

IN THE SUPREME COURT OF SAMOA
HELD AT MULINUU

IN THE MATTER: Articles 15, 47, 52, 63 and 64 of the
Constitution of the Independent State of
Samoa

A N D:
IN THE MATTER: Article 4 of the Constitution; the
Declaratory Judgements Act 1988, and
Government

A N D:
IN THE MATTER: the Electoral Act 2019

BETWEEN: FA'ATUATUA I LE ATUA SAMOA UA
TASI (F.A.S.T. PARTY)

First Applicant

A N D: HON FIAME NAOMI MATAAFA; HON
LAAULI LEUATEA POLATAIVAO
FOSI; HON OLO FITI AFOA; HON
LEATINUU WAYNE SOOALO; HON
TUALA TEVAGA IOSEFO
PONIFASIO, HARRY JEFFREY
SCHUSTER; HON
TOEOLESULUSULU
CEDRIC POSE SALESA SCHUSTER,

Second Applicants

A N D: LUATUA SEMI EPATI Matai Samoa o
Saleimoa

Third Applicant

A N D: AFAMASAGA TOLEAFOA
FA'MATALA AND SAINA TOMI SETU

Fourth Applicants

A N D: THE ATTORNEY GENERAL appointed
under Article 41 of the Constitution and
named on behalf of the Head of State and of

the executive government of the
Independent State of
Samoa

First Respondent

A N D: **ELECTORAL COMMISSIONER**
appointed under the Electoral Commission
Act 2019

Second Respondent

A N D: **HRPP** a political party

Third Respondent

Coram: Chief Justice Satiu Simativa Perese
Justice Vui Clarence Nelson
Justice Leilani Tuala-Warren

Counsel: B. Keith, B. Heather-Latu & G. Latu & for the Applicants
M. Heron QC, P. Rishworth QC & S. Ainuu for the First & Second Respondents
M. Leung-Wai & M. Alai for the Third Respondent
H. Wallwork-Lamb for Samoa Law Society (as Intervener)

Hearing: 14 May 2021

Judgment: 17 May 2021

JUDGMENT OF THE COURT

Introduction

[1] In sixty years of independent and sovereign governance, Samoa faces a Constitutional test which is novel in this country. Following the holding of a General Election two parties have garnered between them all the Parliamentary seats. The number of seats that each party is equal; neither party can claim a majority.

[2] The Head of State Tuimaleali'ifano Va'aletoa Sualauvi II (previously 'His Highness The Head of State' but substituted with 'Head of State' by the Head of State Amendment Act 2019)("HOS") in an address delivered on 4 May 2021 called for a fresh General Election to overcome the numerical impasse between the parties. He provided his reasons to the nation. The members of this Court make plain that we do not consider that the HOS has acted in anything other than what he believes to be the best outcome for his beloved Samoa. There is no basis for any suggestion that the HOS acted with malevolence.

[3] Nothing in this Judgment should be construed as being critical of the HOS.

[4] Rather, this judgment is concerned with the correctness of the advice upon which the HOS relied, which advice we say at the outset was inadequate.

[5] We also note that it is not unusual for very important Constitutional issues to find their way to the court and a decision. This court has an obligation to maintain the rule of law and protect the principles and rules of the Constitution. In jurisdictions with written Constitutions, the courts are the acknowledged guardians of the Constitution. We take these obligations seriously and will do what needs to be done to satisfy them. We acknowledge the work of the lawyers involved in this matter, at short notice and in difficult circumstances. However, we say that after hearing all the careful submissions we consider that this case at its core is straight forward and is capable of being resolved promptly.

[6] We begin the reasons for our decision by setting out the factual background, then the pleadings and a detailed analysis of the arguments made both in writing and orally at the hearing. We follow that with a discussion of the issues as we see them.

Background

[7] On 3 March 2021, the HOS dissolved the 16th Parliament of Samoa in accordance with Article 63(3) of the Constitution of the Independent State of Samoa ("the Constitution") in anticipation of the 2021 General Election. The HOS issued a Writ of Election on 12 March 2021 in accordance with section 52 of the Electoral Act 2019.

[8] Accordingly, a General Election was held on 9 April 2021. The official results of that election, declared on 16 April 2021, were as follows:

- (i) The Human Rights Protection Party (“HRPP”) held 25 seats;
- (ii) Faatuatua i le Atua Samoa ua Tasi (“FAST”) held 24 seats; and
- (iii) 2 seats were independently held.

[9] Subsequently, both independent candidates made it known publicly and to the HOS that they supported and would join FAST on their assumption of public office. That brought the total number of seats that FAST could rely on to 26.

[10] On 20 April 2021, the HOS, acting under article 44(1A) of the Constitution, declared the next highest ranked female candidate to be elected to meet the 10% quota of female representation required in the Legislative Assembly in accordance with the Constitution. That female candidate was a member of HRPP, and increased the total number of seats HRPP could rely on to 26.

[11] Therefore, after 20 April 2021 both HRPP and FAST had 26 candidates each.

[12] Without notice on 4 May 2021 the HOS addressed the nation. He recorded that he had been “observing with particular care, interest and concern the events that followed” the 9 April 2021 General Election. In his speech he advised that:

- (a) There was a deadlock between HRPP and FAST, given that each would hold 26 seats of the 52 seat Parliament;
- (b) Electoral petitions were time consuming;
- (c) The operation of Government would remain uncertain and by the end of June, the Government budget would run out and that a failure to table and pass a new Budget for 2021/2022 would have “overreaching effects on the everyday functions of Government, including its ability to respond to the COVID-19 Pandemic and sustain its current responses.”
- (d) A Parliament needed to be in place by June 2021 to pass the necessary Budget;
- (e) He was assured that, as HOS, he was capable of calling fresh elections in circumstances where there is no clear majority capable of forming a Government and where it was in the public interest to do so; and
- (f) He had advised the leaders of HRPP and FAST regarding his decision to call for a second General Election.

