the following ways:
(a) it may allow the appeal and the decision appealed from shall thereupon be
null and void;
(b) it may dismiss the appeal;
(c) it may refer the decision back to the Fono for reconsideration,-
but it shall not have power to impose any punishment or penalty to substitute
one punishment or penalty for another.

(6) There shall be no right of appeal from a decision of a Fono given after
reconsideration pursuant to subsection (5)(c).

(7) In all other respects the procedure shall be as prescribed by the Land and Titles Act
1981 or as directed by the Court.

(8) For the purposes of this section "Court" means the Land and Titles Court continued
under the Land and Titles Act 1981.

21. Young Offenders Act 2007
An Act to provide a criminal justice system for Young persons, their treatment by the
courts, and related purposes.

2. Interpretation – In this Act, unless the context states otherwise:
"adult" means a person of or over the age of 17 years;
"fa'aleleiga" means any customary reconciliation process whereby the parties to a
dispute have come to a successful resolution of the matter in dispute;
"Young Person" means any person of or over the age of 10 years and under the age of
17 years

Part II Youth Court

4. Establishment of Youth Court-(1) There will be a division of the District Court to be
called the "Youth Court" which will be presided over by District Court Judges.
(2) Proceedings in the Youth Court, where determined appropriate by the Court, may be
conducted in a manner consistent with Samoan custom and tradition.

5. Jurisdiction of Youth Court-(1) Subject to subsection (3), any criminal charge
brought against a Young Person shall be laid in the Youth Court and the hearing of each
charge will be subject to the provisions of this Act.
(2) Any Young Person who is charged with a criminal offence must be dealt with in
accordance with the provisions of this Act.
(3) A charge of murder against a Young Person shall be laid in the Supreme Court and
dealt with by the Supreme Court.

6. Procedure of Youth Court
(4) Where a Young Person admits any charge, the Court must direct the Probation
Service to arrange a pre-sentence meeting in accordance with Part IV of this Act, unless
the Court is advised that prior to a charge being laid, there has already been a meeting at
which a fa'aleleiga has occurred which, in the Court's opinion is reasonable and just or
where the Court considers such a course is not appropriate in the circumstances and in
such cases the Court may proceed to sentence the Young Person in accordance with
section 15.

7. Youth Court May Require Parents Attendance-(1) The Court may issue a summons
requiring the parents, parent or guardian of a Young Person to appear before the Court and may ask any questions of the parent or parents or guardian and may require such questions to be answered under oath.

(2) If a parent or guardian fails to appear before the Youth Court when summoned to do so, the Court may issue a warrant of arrest to bring the parent or guardian before the Court, such warrant to be executed by a Police Officer.

8. Matters relating to Youth Court closed to the Public and Media-(1) Unless the Court determines otherwise, any proceedings conducted in the Youth Court will be closed to the general public and to the Media.

(2) Unless the Court is of the opinion that the public interest requires it, the name and identifying details of a Young Person may not be published by the Media or any other person.

(3) The name and identifying details of any victim involved in an offence for which a Young Person is charged must not be published by the Media or any other person.

(4) Any person, media person, media organization, media office or media authority, who publishes or causes to publish any information or publication prohibited by this section commits an offence and shall be liable upon conviction to a fine not exceeding 100 penalty units.

9. Rights of a Young Person - A Young Person is entitled to:

(a) receive independent legal advice; and
(b) the attendance of his or her parent and/or caregiver or any member of his or her family at the hearing of proceedings where it is practical to do so; and
(c) apply for legal aid.

Part IV Pre-sentence Meetings

11. Pre-sentence meetings to take place where Court directs - (1) Where a Young Person acknowledges committing an offence or where a Court has found that an offence has been proved against a Young Person, the Court may direct the Probation Service to arrange for a pre-sentence meeting, which must be held not later than 31 days after the date of the Court's direction to the Probation Service.

(2) Any pre-sentence meeting directed to be convened by the Court will be conducted in accordance with Samoan custom and tradition as considered appropriate by a probation officer or as directed by the Court.

(3) Any person may attend any pre-sentence meeting convened if approved by a probation officer. Those in attendance may include any victim and members of the victim's family, the police, the probation service, village or church representatives, and members of the Young Person's family.

(4) Any person approved by the Young Person and the Young Person's family at a pre-sentence meeting may represent the Young Person in the meeting.

12. Purpose of pre-sentence meetings-(1) Any pre-sentence meeting must:

(a) discuss the circumstances of the offending; and
(b) seek the views of those in attendance; and
(c) consider whether a reconciliation or other outcome may be arrived at by the parties affected.

(2) In this section, an outcome may include payment to any victims for reparation, property loss, medical expenses incurred or any other reasonable loss suffered by the
victim as a result of the Young Person's actions.

13. Principles to consider at pre-sentence meetings – Any outcome determined at a pre-sentence meeting shall have regard to the following principles:

(a) the accountability by the Young Person for the wrong that has been done; and

(b) the rehabilitation of the Young Person including an assessment of the suitability of his or her current living arrangements; and

(c) the involvement of the Young Person's family, church, chief, and village; and

(d) the protection of the community; and

(e) an acknowledgement of the views of the victim and to restoring the position of the victim in accordance with Samoan custom and tradition;

(f) the putting in place of a plan for rehabilitation of the Young Person that fosters responsibility by the Young Person and which promotes the Young Person's self-esteem, cultural awareness and understanding.

14. Probation Service to record pre-sentence meeting – (1) At every pre-sentence meeting, the Probation Service will ensure that a probation officer is present at all times to record in writing the outcome of the meeting.

(2) Any record of a pre-sentence meeting under subsection (1) must be provided to the Youth Court immediately prior to the next sitting of the Youth Court concerning the Young Person to which the written record applies.

(3) Any course of action or punishment recommended at a pre-sentence meeting as to how a Young Person might best be treated must be able to be completed within 6 months of the Young Person being sentenced by the Court.
Appendix B

Extracts from the Constitution and Acts of Parliament relevant to chiefship in Vanuatu

Compiled by the author. Sourced from PacLII, www.paclii.org/vu

Note: In order to fit with the chronology of events described in the thesis, the year stated for each extract is usually the year in which the law was passed, and not the year of the current Consolidation of Statutes.

15. Customary Land Tribunal Act 2001
18. Family Protection Act 2008
20. Island Courts Act 1983
22. Marriage Act 1993
23. Members of Parliament (Vacation of Seats) Act 1984
25. National Parks Act 1993
27. Ombudsman Act 1988
28. Passports Act 2009
30. Police Act 2010
31. Trademarks Act 2003


WE, the people of Vanuatu,
PROUD of our struggle for freedom,
DETERMINED to safeguard the achievements of this struggle,
CHERISHING our ethnic, linguistic and cultural diversity,
MINDFUL at the same time of our common destiny,
HEREBY proclaim the establishment of the united and free Republic of Vanuatu founded on traditional Melanesian values, faith in God, and Christian principles,
AND for this purpose give ourselves this Constitution.

1. Republic of Vanuatu
The republic of Vanuatu is a sovereign democratic state.
2. Constitution supreme law
   The Constitution is the supreme law of the Republic of Vanuatu.
3. National and official languages
   (1) The national language of the Republic of Vanuatu is Bislama. The official languages are Bislama, English and French. The principal languages of education are English and French.
   (2) The Republic of Vanuatu shall protect the different local languages which are part of the national heritage, and may declare one of them as a national language.


5. Fundamental rights and freedoms of the individual
   (1) The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health –
   (a) life;
(b) liberty;
(c) security of the person;
(d) protection of the law;
(e) freedom from inhuman treatment and forced labour;
(f) freedom of conscience and worship;
(g) freedom of expression;
(h) freedom of assembly and association;
(i) freedom of movement;
(j) protection for the privacy of the home and other property and from unjust deprivation of property;
(k) equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.

