Samoan Jurisprudence and the Samoan Lands and Titles Court: the perspective of a litigant

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When I was asked to give an address today I enquired about my audience. I was told that they were to come mainly from the disciplines of Law and Pacific Island Studies. Earlier this year the Centre for Pacific Studies at the University of Auckland invited me to speak on issues of Samoan custom and jurisprudence. It seems pertinent to share those thoughts with you also. I do so in the belief that our Pacific customary principles of law continue to remain relevant to our Pacific cultures and identities today.

Introduction

My topic is “Samoan jurisprudence and the Samoan Lands and Titles Court”. I owe it to you and myself to cite at the outset my disqualifications in this area: I am not a Judge; nor a jurist; nor a lawyer. My qualification is that I am a litigant.

In thinking about this I am reminded of a famous story about Robert Benchley while he was a student of International Law at Harvard University. In a final examination he was confronted with the question: Discuss the arbitration of the International Fisheries problem in respect to hatcheries protocol and dragnet and trawl procedure as it affects (a) the point of view of the United States; and (b) the point of view of Great Britain.

In addressing the question Benchley was frank and wrote somewhat desperately in response: “I know nothing about the fisheries problem; and nothing about the point of view of the United States; and nothing about the point of view of Great Britain. Therefore, I shall discuss the question from the point of view of the fish”.

I wonder if I am overstretching a point if I say I know little about jurisprudence and less about philosophy. And I am not a Judge; nor Jurist; nor Lawyer. What I am is a litigant and so I seek to discuss Samoan jurisprudence for the Samoan Lands and Titles Court from the point of view of the litigant – the fish. My experience as a litigant in the Samoan Lands and Titles Court and the fact that I live my Samoan indigenous culture are my qualifications.
In the Samoan language there is no word for jurisprudence. Nor is there a word for philosophy. But there is a word for law, which is *tulafono*. Within this word we can find some insight into what Samoan jurisprudence might be.

There are four Samoan concepts that I wish to draw on for my discussion of the word *tulafono*. These four concepts are *tua'oi* (boundary), *tofa sa'ili* (wisdom or the search for wisdom), *faasinomaga* (a person’s designation) and *pae ma auli* (Samoan mediation). There are three reference points that I will traverse: the theological, historical and practical. Each contributes to the development of a Samoan jurisprudence.

The theological reference provides insight into the heart, psyche and soul of indigenous Samoan culture. The historical reference provides context for understanding the current problems faced by Samoa’s Land and Titles Court. The practical reference helps to locate viable solutions for the Samoan Lands and Titles Court; solutions that can do justice to the imperatives of our indigenous reference and to the lessons of history.

I begin with a discussion of the Samoan theological reference.

**Samoan theological reference**

Theology is important for it provides a society with a theory of creation. A theology of Samoa is found in what Samoans call ‘the Mau’. Mau, meaning the indigenous world view of Samoan people. In fact, any ‘ology’ framework based or oriented on the Samoan indigenous reference is referred to as the ‘Mau a Samoa’. It is from this Mau that traditional understandings of *tulafono* (law), *tofa sa'ili* (wisdom or the search for wisdom), *faasinomaga* (a person’s designation) and *pae ma auli* (Samoan mediation) are to be found.

*Tulafono* means Law. *Tula* means head; *fono* means formal meeting. *Tulafono*, can be literally interpreted to mean the “head of a fono”. In this sense, laws emerge from the coming together and the synthesising of wisdom from the “heads of a fono”.

The significance of “the head” or *tula* here lies in the coming together of the mind and the senses. As I have noted before: “Harmony in the mind involves finding unity in the messages conveyed by the senses. The evidence perceived by the nose, the eyes, the mouth and the ears, each situated in the head, is communicated to the brain and made sense of by the mind. It is the function of the mind to assess sensory evidence for cognitive meaning. …The divinity of the head gives rise to the Samoan saying: ‘o le faiva o mafaufau o le faatonutonu ma le faasoasoa (meaning, the function and purpose of the mind is to discern evidence and make good judgements)”.

The *tula* or head of a chief is *tapu*. To touch the head of a chief is a serious breach of *tapu* because the head, as suggested, is the residence of divine discernment and so

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should not be tampered with. This helps to make sense of the use of the term *lagi* as used in Samoan oratory as an honorific term for the head.

In the ancient Samoan *Mau* the ultimate head is the Absolute, God or *Tagaloaalagi*. Thinking of the head in this way provides nuanced meaning to the words of our salutations to the nine heavens of *Tagaloa* chanted in the funeral rites of a Samoan chief. Funeral rites and chants provide a vehicle for contemplation on the journey of life. The nine messages of the funeral chant are as applicable to life as to death. The chant goes:

“Tulouna le lagi tuatasi! Tulouna le pogisa ma le leai!
*Salutations to the first heaven! Salutations to the darkness and the void!*

Tulouna le lagi tuatualua! Tulouna le nanamu!
*Salutations to the second heaven! Salutations to the sense of smell!*

Tulouna le lagi tuatololu! Tulouna le efuefu!
*Salutations to the third heaven! Salutations to the dust!*

Tulouna le lagi tuafa! Tulouna le iloa!
*Salutations to the fourth heaven! Salutations to the knowable!*

Tulouna le lagi tualima! Tulouna le maua!
*Salutations to the fifth heaven! Salutations to the obtainable!*

Tulouna le lagi tuaono! Tulouna le ‘ele’ele!
*Salutations to the sixth heaven! Salutations to the earth!*

Tulouna le lagi tuafitu! Tulouna le papatū!
*Salutations to the seventh heaven! Salutations to the standing rock!*

Tulouna le lagi tuavalu! Tulouna le maa taanoa!
*Salutations to the eighth heaven! Salutations to the stones!*

Tulouna le lagi tuaiva! Tulouna le mauga!
*Salutations to the ninth heaven! Salutations to the mountain!*

In Samoan theology there are ten heavens. God Tagaloa resides in the tenth heaven. The tenth heaven represents the absolute which is the preserve of God. In the funeral chant of a Samoan chief cited above there are salutations beginning with the first heaven and ending with the ninth. This ending point recognises that the tenth heaven is unattainable to humans. The principle imperative of our search as humans (*tofa sa’ilī*) for God’s truth is the recognition that this truth is beyond our reach as humans and that so long as we are alive our search is never ending.