[13] The HOS also announced that he had issued a Writ, dated 4 May 2021, directing the Electoral Commissioner (“Second Respondent”) to prepare for another General Election on 21 May 2021 and revoking the earlier Writs in relation to the 9 April 2021 General Election.

[14] The Applicants brought these proceedings three days later on 7 May 2021. The HRPP was accepted as Third Respondent to the proceedings following acceptance of its joinder application on 7 May 2021.

[15] The Samoa Law Society was granted leave to appear as Intervener despite objections by all Respondents. This is a more limited role than that of an *amicus curiae*. The Court relied on Rule 206 of the Supreme Court (Civil Procedure) Rules 1980, and more generally on the Court’s inherent jurisdiction in the exercise of its discretion. The Samoa Law Society did not make any submissions.

The Proceedings

The Applicant

[16] By Amended Notice of Motion for Relief dated 7 May 2021 under Articles 52, 63 and 64 of the Constitution, the Applicants seek the following Orders;

- (a) Declaring that there has been, and could not be, any lawful dissolution of the presently elected Legislative Assembly in accordance with article 63 of the Constitution of the Independent State of Samoa;
- (b) Declaring that the purported Writ of Election given under the hand of the Head of State on 4 May 2021 is unconstitutional under article 64 and contrary to the founding Constitutional principle that the State exercises its powers through the chosen representatives of the people and is therefore void;
- (c) Declaring that any Notice of such Writ of election issued by the second respondent, is unlawful, unconstitutional and therefore void;
- (d) Declaring that the purported contents of the Writ:
 - (i) the appointment of an Election Day on 21 May 2021;
 - (ii) appointing the day for the issue of the Public Notice of Writ being 4 May 2021;
 - (iii) appointing the last day for the Withdrawal of nominations being Friday 7 May at 12noon;

- (iv) appointing a Pre-polling day of Wednesday 19 May 2021;
 - (v) appointing a Polling day being Friday 21 May 2021; and
 - (vi) appointing the latest day for the return of a writ on Friday 4 June 2021 unlawful, unconstitutional and void ab initio and are individually and collectively made contrary to the Constitution, and without lawful authority or under any law and are therefore unlawful and void;
- (e) Declaring the Warrants of Election issued on 12 March 2021 and 16 April 2021 to be valid and made lawfully;
 - (f) Declaring that under Article 52, the presently elected Assembly is to be convened by the 45th day after the General Election held on 9 April 2021, being 24 May 2021 ;
 - (g) Declaring that it is only through meeting of the Assembly and the passage of a reasonable period, including the resolution of any disputes as to the election and appointment of any members, that it can be lawfully determined whether no person has the confidence of the majority of the Assembly under Article 63(2)-(3);
 - (h) Such further orders that the Court deems necessary or just in the interests of justice;
 - (i) The costs of these proceedings; and
 - (j) Declaring that the Writ of Election and the taking of any actions in furtherance of that Writ under the Act, is a breach of the Applicants' freedom from discrimination and such Writ should be struck down as being in breach of Article 15 of the Constitution:

[17] Affidavits in support were filed by Hon Fiame Naomi Mataafa, Hon Laaulialemalietoa Leuatea Polataivao Fosi Schmidt, Hon Leatinuu Wayne Sooalo, Hon Afoa Fiti Vaai, Hon Faualo Harry Jeffrey Schuster, Hon Toeolesulusulu Cedric Pose Salesa Schuster, Afamasaga Toleafoa Fa'amatala, Saina Tomi Setu and Luatua Semi Epati.

[18] In essence the Applicants seek these Orders upon the following general grounds;

- (a) The Writ of Election sought to be implemented by the Second Respondent is not authorised by Articles 63 and 64 of the Constitution and fails to satisfy the provisions of section 52.
- (b) Furthermore as there has been no meeting to date of the presently elected Assembly in accordance with Article 52, there has [not] been and could not be any valid dissolution of the presently elected Assembly under Article 63. Article 64 does not authorise the issue of a second writ consequent on the prior dissolution of 3 March 2021.

- (c) The Applicants submit the purported writ and consequent actions are unconstitutional as inconsistent with the founding principle of the Independent State of Samoa that the State exercises its powers through the chosen representatives of the people;

[19] The applicant developed its case through 4 primary points:

- a. The Constitution prescribes and defines the powers of the Head of State;
- b. There were no Constitutional powers that the Head of State could rely on to call for a further General Election;
- c. The grounds for the dissolution of Parliament and/or calling of fresh elections was not made out;
- d. The first respondent had changed her position and was now advancing a narrower explanation of the decision taken by the Head of State, and that such change signals that the Head of State's decision was not made on the broader grounds set out in the proclamation.

[20] The applicant argued:

- a. Art. 64 did not apply to the call for a fresh election because Art. 64 is consequent on a dissolution of the Legislative Assembly, however, there has been no dissolution of the Legislative Assembly following the April 2021 General Election.
- b. Art 63 could not and cannot be invoked because the office of the Prime Minister is not vacant, as required for the operation of this Article, but, and moreover, the dissolution is predicated on the lapsing of a reasonable period – before the Head of State dissolves the Legislative Assembly.
- c. The Constitution itself prescribes the judicial and parliamentary process to follow the election.
- d. The 4 May 2021 writ discriminated against those who wish to be nominated for the 21 May 2021 election and this is contrary to the fundamental rights in Art 15 of the Constitution.
- e. A rejection of the submission that reserve powers are not justiciable, and that the remedies sought cannot be issued.

