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**SAMOA AND NEW ZEALAND'S SPECIAL RELATIONSHIP:
MORE THAN A NEIGHBOUR?**

A thesis
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ABSTRACT

This thesis will discuss in detail the special relationship between Samoa and New Zealand. From the Samoa and New Zealand relationship certain equitable obligations arise because of the special features ascertained in the relationship. These features include the historical and ongoing relationship of both countries as well as the Treaty of Friendship, a unique document that assists in regulating the relationship between both countries. The purpose of this thesis is to discover the true meaning of the special relationship between Samoa and New Zealand and discover the obligations that arise out of it. The special relationship of Samoa and New Zealand will be discussed in light of the fiduciary principles of a *sui generis* relationship. Such relationships have been found to exist in Crown-Aboriginal peoples' relationship in Canada and Australia. This thesis will develop how the Samoa-New Zealand relationship may be analogous to a Crown-Aboriginal peoples' relationship.

A unique feature between the relationship of Samoa and New Zealand is what is encompassed in the text of the Treaty of Friendship. Discussion will focus on the importance of Treaties and the role treaties play in facilitating relationships between countries. Comparative analysis will be drawn on the Māori-Pākehā relationship and how it has developed since the principles of the Treaty of Waitangi have been identified by the New Zealand Court of Appeal. Through the articulation of the principles of the Treaty of Waitangi its status has been acknowledged. This thesis will use this analogy to show that through recognition of the text of the Treaty of Friendship, the special relationship between Samoa and New Zealand may give more legal and practical effect. Other special features of the Samoa-New Zealand relationship will be discussed in detail emphasising the difference of the Samoa-New Zealand relationship to other types of relationships.

The articulation of the special relationship of Samoa-New Zealand will also identify the breaches that have occurred in the relationship. Such breaches include New Zealand maladministration during the colonial period and breaches that occurred during the post-independence era such as the Dawn Raids and the aftermath of the *Lesā* decision. This thesis will address these breaches and make

suggestions on a way forward by addressing some of the crucial issues in the relationship to provide a firmer foundation.

In this thesis, when reference is made to “Samoa”, this means the Independent State of Samoa, which was formerly known as German and Western Samoa. It is not referring to the Eastern Islands of Samoa known as American Samoa. The words “Samoa” and “Western Samoa” are used inter-changeably throughout the thesis. Both words refer to the Independent State of Samoa and are synonymous except where stated.

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GLOSSARY

Aana	Refers to the western division of Upolu.
Aitu	Ghost or spirits.
Ali'i	One of the two types of matai; refers to a High chief. Also a polite word used to refer to men.
Atua	Refers to the eastern division of Upolu. Other meaning is refers to God.
Fa'alavelave	Family obligations and events that may include a wedding, funeral, chief bestowment or any special occasion.
Fa'asamoa	Cultural and traditional ways of Samoan people.
Faipule	Refers to chiefs of a village. It is also the term given to members of Parliament.
Fale	A traditional Samoan house.
Fono o Faipule	Village council of Chiefs.
Hapū	Subtribe; extended family.
Iwi	Tribe.
Kawangatanga	governorship.
Lagi	The heavens.
Matai	Are titled people, either a chief or an orator, whose particular duties are the leadership and care of the family under their control, and who are entitled to the services and cooperation of all members of their families in return for their leadership.
Pākehā	Refers to the Europeans in New Zealand.
Pāpā	Refers to the four highest titles: Gatoaitetele, Tamasoalii, Tuia'ana and Tuiatua.
Pulotu	Afterworld; afterlife
Tafa'ifa	Holder of all four paramount titles of Samoa. These titles are Gatoaitetele, Tamasoalii, Tuia'ana and Tuiatua.
Tama-a-aiga	Reference to the paramount chiefs of Samoa.

Talune	Name of vessel that travelled from Auckland to Samoa carrying the influenza epidemic.
Tāngata Whenua	Referring to the indigenous people of New Zealand, Māori. Literally translates as “People of the Land”.
Taonga	Treasure or gift.
Tapu	Sacred.
Te Tiriti o Waitangi	The Māori text of the Treaty of Waitangi 1840.
Tikanga	Māori traditional law and custom.
Tino Rangatiratanga	Sovereignty.
Tuamasaga	Refers to the central division of Upolu.
Tulafale chief.	One of the two types of matai; refers to an Orator or talking chief.
Tumua and Pule	Referring to the people of Samoa distinctly those who originate from the islands of Upolu and Savaii
Upolu	One of the four main islands of the Independent State of Samoa. Upolu; The capital Apia is located on the island, Upolu.