The salutations on first reading speak of *lagi* as heavens. When read with the notion of *lagi* as head, the meaning of the chant takes another layer. *Lagi* as head could also be *lagi* as place of wisdom, balance and harmony. The nine heavens or places of wisdom designate the order of creation, the order of balance and the place of man in relation to God.
Salutations to the mountain symbolize man reaching out towards God, which is a metaphor for tofa sa’ili. Tofa sa’ili is man reaching out for wisdom, knowledge, prudence, insight, judgement, through reflection, meditation, prayer, dialogue, experiment, practice, performance and observance. Tofa means wisdom. Sa’ili means search.

The common saying in Christian ritual: “o le aiga o le Atua”, i.e. the family of God, assumes a close and intimate relationship between God and man. This intimate relationship between God and man is sacred. Such is the case for the Samoans. But the God of the Christian is God Creator. God in the Samoan indigenous reference is God Progenitor. God married and issued man and so man is a genealogical child of God. In ancient Samoa, the saying: ‘E le se Atua fau tagata’ (God is not God Creator)... o le Atua usu gafa (God is God Progenitor) le Atua o le mau a Samoa (the God of Samoa), thus holds.

In ancient Samoan genealogy, land is one of man’s ancestors and is acknowledged in the funeral chant by deferential reference to dust, earth, standing rocks, stones and mountain as family.

Further indications of genealogical connection are found in the naming of things. For example: fatu is the Samoan word for rock and heart. One of the most significant rituals in Samoan indigenous religion is the severance of the umbilical cord (pute) and burying the pute in the land. The ritual connects man and the land and lends substance to the Samoan saying: “o le tama o le ‘ele’ele”, meaning “man of the soil” and “tulaga vae”, meaning “footprint”. ‘Ele’ele’, meaning earth and palapala, meaning mud, can also mean blood. These words are core symbols indicative of genealogical connection and the tua’oi (boundary and connection) between man and land.

In the Samoan indigenous context this theological reference is reinforced in ancient Samoan funeral ritual taunts where man taunts God in dance performance and song chant with lines expressing the basic message: ‘you have taken one of us, but so long as I have a penis I have the power to reproduce life’.

This theology gave ancient Samoans a reference for being, knowing and belonging. It gave them a designation and identity, i.e. faasinomaga. Faasinomaga is man’s inheritance designated by the designator – God. This designation is located in the heart, mind and soul of a person. It is what gives them meaning and belonging. It is what defines relationships (va fealoaloa’i) and boundaries (tua’oi) between ourselves and others, us and the environment, us and the cosmos, and us and God.

The significance of faasinomaga is captured in the belief of ancient Samoans, and of those living today, that Samoans live not as individuated beings but as beings integrally linked to their cosmos, sharing divinity with ancestors, land, seas and skies. For as I have said elsewhere:  

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“I am not an individual; I am an integral part of the cosmos. I share divinity with my ancestors, the land, the seas and the skies. I am not an individual, because I share a tofi (inheritance) with my family, my village and my nation. I belong to my family and my family belongs to me. I belong to my village and my village belongs to me. I belong to my nation and my nation belongs to me. This is the essence of my sense of belonging”.

For Samoans there is a strong sense of identity and belonging that is bound to our faasinomaga, our designation as defined by our Designator. This designation defines our sense of belonging to our nation and to the faaSamoa (i.e. Samoan culture and customs). It defines our ranks and statuses, our relationships with others and the boundaries within and across.

In my current exploration of indigenous resources on peace and good governance I have found that these sentiments of belonging and sharing divinity with ancestors, lands, seas and skies are common throughout. The thoughts of David Ipinia, a Native American Indian Yurok Artist, were shared with me by a dear friend, Fr. Paul Ojibway, in recent correspondence. In commenting on ‘being Indian’ David says:

“Being Indian is mainly in your heart. It’s a way of walking with the earth instead of upon it. A lot of the history books talk about us Indians in the past tense, but we don’t plan on going anywhere…We have lost so much, but the thing that holds us together is that we all belong to and are protectors of the earth; that’s the reason for us being here. Mother Earth is not a resource, she is an heirloom.”

In reading through correspondence by Fr. Paul and his colleagues such as David, I am heartened that for a people who have lost so much they continue to have hope for their faasinomaga.

Man as a genealogical issue of God and the community as a family of God are reference points from which human rights, at least according to the Samoan indigenous reference of my ancestors, derive: i.e. the right of life, the right to land and titles, the right to share in a community, the right to citizenship, the right to belong.

Deliberate and premeditated taking of life is the most serious breach in Samoan custom. Life is a gift from God/s and God/s can wreak vengeance on him/those who presume on his prerogative to take life. The onus is on the perpetrator/s to account and make amends, not only to God but to his children, which includes the victim/s and/or his/her family and village.

Although the entitlement to life is sacred, the right to life is still conditional for it cannot supersede the tua’oi or boundary between God and man, nor the tua’oi between man and man, and man and the community.