The Response by the First and Second Respondents

[21] The First and Second Respondents pleaded that;

- a. The 16th Parliament of Samoa was lawfully dissolved leading to the issue of a Writ of Election which election was duly held on 9th April 2021;
- b. The Writ of Election issued by the Head of State on 4th May 2021 was consistent with Article 64 of the Constitution as it produced an election within the time frame set by that Article. It contravened no founding Constitutional principle; rather, it promoted an election for the people's representatives pending which there is a caretaker Government;
- c. The Notice of Writ of Election issued by the Second Respondent was properly issued after his receiving the Writ issued by the Head of State under section 52 of the Electoral Act 2019;
- d. The contents of the Writ of Election are in accordance with section 52 of the Electoral Act 2019 that expressly stipulates the statutory requirements to be in the Writ, therefore the contents of the Writ of Election dated 4th May 2021 are lawful and valid;
- e. The Warrants of Election issued on 12th March 2021 and 16th April 2021 have been duly revoked by the Writ for General Election dated 4th May 2021;
- f. Article 52 of the Constitution will operate according to its terms upon the completion of the election on 21 May 2021, the associated counting of ballots and the declaration of the successful candidates made by the Head of State under section 84 of the Electoral Act 2019; and
- g. It is not the case that it is only through a meeting of the Assembly and the passage of a reasonable period of time that it can be determined that no person has the confidence of the majority of the Assembly.

[22] The First Respondent made the following submissions, which we summarise as follows:

- a. the actions taken by the HOS were authorised under Articles 63 and 64 of the Constitution and rested on several key factors:
 - i. The 26-26 deadlock between HRPP and FAST appeared irreconcilable with the need for a Parliamentary majority to form a Government and neither party would

have been able to establish a Government by majority had the HOS convened the 17th Legislative Assembly of Samoa;

- ii. The HOS, as the father and protector of Samoa, needed to act to protect the interests of the people (including economic stability) in circumstances where the General Election results had plainly frustrated the forming of a Government; and
 - iii. Calling for a second General Election was the only practical timely solution to the deadlock and would ensure certainty and the passing of a 2021/2022 Budget to prevent economic hardship (particularly given the ongoing COVID-19 pandemic).
- b. The HOS's lawful authority for the Writ dated 4 May lies in the dissolution of the Assembly that is agreed to have occurred on 3 March 2021 and which led to an election producing no member likely to have the confidence of the Assembly. The HOS has not purported to dissolve any Assembly by the issue of the Writ. There has been only the dissolution of 3 March.
 - c. There is within Articles 63 and s 64 an available power that is responsive to the Constitutional requirement that there be a Prime Minister with the confidence of the Assembly. The HOS has been presented with evidence that clearly shows there is a stalemate with each of the two parties advising that they have 26 seats. The HOS could reasonably conclude that the outcome of the Assembly meeting will be that a further election is required. The possibility of a Writ for a second election consequent upon the same dissolution that produced the first (stalemated) election is within Article 63 construed in light of Article 64.
 - d. The 7 day provision in s52 of the Act does not render invalid a writ delivered outside the period. In that sense it is directory and not mandatory. A similar point had arisen in New Zealand in *Simpson v Attorney-General* [1955] NZR 271 (CA) where a writ was in 1946 issued 17 days after the 7 day period prescribed in New Zealand's then Electoral Act 1927. The Court of Appeal observed that the plaintiff did not appear to take any point about that (he had other points), but dealt with it nonetheless. The Court observed that the summoning of Parliament and the calling for appropriate elections was a prerogative power, and that the Act's requirement to issue a writ not later than 7 days after a dissolution "does not purport to impose any limitations, restrictions or conditions upon the exercise of the prerogative".¹ Further, observed the Court, it could not have been the

¹ At p 290 line 38.

intention of the legislature that, if some calamity or even illness, or, as is doubtless the position here, some mistake ... resulted in the Governor-General's not issuing his Warrant within 7 days after the expiry of a parliament, that should affect the prerogative right to summon parliament as occasion might require after the expiration of 7 days".²

- e. The occasions on which the 7 day period cannot be observed because of circumstances such as the present will be rare and very few in number. But when judged necessary, the legal power is there in articles 63 and 64 to issue a Writ for a fresh election – and that is what occurred here for the stated reasons that the first election had not produced a candidate who could garner the confidence of the Assembly.
- f. Samoa is entitled, and the Courts to recognise that it is entitled, that there will be unique expressions of this in the Samoan context. Traditions and usages are not static but may change. For example, the provisions about appointment of a Prime Minister in article 33 reflect the fact that at the Constitution's inception there was no party system and no way in which it could be said that the outcome of elections *necessarily* had a bearing on whether an extant Prime Minister would continue to hold the confidence of the Assembly in the new session. Sections 52 and 33 were designed to reckon with that: a requirement in the former that a new Assembly's first session commence within 45 days of an election, coupled with the termination of a caretaker Prime Minister's appointment within 7 days if the Prime Minister had failed to resign – requiring each new Assembly to decide its appointment of the member with the confidence to hold the office of Prime Minister. The rise of party politics has meant that these judgments are now possible to make after election returns. The existence of ss 64 and 33 do not in their own terms preclude such a judgment being made earlier than the first meeting of the Assembly – as will be suggested later in these submissions – such that an HOS in his protective role might call for fresh elections where it appears to him on evidence that the elected members will not produce a nominee for appointment and fresh elections are in any event inevitable.³

² At 280 line 53 to 281 line 5.

³ For this explanation of sections 45 and 33 see James Davidson, *Samoa mo Samoa: the emergence of the independent state of Western Samoa*, Melbourne, Oxford, 1967, pp 374-5.

Response by the Third Respondent

[23] A response from the Third Respondent is dated 11 May 2021.