(2) Protection of the law shall include the following –
(a) everyone charged with an offence shall have a fair hearing, within a reasonable time, by an independent and impartial court and be afforded a lawyer if it is a serious offence;
(b) everyone is presumed innocent until a court establishes his guilt according to law;
(c) everyone charged shall be informed promptly in a language he understands of the offence with which he is being charged;
(d) if an accused does not understand the language to be used in the proceedings he shall be provided with an interpreter throughout the proceedings;
(e) a person shall not be tried in his absence without his consent unless he makes it impossible for the court to proceed in his presence;
(f) no-one shall be convicted in respect of an act or omission which did not constitute an offence known to written or custom law at the time it was committed;
(g) no-one shall be punished with a greater penalty than that which exists at the time of the commission of the offence;
(h) no person who has been pardoned, or tried and convicted or acquitted, shall be tried again for the same offence or any other offence of which he could have been convicted at his trial.


7. Fundamental duties
Every person has the following fundamental duties to himself and his descendants and to others –
(a) to respect and to act in the spirit of the Constitution;
(b) to recognise that he can fully develop his abilities and advance his true interests only by active participation in the development of the national community;
(c) to exercise the rights guaranteed or conferred by the Constitution and to use the opportunities made available to him under it to participate fully in the government of the Republic of Vanuatu;
(d) to protect the Republic of Vanuatu and to safeguard the national wealth, resources and environment in the interests of the present generation and of future generations;
(e) to work according to his talents in socially useful employment and, if necessary, to create for himself legitimate opportunities for such employment;
(f) to respect the rights and freedoms of others and to cooperate fully with others in the interests of interdependence and solidarity;
(g) to contribute, as required by law, according to his means, to the revenues required for the advancement of the Republic of Vanuatu and the attainment of national objectives;
(h) in the case of a parent, to support, assist and educate all his children, legitimate and illegitimate, and in particular to give them a true understanding of their fundamental rights and duties and of the national objectives and of the culture and customs of the people of Vanuatu;
(i) in the case of a child, to respect his parents.


18. (2) The following persons shall not be qualified for appointment as chairman or member of the Commission-
   (a) a member of or a candidate for election to Parliament;
   (b) a member of or a candidate for election to local government or municipal councils;
   (c) a member of or a candidate for election to the National Council of Chiefs;
   (d) any person who exercises any position of responsibility in a political party.


29. (1) The National Council of Chiefs shall be composed of custom chiefs elected by their peers sitting in District Councils of Chiefs.
(2) The Council shall make its own rules of procedure.
(3) The Council shall hold at least one meeting a year. Further meetings may be held at the request of the Council, Parliament, or the Government.
(4) During the first sitting following its election the Council shall elect its Chairman.
Functions of Council
30. (1) The National Council of Chiefs has a general competence to discuss all matters relating to custom and tradition and may make recommendations for the preservation and promotion of ni-Vanuatu culture and languages.
(2) The Council may be consulted on any question, particularly any question relating to tradition and custom, in connection with any bill before Parliament.
Organisation of Council and role of chiefs
31. Parliament shall by law provide for the organisation of the National Council of Chiefs and in particular for the role of chiefs at the village, island and district level.
Privileges of members of Council
32. (1) No member of the National Council of Chiefs may be arrested, detained, prosecuted or proceeded against in respect of opinions given or votes cast by him in the Council in the exercise of his office.
(2) No member may, during a session of the Council or of one of its committees, be arrested or prosecuted for any offence, except with the authorisation of the Council in exceptional circumstances.


33. President of the Republic
The head of the Republic shall be known as the President and shall symbolise the unity of the nation.

34. Election of President
(1) The President of the Republic shall be elected, in accordance with Schedule 1, by secret ballot by an electoral college consisting of Parliament and the chairmen of Local Government Councils.

36. Term of office and removal of President
(1) The term of office of the President of the Republic shall be 5 years.

38. Presidential powers of pardon, commutation and reduction of sentences
The President of the Republic may pardon, commute or reduce a sentence imposed on a person convicted of an offence. Parliament may provide for a committee to advise the President in the exercise of this function.


39. Executive power
(1) The executive power of the people of the Republic of Vanuatu is vested in the Prime Minister and Council of Ministers and shall be exercised as provided by the Constitution or a law.

41. Election of Prime Minister
The Prime Minister shall be elected by Parliament from among its members by secret ballot in accordance with the rules in Schedule 2.


47. The Judiciary
(1) The administration of justice is vested in the judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom.


52. Parliament shall provide for the establishment of village or island courts with jurisdiction over customary and other matters and shall provide for the role of chiefs in such courts.


59. (3) A person shall be disqualified for appointment as a member of the Commission if he is a member of Parliament, the National Council of Chiefs or a Local Government Council or if he exercises a position of responsibility within a political party.

61. (1) The Ombudsman shall be appointed, for 5 years, by the President of the Republic after consultation with the Prime Minister, the Speaker of Parliament, the leaders of the political parties represented in Parliament, the chairman of the National Council of Chiefs, the chairmen of the Local Government Councils, and the chairmen of the Public Service Commission and the Judicial Service Commission.

61 (2) A person shall be disqualified for appointment as Ombudsman if he is a member of Parliament, the National Council of Chiefs or a Local Government Council, if he holds any other public office, or if he exercises a position of responsibility within a political party.


73. Land belongs to custom owners
All land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants.

74. Basis of ownership and use
The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu.

75. Perpetual ownership
Only indigenous citizens of the Republic of Vanuatu who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of their land.

76. National land law
Parliament, after consultation with the National Council of Chiefs, shall provide for the implementation of Articles 73, 74 and 75 in a national land law and may make different provision for different categories of land, one of which shall be urban land.

78. Disputes
(1) Where, consequent on the provisions of this Chapter, there is a dispute concerning the ownership of alienated land, the Government shall hold such land until the dispute is resolved.

(2) The Government shall arrange for the appropriate customary institutions or procedures to resolve disputes concerning the ownership of custom land.


82. Legislation for decentralisation
The Republic of Vanuatu, conscious of the importance of decentralisation to enable the people fully to participate in the government of their Local Government Region, shall enact legislation necessary to realize that ideal.

83. The legislation shall provide for the division of the Republic of Vanuatu into Local Government Regions and for each region to be administered by a Local Government Council on which shall be representatives of custom chiefs.

95. (1) Until otherwise provided by Parliament, all Joint Regulations and subsidiary legislation made thereunder in force immediately before the Day of Independence shall continue in operation on and after that day as if they had been made in pursuance of the Constitution and shall be construed with such adaptations as may be necessary to bring them into conformity with the Constitution.

(2) Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom.

(3) Customary law shall continue to have effect as part of the law of the Republic of Vanuatu.

15. Customary Land Tribunal Act 2001

7 Notice of disputes
(2) The notice must be given
   (a) if the land is situated wholly within the boundaries of a village - to the principal chief of that village; or
   (b) if the land is situated within the boundaries of more than one village - to the principal chief of each of those villages.

8 Single village land tribunals
(1) If the principal chief of a village receives a notice of a dispute about customary land under paragraph 7(2)(a), the principal chief must, within 21 days after receiving the notice, establish a single village land tribunal to determine the dispute.

(2) The single village land tribunal consists of:
   (a) subject to subsection (3), a chairperson who is to be the principal chief of the village if he or she is qualified under this Act to adjudicate the dispute and is willing to do so; and
   (b) two other chiefs or elders of the village appointed by the principal chief; and
   (c) a secretary appointed by:
      (i) the principal chief; or
      (ii) the principal chief in consultation with other chiefs or elders of the village where applicable.

(3) If the principal chief of the village is not qualified under this Act to adjudicate the dispute or is not willing to do so, the principal chief must appoint another chief or elder of the village as the chairperson.

(4) The principal chief must not appoint:
   (a) a person under paragraph (2)(b) or subsection (3) unless the person is qualified under this Act to adjudicate the dispute and is willing to do so; or
   (b) a person as the secretary under paragraph (2)(c) unless the person is qualified under this Act to be a secretary and is willing to do so.

