

the Court as a Court of Justice and not just a Court of Samoan custom would declare the exercise of authority to be unreasonable and therefore invalid.

Likewise, if a dispute comes before the Land and Titles Court where the *matai* of a family has ordered the removal of a member of the family from the family's customary lands because of information received by the *matai* from other people against that particular member of the family without first consulting him, the Court may declare such an exercise of authority to be unfair and therefore invalid. The reason is that the Court may consider that before the *matai* took such a drastic action of ordering the removal of a member of his family from the family's customary lands, he should have first consulted that family member about the information he had received against him. By not having done so, the Court would say that the *matai* of the family had acted unfairly and therefore declare the exercise by the *matai* of his authority to be invalid. There are numerous other examples of cases involving the exercise by the *matai* of his authority, which on analysis will show that the Land and Titles Court had acted upon the basis of what is fair or reasonable in holding that such exercise of authority is invalid.

In effect what the cases I have referred to show is that the Land and Titles Court was reviewing the exercise by the *matai* of his customary authority on the grounds of **fairness** and **reasonableness** which are essentially the same as the common law grounds of fairness and reasonableness in judicial review proceedings. However, the Court would never go so far as to say that a *matai* does not hold the authority over the customary lands of the family. This is a fundamental of Samoa custom which the Court would not question.

Apart from notions of fairness and reasonableness, our Land and Titles Court would also apply notions of good conscience, similar to those which one would find in our country law or introduced law of equity, when determining disputes relating to the exercise of customary authority. An example where this was done was a case where the council of chiefs and orators of a particular village had granted permission to the Mormon Church to build a church on customary land within the village. After permission was given, the Mormon Church made the usual presentation as expected in Samoa custom and it was accepted by the village. Construction of the Church then started. However, after about \$40,000 was spent on the construction of the church, the council of chiefs and orators decided to stop the construction and ordered the Mormon Church to leave the village. The reason for this change of attitude was because the council of chiefs and orators became displeased with the *matai* of the village who was the leader of the Mormon Church within the village.

When that case came up to the appellate division of the Land and Titles Court, the Court held, *inter alia*, that the council of chiefs and orators of the village had granted permission to the Mormon Church to build its church on the customary lands of the village. On the basis of that permission, the Mormon Church had made a customary presentation to the village which was accepted by the council of chiefs and orators. The Mormon Church had also expended about \$40,000 on the construction of its church building. The Mormon Church was also not at fault as it was the *matai* who was the leader of the Mormon Church within the village that the council of chiefs and orators

was displeased with. In those circumstances the Court said that it would be unjust for the council of chiefs and the orators to withdraw its permission, stop the construction of the church building, and order the Mormon Church to leave the village. The decisions of the council of chiefs were therefore held to be invalid.

In that case, one can see similarities in the approach taken by the Court with the equitable principle of estoppel. The Mormon Church had acted in reliance upon the permission granted by the council of chiefs and orators to its detriment by expending a substantial sum of money to build its church. For the council of chiefs and orators to withdraw its permission in those circumstances would be inequitable. There are other similar cases that come before our Land and Titles Court but I need not refer to any more of them.

The point I wish to make is that in my respectful view, if there is any area where custom in the context of Pacific Island States jurisdictions and introduced law may be able to co-exist and interact with one another, it is in the principles of fairness and reasonableness associated with judicial review as well as the principles and notions of good conscience to be found in equity.

The one area where Samoan custom and our introduced law are so often in conflict is fundamental rights. The Samoan Constitution which embodies fundamental rights provides that any law and so forth which is inconsistent with any provision of the Constitution shall be void to the extent of the inconsistency. One of the fundamental rights embodied in the Samoan Constitution is "freedom of religion".

In most villages in Samoa there are a number of established religions and some village councils would pass a resolution that there shall be no other religion to be established within the village. However, an individual or family or group of people within the village would set up a new religion within the village. The village council would then order such an individual or family or group of people to stop his or their new religion otherwise banishment from the village would follow. The order of the village is disobeyed and banishment is carried out by the village council. The dispute then comes to the Land and Title Court and sometimes before the Supreme Court as both Courts may exercise jurisdiction over such a dispute because it involves a fundamental right.

The task for the Courts is often straightforward. If the actions by the village council have violated the individual's freedom of religion provided in the Constitution then such actions are inconsistent with the Constitution and therefore void. However, such decisions by the Courts have created tensions within Samoan Society between the fundamental rights of an individual founded upon an individualistic philosophy and set of values and the customary authority of the village councils founded upon a communal philosophy and set of values. So far, it has not been possible for any one to come up with a solution on how to resolve or reduce such tensions. Maybe Samoan society is going through a transition period of becoming increasingly more individualistic than it used to be in the past.

In respect of our civil law, customary land which makes up about 80% of all the lands in Samoa cannot be alienated by way of sale because of the provisions of the Constitution. This constitutional prohibition against the alienation of customary land has been interpreted to mean that customary land cannot be mortgaged because if the mortgagor defaults, the mortgagee by the exercise of his power of sale would be able to sell the land. The outcome of this is that even expensive houses and buildings built on customary land cannot be used as mortgage security for any loan at all, even very small loans.

In December 2005, I held in a case before the Samoan Supreme Court that the common law of fixtures does not apply to customary land so that buildings on customary lands can be used as security for loans. Here I was following the lead shown by the Court of Appeal of Tonga. The result of my decision is that, if buildings on customary land do not form part of the land, then such buildings can be used as security for loans, presumably small loans, to meet such expenses as school fees, medical bills or electricity bills.

Another area where there is co-existence between Samoan custom and our country or introduced law is the criminal law. Traditionally, when a crime is committed, the family of the offender would perform a formal apology known as '*ifoga*' to the family of the victim. This involves the family and *matai* of the offender's family kneeling before the family of the victim with their heads covered with fine mats. If the '*ifoga*' is accepted by the victim's family, then the family of the offender would also make a presentation of fine mats, foodstuffs, and sometimes money to the family of the victim. The offender would then be deemed as forgiven. It is rare for an *ifoga* not to be accepted. The *ifoga* is a mode of restorative justice and it affects not only reconciliation between the offender and the victim if the offence is not one of homicide, but also reconciliation between the offender's family and the victim's family.

Under our present criminal justice system, the '*ifoga*' would not mean complete exoneration of an offender from the crime he has committed. But it is used by the Courts as a mitigating factor for sentencing purposes.

Finally, one other area where Samoa custom may often come into conflict with our country or introduced law is our electoral laws. It is not uncommon during parliamentary elections for a village to decide who should be the candidate for their village in the up-coming election. At times such a decision by the village is accompanied by a threat that any member of the village who votes for any other candidate would face banishment from the village. Such a threat has been held by the Samoa Electoral Court to constitute the corrupt practice of undue influence under our electoral laws. In a few instances, the election of a candidate in a parliamentary election has been declared void on this ground of undue influence.

Two other corrupt practices under our electoral laws are bribery and treating. Bribery is essentially the giving of money to an elector to influence how he votes whereas treating is essentially the giving of food or drinks to an elector for the same purpose. Charity and the giving of money or

foodstuffs to others are very much part of Samoan custom. However, our Electoral Court has repeatedly decided on many occasions that acts of charity or the presentation of money or foodstuffs done by candidates when an election is imminent can amount to electoral bribery or treating if the real motive was to influence electors. In other words compliance with custom is no defence if the real motive behind the presentation was to influence an elector which is the *mens rea* requirement for both bribery and treating.

The only exception provided under our electoral legislation are customary presentations made at a funeral during election time.

