

ATTORNEY-GENERAL AND OTHERS v SAIPA'IA (OLOMALU) AND OTHERS

Court of Appeal Apia
The Rt Hon Sir Robin Cooke, President
The Hon Mr Justice Mills
The Hon Mr Justice Keith
14, 15 and 16 July 1982,

CONSTITUTIONAL LAW - Electoral Act - Constitution of Western Samoa - Validity of Electoral Act Sections 16 and 19 under the Constitution.

HELD: The decision of the Supreme Court declaring the provisions of Sections 16 and 19 of the Electoral Act 1963 void pursuant to Articles 2, 15(1) and 15(2) of the Constitution, reversed by the Court of Appeal

LEGISLATION:

- Constitution of Western Samoa; Articles 2, 4, 8, 15, 42, 43, 44, 45, 81, 100, 101, 102, 103, 109, 111 and 114
- Electoral Act 1963; Sections 16 and 19
- Regulations to the Samoa Amendment Act 1957 (N.Z.)
- Samoa Act 1920
- Citizenship Act 1972 s.23(2)
- Western Samoa Legislative Assembly Regulations 1957 (1957/223)
- Constitutions of other newly-independent countries - Cook Islands, Fiji, Papua New Guinea, Kiribati, Solomon Islands, Tuvalu, New Hebrides (Vanuatu) and Nauru.

CASES CITED:

- Minister for Home Affairs v Fisher [1980] A.C. 319
- Ong Ah Chuan v Public Prosecutor [1981] A.C. 648, 669
- Nairn v University of St Andrews [1909] A.C. 147
- Viscountess Rhondda's Claim [1922] 2 A.C. 339
- Commissioner of Inland Revenue v West-Walker [1954] NZLR 191
- Harding v Coburn [1976] 2 NZLR 577, 582
- C & J Clark Ltd v Inland Revenue Commissioners [1973] 2 All E.R. 513
- Ross v Henderson [1979] A.C. 196, 209

Attorney-General (Neroni Slade), C C Aikman,
Y P Ghai for Appellant
A S Epati for first three Respondents
R. Drake for fourth and fifth Respondents

JUDGMENT OF COURT.

The Litigation

These are appeals from the judgment of Chief Justice St John delivered on 5 April 1982 holding that ss.16 and 19 of the Electoral Act 1963 are void pursuant to article 2 of the Constitution, because inconsistent with article 15(1) and (2). On 3 May 1982 the Chief Justice gave the Attorney-General leave to appeal from the whole of his decision, although in the cases of the respondents Saipa'ia Olomalu and Roderick Crichton leave may have been unnecessary. They had each applied to the Supreme Court for declaratory judgments, presumably under article 4, so in those proceedings appeals may have lain as of right under article 81.

Saipa'ia Olomalu had asked for a declaration that s.19 is unconstitutional. In his supporting affidavit he said that he had applied to be entered on the roll 'as an elector to be a candidate in the present election' but had been refused on the ground that his name did not appear in the register of matais and that he did not qualify to be entered in the individual voters' roll. Roderick Crichton had asked among other things for a declaration that both ss.19 and 16 are unconstitutional. In his supporting affidavit he said that his name had been removed from the individual voters' roll because it was alleged that he had taken a matai title. Those two cases may involve questions other than the validity or otherwise of ss.16 and 19, but this Court has not been asked to consider any other questions on the present appeals.

As to the other three respondents, the Registrar of Electors had notified Georgina Cecilia Moore of his intention to delete her name from the individual voters' roll as, being married to a person holding a matai title, she is disqualified from that roll by s.19(2)(b). She contended that s.19(2) is unconstitutional, but Mr P.A.McAlevy, Magistrate, rejected that contention and upheld the Registrar's objection in a decision delivered on 8 January 1982. She appealed to the Supreme Court from that decision.

Leinati Cecilia Netzler and Dorothy Pereira are sisters. Their father, who was part-European, held a matai title from 1958 to 1965, while both daughters were minors. As the taking of the matai title meant that their father was not qualified for the European electoral roll of 30 November 1963, they are

disqualified from that roll by s.19(1)(b)(i). They contended that s.19 was unconstitutional, but Mr McAlevy, following his decision in Mrs Moore's case, rejected that contention and held that they were not entitled to be entered on the individual voters' roll. They likewise appealed from that decision.

The Constitutional Provisions

The Chief Justice dealt with all five cases together in one judgment and it is convenient that this Court should do the same, confining ourselves as he did to the purely constitutional issues. It is also convenient to set out here the main provisions requiring consideration.

The preamble to the Constitution includes four statements of relevance:

WHEREAS the Leaders of Western Samoa have declared that Western Samoan should be an Independent State based on Christian principles and Samoan custom and tradition;

AND WHEREAS the Constitutional Convention, representing the people of Western Samoa, has resolved to frame a constitution for the Independent State of Western Samoa;

WHEREIN the state should exercise its powers and authority through the chosen representatives of the people;

WHEREIN should be secured to all the people their fundamental rights;

From Part I of the Constitution, headed The Independent State of Western Samoa and its Supreme Law, article 2 should be quoted:

2. (1) This Constitution shall be the supreme law of Western Samoa.