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3 See Diocese of Samoa/Toelau, Family Centre & Afeafe o Vaetoefaga. (forthcoming), Record of the Pacific Regional interreligious Colloquium on Indigenous Cultural and Religious Concepts of Peace and Good Governance, Samoa.
The principle of *tapu* is a prime example of the existence of *tua’oi*. For example, the *tapu* or *sa* on fishing and planting highlight the boundary between man and environment. Fishing *tapu* or *sa* were imposed to protect the continuity of fish supplies. The *tapu* on *vao talutalu* or broken land, whereby the principle of rotation operated, was to ensure or guarantee the ongoing quality of the earth and of yield. Breaches of these *tapu* or *sa* were serious offences against the *tua’oi* between man and environment. Punishment of these breaches was *oso ma le lau*, i.e. the devastation of all food crops which may include razing family residences in the village.

These issues of belonging (of *faasinomaga* and *va fealoaloa’i*), of knowing boundaries (or *tua’oi*), and of knowing how to search for meaning in having these boundaries (for having *tofa sa’ili*) are central to understanding the contours, substance and impact of *tulafono* or Samoan (custom) law, then and today.

Before moving into Samoan customary law proper we must gain an historical appreciation for the changing *tua’oi*.

**Historical reference**

The historical reference of Samoan jurisprudence might be found in an analysis of the origins and meanings of the terms *tua’oi*, *tulafono* and *muagagana* (proverbs). I begin with *tua’oi* and rights.

**Tua’oi and Rights**

*Tua’oi* may be broken down to mean: “*i tua atu o i*”, meaning “beyond this point”; which is a shorthand or abbreviation for the saying: “*i tua atu o ‘i e le au iai lau aia po o lau pule*”. Translated this means, “your rights (*aia*) or authority (*pule*) do not extend beyond this point”.

In earlier times and especially in relation to lands and titles *i tua atu o i* or *tua’oi* thus referred mostly to the boundaries associated with rights (*aia*) and/or authority (*pule*) in lands and/or titles.

**The right to land**

Land in the Samoan language is *fanua*. *Fanua* is also the word for placenta. *Fanua* meaning land and *fanua* meaning placenta frame and define Samoan rights and access to land. Honorifics mark the *tua’oi* between land and people.

Historically, the land *tua’oi* or land connections and inheritance (*tofi*) of Samoa are recognized in national, district and village honorifics. Land boundaries define the *tofi*, i.e. the proportional inheritance of a people. The lands of Samoa are believed to be the lands designated by God for the people of Samoa. As a designation from God each person has a right to their portion. Furthermore, at the village or district level, a key right in the theory of designation or *tofi* is the right to ritual or cultural specificity with regards to *matai* (chiefly) titles and land ownership. This latter right is embodied in the Samoan concept and imperative ‘*aga-i-fanua*’; a concept historically distinguished from ‘*aga-nui*’.
Aga-nuu is a rule or law of general application to Samoa/Samoans. Aga-i-fanua is a rule or law which specifically applies to a family or a village and its origins in history and genealogy. Some villages have special roles afforded to particular families, names or positions specific to their village history. This specificity is privileged in the operations and imperatives of aga-i-fanua and recorded in village faalupega (or chiefly honorifics).

Aga-nuu allows for a common reference across villages, districts and the nation. Aga-i-fanua recognises the uniqueness of each village, its history and genealogy, and so creates tua’oi or boundaries within and without. Aga-i-fanua affirms the uniqueness or idiosyncrasies of villages according to their history. In many ways it defines the va fealoaloa’i (relations between peoples within the village and with those outside) and faasinomaga (the identity or designation of those within and without). Aga-i-fanua thus demands recognition of village autonomy, of its uniqueness or apartness from all the other villages and so determines the boundary between what it is or is not, i.e. between what is aga-i-fanua and what is not; what is aga-nuu and what is not.

None of these rules or laws, however, was meant to be fixed or rigid. Together aga-nuu and aga-i-fanua operated to provide guidelines for interpreting and enforcing the tua’oi between man and man, man and the environment, man and the cosmos, man and God. Such guidelines while open to modification given changing times, were, nonetheless, always founded on a particular theological understanding of man’s relationship with God, as God Progenitor.

The reality of this theology of land is lost in the telling of the Samoan history of land today, the deciding of access to land and land ownership, and the resolving of land disputes. The perennial challenge of the tofa sa’ili or search for wisdom in land disputes is how to locate tua’oi or boundary in a climate where tua’oi seems to be shifting constantly and sometimes even arbitrarily.

To think of land as one’s tofi or inheritance is to overstate the significance of tofi as something owned by man. Tofi in relation to land is more designation, in that land is designated to man. Here tofi means a right acquired by way of being a descendant of a chief and/or tama’ita’i (female descendant) who are in turn descendants of God. The literal meaning of tofi is ‘a portion’. Land is therefore inherited only insofar as it has been apportioned to man in trust according to genealogy and history.

**The right to title**

The ancient right to title is founded on the same grounds to that of land. The standard measure for entitlement to a title is through tautua, i.e. regular service and merit. The common Samoan saying: “o le ala i le pule o le tautua” recognises the discourse of rights to Samoan custom and the implicit location of these rights in traditional notions of authority or pule. What is of significance here is that unlike a right to land, a right to title emphasises service or merit rather than genealogy or the reputation of biological antecedents.

Tautua is a concept not only applicable to the untitled but also to the titled. The saying: “E iloa le matai i le ‘au tautua”, literally means the status of the matai or
chief is measured by the quality and quantity of service afforded him by those who serve. The measure for tautua is therefore performance – the performance of the chief and the performance of those who serve him.

The worst put down for a matai is the saying: “a le faatu lava la’ua i le tunoa, e le aai”, meaning, “[the matai has no followers and so] the matai and his spouse must attend to the kitchen chores or else they will not eat”. The principle advocated is that the right to a title, to status and rank, is ultimately earned through merit and regular service. Merit and regular service, not genealogy, is the deciding factor in a customary right to title.

*The right to life*

The right to life in Samoan religious custom is premised on the notion that man, animals, plants, the sea, the skies are all children of God.