9 Joint village land tribunals
(1) The principal chief of each village who receives a notice of a dispute under paragraph 7(2)(b) must, within 21 days after the last day on which a principal chief receives the notice, together establish a joint village land tribunal to determine the dispute.
(2) The joint village land tribunal consists of:
   (a) subject to subsection (3), the principal chief of each village if he or she is qualified under this Act to adjudicate the dispute and is willing to do so; and
   (b) 2 other chiefs or elders of each village appointed by the principal chief of that village; and
   (c) a secretary appointed by the principal chief of each village acting together.
(3) If the principal chief of a village is not qualified under this Act to adjudicate the dispute or is not willing to do so, the principal chief must appoint another chief or elder of that village as a member.
(4) A person must not to be appointed:
   (a) under paragraph (2)(b) or subsection (3) unless the person is qualified to adjudicate the dispute under this Act and is willing to do so; or
   (b) as the secretary under paragraph (2)(c) unless the person is qualified under this Act to be a secretary and is willing to do so.
(5) The principal chiefs of each village who are members of the village land tribunal and the members appointed under subsection (3) (if any) must elect one of their number to be the chairperson of the joint village land tribunal.

12 Appeal notice
(2) The notice must be given to:
   (a) if the land is situated wholly within one custom sub-area – to the chairperson of the council of chiefs of that custom sub-area; or
   (b) if the land is situated wholly within more than one custom sub-area – to the chairperson of the council of chiefs of each custom sub-area; or
   (c) if the land is situated partly within one or more custom sub-areas and partly within one or more custom areas that are not divided into custom sub-areas – to the chairperson of the council of chiefs of each custom sub-area and to the chairperson of the council of chiefs of each custom area.

13 Single custom sub-area land tribunal
(1) If the chairperson of the council of chiefs of a custom sub-area receives a notice of appeal under paragraph 12(2)(a), the chairperson must convene a meeting of the council within 21 days after receiving the notice.
(2) The custom sub-area council of chiefs must establish a custom sub-area land tribunal to determine the appeal.
(3) The custom sub-area land tribunal consists of:
   (a) subject to subsection (4), a chairperson who is to be the chairperson of the council of chiefs of the custom sub-area if he or she is qualified under this Act to adjudicate the dispute and is willing to do so; and
   (b) 2 other chiefs or elders from the custom sub-area appointed by the council of chiefs of the custom sub-area; and
   (c) a secretary appointed by the council of chiefs of the custom sub-area.
(4) If the chairperson of the council of chiefs of the custom sub-area is not qualified under this Act to adjudicate the dispute or is not willing to do so, he or she must appoint another chief or elder from within the custom sub-area as the chairperson.
(5) A person must not to be appointed:
   (a) under paragraph (3)(b) or subsection (4) unless the person is qualified under this
Act to adjudicate the dispute and is willing to do so; or
(b) as the secretary under paragraph (3)(c) unless the person is qualified under this Act to be a secretary and is willing to do so.

14 Joint custom sub area land tribunal
(1) Each chairperson of a custom sub-area or custom area council of chiefs who receives a notice of appeal under paragraph 12(2)(b) or (c) must, within 21 days after the last day on which a chairperson receives the notice, together establish a joint custom sub-area land tribunal to determine the appeal.
(2) The custom sub-area land tribunal consists of:
   (a) subject to subsection (3), the chairperson of the council of chiefs of each sub-area or custom area if qualified under this Act to adjudicate the dispute and is willing to do so; and
   (b) 2 other chiefs or elders from each sub-area or custom area appointed by that sub-area or custom area council of chiefs; and
   (c) a secretary appointed by the chairpersons of the sub-area and custom area councils of chiefs acting together.
(3) If the chairperson of a council of chiefs of a custom sub-area or a custom area is not qualified under this Act to adjudicate the dispute or is not willing to do so, that chairperson must appoint another chief or elder from that custom sub-area or custom area as a member.
(4) A person must not to be appointed:
   (a) under paragraph (2)(b) or subsection (3) unless the person is qualified to adjudicate the dispute under this Act and is willing to do so; or
   (b) as the secretary under paragraph (2)(c) unless the person is qualified under this Act to be a secretary and is willing to do so.
(5) The chairpersons of each custom sub-area or custom area council of chiefs who is a member of the custom sub-area land tribunal and any members appointed under subsection (3) must elect one of their number to be the chairperson of the joint custom sub-area land tribunal.

17 Appeal notice
2) The notice must be given:
   (a) if the land is situated wholly within one custom area - to the chairperson of the council of chiefs of that custom area; or
   (b) if the land is situated within more than one custom area – to the chairperson of the council of chiefs of each custom area.
(3) The notice must:

18 Single custom area land tribunal
(1) If the chairperson of a council of chiefs of a custom area receives a notice of appeal under paragraph 17(2)(a), the chairperson must convene a meeting of the council within 21 days after receiving the notice.
(2) The custom area council of chiefs must establish a single custom area land tribunal to determine the appeal.
(3) The single custom area land tribunal consists of:
   (a) subject to subsection (4), a chairperson who is to be the chairperson of the custom area council of chiefs if he or she is qualified under this Act to adjudicate the dispute and is willing to do so; or
(b) 2 other chiefs or elders from each custom area are appointed by that custom area council of chiefs; and
(c) a secretary appointed by the chairpersons of the custom area council of chiefs acting together.

(3) If the chairperson of the council of chiefs of a custom area is not qualified under this Act to adjudicate the dispute or is not willing to do so, that chairperson must appoint another chief or elder from that custom area as a member.

(4) A person must not to be appointed:
(a) under paragraph (2)(b) or subsection (3) unless the person is qualified to adjudicate the dispute and is willing to do so; or
(b) as the secretary under paragraph (2)(c) unless the person is qualified under this Act to be a secretary.

(5) The chairpersons of each custom area council of chiefs who are members of the custom area land tribunal and any members appointed under subsection (3) must elect one of their number to be the chairperson of the custom area land tribunal.

22 Appeal notice
(2) The notice must:
(a) be in writing in Bislama, French, English or another language of the person or group giving the notice; and
(b) be given to the chairperson of the council of chiefs for that island;

23 Island land tribunals
(1) The chairperson of the island council of chiefs must convene a meeting of the council within 21 days after receiving a notice of appeal under section 22.
(2) The island council of chiefs must establish an island land tribunal to determine the appeal.
(3) If the land the subject of the decision being appealed against is situated wholly within one custom area, the island land tribunal consists of:
(a) subject to subsection (4), a chairperson who is to be the chairperson of the custom area council of chiefs if he or she is qualified under this Act to adjudicate the dispute and is willing to do so; and
(b) 4 other chiefs or elders from the custom area appointed by the island council of chiefs; and
(c) a secretary appointed by the island council of chiefs.

(4) If the chairperson of the custom area council of chiefs is not qualified under this Act to adjudicate the dispute or is not willing to do so, he or she must appoint another chief or elder from the custom area as the chairperson.

(5) If the land the subject of the decision being appealed against is situated within more than one custom area, the island land tribunal consists of:

(a) subject to subsection (6), the chairpersons of the council of chiefs of each custom area if qualified under this Act to adjudicate the dispute and willing to do so; and
(b) 4 other chiefs or elders from each custom area appointed by the island council of chiefs; and
(c) a secretary appointed by the island council of chiefs.

(6) If the chairperson of the council of chiefs of a custom area is not qualified under this Act to adjudicate the dispute or is not willing to do so, he or she must appoint another chief or elder from that custom area as a member.

(7) A person must not to be appointed:

(a) under paragraph (3)(b) or (5)(b), or subsection (4) or (6), unless the person is qualified to adjudicate the dispute and is willing to do so; or
(b) as the secretary under paragraph (3)(c) or (5)(c) unless the person is qualified under this Act to be a secretary and is willing to do so.

(8) The chairperson of each custom area council of chiefs who are members of the island land tribunal and any members of the island land tribunal appointed under subsection (6) must elect one of their number to be the chairperson of the island land tribunal referred to in subsection (5).

24 Rehearing

2) The notice must:

(a) be in writing in Bislama, French, English or another language of the person or group giving the notice; and
(b) be given to the chairperson of the island council of chiefs within 21 days after the island land tribunal announced its decision; and
(c) specify the grounds of the appeal; and
(d) contain a description, and specify the location, of the land; and
(e) contain the names of the parties to the dispute.

(3) The chairperson of the island council of chiefs must convene a meeting of the council within 21 days after receiving the rehearing notice.