(2) Any existing law and any law passed after the date of coming into force of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

Part II is headed Fundamental Rights. There are articles providing for the right to life; the right to personal liberty; freedom from inhuman treatment; freedom from forced labour; the right to a fair trial; rights concerning criminal law; freedom of religion; rights concerning religious instruction; rights regarding freedom of speech, assembly, association, movement and residence (these are all covered by article 13); rights regarding property; and freedom from discriminatory legislation. The last, article 15, is the one relied on by the Respondents and should be quoted in full.

Article 15

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

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

(3) Nothing in this Article shall -

(a) prevent the prescription of qualifications for 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 restrictions 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.

Part III deals with the Head of State, Part IV with the Executive, and Part V with Parliament. In Part V the following articles require particular consideration:

Parliament

42. There shall be a Parliament of Western Samoa, which shall consist of the Head of State and the Legislative Assembly.

Power to make laws

43. Subject to the provision of this Constitution, Parliament may make laws for the whole or any part of Western Samoa and laws having effect outside as well as within Western Samoa.

Members of the Legislative Assembly

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

Qualifications for membership

45. (1) Any person shall be qualified to be elected as a Member of Parliament who -
- (a) is a citizen of Western Samoa; and
 - (b) is not disqualified under the provisions of this Constitution or of any Act.
- (2) If any person other than a person qualified under the provisions of Clause (1) is elected as a Member of Parliament, the election of that person shall be void.

Article 44 is shown above as amended by the Constitutional Amendment Act 1963. The effect of the amendment was to replace the original 45 territorial constituencies by the 41 now provided for, represented in the manner specified in clause (1)(a) and (aa).

Parts VI, VII and VIII deal respectively with the Judiciary, the Public Service and Finance. Part IX, Land and Titles, contains the only direct references in the Constitution to the matai system. We set out articles 100 to 103:

Matai titles

100. A matai title shall be held in accordance with Samoan custom and usage and with the law relating to Samoan custom and usage.

Land in Western Samoa

101. (1) All land in Western Samoa is customary land, freehold land or public land.

(2) Customary land means land held from Western 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 Western Samoa for an estate in fee simple.

(4) Public land means land vested in Western Samoa being land that is free from customary title and from any estate in fee simple.

No alienation of customary land

102. 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 authorize -

- (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.

Land and Titles Court

103. 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.

Part X deals with Emergency Powers. Part XI, General and Miscellaneous, includes provision for amendment of the Constitution:

109. (1) Any of the provisions of this Constitution may be amended or repealed by Act, and new provisions may be inserted in this Constitution by Act, if a bill for any such purpose is supported at its third reading by the votes of not less than two-thirds of the total number of Members of Parliament (including vacancies) and if not fewer than ninety days elapse between the second and third readings of that bill:

Provided that no bill amending, repealing or adding to the provisions of Article 102 or the provisions of this proviso shall be submitted to the Head of State for assent until it has been submitted to a poll of the electors on the rolls for the territorial constituencies established under the provision of Article 44 and unless it has been supported by two-thirds of the valid votes cast in such a poll.

(2) A certificate under the hand of the Speaker that a bill has been passed under the provisions of Clause (1) shall be conclusive and shall not be questioned in any court.

Another article in Part XI is concerned with interpretation, defining various terms. It is not necessary to reproduce any of the definitions here. In Part XII, Transitional, the opening provisions of article 114 should be noted:

114. Subject to the provisions of this Constitution -

(a) the existing law shall, until repealed by Act, continue in force on and after Independence Day;

Finally from the Constitution, some of the provisions of the Second Schedule, which relates to the Members of Parliament to be elected by persons whose names appear on the individual voters' roll, should be reproduced:

1. Within [three years] of Independence Day and at intervals of not less than five and not more than six years thereafter, the Head of State shall appoint the Registrar of Electors as an Electoral Commissioner to determine the number of Members of Parliament to be elected by the persons whose names appear on the individual voters' roll.

2. The number of Members of Parliament to be elected by the persons whose names appear on the individual voters' roll shall bear, as nearly as possible, the same relationship to the number of persons deemed to be

represented by those Members as the number of Members of Parliament to be elected by territorial constituencies bears to the number of persons deemed to be represented by those Members.

3. In making a determination under the provisions of Article 1 and 2, the Electoral Commissioner shall give effect to the following provisions:

- (a) the number of persons deemed to be represented by the Members of Parliament to be elected by the persons whose names appear on the individual voters' roll shall be calculated by multiplying by three the number of persons whose names appear on the individual voters' roll as at 31 December in the year preceding the year of the appointment of the Electoral Commissioner.
- (b) The Electoral Commissioner shall -
 - (i) ascertain the official estimate of the population of Western Samoa (prepared under the authority of Cabinet) as at 31 December aforesaid; and
 - (ii) estimate the number of persons included in the aforesaid estimate of population who are not citizens of Western Samoa.
- (c) The number of persons deemed to be represented by Members of Parliament to be elected by territorial constituencies shall be calculated by deducting from the aforesaid estimate of population -
 - (i) the number of persons deemed to be represented by the Members to be elected by the persons whose names appear on the individual voters' roll; and
 - (ii) the number of persons who are not citizens of Western Samoa, estimated as aforesaid.

In article 1 of that schedule, 'three years' was substituted for 'one year' by a constitutional amendment in 1963. The effect of the schedule is that the persons on the individual voters' roll currently elect two members to the Legislative Assembly.