[24] The Third Respondent opposes the orders sought by the Applicants in their Amended Notice of Motion for Relief under Articles 52, 63 and 4 of the Constitution of the Independent State of Samoa upon the following grounds:

- a. The Writ of Election issued by the Head of State dated 4th May 2021 was done in accordance with the Constitution and the Reserve Powers of the Head of State and is therefore a lawful exercise of the powers of the Head of State;
- b. The exercise by the Head of State of his powers relating to the calling of elections are non-justiciable;
- c. Any Notice issued by the Second Respondent pursuant to or in support of the Writ of Election dated 4th May 2021 would be a lawful exercise of the functions and powers of the Second Respondent;
- d. The Interim Declarations being sought by the Applicants are remedies that cannot be issued against the First and Second Respondents; and
- e. The Interim Declarations being sought by the Applicants would prejudice the interests of the Third Respondent.

[25] The Third Respondent submits that the Head of State has the power under the Constitution and common law to call for fresh elections. The Head of State dissolved the Legislative Assembly on 3rd March 2021 to make way for the General Elections of 9th April 2021. The dissolution was made pursuant to Article 64 which requires for a General Election to take place within 3 months after dissolution.

[26] After 3rd March 2021, the Legislative Assembly has not convened up to now. The Head of State therefore cannot be said to have recently dissolved the Legislative Assembly when he called for fresh elections, since the Legislative Assembly has not convened following its dissolution on 3rd March 2021. In other words, the Legislative Assembly has been in dissolution since 3rd March 2021.

[27] The English common law applies in Samoa, "in so far as they are not excluded by any other law in force in Samoa" according to Article 111 of the Constitution where "law" is defined.

[28] It therefore follows in its submission that Samoa's Head of State would have all the powers and privileges applicable to the Crown in England. Such powers are known as:

- a. prerogative powers pertaining specifically to the Crown; and
- b. reserve powers for Governor Generals in countries that are part of the Commonwealth.

[29] They submit that the Head of State may also have additional prerogative powers by virtue of the common law, where these are not inconsistent with the Constitution or other domestic law. This includes a power to call a second General Election to resolve a political impasse.

[30] The Constitution specifically sets out some powers that have their origin in prerogative powers, to be exercised by the Head of State. However, the Constitution was brought into effect on the background of common law, and it was intended that other prerogative powers could continue by virtue of that common law, to the extent that they are not inconsistent with the Constitution.

[31] Samoa's Head of State would have all the powers and privileges applicable to the Crown in England, to the extent that these are not inconsistent with the Constitution. This includes a general power to call an election when a government has failed to form.

[32] A stalemate with the political parties cannot be rectified because of Samoa's strict anti-hopping legislation. ¹¹ Unlike other countries like New Zealand where they have several political parties that can come together to form a Government to overcome a stalemate.

[33] Having a hung Parliament means no Speaker can be appointed since Article 49(1A) and (1B) states that a Speaker must be nominated by "the party that wins majority of all the seats in the Legislative Assembly after a General Election" or "parties in Government". In addition, a Prime Minister can only be appointed who commands the confidence of a majority of Parliament. Article 32(2)(a), cannot be determined in a stalemate.

[34] The Third Respondent submits the present unprecedented situation in Samoa is an example of where such a power may be needed, and whilst the justiciability of the royal prerogative is likely in the

context of recent authorities⁴, it is submitted that justiciability of any direct exercise of the Head of State's powers should be limited to exceptional circumstances and treated on a case-by-case basis.

THE ISSUES FOR THE COURT.

[35] The main issues which the Court must determine are broadly framed as follows:

- 1 What is the source of the Head of State's power to call for a further General Election?
- 2 What is the source of the Head of State's power to void or otherwise set aside or disregard the outcome of the first General Election held on 9 April 2021?

[36] These issues were made plain to the parties at the first mention of the matter on Friday 7 May 2021.

[37] We have had the benefit of focused and careful submissions from learned Counsel of very senior standing in Samoa and New Zealand, and we express our thanks for the high quality of their submissions under difficult circumstances, and we are grateful for their prompt efforts to assist this court with the decision we must make.

The parties' arguments:

[38] We crystallise the parties' arguments as follows.

The Applicants

[39] The Applicants' main argument is that the Head of States powers are confined to and defined by the terms of the Supreme law of Samoa – the Constitution. They say the Constitution does not expressly or impliedly empower the Head of State to call for a second General Election, as he purported to do by Proclamation dated 4 May 2021 and by the issuing of writs pursuant to the Electoral Act 2019 on the same day.

⁴ Council of Civil Service Unions v Minister for the Civil Service [1985] A.c. 374; [1984] 3 W.L.R. 1174; [1984] 3 All E.R. 935; Bobb & Anor v. Manning (Trinidad and Tobago) [2006] UKPC 22 (25 April 2006) (esp paras [12] and [141]); and Qarase v Bainimarama [2009] FJCA 67; [2009] 3 614 (9 April 2009) (see esp [731 - [86] of the Court of Appeal decision).

The First and Second Respondents' submission

[40] The first and second The First and Second Respondents submit the Head of States powers are to be found in the Constitution. Specifically, they say the Head of State dissolved the Legislative Assembly in accordance with the terms of Art. 63(3) on the 3rd March 2021. That following the holding of the General Election on 9 April 2021 and subsequent events there is an intractable stalemate; no party has a majority. Accordingly, the Head of State may, in his sole discretion, be able to call for a fresh General Election within three months of the date of the dissolution on 3 March, pursuant to Art. 64 of the Constitution. Finally, the Head of State may call such a further election by issuing a writ under s.52 of the Electoral Act 2019.