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INTRODUCTION

The relationship of Samoa and New Zealand began as a historical colonial relationship and has now become an ongoing special relationship. The two countries are more than neighbours; they have a history and an ongoing relationship that continues to tie both countries together. This thesis aims at articulating the special relationship between Samoa and New Zealand and the equitable obligations that arise out of this special relationship. The special relationship of Samoa and New Zealand has been validated by the Treaty of Friendship that was signed in 1962, a Treaty that is unique to the Samoa- New Zealand relationship.

The reason for this study is to provide an analysis of what is encompassed in the special relationship of Samoa and New Zealand. The Treaty of Friendship does state that Samoa and New Zealand enjoy close links but does not articulate the obligations and ramifications that arise from such a relationship. Other special features such as the historical and ongoing relationship will be discussed to assist in defining the close links between Samoa and New Zealand. The relationship of both countries has had its positive and negative features but one thing that is certain is that the interaction between Samoa and New Zealand will continue through migration, intermarriage, political, economic and social factors. This thesis will articulate and address the meaning of the Samoa-New Zealand special relationship to find that it is one that is analogous to a *sui generis* fiduciary relationship. A *sui generis* fiduciary relationship is one that encompasses fiduciary principles in unique circumstances. Such relationships have been found by the Judiciary in the Crown-aboriginal peoples' context.¹

The thesis will begin by introducing the reader to the historical context of the special relationship between Samoa and New Zealand. Chapter 1 explains in detail the historical journey of this relationship between the two countries and how colonial relationships are reflective of fiduciary relationships as it has been found in the Crown-Aboriginal relationship. Chapter 1 will also discuss in detail the administration techniques used by New Zealand administrators whilst in

¹ *Guerin v The Queen* (1984) 13 DLR (4th) 321.

Samoa. The Treaty of Friendship will be discussed in detail signifying its importance in the regulation of the special relationship between both countries.

Chapter 2 will discuss the legal framework of the thesis. Fiduciary relationships are equitable obligations that are utilised to govern relationships of two or more parties. The fiduciary principles will be identified and elaborated on in detail to be followed by a discussion of the extension of the fiduciary law, a *sui generis* fiduciary relationship. A relationship of a *sui generis* nature is a fiduciary relationship that contains fiduciary principles in unique circumstances; different from any other type of relationship. This thesis aims to demonstrate that the Samoa-New Zealand relationship is also a unique relationship that reflects features of a *sui generis* fiduciary nature. The obligations that arise out of the Samoa-New Zealand relationship in the *sui generis* fiduciary framework will also be discussed in detail. This will assist to articulate relationships between parties where one party ought to act in the best interests of the other.

The text of the Treaty of Friendship between Samoa and New Zealand has not been well articulated to allow both parties to realise the special features that are contained within it. Chapter 3 will discuss the importance of treaties emphasising that breaching treaty obligations is an issue that must be addressed to strengthen the special relationship between Samoa and New Zealand. The special features of the Samoa-New Zealand relationship will be articulated to show the close links that exist between both countries. Comparative analysis will be made in reference to the Māori-Pākehā relationship with relevance to the gradual recognitions of the Treaty of Waitangi and how acknowledging the Treaty of Waitangi and its principles has led to a better understanding of the relationship between Māori and Pākehā.

Chapter 4 will discuss the breaches that have occurred during the special relationship between Samoa and New Zealand and how they may be addressed and suggest measures for a way forward in the relationship. Breaches that occurred during the colonial administration of Samoa by New Zealand have been addressed by the New Zealand government. However after Samoa's Independence, breaches of the Samoa-New Zealand relationship continued to

follow such as the Dawn Raids debacle, rigid Immigration policies and the aftermath of the *Lesia* decision which led to the deprivation of citizenship rights. This thesis will suggest how these breaches may be addressed and provide suggestions on how the special relationship between Samoa and New Zealand may move forward on a firmer foundation.