The Constitution was adopted by a Constitutional Convention, to whose proceedings we will refer later. At a plebiscite held under the supervision of a United Nations Commissioner on 9 May 1961, on the basis of universal adult suffrage, two questions were submitted to the voters:

1. Do you agree with the Constitution adopted by the Constitutional Convention on 28 October 1960?

2. Do you agree that on 1 January 1962 Western Samoa should become an independent state on the bases of that Constitution?

Both questions were answered affirmatively by large majorities; 31,426 or 83 percent of the total vote cast answering Yes to the first question and 29,882 or 79 percent answering Yes to the second.

The Challenged Provisions

The Electoral Act 1963 was enacted by Parliament pursuant to articles 42,43 and 44(3) of the Constitution. The two provisions in it that are challenged concerned first the qualifications of the electors for the territorial constituencies, and second the qualifications of those on the individual voters' roll. They are as follows:

"16 Qualification of electors - (1) Subject to the provisions of the Constitution and of this Act every person shall be qualified to be registered as 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 Matais established and kept pursuant to the [Samoan] Land and Titles Protection Ordinance 1934; and

[(bb) He is of or over the age of 21 years; and]

(c) He is not disqualified as a candidate for election by virtue of any of the provisions of section 5 of this Act; and

(2) Any person whose name appears on the individual voters' roll shall be qualified to be registered as an elector of a constituency .

In subs (1)(b) the word "Samoan" has been inserted pursuant to s.3(f) of the Reprint of Statutes Act 1972.

Para.(bb) was inserted by S.2 of the Electoral Amendment Act 1964.

"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 name entered on the individual voters' roll if he is a citizen of Western Samoa of or over the age of 21 years and

not disqualified as a candidate for election by virtue of any of the provisions of Section 5 of this Act, and if -

- (a) His name was entered on the European electoral roll on the 30th day of November 1963; or
 - (b) He -
 - (i) Is the child of a father whose name was entered on, or who if alive on the 30th day of November 1963 would have qualified to have his name 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 acquired his citizenship of Western Samoa by naturalisation [or by registration]; or
 - (d) He acquired his citizenship of Western Samoa by birth and is the child of a father who is not a citizen of Western Samoa or of a father who if alive at the date of the commencement of the Citizenship of Western Samoa Ordinance 1959 would not have automatically qualified to be a citizen of Western Samoa by virtue of any provision of that Ordinance.
- (2) Notwithstanding the provisions of subsection (1) of this section no person shall be qualified to have his name entered on the individual voters' roll if he -
- (a) Holds a matai title or is exercising any customary right or privilege in regard to customary land; or
 - (b) Is married to a person holding a matai title or exercising any customary right or privilege in regard to customary land.

In subs (1)(c) the words "or by registration" were added by s.23(2) of the Citizenship Act 1972.

In a broad way, although there are many differences in detail, these provisions of the 1963 Act correspond to New Zealand provisions in force before the end of Trusteeship. The immediate forerunners of article 44 of the Constitution and ss.16 and 19 of the Electoral Act were the Samoa Amendment Act 1957 of the New Zealand Parliament and the Western Samoa Legislative Assembly Regulations 1957 (1957/223). Sections 21, 22 and 23 of the New Zealand Act provided for the Legislative Assembly of Western Samoa. It consisted of one Samoan elected member for each of 41

to 45 Samoan constituencies; and five European elected members, to be elected by those persons whose names appeared on the European electoral roll "compiled in accordance with a system of universal adult suffrage". The words just quoted did not apply to the Samoan electoral rolls, and there can be no doubt that the New Zealand Act and Regulations embodied the matai system.

The Matai System

For an account of the system and of the background to the present question it is sufficient to take some extracts from the Official Records of the United Nations General Assembly, document A/4840, the Report of the Plebiscite Commissioner for Western Samoa, dated 11 August 1961. The first of these extracts, para.11, refers to a Constitutional Convention in 1954:

11. Questions relating to suffrage were discussed in detail by the Constitutional Convention. According to Samoan custom, the traditional spokesmen for the community were the matai, or family heads, who were elected by their respective families (aiga) and were removable by them. Samoans did not agree to accept universal suffrage, since they regarded the matai system as an essential feature of their way of life. They insisted that it was in full accord with democratic principles. In these circumstances, the Constitutional Convention recommended restricted suffrage. It was proposed to apply universal suffrage to the European community only, while in the Samoan constituencies the matai would have the right to vote and to be nominated as candidates for election. The Government of New Zealand accepted these recommendations of the Constitutional Convention as reflecting the wishes of the overwhelming majority of the Samoan people. It proposed, at the same time, that possible future adjustments should be facilitated by legal provisions permitting the extension of the franchise as and when this became acceptable to the people. This proposal, as well as the proposal that elections by secret ballot should be made compulsory when there was more than one nomination in a constituency, was agreed to in principle by the Samoan representatives.