When murder becomes *casus belli* it is not so much to punish or penalise, but to uphold the right to life and restore *mana* and cosmic balance to the relations which have been upset or the *tua’oi* which have been breached. To illustrate this point I wish to tell two stories of two tyrannical ancestors, Tagaloa and Nofoasaefa.

When the tyrannical Tagaloa was rowed out to open sea by his disaffected constituents in Safune and left to fare against nature and the elements, the Safune people were not prepared to tempt fate by taking the life of the anointed; rather Tagaloa was thrown to the mercy of the God/s. Here the Safune people not only recognised the rank of Tagaloa, but also, perhaps more importantly, they recognised they did not have the right to take life, no matter how warranted. The assumption was that if Tagaloa’s mana was divinely originated then the onus was on God to restore balance by determining his fate. Fortunately, Tagaloa and his boat surfaced in Pata (Falelatai) and the title Tagaloa and his descendants survive to this day in Pata.

Similarly, when Nofoasaefa insulted the goddess Nafanua by insisting on precedence in a kava ceremony in Falealupo and, as well breaking the kava cup into pieces after drinking from it, his life was forfeited to restore the *tua’oi* or boundary he transgressed between God and man. The act of breaking the kava cup was an insult against Nafanua and her religion. Nofoasaefa’s act of defiance reflected his desire to be of higher status than Nafanua. Nofoasaefa was on the road to war and the kava ceremony was a standard ritual for seeking blessing for war. However, with the breaking of the kava cup he attempted to assert his claim to divine power. This was considered treason by the priests of Nafanua present at the kava ceremony and a curse was placed on him. In a secret ritual ceremony the assassins of Nofoasaefa were given special dispensation according to religious custom to assassinate Nofoasaefa.

The right of life as conditional is illustrated here. The right to life depends on maintaining respect of the *tua’oi* or boundary – in this case the boundary between man and God. Nofoasaefa’s breach of *tua’oi* is his presumption of the Absolute. Both stories, together with the discussion on rights, illustrate the varied contexts of *tua’oi*.

It is useful at this point to look closer into what *tua’oi* might be exactly.
Tua’oi

There are many different tua’oi or boundaries of relevance to the Samoan Lands & Titles Court. For example:

- **Tua’oi tagata – tua’oi or va** between people, for instance:
  - ‘au aiga and matai;
  - alii and tulafale;
  - parents and children;
- **Tua’oi or va** between nuu (village) and itumalo (district);
- **Tua’oi or va** between nuu and malo (Central Government);
- **Tua’oi or va** between itumalo faaleaganuu (indigenous governmental structures) and itumalo faafaipule (introduced governmental structures);
- **Tua’oi or va** between the nuu and the fafeau;
- **Tua’oi or va** between the Samoan Lands and Titles Court and other Courts (including village fono);
- **Tua’oi or va** between the Samoan Land and Titles Court bench and indigenous mediators such as pae ma auli.

From this we see that the various tua’oi are in themselves multi-layered. Moreover, they can operate simultaneously. For our purposes I raise brief discussion only on the tua’oi between people – namely between matai and ‘au aiga, tamaalii (high chief) and tulafale (orator), parent and child; the tua’oi between nuu (village), itumalo (district) and Malo (central government); and between the Lands and Titles Court bench and pae ma auli (Samoan mediators).

**Tua’oi between matai and au aiga**

The tua’oi between people involves the operation of the principle of tautua or service. In the current context tautua includes more than the traditional notion of tautua nofo tuāvae (meaning, service performed daily by someone who resides at the family household to the matai and village) and includes tautua ‘ai taumalele (meaning, service given by somebody living outside the village and the matai residence, e.g. living in Apia) and osi aiga (which is service that is not regular service but entails presentations occasionally made to the family for family faalavelave (t2).

Traditionally the nofo tuāvae succeeded to the title and the rare exception is the nofo

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4 The term va is used here as shorthand for the term va fealoaloa’i, which relates to the idea and belief that there exists relational bonds between peoples, between peoples and their gods/God, peoples and the seas, skies and stars. And, that these bonds are, more often than not, sacred. The va fealoaloa’i thus refers specifically to the relational bond between different entities. When using the term va alongside the term tua’oi, in the manner noted above, I am not suggesting that they are synonyms. Rather, I am noting that they are interchangeable depending on who the speaker is. That is, in Samoan speech protocols one employs the term va when speaking of his or her own personal relationships or about those relationships close to them. When speaking objectively of the relationships of others, particularly of those that are unfamiliar (at a personal level) to the speaker, the term tua’oi is the more appropriate term to describe those relationships. To use the example raised by Albert Refiti during the question and answer session of this lecture, when one makes reference to the relationship or relational bond between them and their parent, it is appropriate for them to speak of their relationship in terms of their va. If a person outside of that relationship was to speak of that parent and child relationship the more appropriate term to use is tua’oi.
sii (i.e. the installation of someone to a title who resides outside the family household). This extension of the meaning of tautua to include tautua ‘ai taumalele and osi aiga has qualitatively increased the numbers of those eligible to receive a title.

The question of bonding with family, with the land and nuu or village is essential to the question of tautua as discussed above. The tua’oi that arises here is that between those who seek a right to a title and those who have the right to bestow one. This tua’oi may also be viewed as part of the va fealoaloa’i or relations between matai (chiefs) and taulé’ale’a (untitled men) or between matai and ‘au aiga (immediate family or household).

**Tua’oi between tamaalii and tulafale**

Traditionally a distinction or tua’oi was made between the roles of tamaalii (high chief) and tulafale (orator). Tofa, as suggested earlier, is the term for wisdom. Tofa is also the term for sleep, i.e. the sleep of the high chief. Moe refers to the sleep of an orator. These are sleep informed by God and ancestors. This sleep (i.e. tofa of a chief or moe of an orator) is known in Samoan as moe manatunatu, a sleep dialogue between chiefs or orators with God and/or ancestors. The wisdom gained from this dialogue informs fono deliberations.