CHAPTER 1: HISTORICAL CONTEXT

Samoa and New Zealand are two Pacific nations that have a historical and special relationship. This chapter will focus on the historical relationship between the Independent State of Samoa (“Samoa”) and New Zealand. It will outline the beginning of this relationship, to show how it has developed and what this relationship truly means for both countries. This relationship has not been one without troubles. This aim of this chapter is to bring together the historical elements to establish the special relationship between Samoa and New Zealand and the obligations that arise out of it.

A brief description of pre-colonial Samoa will be outlined leading to a discussion of Samoa’s first contact with the western world. Germany was Samoa’s first coloniser followed by the arrival of New Zealand troops on Samoan shores. In its history as a nation, while Samoa has had and continues to have significant relationships with different countries, the relationship with New Zealand is the most significant. It is a relationship that was established from colonial beginnings and has become a more formalised relationship. New Zealand has exerted the most influence in the lives of many Samoans and continues to do so today.

Samoa is a Pacific Island nation located in the South Pacific Ocean and is part of the Polynesian group. The Samoa Islands are located between 13 and 15 degrees of south latitude and 171 and 173 degrees of west longitude.¹ Their closest neighbours are Tokelau, American Samoa, Tonga and Fiji. Samoa is made up of volcanic islands and consists of four main inhabited islands and a few smaller uninhabited islands. The two biggest islands are Savai’i and Upolu. Upolu is where the capital, Apia is located and is the most populous island. The other two smaller islands are Manono and Apolima. The smaller islands that surround the main islands are Fanuatapu, Namua, Nu’utele, Nu’ulua and Nu’usafee which are uninhabited.

Samoa has an estimated population of 180,741 and experiences growth every year.² Since the last census the annual growth rate for Samoa’s population for the

¹ F.J.H Grattan *An Introduction to Samoan Custom* (1948) 1.

² Report of the Population and Housing Census 2006, Samoa Bureau of Statistics, (July 2008) 2.

years 2001-2006 was 0.5%.³ Samoans have a strong sense of cultural identity with much focus on its cultural traditions better known as *fa'asamoa*, meaning the cultural and traditional ways of the Samoan people. Family ties are of the utmost importance in Samoan society; families are very close knit and most families live in an extended family unit. The next section will give a description of pre-colonial Samoa before it was influenced by outside contacts.

A. PRE-COLONIAL SAMOA: THE TRADITIONAL SAMOAN SOCIETY.

Before the arrival of missionaries and the influence of the Colonial Powers (Great Britain, Germany, and the United States of America) of the eighteenth century, Samoa lived according to its own traditional and religious beliefs.

Although the Samoans of the present have interests and needs which did not exist for their ancestors, the structure of Samoan society and the whole code of values which have been passed on to Samoans from earlier generations' remains and its essential principles are unchanged.⁴

The family and village is of the utmost importance in Samoan society. Traditionally, as is still the case, Samoa's government is facilitated by a chiefly system that is referred to as the *matai*⁵ system. There are two types of chiefs in Samoa, the *ali'i*⁶ and *tulafale*.⁷ The former is of higher rank and status than the latter. The obligations and responsibilities they hold are different.⁸ Matai titles are the essence of Samoan culture. A matai is the titular head and chief of a family.⁹ He or she holds the responsibility of making decisions and caring for the wellbeing of the family. One who obtains a matai title is held in prestige and all matai titles have different status. Matai titles are bestowed by extended family members and acknowledged by other matai, village councils and the district. The extended family are also the only ones authorised to remove matai titles. Those

³ Ibid, 3.

⁴ L Meti, *Samoa: The Making of the Constitution* (2002) 3.

⁵ *Matai* – are titled people, either a chief or an orator, whose particular duties are the leadership and care of the family under their control, and who are entitled to the services and cooperation of all members of their families in return for their leadership. From L Meti, *Samoa: The Making of the Constitution* (2002) 3.

⁶ *Ali'i* – is one of the two types of matai and refers to a High chief.

⁷ *Tulafale* – is one of the two types of matai and refers to the Orator or Talking Chief.

⁸ M Meleisea, *Lagaga: A Short History of Western Samoa* (1987) 27.

⁹ Ibid, xviii.

accorded a matai title have to meet certain criteria. This criteria includes one's service to the extended family and village. Other important attributes are oral knowledge of genealogies as well as stories of creation, myths and legends of Samoan motifs and traditions.¹⁰

The matai is the head of the family and a group of matai in a village make up the village council. There is a hierarchy in the village where each matai title carries a certain status. The more prestige the title, the more status that matai has in the village council. Respect is also accorded according to the rank of the matai title.¹¹ The village council meet on a regular basis to decide on the governance and regulation of the village and its members.¹² The village council set the rules and laws of the village and also impose penalties when these rules and/or laws are breached.¹³ Matai being the heads of extended families and decision-makers in the village are influential in the family and village unit.