The next three extracts related to a United Nations Visiting Commission:

25. The 1959 Visiting Mission had given considerable attention to the various views which were expressed to it by Samoan leaders and by deputations of the general public on the question of the electoral system existing in the Territory. In general, at its meetings with the members of the Legislative Assembly and in public gatherings throughout the Territory, the Mission met with little opposition to the existing matai suffrage, so that the Commission for these

groups expressed determination to see this system of suffrage retained. On the other hand, the Mission saw that there was already a limited amount of support, even within the Legislative Assembly, for the adoption of universal suffrage, with the matai alone being eligible as candidates. Various organizations of persons of European status expressed to the Mission their willingness, and even their desire, to be associated with the rest of the population in a common roll based on universal suffrage while this view was also expressed by a number of educated Samoans. None of these persons, as the Mission stated in its report, were prepared, however, to claim that there was then wide support for this view among the broad mass of Samoans.

26. The Mission reported that it was often claimed that the system of Matai suffrage might be regarded as more representative than would appear at first sight. First there was approximately one matai for every seven adult Samoans, or for eighteen Samoans of all ages. Secondly the greater number of matai titles were conferred by the families concerned in a basically democratic way, so that the system might in some respects be regarded as one of election at two stages.

27. Basing itself on the recommendations of this visiting Mission, the Trusteeship Council at this twenty-sixth session reiterated its hopes that universal suffrage would be accepted by the people of Western Samoa and that the Administering Authority would continue to impress upon the Samoan people the desirability of introducing that system. It also expressed the hope that universal adult suffrage for elections in the Territory would be adopted at an early date. It considered that the racial basis of the present electoral arrangements should be eliminated and commended to the working Committee the suggestions of the 1959 Visiting Mission with regard to the electoral system. The Council also hoped that it would soon be possible to extend the normal practice of secret ballot for legislative elections. It shared the view of the Administering Authority that the plebiscite could play a positive role in educating the people regarding the advantages of that system.

After dealing in detail with the plebiscite, the report states in a section headed Conclusions:

140. In the brief period during which I had the pleasure of meeting again many of the Samoan people, their dignity, courteous behaviour and generous hospitality won my profound admiration and gratitude. The participation of the large number of both titled and untitled men in the plebiscite as well as the enthusiasm with which women flocked to the polls

were to me most welcome signs and a hopeful augury for the future. The conduct of all the people during the plebiscite showed a sense of responsibility and respect for order which deserves the highest praise. I am confident that the exercise of universal adult suffrage for the first time by the people of the Territory will be the beginning of an evolution which may, in due time, lead to its adoption in the political life of Western Samoa.

The Chief Justice's Decision

The judgment under appeal was naturally supported in this Court by counsel for the respondents, Mr Epati and Mrs Drake, except only some passages which they described as obiter dicta. To some extent they expanded on the Chief Justice's reasons. For instance, Mr Epati suggested as an alternative argument that the framers of the Constitution might deliberately have left the franchise question in some obscurity. But the Chief Justice's own statement of his reasons is as clear a presentation of the point of view which he upheld as one could expect to find. Accordingly we will now traverse it quite fully, before going on to state the conclusions that we have reached after considering not only his judgment but also the arguments that we had the advantage of hearing from counsel.

After quoting the provisions in question, St John C.J. began his reasoning by emphasising the undoubted truth that the function of the Court, if the relevant part of the Constitution is clearly expressed, is to give effect to those clear words. As he said, it is irrelevant if the decision is inconsistent with Samoan custom or culture, except insofar as they may have been preserved by the Constitution. He pointed out that the fourteenth amendment to the United States Constitution did not apply to the Federal legislature, qualifications for which were dealt with separately, but had been held to apply to State voting rights. He accepted that a Constitution cannot be interpreted in vacuo and that its interpretation can be affected by the historical background and conditions, but - and again we fully agree - the prime matter is the words used by the framers. He cited the judgment of the Privy Council, delivered by Lord Wilberforce, in Minister of Home Affairs v Fisher [1980] A.C. 319, as an unsurpassed exposition of the approach to fundamental rights provisions. In that judgment Lord Wilberforce spoke of a constitutional instrument such as the Bermuda one as 'sui generis, calling for principles of interpretation of its own ... Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a

recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedom with a statement of which the Constitution commences'.

Lord Wilberforce went on to say that this must mean approaching the question of what is meant by 'child' with an open mind. The decision of the Privy Council was that in that constitutional context the word was not restricted to legitimate children. Once more we would wholeheartedly join with the Chief Justice in endeavouring to approach the present constitutional question in the spirit indicated by Lord Wilberforce. It has to be noted, however, that the Bermuda case was not in any way concerned with the relation between fundamental rights and the suffrage, so the actual decision in that case is not of direct help.

The Chief Justice then pointed out that it had to be considered whether there was 'equality before the law' or 'equal protection' within the meaning of article 15(1), or discrimination on any of the bases set out in article 15(2). This is of course correct. He said that discrimination between matais and untitled people was based on Family status, and that being a matai or a matai's wife related to status within a family. We agree that the system of matai suffrage and an individual voters' roll does involve discrimination on such grounds; the question is, as the Chief Justice recognised, whether it is discrimination in a field to which article 15 extends.

He continued by citing decisions of the United States Supreme Court, mentioning specifically three in 1964, 1978 and 1979 respectively, which dealt with the phrase 'the equal protection of the laws' in the fourteenth amendment (1868). He said that these decisions showed a rigorous application of that provision to electoral qualification in the State sphere. We will return to this matter.