In honorific speech tofa and moe is used in association with gaining perspective as with tofa mamao (‘long view’) and moe or faautaga loloto (‘deep view’). The role of the high chief (tofa) is to look ahead and divine the implications in the long term and to intervene on behalf of the long view, mercy and compassion. The role of the orator (moe) is to exercise authority (pule) and to focus on complexity and context.

This distinction between tamaalii and tulafale comes to nothing if in the deliberations of tofa and moe the alii encroaches on the role and function of the tulafale, and the tulafale encroaches on the role and function of the tamaalii. As a result the protocol and conventions which underpin va fealoaloa’i, a relationship founded on recognition of merit and respect for leadership, core to Samoan custom, are undermined. Moreover, the recognition of merit and respect was never meant to be defined definitively by judicial decision. Rather, it was meant to be sorted by personal interaction motivated by mutual respect for respective roles.

**Tua’oi between parents and children**

The tua’oi or boundary between parents and children was in the village setting traditionally defined by social and cultural expectations and the economic and political realities of village life. In this tua’oi parents speak on behalf of their children (i.e. young or untitled children) in matters of importance. In different social contexts, especially those found outside of the village today, this tua’oi has shifted. An illustration of the kind of shifts that have occurred is found in the following story of a young Samoan New Zealand-based woman who in a formal meeting decided to voice her opinion in a way that would have traditionally been in breach of the tua’oi between herself and her grandmother, present at the same meeting. The story goes:

In New Zealand a Samoan man was confined in a facility managed by a Health Care Provider. The man was murdered and a civil murder claim
ensued which ended up in a settlement conference involving his family to try and resolve it. The discussions lasted for several hours and finally got to the point where everyone was talking about atonement. There were three Samoan 'experts' there representing different organizations and they were having an argument as to what the proper cultural protocol was for atonement [i.e. ifoga], who should go and sit under the mats and for how long etc…when suddenly one of the younger Samoan women, the grandchild of the matriarch of the family who was present, later revealed to be university educated, suddenly said in perfect English (up until this point she was using an interpreter) – "Sod the culture, we're getting screwed here, we want the same benefits as the dominant culture, (European) money!!!!" The mediator then said to her, “hey that's great you speak English, we can send the interpreters home”? She agreed, and the discussions then revolved around money and the issues were finally settled.”

In the traditional village setting the matriarch would have been the spokesperson and the young person would not have been able to speak. In this setting the young person was in fact able to speak and speak on the family’s behalf. This illustrates a change in tua’oi between parent and child through a change in context whereby seeking atonement involves more than restoring harmony between relations; it also involved recognising the new circumstances of dispute resolution for Samoans, at least for those living outside of Samoa in places, like New Zealand. Knowing how to deal justly with these contextual shifts in tua’oi created by wider structural forces is part of the challenges that face Samoan jurists today.

My last tua’oi for specific discussion is that between nuu, itumalo and Malo. This provides yet another example of the kinds of tua’oi at play in the contemporary scene.

*Tua’oi between nuu, itumalo and malo*

Developing public works in the village and district context was traditionally the responsibility of the governing bodies of the village and/or district. By and large these have been taken over today by Central Government. The tua’oi between nuu (village councils), itumalo (district bodies) and Malo (Central Government) has evolved with the imperatives of changing economic times and political circumstances.

To illustrate the changes in this tua’oi between nuu, itumalo and Malo, the Prime Minister Tuilaepa Sailele, tells of how in the village of Fasitoouta the intervention of Government proved useful to achieving resolve of a long-standing conflict in the village. The strife caused disharmony for twenty years.

As part of Government policy each village was entitled to have an access road to their plantations constructed at no expense to them. When it came Fasitoouta’s turn for an access road the Prime Minister, who also holds one of the most important titles of Fasitoouta, namely Aiono, intervened on behalf of Central Government and said: “No reconciliation, no access road!” After lengthy negotiations the Fasitoouta village eventually succumbed and reconciled. The reason of course was that it was in their common interest to do so.

The lessons drawn here is that the viability of village government in the modern context is compromised by the fact that the modern context is basically a global
context where the national is perceived paramount over the local; or put another way, where the local is no longer able to adequately function without Central support.

I move now to a brief discussion of the relationship between tua’oi and tulafono.

**Tua’oi and tulafono**

*Tulafono* are based on *tua’oi*. Laws as *tulafono* are not abstract principles, rules or regulations devoid of feeling or emotion. They are principles, rules and regulations governed by recognition of the importance of both the mind and soul to the exercise of law-making. Law-making occurs by way of engaging in a *fono*. *Fono*, as noted earlier, means a formal meeting of village and/or district. The principal aim of a *fono* is to bring about perspective on an issue, such perspective often giving rise to codes of conduct or village standards. Traditionally the notion of *fono* had six dimensions. These dimensions are also the order in which a *fono*, proceeding towards the establishment of *tulafono*, operates. These dimensions are generally described as:

- **Tuvao Fono** (meaning, ‘to step into the forest’; referring to those who break new ground);
- **Lo’u Fono** (metaphorically referring to the ‘bending of a branch’; referring to those who have the right to critique);
- **Lauga Togia** (*lauga* referring to ‘a speech’ or to the act of ‘speaking’ and *togia* meaning to designate according to tradition and custom a right or privilege; *lauga togia* refers specifically to those who have been given the right to make interventions in formal deliberations);
- **Faai’u Fono** (*faai’u* meaning to conclude or end; *faa’iu fono* referring to those who have the right to conclude the meeting or alternatively to rule that the fono revisit the issue through same order of speaking);
- **Faaola Fono** (*faaola* means to let someone off either completely or that the penalty is reduced; *faaola fono* thus refers to those who in serious cases require intervention on behalf of the long view, mercy and compassion - this is done by *tamaalii*);
- **Tulafono** (is the resultant consensus – gained through movement through and/or involvement of above dimensions - culminating in the formation of a rule or law governing behaviour or setting standards).