(4) The island council of chiefs must establish another island land tribunal to rehear the dispute. The island land tribunal is to conduct the rehearing as if it was hearing and determining the dispute for the first time.

(5) The island land tribunal mentioned in subsection (4) consists of:

(a) a chairperson who is to be a chief or elder within the custom area appointed by the island council of chiefs; and
(b) 4 other chiefs or elders living within the custom area appointed by the island council of chiefs; and
(c) a secretary appointed by the island council of chiefs.

35 Determination of boundaries and lists for islands with more than one custom area
(1) This section applies to an island that is divided into more than one custom area, being custom areas that may or may not be divided into custom sub-areas.

(2) As soon as possible after this Act commences:
   (a) the council of chiefs of each custom area on the island must:
       (i) determine the boundaries of the custom area; and
       (ii) approve a list of chiefs and elders who have sufficient knowledge of the custom of the custom area to adjudicate disputes relating to the boundaries or ownership of customary land in the custom area; and
       (iii) send a copy of the list to the secretary of the island council of chiefs; and
   (b) the council of chiefs of each custom sub area must:
       (i) determine the boundaries of the custom sub-area; and
       (ii) approve a list of chiefs and elders who have sufficient knowledge of the custom of the custom sub-area to adjudicate disputes relating to the boundaries or ownership of customary land in the custom sub-area; and
       (iii) send a copy of the list to the secretary of the council of chiefs of the custom area in which the sub-area is situated and to the secretary of the island council of chiefs.

(3) The council of chiefs of each custom area and each custom sub-area must:
   (a) as soon as possible after the end of each year, revise the relevant approved list of chiefs and elders, making such additions, deletions and amendments as it considers necessary to keep the list up to date and accurate; and
   (b) as soon as possible after revising the list, send a copy of:
       (i) each revised list to the secretary of the island council of chiefs; and
       (ii) each revised list for a custom sub-area to the secretary of the council of chiefs of the custom area in which the sub-area is situated.

36 Determination of boundaries and lists for islands with one custom area

(1) This section applies to an island if there is only one custom area on the island.

(2) As soon as possible after this Act commences, the island council of chiefs must:
   (a) determine the boundaries of each custom sub-area on the island; and
   (b) approve a list of chiefs and elders who have sufficient knowledge of the custom of the island and each custom sub-area to adjudicate disputes relating to the boundaries or ownership of customary land on the island and in each custom sub-area.

(3) The island council of chiefs must, as soon as possible after the end of each year, revise the approved lists of chiefs and elders, making such additions, deletions and amendments as it considers necessary to ensure keep the list up to date and accurate.

37 Qualifications of members of land tribunals

(1) A chief or elder is not qualified to be a member of a land tribunal unless he or she is included in a list approved under section 35 or 36.

(2) A chief or elder must not be appointed or continue as a member of a land tribunal if he or she:
   (a) is incapable by reason of physical or mental disability from adjudicating the dispute before the tribunal; or
   (b) is holding any elected office in a national Parliament, local government council or municipal council; or
(c) is holding any office in a political party; or
(d) has such business or financial interests, or social, religious, political or other beliefs or associations that will prevent him or her from applying custom honestly and adjudicating impartially; or
(e) has been found by a land tribunal:
   (i) to have influenced or attempted to influence the decision of a land tribunal; or
   (ii) to have adjudicated in a dispute before a land tribunal when disqualified from doing so; or
   (iii) to have appointed, or attempted to appoint, a person whom he or she knew, or ought reasonably to have known, was not qualified to be appointed as a member; or
(f) has been convicted of an offence against section 42.

40 Responsibilities of Director
(1) The Director must:
   (a) arrange for the form in Schedule 3 to be translated into Bislama and such other languages as the Director thinks is reasonably necessary, and for copies to be distributed to the principal chief of each village and to the chairperson and secretary of the council of chiefs of each island, custom area and custom sub-area; and
   (b) arrange for any guidelines issued under section 43 to be translated into Bislama and such other languages as the Director thinks is reasonably necessary, and for copies to be distributed to the principal chief of each village and to the chairperson and secretary of the council of chiefs of each island, custom area and custom sub-area; and
   (c) arrange, where necessary, appropriate training programs for principal chiefs of villages and the chairperson and secretary of the council of chiefs of each island, custom area and custom sub-area;

41 Responsibilities of local government and municipal councils
(1) Each local government council and municipal council must encourage and assist chiefs to identify the boundaries of custom areas and custom sub-areas.
(2) The powers under this Act of the councils of chiefs of custom sub-areas, custom areas and islands are not in any way limited by their involvement in any units of a local government council or municipal council (for example wards, districts or local government council areas).

43 Guidelines
The Minister may, after consultation with the National Council of Chiefs, issue written guidelines for the purposes of this Act. Such guidelines are advisory and are not mandatory.

5. Composition of Local Government Councils
Each Local Government Council shall be composed of elected members and appointed members.

7. Appointment of members of Local Government Councils
(1) The Minister may by Order provide for appointed members of each Local Government Council in respect of its Local Government Region and such members shall consist of:
   (a) chiefs appointed by the Minister from among persons nominated by representative
bodies of chiefs
(b) women appointed by the Minister from among persons nominated by representative bodies of women;
(c) youth representatives appointed by the Minister from among persons nominated by representative bodies of youth;
(d) church representatives appointed by the Minister from among persons nominated by representative bodies of churches.

(2) The appointed members –
(a) shall hold office for a period of four years and shall be eligible for reappointment; and
(b) shall be consulted on any matter, question or issue coming before the Local Government Council for its decision.

(3) The appointed members shall not be entitled to vote at the meetings of the Local Government Councils.

9. Procedure for enacting by-laws
(1) The Local Government Council shall deal with draft by-laws tabled by any member of the Local Government Council with the Chairman of the Council.
(2) Draft by-laws and proposals shall be voted on by the Council after having heard the opinion of the appointed members.

12. Voting and quorum
(1) All decisions shall be determined by a majority of the votes of the elected members present. Each elected member present shall have the right to cast only one vote.

18B. Disqualification for election or appointment as member of Local Government Council
(1) The following persons shall not be qualified for election or appointment as members of Local Government Councils –
(a) the President;
(b) Judges and Magistrates;
(c) members of Parliament;
(d) members of the police force;
(e) members of the National Council of Chiefs;
(f) public servants;
(g) members of the teaching service;
(h) a person who is in the service of the Local Government Council; and
(i) a municipal councillor.

(2) Any member of the district council of chiefs, island council of chiefs and area council of chiefs who holds the position of chairman, vice-chairman, secretary or treasurer, shall not be qualified for election as a member of a Local Government Council.

PART 8A – DECENTRALIZATION REVIEW COMMISSION

Note: This PART 8A was added in 2000 and repealed in 2010

31A. Establishment of Commission
(1) The Minister is, by Order in writing, to establish a Decentralization Review Commission consisting of 3 members.

31E. Consultation
In exercising its powers and performing its functions, the Commission must:
(a) consult widely; and
(b) have regard to the traditional systems of governance, in particular the role of chiefs; and
(c) have regard to promoting the role of women in governance and decision making; and
(d) have regard to ensuring a voice for youth in governance.


19 Terms of reference for Environmental Impact Assessment
(1) The Director must develop a terms of reference for any work that is to be undertaken for an EIA, including a description of the scope of work required.
(2) In developing the terms of reference, the Director must give special consideration to the need for consultation, participation and involvement of custom landowners, chiefs and other interested parties, and may consult with the National Council of Chiefs for that purpose.