[41] The First and Second Respondents also say that whilst the Court may consider whether there is a power to call a further General Election, that if such a power exists, then its use is a matter which is not justiciable. This means that the Court cannot review the use of the power, if it exists. This bifurcation was discussed at some length with Mr Rishworth in respect of the operation of s.52 Electoral Act. We do not understand Mr Rishworth to argue a different Constitutional approach with respect to Arts. 63 and 64. That is to say, we understand the First and Second Respondents to submit that the Constitutional issue before this court is a limited inquiry to simply determine where there is a right to call for a further General Election; the use of the power is not a justiciable issue.

[42] It is not necessary for this court to determine whether the exercise of a discretionary power arising under the Constitution is reviewable by this court. We simply acknowledge that it is not for the purposes of the submission made on behalf of the Head of State. The law in Samoa as to the reviewability of the exercise of Constitutional discretions is a matter for another case and day. We consider that at present the state of the law in this area is not settled in jurisdictions from whom we might normally draw assistance. But the authorities are clear that whether a power exists under the Constitution is justiciable; responsibly the First and Second Respondents accept that.

The Third Respondent

[43] The Third Respondent argued the power to call a fresh election arises from the exercise of the royal prerogative which the Head of State derives from the Queen of England. This argument was refined to be that the types of powers the Queen of England has which are known as prerogative powers, should

be impliedly attributed to the Head of State because English common law continues to apply in Samoa unless inconsistent with domestic law by virtue of Arts. 111 and 114 of the Constitution. The Head of State is the titular head of the Government of Samoa; he is appointed as *O le Ao o le Malo* Art.16; acts on the advice of responsible ministers or except as otherwise provided in the Constitution, Art. 26; and is a member of the Parliament of Samoa, Art. 42.

DISCUSSION

[44] We begin with a contextual overview of the legal framework within which this decision needs to be made.

The Constitution

[45] The supreme law of Samoa provides in its preamble:

IN THE HOLY NAME OF GOD, THE ALMIGHTY, THE EVER LOVING WHEREAS sovereignty over the Universe belongs to the Omnipresent God alone, and the authority to be exercised by the people of Samoa within the limits prescribed by God's commandments is a sacred heritage

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

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

WHEREIN the impartial administration of justice should be fully maintained

AND WHEREIN the integrity of Samoa, its independence, and all its rights should be safeguarded

NOW THEREFORE, we the people of Samoa in our Constitutional Convention, this 28th day of October 1960, do hereby adopt, enact and give to ourselves this Constitution.

[46] In the context of this matter, some of the statements are more relevant than others; but they are all to some degree relevant because they provide an insight into Samoa and its people, their faith, culture, and values.

[47] Part I of the Constitution is headed the Independent State of Samoa and its Supreme Law, and, relevantly, provides as follows:

Art. 1 Name and description - (1) The Independent State of Samoa (hereinafter referred to as Samoa) shall be free and sovereign.

Art 2 The Supreme Law - (1) This Constitution shall be the supreme law of 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.

[48] Part III of the Constitution provides for the appointment and Constitutional powers of the Head of State. The main provisions which appear relevant to the scope of the role of the Head of State appear to be:

16. O le Ao o le Malo - There shall be a Head of State of Samoa to be known as O le Ao o le Malo.

18. Election of Head of State - (1) The Head of State shall be appointed by the Legislative Assembly acting on the recommendation of the party or parties in Government. (2)... (3) The validity of the appointment of the Head of State shall not be contested in any Court. (4) Within 60 days before expiry of the term of appointment of the Head of State or as soon as practicable when there is a vacancy in the office of Head of State, the party or parties in Government shall submit to the Speaker a written Notice recommending the name of only 1 person to be appointed as Head of State.

19. Term of office of Head of State - (1) Subject to the provisions of Article 21, the Head of State shall hold office for a term of 5 years from the date on which he or she assumes the functions of his or her office:

21. Resignation and removal from office - (1) The Head of State may resign his or her office by writing under his or her hand addressed to the Prime Minister, who shall forthwith advise the Speaker of the Legislative Assembly of that resignation.

(2) The Head of State may be removed from office by the Legislative Assembly on the ground of misbehaviour or of infirmity of body or mind.

22. Salary of Head of State - The salary of the Head of State shall be determined by Act and shall be charged on the Treasury Fund, and that salary shall not be diminished during the period of office of the Head of State, unless as part of a general reduction of salaries applied proportionately to all persons whose salaries are determined by Act.

26. Head of State to act on advice - (1) Except as otherwise provided in this Constitution, the Head of State in the performance of his or her functions shall act on the advice of Cabinet, the Prime Minister or the appropriate Minister, as the case may be.

(2) If Cabinet, the Prime Minister or an appropriate Minister tenders advice to the Head of State as to the performance of any function of the Head of State and, if the Head of State does not, within 7 days after the date on which the tendering of that advice comes to the notice of the Secretary to the Head of State, accept that advice or take some other action in relation thereto which the Head of State is entitled to take under the provisions of this Constitution or of any Act, the Head of State shall be deemed to have accepted that advice; and an instrument under the hand of the Secretary to Cabinet, acting on the instruction of the Prime Minister, to that effect shall operate as the performance of the function concerned in accordance with that advice.

28. Oath of office - The Head of State and each member of the Council of Deputies shall, before assuming the functions of his or her office, take and subscribe before the Chief Justice an oath in the form set out in the Third Schedule.

[49] Part IV of the Constitution establishes the Executive and the Head of State's role:

31. Executive power - (1) The executive power of Samoa shall vest in the Head of State and shall be exercised by him or her under the provisions of this Constitution.

(2) Nothing in clause (1) shall prevent Parliament from conferring by Act functions on authorities other than the Head of State.