As to the Western Samoan Constitution, without deciding that there was a doubt as to the application of article 15 to article 44, the Chief Justice referred to the debates in the 1960 Constitutional Convention. He mentioned a forecast by Professor Davidson (a constitutional adviser) that article 44 would gradually eliminate individual voters by absorption into the Samoan cultural system; but he said that the draft article to which Professor Davidson was referring was significantly different from that finally adopted, as the words 'subject to the provisions of this Constitution' were added to article 44(3) later. That, however, we are forced to find to have been a mistaken assumption on the Chief Justice's part, as will appear.

He thought that the inclusion of those words clearly indicated that the framers intended article 15, inter alia, to apply to article 44. This we understand to be a main point, perhaps even the most crucial point, in his judgment.

He added that if the framers had intended that only matais should vote in the territorial constituencies, they would have said so. In that connection we must mention that the argument put to us by the Attorney-General was not that matai suffrage was entrenched by the Constitution, but that it was permitted. He maintained that the Constitution was deliberately flexible as to the franchise in the territorial constituencies, thus allowing Parliament to widen the basis as and when that was found desirable. In our view this consideration does meet that particular point in the Chief Justice's reasoning.

Another verbal point in that reasoning was that article 15 includes certain express exemptions (as to qualifications for the service of Western Samoa etc. and the protection or advancement of women etc.) For our part, however, we are unable to find those express exemptions of any real help in deciding whether article 15 was ever envisaged as extending to the entirely different subject of the parliamentary franchise.

Then St John C.J. made what we see as a more forceful point. He did so by asking rhetorical questions. If article 44(3) gives the legislature the right to determine who shall vote without regard to article 15, could it disqualify the adherents of a particular religion or political persuasion? Faced with those questions in this Court, counsel for the Appellant had to acknowledge that in theory the answer must be Yes. It is a theoretical risk that would have to be weighed if there were such a finely-balanced ambiguity in the words of the Constitution that the Court virtually had a choice of interpretations. On the other hand it has to be seen in perspective. There are many political systems, including those of the United Kingdom and New Zealand, where on orthodox principles similar spectres can be conjured up. And the same can probably be said even of many countries with elaborate written constitutions.

The Chief Justice next referred to article 15(4), treating it as an 'admission' by the framers of the Constitution that some existing law offends article 15(2) and posing the question whether the requirement that the State shall direct its policy towards progressive removal can be monitored by the Court. His first answer to that question was that, as the 1963 Act was new law, article 15(4) could not apply. In the view we take it becomes unnecessary, as will be seen, to decide that question, but we are attracted to the Chief Justice's first answer to it.

As an alternative answer, he invoked article 4, which gives any person the right to apply to the Supreme Court to enforce his constitutional right, and said 'It is nigh on twenty years since Independence. It would make a mockery of the phrase "progressive removal" to hold that a delay of twenty years or more was justifiably the intention of the framers".'

The Chief Justice continued with observations centring on the proposition - not accepted by the Attorney-General before us - that unity as a nation is an idea which was absent in Samoan political theory. He held that a national government framework had been imposed on Samoan culture and (in effect) that matai suffrage was incompatible with that framework. Rejecting the submission that 'reasonable' should be read in as a qualification in article 15, he found that ss.16 and 19 of the 1963 Act were both void.

The Chief Justice concluded by saying that his decision did not invalidate any election conducted pursuant to the Act in the past. The decision was to speak only as to the future: unless it was reversed on appeal, or the Constitution amended in the meantime, the next election of a member or members of Parliament could not take place on the basis of the Act as it stands. He added the opinion, obiter, that nothing short of universal suffrage for all citizens, male and female, who had attained the age of 21 years will suffice to satisfy the constitutional strictures as they now stand.

Comparisons with other Constitutions

The provisions in the Western Samoan Constitution for territorial constituencies and an individual voters' roll are unique. They are explained by the particular history and social structure of Western Samoa. In considering their relationship to the fundamental rights provisions of the Constitution we do not think that major importance can safely be attached to comparisons with other Constitutions.

In particular there is no close analogy with the United States. It is true that in recent times - indeed since the Western Samoan Constitution was adopted - the United States Supreme Court has developed its jurisprudence regarding the fourteenth amendment by treating the equality provisions as applicable to State voting rights. But the very fact that the Federal legislature is dealt with separately in the United States Constitution, and that the electoral system for it is not affected by the fourteenth amendment, may be said by contrast to leave room for applying that amendment to the State legislatures. And, be that as it may, the recent Supreme Court decisions throw little light, in our opinion, on the interpretation of a Constitution which is not federal and which provides for a single national Legislative Assembly elected on a dual basis. It is noteworthy, too, that in

Ong Ah Chuan v Public Prosecutor [1981] A.C. 648, 669, the Privy Council considered that decisions of the United States Supreme Court on that country's Bill of Rights (an expression including the fourteenth amendment) are of little help in construing provisions of the Constitution of Singapore or other modern Commonwealth constitutions which follow broadly the Westminster model.