18. Family Protection Act 2008

7 Declaration of authorised persons
(1) The President acting on the advice of the Judicial Service Commission is, by declaration in writing, to appoint authorised persons.
(2) The Minister is to recommend to the Judicial Services Commission persons for appointment under subsection (1). A person is to be recommended only if:
   (a) the person has undertaken training approved by the Minister for the purposes of this section; and
   (b) the person has a good knowledge of this Act and understands how it works; and
   (c) the person understands the social and cultural environment within which domestic violence takes place; and
   (d) the person:
      (i) is the principal chief of a village; or
      (ii) is an assistant chief of a village, a church leader, a community leader, a teacher, or a village health worker nominated by the principal chief of the relevant village; or
      (iii) is a member of the Vanuatu Police Force of or above the rank of inspector; or
      (iv) has applied in writing to the Minister to be recommended for appointment.
(3) The Minister must:
   (a) consult with the President of the National Council of Chiefs and the Director of the Department of Women’s Affairs and the Director General of the Prime Minister’s Department before making a recommendation; and
   (b) ensure so far as practicable that recommendations are made in respect of an equal number of men and women in each local government region of Vanuatu.
An Act to establish health committees throughout Vanuatu and for related purposes.
3 (2) The members of the committee are:
(a) the head nurse of that health centre; and
(b) a representative of the chiefs of the communities within the relevant health area; and
(c) a representative of the youths of the communities within the relevant health area; and
(d) a representative of the women in the communities within the relevant health area.

20. Island Courts Act 1983
1. Establishment of island courts
(1) The Chief Justice by warrant under his hand may establish throughout Vanuatu such island courts as he shall think fit which shall exercise within such limits as may be defined by such warrant the jurisdiction therein defined and such jurisdiction as may be conferred by this or any other Act on island courts generally.
3. Constitution of island courts
(1) The President of the Republic acting in accordance with the advice of the Judicial Service Commission shall appoint not less than three justices knowledgeable in custom for each island court at least one of whom shall be a custom chief residing within the territorial jurisdiction of the court.
10. Application of customary law
Subject to the provisions of this Act an island court shall administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order.

Leaders
5. In addition to the leaders referred to in Article 67 of the Constitution the following are declared to be leaders:
(a) members of the National Council of Chiefs
(b) elected and nominated members of local government councils;
(c) elected and nominated members of municipal councils;
(d) political advisors to a Minister;
(e) directors-general of ministries and directors of departments;
(f) members and the chief executive officers (however described) of the boards and statutory authorities;
(g) chief executive officers or secretaries-general of local governments;
(h) the town clerks (or their equivalent in name) of municipal councils

11. Role of Chiefs
It is the intention of this Code that Chiefs be able to maintain their customary role in connection with the conduct of leaders, so long as that does not conflict in any way with the
22. Marriage Act 1993

Registration of Marriage
15. (1) Immediately upon the celebration of any civil, religious or custom marriage, it shall be registered in conformity with the provisions of the Civil Status Act, Cap. 61.
(2) Where the marriage is performed by a minister for celebrating marriages, the person performing the ceremony of marriage and, in the case of a custom marriage, the bridegroom or the head of his family or the head of the bride's family or the chief of the village of either of the parties or an assessor, who was present at the marriage, shall thereafter forward to the District Registrar on the first occasion possible a notice as prescribed in Form C in Schedule 1.

23. Members of Parliament (Vacation of Seats) Act 1984

1. Disqualification of holders of certain offices
A person is disqualified for membership of Parliament who –
(a) holds office of President of the Republic;
(b) holds office of judge or magistrate;
(c) is a member of the police force;
(d) is a member of the National Council of Chiefs;
(e) is a public servant;
(f) is a member of the teaching service.


An Act to establish the National Council of Chiefs, the Island Councils of Chiefs throughout Vanuatu and the Urban Councils of Chiefs in the urban areas and for related purposes.

Be it enacted by the President and the Parliament of the Republic of Vanuatu as follows-

Part 1 – Preliminary

1 Interpretation
In this Act, unless the contrary intention appears:
Council means the National Council of Chiefs.
Custom chief means a person who is recognized by a community as entitled under the custom of that community to hold the position of a chief.
Chairperson means the Chairperson of the National Council of Chiefs.
Minister means the Minister responsible for National Council of Chiefs.

Part 2-The National Council of Chiefs
Division 1 - Establishment, Functions and Powers of the Council
2 Establishment of the National Council of Chiefs
(1) The National Council of Chiefs is established pursuant to Article 29(1) of the
Constitution.

(2) The Council is the governing body of the Island Councils of Chiefs and the Urban Councils of Chiefs.

3 Functions of the Council

(1) The Council has the functions as are conferred on it by Article 30 of the Constitution.

(2) In addition to and without limiting the generality of Article 30 of the Constitution, the Council also has the following functions:
   (a) to keep and maintain a proper register of the members of the Council;
   (b) to keep and maintain a proper register of the members of an Island Council of Chiefs and an Urban Council of Chiefs;
   (c) to provide advice on matters relating to custom to an Island Council of Chiefs or an Urban Council of Chiefs;
   (d) to facilitate the functioning of an Island Council of Chiefs or an Urban Council of Chiefs;
   (e) to ensure that an Island Council of Chiefs and an Urban Council of Chiefs perform their functions as are conferred on them under this Act or any other Act.
   (f) to undertake such other functions as are conferred on the Council under this Act or any other Act.

(3) The Council may delegate in writing any of its functions to the Chief Executive Officer.

4 Powers of the Council

The Council has powers to do all things that are necessary or convenient to be done for or in connection with the performance of its functions.

Division 2 - Membership of the Council and Meetings

5 Composition of the Council

(1) The Council consists of custom chiefs elected by the Island Councils of Chiefs and the Urban Councils of Chiefs.

(2) Each Island Council of Chiefs and Urban Council of Chiefs is to elect such number of representatives to be members of the Council, as set out in the Schedule.

(3) Subject to the Constitution and this Act, the Minister may by Order in writing provide for the regulation and conduct of elections of members of the Council by the Island Councils of Chiefs and the Urban Councils of Chiefs.

(4) Without limiting subsection (3), the Minister may provide for-
   (a) the date of election of the members of the Council; and
   (b) the procedure for the nomination of candidates for election as members of the Council; and
   (c) the method of election.

(5) An elected member of the Council holds office for a period not exceeding 5 years and may be re-elected to the Council.

(6) A member of the Council may resign in writing at any time by giving his or her resignation in writing to the Chairperson.

(7) If a member of the Council resigns or dies, the Council must ensure that the relevant Island Council of Chiefs or Urban Council of Chiefs elects a custom chief from their island or urban area to replace that member of the Council.
6 Chairperson of the Council
(1) The Chairperson of the Council is to be elected by the members of the Council at the first sitting of the Council following an election of a new Council.
(2) The Chairperson is to hold office for so long as the Council that elects him or her exists.
(3) The Chairperson may resign from his or her office by giving a written resignation to the Council.
(4) If the Chairperson dies or resigns from office, the eldest member of the Council is to act as the Chairperson until the new Chairperson is elected by the Council.
(5) The Chairperson is to represent the Council in any official meetings or ceremonies.
(6) The Chairperson may in writing delegate his or her responsibility under subsection (5) to any member or staff of the Council.

7 Meetings of the Council
(1) The Council shall hold at least one meeting a year. Further meetings may be held at the request of the Council, Parliament or the Government.
(2) The Chairperson is to chair all meetings of the Council. If the Chairperson is absent, the members present must choose a member to chair that meeting.
(3) At the meeting of the Council, a quorum consists of 16 members present at the meeting.
(4) Each member present at the meeting has one vote and questions arising at the meeting are to be decided by a majority of votes. If the voting at the meeting is equal, the member chairing the meeting has a casting vote.
(5) Subject to this Act, the Council may determine and regulate its own procedures.

Division 3-Other Matters

10 Allowances and Gratuities
(1) The members of the Council including the Chairperson are entitled to the following allowances:
   (a) a sitting allowance of not more than VT5, 000 for each day in which the Council sits for a meeting;
   (b) a subsistence allowance of not more than VT5, 000 for each day in which the Council sits for a meeting;
   (c) a monthly allowance of VT30, 000 per month.
(2) Each member of the Council including the Chairperson is entitled to a gratuity payment of VT250, 000 payable at the end of a term of the Council.

Part 3- Island Councils of Chiefs and Urban Councils of Chiefs

11 Establishment of Island Council of Chiefs and Urban Council of Chiefs
The Island Councils of Chiefs and the Urban Councils of Chiefs are established.