[50] Part V of the Constitution contains important provisions concerning the authority of Parliament:

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

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

[51] There are also express powers relating to issues of membership of Parliament, and how they are to be resolved.

47. Decisions on questions as to membership - All questions that may arise as to the right of any person to be or to remain a Member of Parliament shall be referred to and determined by the Supreme Court.

48. Filling vacancies - Whenever the seat of a Member of Parliament becomes vacant under the provisions of clause (2) of Article 46, the Speaker shall, by writing under his or her hand, report that vacancy to the Head of State, and the vacancy shall be filled by election in the manner provided by law.

[52] The Constitution provides that the Legislative Assembly is to meet at a time and place appointed by the Head of State, and the Assembly is to meet not later than 45 days after the holding of a General Election.

52. Meetings of the Legislative Assembly - The Legislative Assembly shall meet at such times and at such places as the Head of State appoints from time to time in that behalf by notice published in the Samoa Gazette and recorded in the *Savali*:

PROVIDED THAT the Assembly shall meet not later than 45 days after the holding of a General Election and at least once in every year thereafter, so that a period of 12 months shall not

intervene between the last sitting of the Assembly in one session and the first sitting thereof in the next session.

[53] This provision is silent as to the question of composition of the Legislative Assembly; it simply provides for the assembly to meet no later than 45 days after the election. We consider it also relevant that any issue concerning whom might act as the speaker for the meeting is resolved in Art. 55 which provides:

55. Presiding over Legislative Assembly - The Speaker, or in his or her absence the Deputy Speaker, shall preside over sittings of the Legislative Assembly. In the absence from any sitting of both the Speaker and the Deputy Speaker, the Members of Parliament present shall choose one of their number (not being a Minister) to preside over that sitting.

[54] Art.55 may provide an answer, at least in principle, to the conundrum of how parties might select a speaker if no party has a majority; where a speaker is absent (read in a speaker cannot be elected), then the Constitution proposes that those present at a sitting may choose one from among them.

[55] There may be something in the different language used in the two articles (Arts.52 and 55). Art.52 refers to a “meeting” of the assembly, whereas Art 55 refers to a “sitting” of the Assembly. However, we do not see it as material to resolve the difference. It may be possible to draw an inference that if the Constitution expressly empowers members to select a speaker in a formal setting, such as a sitting, it would by analogy not be inconsistent to permit the exercise of that type of power in a less formal occasion such as a meeting of the assembly, required by Art. 52. In other words, it would not be inconsistent with the Constitution that a person who would act in the place of a speaker, be chosen from among those present at a meeting of the Assembly; that selection would for all intents and purposes be the selection of a majority of the members present.

[56] The First and Second Respondents rely on the interrelationship between Articles 63 and 64, and we set those out below.

The meaning of the Constitution

[57] The Court is assisted in its work by the guidance of the Court of Appeal in *Attorney General v Saipaia Olomalu*,⁵ Their Honours held:

“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 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.”

[58] As in *Olomalu*, we begin our discussion of the meaning of the Constitution and in particular Articles 63 and 64 with an acknowledgment that the preamble of the Samoan Constitution speaks of Christian principles and Samoan custom and tradition. We note the, respectfully, submission made by Mr Herron that in this court’s consideration of the meaning of the Constitution that regard may be properly given to Samoan culture. Much in the same way as the principles of *Tikanga* are relevant in New Zealand. We also note the Constitution speaks of the resolve to frame a Constitution for the Independent state of Samoa and that the State should exercise its powers and authority through the chosen representatives of the people.

The meaning of Articles 63 and 64

[59] The First and Second Respondents rely on Articles 63 and 64, and on s.52 of the Electoral Act 2019 as the source of the Head of States power to call a fresh General Election as he did on 4 May 2021. It is an argument that proceeds on the basis that there is no specific and express power in the Constitution but that one can be implied by the operation of these three provisions.

[60] Art.63 sets out the framework for prorogation and dissolution of the Legislative Assembly.

63. Prorogation and dissolution of Legislative Assembly - (1) The Head of State may at any time, by notice published in the Samoa Gazette, prorogue the Legislative Assembly.

(2) If, at any time, the office of Prime Minister is vacant, the Head of State shall, by notice published in the Samoa Gazette, dissolve the Legislative Assembly as soon as the Head of State is satisfied, acting in his or her discretion, that a reasonable period has elapsed since that office was

⁵ *Attorney General v Saipaia Olomalu* [1980-1993] WSLR 41.

last vacated and that there is no Member of Parliament likely to command the confidence of a majority of the Members.

(3) The Head of State may at any time, by notice published in the Samoa Gazette, dissolve the Legislative Assembly, if the Head of State is advised by the Prime Minister to do so, but shall not be obliged to act in this respect in accordance with the advice of the Prime Minister unless the Head of State is satisfied, acting in his or her discretion, that, in tendering that advice, the Prime Minister commands the confidence of a majority of the Members of Parliament.

(4) The Head of State shall dissolve the Legislative Assembly at the expiry of 5 years from the date of the last preceding General Election, if it has not been sooner dissolved.

64. General elections - There shall be a General Election of the Legislative Assembly at such time within 3 months after every dissolution of the Assembly as the Head of State appoints by notice in the Samoa Gazette.

[61] Art. 63 is the only reference in the Constitution to the role of the Head of State in the proroguing and/or dissolution of the Legislative Assembly.

[62] The First and Second Respondents say the call for the 21 May 2021 General Election relies on the Head of State's exercise of the power to dissolve contained in Art. 63(3), as exercised with respect to the first General Election.