On the other hand we think that some help may be gained from considering the Universal Declaration of Human Rights and the Constitutions of other countries in the region that have achieved independence since the second world war. The Universal Declaration, adopted and proclaimed by the General Assembly of the United Nations in 1948, includes various declarations for equality and against discrimination, notably the opening and the fifth paragraphs of the preamble and provisions in articles 7, 10, 16 and 23. It is important to note, however, that the franchise is dealt with separately in article 21:

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- (2) Everyone has the right of equal access to public service in his country.
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

While in a broad way the Western Samoan Constitution embodies in Part II provisions for fundamental rights corresponding to many of those in the Universal Declaration, it is striking that there is nothing equivalent to article 21. And it is especially striking in the light of a fact of history which, in our view, no principle requires this Court to ignore. It was a United Nations Visiting Mission in 1959 which pointed out that consideration had not yet been given to including some provisions concerning human rights in the Western Samoan Constitution. The Mission recommended that the Constitution should contain provisions on the lines of the Universal Declaration and the constitutions of other States. (Official Records of United Nations, T/1449, para.79.) Against that background we can only assume that when the draftsmen came to prepare Part II of the Constitution, mindful of the clear position always taken about the suffrage, they deliberately omitted a provision for universal suffrage.

By contrast Constitutions of other newly-independent countries, in addition to providing for fundamental rights, including rights to equality and against discrimination, expressly provide for universal suffrage as well. Examples are the Cook Islands (Constitution Amendment (No.9) Act 1980-81, articles 27(2) and 64); Fiji (Constitution, articles 15 and 40, scheduled to Fiji Independence Order, U.K. Statutory Instruments 1970, p.6630); Papua New Guinea (Constitution 1975, articles 50 and 55); Kiribati (Constitution 1979, articles 15 and 66, Kiribati Independence Order 1979, U.K.S.I. 1979, No 719); Solomon Islands (Constitution 1978, articles 15 and 55, S.I. 1978/783); Tuvalu (Constitution 1975, articles 15 and 54, scheduled to Tuvalu Independence Order, S.I. 1978, p.3781); New Hebrides (Vanuatu) (Constitution 1980, articles 4(2) and 5(1)(k); and a little less clearly, Nauru (Constitution 1968, articles 3 and 29).

Those are all Constitutions later in date than that of Western Samoa. Obviously their relevance is the less on that account. But we do not think that they can be totally ignored for present purposes. Like the Universal Declaration itself, they imply that the parliamentary suffrage is naturally regarded by constitution-makers as a separate and special subject: at least not necessarily covered by general provisions regarding fundamental rights. In that way they confirm that it would be wrong for this Court to approach article 15 with any assumption that such an article is likely to be meant to extend to the suffrage.

The Meaning of the Constitution

We have already indicated our agreement that the Constitution should be interpreted in the spirit counselled by Lord Wilberforce in Fisher's case. He speaks of a constitutional instrument such as this as sui generis; in relation to human rights of 'a generous interpretation avoiding what has been called the austerity of tabulated legalism'; of respect for traditions and usages which have given meaning to the language; and of an approach with an open mind. This involves, we think, still giving primary attention to the words used, but being on guard against any tendency to interpret them in a mechanical or pedantic way. In this spirit we turn to the provisions of the Constitution now relevant.

The first point that seems to us of importance in the Constitution itself is that the preamble speaks of an Independent State based on Christian principles and Samoan custom and tradition; and while going on to speak of 'the chosen representatives' of the people, it does not specify universal suffrage. In the next recital fundamental rights are mentioned: the implication again seems to be that this is, or may be, a different subject from the manner in which representatives are to be chosen.

Then we note that the fundamental rights defined in Part II do not include any reference to voting, unlike article 21 of the Universal Declaration. In the Constitution a natural place to have included the right to vote, had it been intended, would have been article 13. That article is concerned with the rights of all citizens of Western Samoa, whereas the other rights are stated as belonging to all persons. By article 13(1), subject to the later clauses of the article, all citizens shall have the right -

- (a) to freedom of speech and expression; and
- (b) to assemble peaceably and without arms; and
- (c) to form associations or unions; and
- (d) to move freely throughout Western Samoa and to reside in any part thereof.

Of the various rights covered by Part II those in article 13 are the ones of particular political value. It is significant that electoral rights are not specified there or anywhere else in Part II.

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

Against that background, if the Constitutional Convention had intended to introduce and entrench universal suffrage, we have no doubt that the provision for it would have been made in plain and specific terms. It would never have been left merely to general language such as the language of article 15.

For the foregoing reasons we are convinced that article 15 does not have the scope contended for by the Respondents and accepted in the judgment under appeal. In short we are satisfied that the article was not intended to and does not relate to voting at

general elections. When the Constitution is considered as a whole, we do not think that the question is left in any true obscurity. Parliamentary electoral qualifications are a special subject, outside the purview of article 15 and not dealt with at all in Part II of the Constitution. Such provisions as the Constitution makes on the subject are to be found in Part V.

The Pattern of the Electoral Provisions in the Constitution

Our conclusion that article 15 does not extend to the franchise is reinforced by some of the provisions in Part V themselves. First, as already mentioned there is significance in the very fact that this part of the Constitution provided for the twofold system of 45 (now 41) territorial constituencies and an individual voters' roll, the persons on which are to elect a number of members determined as laid down in the Second Schedule. Even without looking beyond the Constitution itself and the provisions which it replaced, the reasonable inference is that the territorial constituencies were to correspond approximately with the Samoan constituencies provided for during Trusteeship and that a main reason for maintaining the dual system was to enable continuance of the matai franchise in those constituencies if Parliament saw fit.