12 Composition of the Island Councils of Chiefs and the Urban Councils of Chiefs
(1) An Island Council of Chiefs and an Urban Council of Chiefs consists of custom chiefs:
   (a) for an Island Council of Chiefs- chiefs elected by their respective Area Council of Chiefs in the islands other than the urban area;
   (b) for an Urban Council of Chiefs - chiefs appointed by their respective Island Council of Chiefs to represent their Island Council of Chiefs in the urban area.
(2) A custom chief must not be appointed to an Urban Council of Chiefs under paragraph 1(b), unless that custom chief resides in the relevant urban area.
(3) For the purposes of subsection (1), the Minister is to determine by Order:
(a) for an Island Council of Chiefs - the number of chiefs to be elected by their respective Island Council of Chiefs in the islands;
(b) for an Urban Council of Chiefs - the number of chiefs to be appointed by their respective Island Council of Chiefs to represent their island.

13 Functions of an Island Council of Chiefs and an Urban Council of Chiefs
(1) The functions of an Island Council of Chiefs and an Urban Council of Chiefs are:
   (a) to resolve dispute according to local custom;
   (b) to prescribe the value of exchange of gift for a custom marriage;
   (c) to promote and encourage the use of custom and culture;
   (d) to promote peace, stability and harmony;
   (e) to promote and encourage sustainable social and economic development;
   (f) to undertake such other functions as are conferred on them under this Act or any other Act.

   (2) To avoid doubt, each Island Council of Chiefs and Urban Council of Chiefs must only perform the functions referred to in subsection (1) in their respective islands or urban areas.

14 Powers of an Island Council of Chiefs and an Urban Council of Chiefs
An Island Council of Chiefs and an Urban Council of Chiefs have the power to do all things that are necessary or convenient to be done for or in connection with the performance of their functions.

Part 4 - Management and Staff

15 Chief Executive Officer of the Council
(1) The Public Service Commission is to appoint a Chief Executive Officer who is to be an employee of the Public Service Commission, upon such terms and conditions as may be determined by the Public Service Commission.

(2) The Chief Executive Officer is the Secretary of the Council.

(3) To avoid doubt, the Chief Executive officer has no voting right at a meeting of the Council.

16 Removal of the Chief Executive Officer
(1) A person may be removed as the Chief Executive Officer if the person:
   (a) is or becomes a member of Parliament, a Local Government Council or a Municipal Council; or
   (b) is or becomes a member of the National Council of Chiefs; or
   (c) fails to perform in a satisfactory manner the functions that are conferred on him or her under this Act or any other Act.

17 Functions of the Chief Executive Officer
(1) The Chief Executive Officer is the head of the Office of the Council.

(2) The Chief Executive Officer has the following functions:
   (a) to convene meetings of the Council at the request of the Council, Parliament or the Government;
   (b) to implement decisions of the Council;
   (c) to provide adequate support services to the Council;
   (d) to attend all meetings of the Council and prepare the minutes of the meetings;
(e) to manage the staff of the Council;
(f) to generally assist the Council in the performance of its functions;
(g) to manage the resources of the Council;
(h) to undertake such functions of the Council that is delegated to him or her by the Council.

18 Staff of the Council
The Public Service Commission may appoint other staff of the Council upon such terms and conditions as may be determined by the Public Service Commission.

Part 5 Financial Matters and Miscellaneous
20 Funds of the Council
(1) The funds of the Council consists of:
   (a) money appropriated to, or for the purposes of, the Council under the Appropriation Acts; and
   (b) any other money received by the Council from any other source.
(2) The Council may open and maintain such bank accounts in accordance with the provisions of the Public Finance and Economic Management Act No. 6 of 1998.
22 Annual report
The Council must within 4 months after the end of each financial year furnish a report to the Minister relating to the operations of the Council for that year.

SCHEDULE

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**25. National Parks Act 1993**

**Constitution of the Board**

4. (1) The Board shall consist of -
   
   (a) the Director of Forestry;
   (b) the Director of Lands;
   (c) the Director of Geology and Mines;
   (d) the Director of Fisheries;
   (e) the Principal Environmental Officer;
   (f) the Chairman of the National Council of Chiefs; and
   (g) not more than three other persons appointed by the Minister.

**General duties of the Board**

(2) Before making any recommendation under subsection (1) of this section, the Board shall consult with the custom owners, every local authority whose area includes any land in the area to be declared and the chief or chiefs whose areas include any part of the area to be declared and shall not less than three months before making such recommendation cause notice in the prescribed form to be exhibited in the prescribed manner in some conspicuous place in that area.


Specifies the salaries payable to the holders of certain offices. The salary specified for the President of the National Council of Chiefs is VT945,000. Members of the National Council of Chiefs receive VT4,000 per day.
27. Ombudsman Act 1988

(2) A person is disqualified for appointment as Ombudsman if he or she:
   
   (a) is a member of Parliament, the National Council of Chiefs or a local government council; or
   (b) holds any other public office; or
   (c) exercises a position of responsibility within a political party.

3. (1) The Ombudsman is appointed under the Constitution, for 5 years, by the President after consultation with:
   
   (a) the Prime Minister; and
   (b) the Speaker of Parliament; and
   (c) the leaders of the political parties represented in Parliament; and
   (d) the chairman of the National Council of Chiefs; and
   (e) the chairmen of the local government councils; and
   (f) the chairmen of the Public Service Commission and the Judicial Service Commission.

28. Passports Act 2009

Schedule 1
Persons Entitled to Hold Diplomatic Passports
   • President
   • Prime Minister
   • Speaker of Parliament
   • Chief Justice
   • Government Ministers
   • Heads of missions (as defined in the Foreign Service Act No. 22 of 2008)
   • Diplomatic and consular staff of the Ministry of Foreign Affairs
   • Spouses and children under the age of 18 years of persons holding diplomatic passports, provided the diplomatic passport holders are travelling on duty at Government expense

Schedule 2
Persons Entitled to Hold Official Passports
   • Members of Parliament
   • Judges of the Supreme Court
   • Attorney General
   • Solicitor General
   • Public Solicitor
   • Public Prosecutor
   • Magistrates
   • Chairman of the Public Service Commission
   • Chairman of the Teaching Service Commission
   • Chairman of the Police Service Commission

B23
• Commissioner of Police
• Ombudsman
• Auditor-General
• Member of the National Council of Chiefs
• Chairperson of the Vanuatu National Council of Women
• Administrative staff appointed to missions (“mission” as defined in the Foreign Service Act No. 22 of 2008)
• Senior Officers of the Vanuatu Government and Parliament
• Spouses and children under the age of 18 years of persons holding official passports, provided the official passport holders are travelling on duty at Government expense
• Chairperson of a Local Government Council
• Member of a Local Government Council
• Secretary General of a Local Government Council
• Mayor of a Municipal Council
• Municipal Clerk
• Councillor of a Municipal Council


36 Purpose of this part
The purpose of this Part is to provide to a court a range of sentencing options and means of dealing with offenders other than by imprisonment.

37 Court to have regard to keeping offenders in the community
If an offender is convicted of an offence punishable by imprisonment, the court must in addition to other sentencing options it may impose, have regard to the possibility of keeping offenders in the community so far as that is practicable and consistent with the safety of the community.

38 Promotion of reconciliation
(1) Notwithstanding the provisions in this Act or any other Act, a court may in criminal proceedings, promote reconciliation and encourage and facilitate the settlement according to custom or otherwise, for an offence, on terms of payment of compensation or other terms approved by the court.
(2) Nothing in this section limits the court’s power to impose a penalty it deems appropriate for the relevant offence.

39 Account to be taken of compensation payment
When sentencing an offender, the court must, in assessing the penalty to be imposed, take account of any compensation or reparation made or due by the offender under custom and if such has not yet been determined, may, if satisfied that it will not cause undue delay, postpone sentence for such purpose.

30. Police Act 2010

9. Police Service Commission
(1) The Police Service Commission is established.
(2) The Commission consists of 6 members appointed in writing by the President for 4 years.
(3) A member of the Commission is to be nominated for appointment by each of the
following persons:
   (a) the Prime Minister; and
   (b) the Minister; and
   (c) the Chief Justice; and
   (d) the Minister of Justice; and
   (e) the Chairperson of the Public Service Commission; and
   (f) the Chairperson of the National Council of Chiefs

31. Trademarks Act 2003

Registration of trademark involving indigenous culture

94. (1) If it appears to the Registrar that an application is for registration of a trademark that involves an expression of indigenous culture, the Registrar must refer the application to the National Council of Chiefs.