[63] The argument can be unpacked as follows. First it is acknowledged that a General Election was called under the Constitutional authority of Art 63(3) with respect to the first General Election. A writ was issued, in reliance on the Constitutional authority under Art. 63(3), and a General Election was held in April 2021. However, the First and Second Respondents then go on to say the General Election resulted in a tie, and the Head of State has decided to call a fresh General Election, which is in accordance with Art 64. This fresh election needs to be held within 3 months of the date of the Legislative Assembly being dissolved in March 2021, because of the requirements of Art. 64.

[64] In issuing a writ for the second General Election, on 4 May 2021, the Head of State relies on the initial dissolution made in March 2021, which resulted in a tied election and has not produced a majority to govern Samoa.

[65] The Applicants' submission brings together different pieces of law from which the Court is invited to find a power to call a fresh election. Respectfully, this selective approach is rejected. Although the law should always be interpreted in context, we do not accept that the framers of the Constitution intended or relied on the Court to fill in the gaps to the extent that the first respondent suggests.

Article 63

[66] We consider that Art 63 provides for all the ways by which the Legislative Assembly may be prorogued or dissolved.

[67] The power to prorogue arises under Art 63(1). The powers to dissolve Parliament arise under Arts. 63(2) and 63(3). These powers are clearly expressed and there is no ambiguity about the words. This degree of prescription suggests that the Constitution is unlikely to contemplate a further source of power being implied, such as that contended for in this matter; that it would rest with the Head of State, and could be exercised for any reason determined by the Head of State.

[68] In this case the Head of State says he has good reason to call the re-run: namely, a tied parliament. There were other grounds advanced, but it appears to us that the most critical ground was that the first General Election had resulted or produced an intractable deadlock. The Respondents submit that there needs to be some way out of the impasse, and that route can only be found by a necessary implication that the Head of State has the power to break the deadlock.

[69] We respectfully disagree with this submission, which appears to have one foot in the Constitution and the other in the public law doctrine of necessity. That is to say, the primary submission is that the power to call for a fresh General Election arises from the Constitution. However, if the Constitution does not provide for that power because it expressly provides otherwise, as appears to be the case, then, and as a fall-back position, the Court can consider the doctrine of necessity – that the deadlock can only be broken in a timely way by recognising that the Head of State, being the father of the nation, has the power to call for a fresh election.

[70] In our view there is no impending Constitutional calamity, there may be a political calamity, but that is not the same thing.

[71] We consider that the Constitution, by Arts. 52 and 63, speaks perfectly plainly about what might happen in the event of a tie following a General Election.

[72] The Head of State is obliged to call the Legislative Assembly to meet following a General Election; Art. 52.

[73] If after a reasonable time the Head of State considers that a reasonable period-of-time has elapsed since the office of the Prime Minister was last vacated and that despite the discussions there is no member of parliament likely to command the confidence of a majority of Members – then, the Head of State is expressly entrusted with the power to dissolve the Legislative Assembly under Art. 63(2) and call for a fresh election under Art. 64.

[74] In our view, this is what the Constitution anticipates.

Article 52

[75] There is no apparent basis for bypassing this important Constitutional step in the electoral process. The First and Second Respondents argue that the intractability of the parties, the urgency to settle a budget and continue forward planning for Samoa’s Covid response, and the need to bring certainty to the Nation and its people, are reasons for resorting to the call for a fresh election without calling a meeting of the Legislative Assembly. We respectfully disagree. The calling of a meeting of the Legislative Assembly will enable the cultural process of *soalaupule* to take place.

[76] We do not interpret the Constitution to undermine or discourage observance of cultural traditions. Chiefs of a village do not resolve the problems arising among the people of the village by sending emails or social media posts to each other either directly or through surrogates. On the contrary, since the adoption of the Constitution, it has been tradition to sit together and discuss matters to find solutions. If no solutions can be found, then those meetings are adjourned to allow for discussions to continue. That is in the nature of an oral tradition.

[77] This court does not accept that the reasons for a call to action which were raised by the First and Second Respondents cannot be responsibly handled by a caretaker government. It is certainly the case that with respect to Samoa’s Covid response that the caretaker government is continuing with the necessary work required to protect the people of Samoa.

Article 64

[78] The power for calling a General Election is contained in Art 64; which must be within 3 months of the dissolution of the Assembly at such time the Head of State appoints by notice in the Samoa Gazette.

[79] The opening words of Art. 64 provides *[t]here shall be a General Election*. It appears to us that the First and Second Respondents' argument relies on a submission that these words do not preclude the holding of more than one General Election. We do not accept that submission.

[80] In giving primary attention to the words used, we do not see that the phrase can be enlarged to refer to more than one General Election. As described earlier, when a General Election fails to yield a majority, the Constitution contemplates that the Assembly meet and if after a reasonable time no majority can be discerned, then the Head of State is empowered to call a new election under Art. 63 and the time frames prescribed in Art 64 applies to the exercise of the new dissolution, and not a dissolution which occurred months earlier.

[81] We also consider the prescriptiveness of Art. 63 suggests that the framers of the Constitution have specifically turned their minds to the circumstances under which a dissolution might be made. It is unlikely that the framers would then go on in Art. 64 to permit an implied power to call for more than one General Election to someone who is an unelected official to exercise independently, and free from review by not only the Legislative Assembly but also the Supreme Court. Such unfettered power, if it existed, would authorise as many General Elections as the person exercising the power considered necessary, for their purposes, at any time during the following three-month period. So, for instance, the unfettered power might be used if the person exercising the power did not agree with the types of candidates, preferring that there should be more female candidates; it could be used if the campaigning was particularly robust and appearing to be unfair or uncharitable on one or other party; it could be relied on to call a halt to the voting on an election day for whatever reason. These are examples of outcomes which we do not attribute to the plain meaning of the words of Art. 64 of the Constitution.

[82] Respectfully, we consider that if the Legislative Assembly wished to give that power to the Head of State, that it would have expressly said so.