This breaking down of the notion *tulafono* enables the colour and logic of the concept to be more explicit to students of Samoan custom or law; indeed to students of Samoan jurisprudence.
In my Samoan oral culture knowledge on any subject, philosophical or otherwise was, more often than not, embodied in proverbs or *muagagana*\(^5\). In searching for an understanding of *tulafono* the first and most logical place of call should be an analysis of Samoan proverbs.

The Samoan term for proverbs, *muagagana*, is significant in that it speaks directly to the role of proverbs or proverbial speak in Samoan traditional culture as ‘first principles’: *mua*, meaning ‘first’; and *gagana*, meaning ‘language’; ‘first’ also meaning ‘priority’ and by extension ‘right’. On this basis *muagagana* are arguably the Samoan indigenous basis for ‘right behaviour’; Samoan moral and ethical codes of conduct or standards. *Tulafono* when read alongside *muagagana* in this way can only be interpreted as products, not of and/or from a culture of rigid calculation and unfeeling application, but of a culture that privileges the dignity and sacredness of humans, their weaknesses and strengths, and their right to live in a manner and form, within their customs, rules and laws that do justice to them as living beings, as creations and children of God. In this sense, *tulafono* is arguably more about justice than law.

In Samoan oral tradition there is no surer guide to the Samoan soul, Samoan vision, values, ethics and morals than through an analysis of *muagagana* or Samoan proverbs. Some examples of Samoan proverbs include:

- “*O le tagata ma lona faasinomaga*” (i.e. ‘every man, homo sapiens, is entitled to a designation) – the proverb makes the point that every person is entitled to a designation;

- “*Fili i le tai lē agavaa*” literally *choose the leader by performance in the open seas* – the proverb makes the point that a leader should be selected by performance or merit;

- “*E iloa le matai i le ‘au tautua*” literally *a matai is assessed by the quality of the service given him* – the proverb makes the point that the status of the *matai* is measured by the quality of service and the numbers of those who serve;

- “*E le tu se tamaaiga i luga o se uaniu*” (i.e. a *tamaaiga* does not stand at the top of a coconut tree) - the proverb makes the point that a *tamaaiga*’s eminence is dependent on the love and loyalty of his family, immediate and extended;

- “*O mea a tamaalii o le togisala, o mea a tufanua o le faalumaina*, (i.e. the mark of a chief is to own up about wrongdoing and to make amends consistent with culpability and remorse; the mark of bad breeding is where there is no accounting and making amends for wrongdoing and so contempt is suffered as a consequence) – the point is obvious in the translation;

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\(^5\) Alaga upu (meaning, “the road to knowledge, the road to whatever is through this word” – suggestive of ‘the right path’) is often used interchangeably with the term ‘muagagana’.
• “Taipisia nuu malolo”, (i.e. neither crew nor passengers of a boat are spared salt water in storm tossed seas) – the proverb makes the point that the collective interest/security is the common concern of all belonging to the community and you ignore at your peril; and lastly, but by no means least, the proverb...

• “Pe na o le utu e vaelua’ina” (even a louse can be divided and shared) - the proverb makes the point that even the smallest of things can be divided and shared. This proverb underlines the imperative of the spirit of sharing in a community.

Samoans do not have a body or canon of work yet that spells out a Samoan indigenous philosophy or precepts. What we have are our proverbs or muagagana. These serve as our primary point of reference for developing ‘first principles’ for a Samoan jurisprudence.

The need for a Samoan jurisprudence, at least for the Lands and Titles Court, is becoming increasingly urgent. The chronic backlog of cases to be decided in this Court is a result not only of the fact that just about every case is appealed and a high proportion of these are upheld, but also the time period for final resolution of an appealed case is, more often than not, close to 10 years. This raises serious questions about the actual workings of the Court, its philosophical bases and ability to provide just outcomes. Especially where delay in the determination of appointments to important titles impacts on use and enjoyment of lands and other titles, and as well on the role and function of that title holder on village and district hierarchy.

The Samoa Minister of Justice in discussions with me acknowledged the serious backlog problem and the far-reaching impacts of this. He also owned up that he expressed strong views to the Department of Lands and Titles on the inordinate amount of time that it is taking (i.e. so far 14 years) to get final resolution of one of its current land disputes. This highlights the critical nature of the problem and the need for urgent solutions, in particular solutions capable of encompassing the lessons of history and the indigenous reference.

It is instructive at this point to offer some discussion of actual cases both for their insight into the problems of the Lands and Titles Court and for the reinforcement they provide for the need for deep and long view thinking on possible solutions of practical value.

This leads me to the final section of my talk, what I have called the ‘Practical reference’.

Practical reference

The practical reference suggested in this final section relates to the practical concerns of litigants and the serious impacts that slow resolve of these concerns have.
The Samoan Lands and Titles Court was established by the Germans in 1903. Before 1903 the judicial functions of the Lands and Titles Court were exercised through *pule* and through the process of ‘*pae ma auli*’ (or mediation).

In my experience there is a tendency by the Lands and Titles Court to resist traditional judicial review (i.e. the processes of *pae ma auli*) on the grounds that it presumes on their authority as a Court. However, this Court, more than any other in Samoa, has a duty to assess its processes for achieving justice by way of acknowledging at least the possible value of exploring indigenous dispute resolution or customary law models, such as *pae ma auli*, to its work as an indigenous Court concerned with indigenous claims. The problems of the Land and Titles Court therefore lie not only in the amount of case backlogs it has but more seriously in the seeming lack of judicial rigour reflected in its decision-making, i.e. in its interpretation of Samoan custom in the past and the application of Samoan custom in the present.