Secondly, article 44 (1)(a) and (aa) as they are now, and article 44(1)(a) as it initially was, differ materially in their wording from article 44(1)(b). The latter subclause speaks of members elected by those persons whose names appear on the individual voters' roll. The former subclauses speak of members elected for each of certain territorial constituencies. This is an indication that there may be differences in the modes of election. It permits, but does not require, a system whereby only registered matais may be on the roll and allowed to vote in the territorial constituencies, but the members represent all persons in their constituencies.

Thirdly, article 45 deals with qualifications for election as a Member of Parliament. It enables a disqualification to be imposed, not only under the Constitution itself, but also under any Act; and we note that an effect of s.5(1) and (2) of the Electoral Act 1963 appears to be to disqualify as candidates persons who are not registered as electors. However, these appeals do not call for an interpretation of s.5. What is of some importance for the purpose of these appeals is that in article 45 the Constitution does deal with qualifications to be elected. This brings out, by contrast, that qualifications to be electors are not prescribed by the Constitution.

We have drawn attention to the importance attached in the judgment under appeal to the words 'Subject to the provisions of this Constitution' at the beginning of article 44(3), which goes on to provide among other things that the qualifications of

electors shall be prescribed by law. Unless the words quoted prevent Parliament from enacting a law embodying matai suffrage in the territorial constituencies, the clause gives Parliament that power. St John C.J. held that the words quoted did have that restrictive effect, reading them as he did in association with article 15 as he interpreted it.

We are compelled to disagree with his judgment on those points. The qualification 'subject to' is a standard way of making clear which provision is to govern in the event of conflict. It throws no light, however, on whether there would in truth be a conflict without it: see Harding v Coburn [1976] 2 N.Z.L.R. 577, 582 citing C & J Clark Ltd v Inland Revenue Commissioners [1973] 2 All E.R. 513. The conclusion in Harding v Coburn was approved by the Privy Council in Ross v Henderson [1979] A.C. 196, 209.

We have already given our reasons for holding that article 15 does not govern parliamentary electoral rights. Accordingly we see no conflict between it and article 44(3). We accept that the most probable explanation of the insertion of 'Subject to the provisions of this Constitution' in article 44(3) is that those words were intended to make crystal clear that (unless the Constitution is amended in this regard) the persons whose names appear on the individual voters' roll are entitled to elect a number of members determined under the Second Schedule.

Some later provisions of the Constitution also lend support to the conclusion already stated. Article 109 entrenches in a unique way the provisions of article 102 prohibiting alienation of customary land. To alter those provisions the ordinary process of constitutional amendment is not enough. As well there has to be the support of two thirds of the votes at a poll of the electors on the territorial rolls, not the individual voters' roll. Part IX as a whole shows the clear link between customary land and the matai system. The inference is that the framers of the Constitution saw a similar link between the matai system and the territorial rolls.

In the next section of this judgment we refer to the proceedings of the Constitutional Convention in 1960. What happened in the Convention strongly supports, we think, the conclusion that we have already stated. There are several important features of the proceedings, but the most important is that a proposal for universal suffrage was actually put forward and rejected. Our conclusion that the Constitution does not guarantee universal suffrage has been arrived at without the aid of reference to the Convention's proceedings; but we think it right to refer to those proceedings so as to make sure that the words of the Constitution as adopted by the Convention do convey what was truly intended.

The Constitutional Convention

Counsel for the Government drew the attention of the Court to a range of extrinsic material. We have already used some of it (the reports of the United Nations Visiting Mission in 1959 and of the Plebiscite Commissioner in 1961) as authoritative accounts of the history, antecedents and surrounding circumstances. The Universal Declaration of Human Rights, which may be said to be in the same category, was referred to in argument on both sides.

In addition we were asked by the Appellant to consider the proceedings of the Convention which adopted the Constitution. We received this material provisionally, reserving any ruling about admissibility. We do not need to attempt any complete statement of the circumstances and reasons which may justify resort to the proceedings of a constitutional convention as an aid to constitutional interpretation. As already mentioned, in this case we propose to use the Convention proceedings only to confirm the interpretation already reached without regard to them.

Moreover, in this case there can be no doubt about what the Convention understood and meant. There may well be cases where a record of convention debates will throw no clear light on the intention of the participants regarding the precise point subsequently calling for judicial interpretation. Just as very often that would probably be the result of consulting Hansard in a search for help with the meaning of an ordinary Act of Parliament. But in the present case the record of the Convention gives particularly cogent aid. To shut our eyes to it would be artificial. We are certainly not suggesting, however, that it would be right to allow convention debates to control or alter the meaning of clear words in a constitution as determined with due regard to their context and antecedents.

The first relevant passage from the Convention proceedings relates to article 15(2). Professor Davidson, the Constitutional adviser to the Western Samoan Government, read the introductory phrase to that clause and continued:

There are several points in the Constitution in which it is made legal for preference to be given to certain people to enable posts in the government to be filled by those who ought to fill them in accordance with Samoan custom. One of the most important of these is Article 18(2)(b). This subclause states that the Legislative Assembly may determine the qualifications required for those who may be candidates for Head of State. Another instance occurs in Article 45(1)(b), which deals with the qualifications of Members of Parliament. This subclause makes it possible for non-titled people to be disqualified as Members of the Legislative Assembly and for that right to be restricted to matais. In other words this clause seeks to ensure that everyone has

equal rights before the ordinary law of the country, but does not impose equality in regard to political rights. (Territory of Western Samoa, Constitutional Convention Debates 1960, pp 221-222).