(2) The Registrar must not register a trademark that involves an expression of indigenous culture unless:
   
   (a) the custom owners have given their prior informed consent to the registration; and
   (b) the applicant and the custom owners have entered into an agreement on the payment by the applicant to the custom owners of an equitable share of the benefits derived from the use of the trademark.

(3) However, the Registrar may register the trademark without the prior informed consent of the custom owners if the Registrar is, after consultation with the National Council of Chiefs, satisfied that:
   
   (a) the custom owners cannot be identified; or
   (b) there is a dispute about ownership of the expression of indigenous culture concerned.

In such a case, the Registrar must not register the trademark unless the applicant and the National Council of Chiefs have entered into an agreement on the payment by the applicant to the National Council of Chiefs of an equitable share of the benefits derived from the use of the trademark.

(4) If an agreement mentioned in subsection (2) or (3) has not been entered into within 12 months after the trademark application has been lodged:
   
   (a) the Registrar may register the trademark; and
   (b) the registered owner may use the trademark; and
   (c) the Registrar is to determine the amount payable to the custom owners or the National Council of Chiefs by the registered owner of the trademark, being payment of an equitable share of the benefits derived from the use of the trademark.

(5) Any payments made to the National Council of Chiefs under an agreement mentioned in subsection (3) or a determination under paragraph (4)(c) must be used for the purposes of indigenous cultural development.

(6) An appeal lies to the Court from a decision of the Registrar determining an amount under paragraph (4)(c).

(7) An agreement mentioned in subsection (2) or (3) may contain other conditions, including how and when the trademark is to be used.

(8) The National Council of Chiefs may issue written guidelines for the purposes of this
section.

(9) The National Council of Chiefs must consult with the Vanuatu National Cultural Council before entering into an agreement under subsection (3) or issuing guidelines under subsection (8).
Appendix C
Glossary of terms and list of Pacific Island countries

Ali’i

Ali’i, or high chiefs, are one of two categories of matai (Samoan chief, see below). The ali’i is the political and ritual head of an extended family network. The ali’i has responsibility for ensuring that the dignity of their village is upheld and, as a group, they make the more important decisions that affect the welfare of the village. Each ali’i has a tulafale, often referred to as an orator or speaking chief (see below). (Ali’i are discussed in more detail in Chapter 3.3.2.)

Anglo-French Condominium

The Anglo-French Condominium was an arrangement made between the United Kingdom and France in which they shared joint administration of the New Hebrides (now known as Vanuatu). The agreement was formalised in the 1906 Convention between the United Kingdom and France Concerning the New Hebrides. The Condominium remained in place until the Constitution was enacted in 1979, establishing Vanuatu as an independent state. (The Anglo-French Condominium is discussed in more detail in Chapter 4.4.4.)

Chief

For the purposes of this thesis, a chief is defined as the head of a group founded by kinship and descent. Chiefs are ‘traditional leaders’ in the way that they embody notions of the past. However, contemporary chiefs do not replicate the roles or functions of positions that existed in the past. The position of chief does not have a fixed or clearly defined role or set of rights and privileges. Rather the position is adaptable and subject to change.

Chiefs in this thesis, as elsewhere, are generally referred to as male. This is because, although female chiefs do exist, they are few in number. Furthermore, where women

1 So'o, Governance and rendered services p154.
2 Convention between the United Kingdom and France Concerning the New Hebrides, 1906.
do achieve chiefly status it is rarely regarded as equal to that of their male counterparts.

*Complementarity*

Complementarity is one of three categories of interaction between state, custom and civil society as identified by Boege et al. in their study of hybridity. They define complementarity as ‘the identification of areas of overlap and (intentional or unintentional) cooperation of state, customary and civil society institutions.’\(^3\) (See also Incompatibility and Substitution, below.)

*Custom*

Custom in the context of this thesis refers to the beliefs and habitual practices of identified groups of people in the Pacific Islands. (See also *kastom*, below.)

*Customary law*

Customary law can be defined as the unwritten rules and processes by which societies in the Pacific Islands maintain order and resolve disputes.\(^4\) Powles’ description of customary law as the ‘articulation of a particular value system through processes themselves derived from that system’\(^5\) is of particular relevance in that it highlights the link between values and the processes used to perpetuate those values. That is, in the Pacific Islands, customary laws as well as the processes used to articulate and enforce those laws, both stem from the indigenous culture in which they are being applied.

*Fa’alupega*

The *fa’alupega* describes the historical and genealogical origins of the titles of senior *matai* (Samoan chiefs, see below). The *fa’alupega*, which is recited at meetings of chiefs and on special occasions, clearly accords each *matai* title a place in the social

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\(^4\) Based on the definition given by Corrin in: Corrin, Customary Land and the Language of the Common Law, p306.

structure of a village and acts as a record of events, privileges and relationships.  
There are different fa’alupega for individual titles, groups of titles, for the nu’u (village, see below), district and nation.

**Fa’amatai**

Fa’amatai can be translated as ‘the way of chiefs’ and refers to the chiefly system in Samoa. (Fa’amatai is discussed in more detail in Chapter 3.5.3.)

**Fa’asamoa**

Fa’asamoa (or the Samoan way of life) is a clearly defined system of governance, characterised by living under the leadership of a matai (Samoan chief, see below) and occupying land under customary tenure. According to fa’asamoa, every person in Samoa belongs to a particular status group and his or her relationships, duties and obligations are clearly established by this status. (Fa’asamoa is discussed in more detail in Chapter 3.5.2.)

**Faife’au**

The position of faife’au (Protestant native pastor) was created by Christian missionaries in Samoa in the 1800s. The faife’au are now well incorporated into village life, providing a focus for hospitality, education and protection. They cannot hold a chiefly title and generally do not participate in the fono, but they have been incorporated into the fa’alupega (see above) and are accorded equal rank with senior matai titleholders.

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8 Ibid. p212.


10 Tuimaleali’ifano, Talofa e ’Aiga, ua ’ai e lago le tofa! Village governance and development in Falelatai p172.
Fono
Council of matai (Samoan chiefs, see below).

Governance
Governance is defined in this thesis as ‘the rules and institutions for the authoritative organization of collective life.’¹¹ (The defining of governance is discussed further in Chapter 1.3.1.)

Graded Society
The variety of governance structures present in Vanuatu fall within two broad categories of society - graded and ranked. Graded societies were in place in the north and northern-central islands when Europeans made first contact.¹² This system requires that men and women who aspire to hold positions of leadership pass a series of tests which progressively become more complex and demanding.¹³ (See also Ranked Society, below. Ranked and Graded societies are discussed in more detail in Chapter 4.3.2 and 4.3.3.)

Hybridity
Hybridity is a situation in which contrasting patterns of power and authority co-exist. In this thesis, this is applied to hybrid states which are defined as:

  domains of contrasting patterns of power and authority [which] combine elements of the western model and elements stemming from the local precolonial autocephalous traditions of governance and politics;
  governance is carried out by an ensemble of local, national and also often international actors and agencies.¹⁴

Incompatibility
Incompatibility is one of three categories of interaction between state, custom and civil society as identified by Boege et al. in their study of hybridity. They define

¹¹ Donahue, Market-Based Governance and the Architecture of Accountability p1.
¹² Bonnemaison, Graded Societies and Societies Based on Title: Forms and Rites of Traditional Power in Vanuatu p210.
¹³ Ibid. p200.
¹⁴ Boege, Brown, Clements and Nolan, States Emerging from Hybrid Political Orders - Pacific Experiences p5.
incompatibility as ‘the identification of customary approaches that conflict with state and/or civil society approaches.’\textsuperscript{15} (See also Compatibility, above, and Substitution, below.)