I raise four different cases for support on this point. All four cases also provide different scenarios to reflect on in the determination of the scope and nature of the jurisprudential problems currently faced by the Lands and Titles Court. For confidentiality reasons these four cases are kept anonymous. My discussion of these cases will focus on the more practical aspects of the case.

Case 1:
The first case I wish to note involves litigation in the Lands and Titles Court where the Court handed down a decision that suggested that *suli* (heir) and *feagaiga* (heir of a female line recognised by formal ritual as inheritor of the sacred covenant) were different. That is, that *feagaiga* is not *suli*. Here I wish to point out that this is an aberration because *feagaiga* which is core to the Samoan cultural and philosophical reference is premised on the fact that *feagaiga* is an issue of the body. That is, the principle upon which *feagaiga* is founded, i.e. *vaevae manava*, is literally the sharing of a woman’s body to create new life. The logic then follows that if *feagaiga* is founded on *vaevae manava*, and *suli* is founded on birth, then both are founded on one and the same thing.

Case 2:
The second case raises the point about the significance of authentic genealogical record for claiming legitimate rights to title.

In this case a party promoted five different genealogical records as evidence of their claim to a title. That is, in 1907, 1925, 1972, 1978 and 1997 five different genealogies were submitted by the same party in support of their respective claims. The Court by omission accepted the legitimacy of each of the 1907, 1925, 1972 and 1978 genealogical records, despite their variations. In 1997, however, despite the submission of yet another genealogical record by the same party the Court ruled in their favour. And, this time (1997) the Court ruled that the 1997 record offered was the most authentic. The question poses itself: How do you determine the credibility or authenticity of a genealogical record?

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6 This process is usually carried out by *feagaiga/respected village or family elder(s)/person of high status.*
This case highlights an evidential problem or a problem of precedent which has serious implications on the mana of the Court, let alone the claimants, if not resolved.

Case 3:
The third case illustrates the point about the need for solutions that can move beyond the restrictions of rigid legal interpretation and application towards a more flexible application of rule capable of meeting justice and human dignity concerns – concerns often brought about because of the changes in people’s lived realities.

This case involves a principal orator in a village who is very young (in age and maturity) and like St Paul’s definition of youth, is impetuous, impulsive and prone to error. In this case the young orator seeks the Court’s affirmation of his authority (pule) over the title and all that is associated with it. Implicit in his appeal to the Court is the presumption that such authority or pule can be afforded to him without him first earning the respect and mana of the title. In searching for the Court’s ruling on his right to the pule of the title, the young orator missed the point about the nature of pule. Traditionally, the kind of respect and mana implicit in pule could only come about through an active nurturing of the va fealoaloa’i, i.e. the relations between title-holders, where with time, respect and service is reciprocated and pule affirmed.

Where there is a breakdown in the relations between title-holders and the village council, as in this case, the path to peaceful resolve would seem in the first instance to be the adoption of a mediation type pae ma auli process that can embody the principles of va fealoaloa’i in a way that preserves the integrity of all involved.

The mere fact that this young matai sought leave from the Court to determine his pule suggests not only arrogance but ignorance. Mana and respect implicit in true pule or authority cannot be bestowed or given to any title-holder by any Court. By Samoan custom true pule is bestowed or given only to those who earn it. Pule is not inherited automatically. Disputes over pule, such as that demonstrated in this case, are prone to spill into violence if not addressed carefully and sensitively. Interpreting custom too narrowly or too rigidly in these cases can be more counterproductive than productive. Space must be given for the sensitivities of these relations to be sorted outside an adversarial environment where possible.

Case 4:
The final case for reflection furthers the point about the need for flexible legal accommodation in deciding cases that impact on cultural sensitivities, especially where human dignity is concerned.

This final case involves the situation where an elderly chief was beginning to lose his faculties. Traditionally, the elderly chief would designate a successor and retire away from public life so that he and the title do not lose mana. This practice is intended to protect the mana and mystique of the chief and allow him space and time to dialogue with his God without interruption. This is deference provided by Samoan custom and culture to old age.

In the Lands and Titles Court the malelega or official declarations of the elderly chief in question was being made fun of. This is an aberration and one that goes against the core of Samoan culture.
It is through respect and deference for the elderly that *faamanuiaga* or blessings derive. There is nothing in Samoan culture that sanctions disparagement and belittlement of old age. In fact we tempt fate in showing so little respect for our elderly.

The issues in the last two cases should not be resolved in the Lands and Titles Court as they currently stand. They should be mediated through the traditional mediation processes of *pae ma auli*. *Pae ma auli* refers to the act of smoothing out the roughness of ‘stones’ by way of mediating differences to find a suitable solution to a problem or dispute. The issues of the first two cases are easily resolved by the Lands and Titles Court, but only if the Court is willing to seriously address its judicial competencies and standards.

I now provide, before concluding, mention of two possible ways forward.

**Ways forward**

To address some of the problems noted above, Justice Eddie Durie recommended in conversation with me in preparation for this paper, the process of arbitration. Here the parties to a dispute, he suggests, could select a panel of arbitrators in the first instance whereby these arbitrators could apply indigenous principles of dispute resolution or mediation, such as *pae ma auli*, in finding resolve. Where this kind of arbitration fails, i.e. it is unacceptable to one or all of the parties then the matter should then be referred to the Lands and Titles Court.

This seems to me a workable solution for the Samoan Lands and Titles Court and one that recognises the importance of finding context in our rapidly changing *tua’oi*, both in terms of the indigenous reference and in its modern accommodation.

Before moving to my second ‘way forward’ I note a point made by Chief Maori Court Judge Joe Williams, who tells the story about a traditional leader of a Maori community under judicial review. This is an important point to keep in mind when working through the practicalities of implementing jurisprudential ideals.