It is true that Professor Davidson did not specifically mention the right to vote. But he was not purporting to give a complete list of those political rights which he said were untouched by the prohibition of discrimination. And the right to vote is clearly a political right. Neither the text of the draft nor constitutional development to that stage made any relevant distinction between, on the one hand, the right to be Head of State and the right to be elected and, on the other hand, the right to vote in the territorial (earlier Samoan) constituencies. The only difference that could be pointed to in the wording of the three provisions - article 18(1)(b) about the Head of State, article 45(1) about members, and article 44(3) about suffrage - is that the last, unlike the others, is introduced by the phrase 'Subject to the provisions of this Constitution'. We have already dealt with that phrase. Here it is enough to note that on Professor Davidson's explanation 'the provisions of the Constitution' bearing on article 44 could not include article 15(2); for in his view that provision did not extend to political rights. In other words, the Convention proceeded on the advice and basis that the equality guarantee of article 15 did not prevent discrimination in important political rights.

The second relevant passage from the debates relates to the interpretation of article 44(3). The Chief Justice rejected an argument for the Government based on a forecast by Professor Davidson about the effect of article 44. According to Professor Davidson, the Working Committee which prepared the draft constitution felt that everyone ought eventually to be represented by one group of members elected by the territorial constituencies. At that time only the matai voted in those constituencies. So provision had to be made for the individual voters' roll, to cater for those who had had the right to vote for many years - an obvious reference to European voters (Convention Debates, p.482). One reason for the Chief Justice's rejection of the argument based on that forecast was that he thought that the wording of article 44(3) being considered at the session at which the statement was made did not include the introductory phrase subjecting it to the provisions of the Constitution. We have had the benefit of a much fuller presentation of the Convention documentation than was available to the Chief Justice. As a result we are satisfied that the text as finally adopted, including the introductory phrase, was in fact before the Convention at the relevant time. (Document CCP/9, entitled Amendments to Part V - Parliament, sets out amendments to all three clauses of draft article 44, including the introductory phrase to clause (3). The beginning of the debate on the article is recorded in the Convention Debates at

p.481. Professor Davidson explained all three amendments, quoting the specific words of those proposed for clauses (1) and (2) and saying also that 'it was necessary to add certain words' to clause (3). The added words must have included 'Subject to the provisions of this Constitution ...' So far as the forecast itself is concerned, it is of course completely consistent with the position that the matai voting system would continue under the provisions of the Constitution - unless and until altered by Parliament.

The Third - and most important - relevant passage from the Convention debates directly concerned the suffrage. It also arose during the debate on article 44. The draft provided for two groups of members: 45 to be elected for the territorial constituencies and those elected by the individual voters. As noted, Professor Davidson's explanation made it quite clear that it was only the matais who voted for the first category (Convention Debates, p.482). A proposal was made for amendment, and for related legislation, which would have changed all that. There would have been, under the Constitution, just one group of members; and, under the proposed legislation, they would have been holders of matai titles but elected on the basis of universal adult suffrage (p.485). The Convention, following a lengthy debate, rejected the proposed amendment and legislation (p.500).

That is to say, the Constitutional Convention expressly considered and rejected the very position which the respondents seek as a matter of constitutional interpretation in this litigation - the abolition of the matai suffrage and its replacement by universal suffrage. Indeed the Convention in one sense was not being asked to go as far in amending the Constitution as we are being asked to go in interpreting it.

Under the proposed amendment the Constitution would not itself have changed the suffrage; the legislature would still have had to take that step by statute.

Before leaving the Convention debates, we should note one possible restraint on their use which was suggested to us for the Respondents in argument. The weight to be given should, it was said, decline with the passage of time. This submission was based on the concept that the scope and significance of the Constitution - intended to be the basic law of a State over a long, unpredictable and changing period - may alter. While that may be so as a general proposition, we do not consider that, if it is ever right, it can apply to such a short period in the life of a people and a State as 20 years and to such a fundamental question as that which we are considering.

Conclusion

It follows that the appeals must be allowed. We hold unanimously that ss.16 and 19 of the Electoral Act were validly enacted under the Constitution. Accordingly the declaration made in the Supreme Court that they are void as contrary to the Constitution is vacated, as are any orders made there in these cases on that footing. It was not mentioned in argument that any other issues will remain to be disposed of in these cases if the appeals were allowed; but as a precaution all five cases are remitted to the Supreme Court for further hearing, if necessary.

In view of the public importance of the issue and in accordance with an intimation given to us by the Attorney-General at the hearing, there will be an order that the Appellant pay the costs of the Respondents in such sum as may be agreed or settled by the Registrar.

It may be as well to add that the present judgment does not imply any view on the part of the Court about whether or not continuing to use the matai system as the main basis for elections to the Legislative Assembly is in the long-term interests of Western Samoa. We recognise the argument that in an indirect way the matai system is democratic. At the same time, as the Attorney-General accepted in argument, there may be room for doubt whether all those adult citizens who are not qualified for the individual voters' roll do have a really effective voice in the territorial constituencies - especially if they do not live in villages. These, however, are questions, not of law, but of social and political policy: questions which, on our interpretation of the Constitution, are to be decided by Parliament, not by the Courts.