\textbf{Kastom}

\textit{Kastom} is a Bislama (Vanuatu Pidgin) term that can be translated simply as ‘custom.’ However, the term today carries political undertones. Custom in Vanuatu was denigrated during the period of colonisation, but in the lead up to independence \textit{kastom} emerged as a source of pride. Within the literature and in government documents, both \textit{kastom} and ‘custom’ are used, sometimes interchangeably, and no standard has yet emerged. Within this thesis, \textit{kastom} is used when referring specifically to Vanuatu. This is done in recognition of the political associations of the term. When referring to custom in more than one country, or when quoting directly, the English word is used. (\textit{Kastom} is discussed in Chapter 4.5.2)

\textbf{Legal Pluralism}

Legal pluralism is defined as ‘the multiplicity of forms of law present within any social field.’\textsuperscript{16} (Legal pluralism is discussed in Chapter 6.2.)

\textbf{Malvatumaui}

The \textit{Malvatumaui} is a national level council of chiefs in Vanuatu. The Constitution of Vanuatu gives the \textit{Malvatumaui} competence to discuss all matters relating to custom and tradition and the preservation and promotion of ni-Vanuatu culture and languages. The Council may be consulted on any bill before Parliament, especially those relating to custom, language and tradition.\textsuperscript{17} The \textit{Malvatumaui} is comprised of thirty one chiefs representing Vanuatu’s Island and Urban Councils of Chiefs.\textsuperscript{18} (The \textit{Malvatumaui} is discussed in Chapters 4.5.5 and 7.3.2.)

\textsuperscript{15} Boege, Brown, Clements and Nolan, \textit{States Emerging from Hybrid Political Orders - Pacific Experiences} p10.
\textsuperscript{16} Rouland, \textit{Legal Anthropology} p51.
\textsuperscript{17} Constitution of the Republic of Vanuatu 1980, Art 30 & 31, See Appendix B5.
\textsuperscript{18} National Council of Chiefs Act 2006, s5(1) Schedule, See Appendix B:24.
**Mana**
Samoan word for sacred power.

**Matai**
A *matai* is a Samoan chief. *Matai* are heads of families and their titles are appurtenant to land. *Matai* today fit within the two categories of *ali‘i* (see above) and *tulāfale* (see below). (*Matai* are discussed in Chapter 3.3.2.)

**Nu‘u**
*Nu‘u* is a Samoan word that can be translated as village. But it more accurately indicates a political entity comprised of a group of extended families that have a shared history, houses and lands.\(^{19}\)

**Pacific Island countries**
The Pacific Island countries are the fourteen independent and associated states located in the Pacific. These fourteen states, along with Australia and New Zealand, make up the membership of the Pacific Islands Forum. A table showing the fourteen countries and their pre and post independence status is at the end of this Appendix C. Pacific Island entities not included in this group that are neither independent nor associated states include: the French territories of New Caledonia, French Polynesia and Wallis and Futuna; the American territories of Guam, Commonwealth of the Mariana Islands and American Samoa; the New Zealand territory of Tokelau; the British territory of Pitcairn; and the Chilean territory of Rapanui (Easter Island).

**Pule**
*Pule* is a Samoan word for power, authority or political influence.

**Ranked Society**
The variety of governance structures present in Vanuatu fall within two broad categories of society - graded and ranked. Ranked societies are found in the southern islands of Vanuatu. Here chiefly titles are handed down through generations, usually

\[^{19}\text{Meleisea and Schoeffel Lagaga: A Short History of Western Samoa } p28; \text{So'o, Democracy and Custom in Samoa: An Uneasy Alliance } p17.\]
passing from father to eldest son. In ranked societies, chiefs sit at the head of an ordered set of titles, each of which has a group of followers. Thus, when a man receives a chiefly title, he automatically acquires obligations, rights and a network of alliances. Rankings are also linked with land holdings but, in some instances, status is inversely related to control over land. That is, the higher a man’s status, the less control he has over land. (See also Graded Societies, above. Ranked and Graded societies are discussed in Chapter 4.3.2 and 4.3.3.)

Substitution
Substitution is one of three categories of interaction between state, custom and civil society as identified by Boege et al. in their study of hybridity. They define substitution as ‘the identification of functional equivalents of the state outside state institutions.’ (See also Compatibility and Incompatibility, above.)

Tama’āiga
There are four dominant chiefly titles in Samoa – Matā’aafa, Tupua Tamasese, Tuimaleali’ifano and Mālietoa. They are known collectively as the tama’āiga, or sons of the families. (Tama’āiga are discussed further in Chapter 3.3.5 and Chapter 7.)

Tradition
The term ‘tradition’ is used in this thesis to indicate practices that embody or represent notions of the past. Traditions are understood as a product of time and place rather than as a perpetuation of practices that have passed down, unchanged through generations.

Transplant and Transfer Theory
Theories of transplant and transfer examine the replication of legal and political systems in another jurisdiction. For example, during the period of colonisation, entire systems based on the English common law, French civil law and German

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20 Bonnemaison, Graded Societies and Societies Based on Title: Forms and Rites of Traditional Power in Vanuatu pp212-214.
civil law were established in countries in Africa, Asia and the Pacific. More recently, legal transplant and the transfer of political institutions have been utilised by legal practitioners and political analysts working in developing countries or collapsed states.22 (Transplant and transfer theory is discussed in Chapter 6.2.)

*Tulāfale*

*Tulāfale* are one of two categories of *matai* (Samoan chief, see above). It is the task of the *tulāfale* (orator or speaking chief) to support the *ali‘i* (or high chief, see above), acting as his representative and speaking on his behalf. The role of the *tulāfale* varies from village to village and can involve such things as holding the genealogical knowledge, organising ceremonial distributions of food, house-building, carrying messages and other roles generally considered to be below those expected of an *ali‘i*.23 (*Tulāfale* are discussed in Chapter 3.3.2.)

*Tūmua* and *Pule*

Samoan was traditionally divided into districts with clearly defined boundaries and political centres. The *Tūmua* and *Pule* were groups of *tulāfale* (orator or speaking chiefs, see above) that convened when an issue arose that involved the whole country. The *Tūmua* represented the four political districts on the island of Upolu and the *Pule* represented the six districts from the island of Savai‘i. (The *Tūmua* and *Pule* are discussed in Chapter 3.3.4 and 7.2.4.)

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23 Davidson, *Samoa mo Samoa: The Emergence of the Independent State of Western Samoa*  p19; Freeman, *The Social Structure of a Samoan Village Community* pp78-79; Meleisea and Schoeffel *Lagaga: A Short History of Western Samoa* p27.
Table 3: The Pacific Island countries and their status before and after independence.\textsuperscript{24}

<table>
<thead>
<tr>
<th>Name</th>
<th>Year of independence</th>
<th>Pre / post-independence relationship with power</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cook Islands</td>
<td>1965</td>
<td>Self governing community under the British Crown / Self governing in free association with New Zealand.</td>
</tr>
<tr>
<td>Federated States of Micronesia</td>
<td>1986</td>
<td>United Nations Trust Territory administered by USA / Self governing in free association with USA.</td>
</tr>
<tr>
<td>Fiji Islands</td>
<td>1970</td>
<td>British colony / Independent.</td>
</tr>
<tr>
<td>Kiribati</td>
<td>1979</td>
<td>Part of British protectorate of Gilbert and Ellice Islands / Independent.</td>
</tr>
<tr>
<td>Marshall Islands</td>
<td>1986</td>
<td>United Nations Trust Territory administered by USA / Self governing in free association with USA.</td>
</tr>
<tr>
<td>Nauru</td>
<td>1968</td>
<td>United Nations Trust Territory administered by Australia on behalf of Australia, New Zealand and the United Kingdom / Independent.</td>
</tr>
<tr>
<td>Niue</td>
<td>1974</td>
<td>Territory of New Zealand / Self governing in free association with New Zealand.</td>
</tr>
<tr>
<td>Palau</td>
<td>1994</td>
<td>United Nations Trust Territory administered by USA / Self governing in free association with USA.</td>
</tr>
<tr>
<td>Solomon Islands</td>
<td>1978</td>
<td>British protectorate / Independent.</td>
</tr>
<tr>
<td>Tuvalu</td>
<td>1978</td>
<td>Part of British protectorate of Gilbert and Ellice Islands / Independent.</td>
</tr>
</tbody>
</table>