[83] We consider it is not appropriate for this Court to read in such a power. It is a matter for the Assembly.

[84] We also defer the issue to the Assembly because of our respect for the separation of powers. The preamble of the Constitution specifically provides that the State should exercise its powers and authority through the chosen representatives of the people. The Court's role in Constitutional matters is to guard

against the coming into force of laws passed by the Assembly which are inconsistent with the Constitution: Art: 4. It is Parliament that makes the law, not the courts.

[85] We are also mindful of the observations made by the Court of Appeal in *Olomalu*:

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.

The electoral process

[86] The Electoral law of Samoa, and by this we mean the Constitution, the Electoral Act 2019 and Regulations, and the relevant decisions of this court, have established sophisticated systems and procedures to govern the various parts of the electoral process. These processes include rules, revised time and again over the years, concerned with the multi-disciplinary process of electing a Legislative Assembly: there are the administrative rules and quasi-judicial powers relating to the First and Second Respondents; this Court has a number of adjudicative involvements, including in the process legislated for to regulate pre- and post-election petitions.

[87] Standing back and looking at the Samoa's electoral law, it is difficult to see how having established these rules and systems, that the Legislative Assembly could also have considered it appropriate to grant the Head of State, whom primarily, and perhaps ordinarily, acts on the advice of the Government, to have a power which could, independent of Cabinet, Parliament and the Judiciary, be exercised to call for a new election because the person exercising the power did not think the result was acceptable to him.

[88] In answer to the question of whether Arts. 63 and 64, and s.52 of the Electoral Act, when read together, give the Head of State a power to call a fresh General Election, we answer the question in the negative.

Royal Prerogative and Reserve Powers

[89] It is not necessary for us to consider the issue that the Head of State was acting pursuant to royal prerogative type powers, raised by the Third Respondent. That is because the First Respondent, sued on behalf of the Head of State advises the Court that the source of power underpinning the Head of State's

decision is the Constitution. We therefore consider that engaging in a discussion on the applicability of prerogative type powers to be somewhat academic.

[90] Save to say, we have serious doubt as to the existence and application of royal prerogative like powers being exercised by the Head of State, on the basis that Samoa adopted the English common law. The English common law and equity adopted in Art. 111 of the Constitution, only refers to those which are not excluded by any other law in force in Samoa. The preamble of the Constitution specifically refers to the framing of an Independent State of Samoa, and this intent, in our view, precludes an assertion of the existence or application of prerogatives which are applicable in or derived from other jurisdictions. This view is based on a plain reading of Art. 1, which provides that the Independent State of Samoa shall be free and sovereign. The whole *raison d'être* of Independence was for Samoa to free itself from its colonial shackles retaining only those institutions and practices it considered worthwhile.

[91] Mr Leung Wai did not advance oral arguments in support of his written submissions concerning “reserve powers”. We consider that in the absence of full argument, it would be inappropriate for this Court to determine the existence of the doctrine one way or the other in this Constitutional setting. We do not, however, accept that the Head of State has relied on reserve powers, if any. Clearly, the first respondent’s submission is that the call for a fresh election is said to be authorised by the Constitution, but we consider that this view is in error.

The Second Issue

[92] We do not intend to discuss the second issue as to whether the Head of State has the power to void, otherwise set aside or disregard the results of the General Election. We do so for the following reasons:

- 1 The First and Second Respondents say the calling of the new election means that the old election is superseded. We do not need to consider what “superseded” means from a Constitutional law perspective, save to say that we agree with the Court of Appeal in *Olomalu* that momentous Constitutional change – which we are in no doubt applies to a situation where tens of thousands of votes are argued to be superseded, is not a sidewind of change that could reasonably be attributed to the Legislative Assembly.
2. The First and Second Respondents’ argument rests on whether there was a power to call for a new election. We have answered that question in the negative.

3. Finally, and for the sake of completeness, we consider that the First and Second Respondents' argument that the calling of a fresh General Election supersedes the lawful exercise of electors' democratic rights, is another reason why the Legislative assembly could not reasonably be regarded as having intend for the existence of the independent and arbitrary power to call for fresh elections, outside of the expressly mandated circumstances set out in Art. 63.
4. We are also concerned that a fresh election may dis-enfranchise certain classes of voters and candidates which could potentially offend article 15 of the Constitution whereby a law in its application would result in a discrimination against people of a certain class.

CONCLUSIONS

[93] We respectfully tender our view and judgment that the Head of State does not have the power to call for a fresh election as he did on 4 May 2021, for 21 May 2021.

[94] Accordingly, we make the following declarations:

1. There is no lawful basis for the Head of State calling for a new election on 21 May 2021;
2. The writ issued under s.52 of the Electoral Act 2016, dated is not issued under any legal authority and is accordingly void;
3. The declarations made above mean that the result of the April 2021 General Election and the relevant writs associated to the results continue to be valid and lawful;
4. The Head of State's attention is directed to the requirements of the Art 52 and the Head of States obligation under the Constitution to call a meeting of the Legislative Assembly within 45 days of the holding of a General Election.

[95] Finally, we note that, arising from this constitutional issue, it may be timely for the office of the Head of State to have access to publicly funded but independent staff and resources, including legal advisors. In the 21st Century the burden of the Office has greatly increased. Much of the work of the office is concerned with implementing the Government of the days advice, and in that regard it is appropriate for the Head of State to receive advice from the Attorney General, Art. 41(2); however, we consider that it would be prudent for the Head of State to have available extra support staff particularly when the need arises.

[96] Costs are to be awarded to the Applicants in the amount of SAT\$20,000.00, payable within 30 days of the judgment.

S. Perese
Chief Justice Perese

M. Nelson
Justice Nelson

T. Tuala-Warren
Justice Tuala-Warren