Joe tells that when this traditional leader was told that he was ineligible to be appointed to a panel of judicial review because he is connected, he responded ‘...but that is Pakeha concept. I should be there! How else can you tell whether or not they are lying?’

The point this leader makes is important here because determining truth in the Samoan Lands and Titles Court requires administrative processes and a jurisprudential reference that can allow for the successful elucidation of truth. This means that the Samoan Lands and Titles Court must become well familiar with the idiosyncrasies of Samoan life, its social, cultural and political imperatives, at the village, district, national and international levels, and know how to balance these. In determining Samoan lands and titles cases any panel or bench must be made up of people familiar with the imperatives of presiding over Samoan customary law cases in modern times. This means people who know and understand the *aga-i-famua*, who
know not only about the history of the village and families and of the idiosyncrasies of village and family honorifics, but also about changing village and district contexts and new points of reference. In effect these are people who can locate the \textit{tua'oi} between what is justiciable and what is not; what should be mediated through \textit{pae ma auli, feagaiga, tofa} and/or the \textit{faaautaga} and what should not.

I am happy to report that the second way forward comes from the Samoan Chief Justice and the President of the Lands and Titles Court who are committed to supporting the following: (a) regular review of Land and Titles Court decisions through internal seminars; (b) litigant access to lawyers; (c) free access to information in Land and Titles Court records; (d) publication in official Samoan law reports of decisions of the Land and Titles Court; and (e) the establishment of a Law School in Samoa to provide academic support for the judicial and administrative work necessary to progress towards a Lands and Titles Court that can do justice to the aspirations of the very peoples it seeks to serve.

\textbf{Conclusion}

This work has been an exercise in \textit{tofa sa’ili}: in searching for wisdom about jurisprudence, especially for the Samoan Lands and Titles Court. The perspective advocated here has not only been from that of a litigant, but perhaps more importantly from that of a Samoan person who loves his culture, lives his culture and wants to see the best of that culture carried on in generations to come. Lands and titles are core to that culture, to the \textit{faaSamoa}, to our \textit{aganuu} and \textit{aga-i-famua}. They are core to a Samoan; to our \textit{faasinomaga}, our designation as Samoans. They are what make us Samoan. Without them we lose our designation as Samoans.

To understand Samoan \textit{tulafono} we must search our Samoan \textit{faasinomaga}; we must search the \textit{tua’oi} of our ancestors and of our children to come; the \textit{tua’oi} between ourselves; between us and our lands; the seas; the skies; the stars – each implicit in and protected by our \textit{tulafono}.

Moving beyond \textit{tua’oi}, challenging \textit{tua’oi}, shifting \textit{tua’oi}, fixing \textit{tua’oi}, are all part and parcel of defining and living human life. Different \textit{tua’oi} or boundaries mark the moving tides of culture and politics embedded in law, practiced in custom and imposed by Courts. The task of the Judge, as of the litigant, and even of the politician, is to constantly ask: what is the purpose of this \textit{tua’oi} and to whom does it serve?

As admitted in the beginning I know very little about jurisprudence, about philosophy, and about law. In preparing for this talk I thought of St Thomas Aquinas and thought about doing what he did in bringing the Greeks into the Christian reference. I thought that perhaps I should do that too. Perhaps I should bring the Western reference into the Samoan indigenous reference. So I did what I usually do when searching for context and meaning and sought the assistance of my friends. In doing so I received a profound message from my dear friend Fr. Paul Ojibway, a Native American Indian Ojibwa Franciscan Friar of Atonement, who gently reminded me that the focus of our search, our \textit{tofa sa’ili}, should not be on any attempt to bring another reference into ours but on an attempt to locate our own, to celebrate it and find how it can integrate with the dignity of others. What he says sums up what I would like to leave with you.
To me he has found the soul of why we are engaging in this exercise, this exercise of *tofa sa’ili*, for a jurisprudence that can do justice to the aims of the most indigenous of our Samoan courts – our Land and Titles Court.

Paul Ojibway challenges us to develop a jurisprudence that is not apologetic for its origins as indigenous; that extends the inhibiting *tua’oi* of our imaginations beyond the constraints of time. He energises and gives perspective to our search. He states:

“From our own intuitions on the subject, the matter of “reference” as a base for “integration” is the key to the whole question. Without a whole lot of philosophical finery I wonder if we need as Indigenous to see the question in a wholly different way – seeing Aristotle and the Greek imagination as an ‘indigenous’ worldview itself that needs the critique much more now than our contemporary “indigenous” efforts as critiqued by the Western philosophical cannon. …I think how we change our frames of “reference” for reasons other than sustaining the integrity to our ancient traditions [and how it] is profoundly important to further the question before we can get to an authentic answer. Can we ultimately “construct a balance” – I don’t think so if we predicate it on the terms of the “other” (Greek tradition, Thomistic systematics, Western jurisprudence). We [indigenous peoples] are in a state of imbalance that has lessons to teach – especially in how we as Indigenous fail in our imagination about the emerging traditions in and of ourselves. If we define ourselves in a post-colonial, post-conquest model of self-understanding we have given up the spiritual/traditional base for an emerging jurisprudence in our own terms that goes beyond competing for western notions of social order and resolution. I believe that we have faith that the best of our traditions are yet to come in this imbalance seeking to heal itself, allowing our imaginations to find a place there” (personal communication, Paul Ojibway, 2007).

This I believe also. Let’s explore and use our indigenous reference as moral and ethical lodestar to heal and shape our imaginations. Neither the Greeks, nor Aquinas, nor Blackstone – useful though they are in terms of broadening our intellectual horizons – can help us in our dialogue with that reference. Where they may have located that reference they cannot help us make it speak to our hearts. That we have to do for ourselves. This is the challenge of Pacific jurisprudence.

Soifua.