Samoans live in a communal lifestyle and operate as a collective society. They live in villages which are part of districts. The village consists of many families with all different ranks. "The unit of Samoan social life is the family".¹⁴ Family consists of many members from parents, children, grandparents, aunts, uncles and cousins as well as in-laws. "A Samoan family is not merely a biological group as Europeans understand the term".¹⁵ Adoptions are common and they are treated as members of the family. During traditional times it was rare for families to live in a nuclear unit. Due to the communal living, most families lived together with extended family members and that was the norm in traditional society as it is still extensively practised in modern Samoan society today. People use land for settlement, for plantations, where cultivation of crops for daily consumption takes place; and village land which includes much of the uncultivated land.¹⁶ Customary land is under the direction of the matai and all members of the extended family.

¹⁰ C Macpherson & L Macpherson, *The Warm Winds of Change: Globalisation in Contemporary Samoa* (2009) 91.

¹¹ *Supra* n 8.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ F.J.H. Grattan, *An Introduction to Samoan Custom* (1948) 10.

¹⁵ *Ibid.*

¹⁶ *Supra* n 8 at 26.

“Although Samoan society was based upon unequal rank, this inequality was not economic – everybody had access to food and other important resources”.¹⁷ Most of Samoa’s land is customary although there is government and freehold land.

Samoa is divided into several political districts where each district has its own creation stories. These creation stories are legends and myths that explain the history of each district. In Upolu there are three political divisions: *Atua* which is the eastern division; *Tuamasaga* is the central division of Upolu and *Aana* the western division of Upolu.¹⁸ In Savai’i the biggest island in Samoa there are also three political divisions: *Faasaleleaga*, *Itu o Taoo*¹⁹ which was the north side of Savai’i and *Itu o Faatoafe*²⁰, the southern side of Savaii. These principal divisions still exist today although some have been renamed and other divisions have been added to the political framework of Samoa. There are many oral traditions that tell the stories of these divisions and it is important to note that there are many other different versions. Some divisions are a result of civil warfare and political rivalry. Others are a result of agreements between districts and historical ties. The political divisions still remain an important aspect in the Samoan society and the government. It encompasses the identity of each Samoan as many Samoans are identified with the districts they come from.

Traditional leadership in Samoa consists of the highest ranking titles.

Samoan oral traditions and genealogical records indicate that in approximately the sixteenth century a new centralisation of rank and political authority was created in the western islands.²¹

The highest titles in Samoa were Tuimanu’a, Tuia’ana and Tuiatua. New titles have been the result of the Tongan rule in Samoa.²² History dictates that Tonga ruled Samoa for three hundred years until the legendary Samoan brothers named Tuna and Fata drove the Tongans from the shores of Samoa. This resulted in the creation of another paramount title, Malietoa. Intermarriage between members of

¹⁷ Ibid.

¹⁸ G Turner, *Samoa: A Hundred Years ago and Long Before* (1884) 234.

¹⁹ *Itu o Taoo* – was called the side of men for their bravery in the war against Aana in 1830.

²⁰ *Itu o Faatoafe* – called the side of women.

²¹ M Meleisea, *Lagaga: A Short History of Western Samoa* (1987) 30.

²² Ibid, 31.

high ranking families assisted in strengthening the mana of the paramount households.

One ancient descendant, a lady named *Salamasina* became the heir of all the chiefly descent bloodlines and all the important chiefly genealogies can be traced back to *Salamasina*.²³ Since the time of *Salamasina*, four of the highest titles have been known as the *papa*. The four titles in the *papa* are *Gatoaitete*, *Tamasoalii*, *Tuia'ana* and *Tuiatua*. When one person holds all these four titles they are referred to as the *Tafa'ifa*.²⁴ To date no one has been able to achieve this prestigious honour but *Salamasina*. The *Tafa'ifa* is recognised as the highest chief in the land by all the districts and divisions and was considered to have the favour of the Gods.²⁵ There was much civil war competing for the titles and power within districts. Genealogical bloodlines is a very important aspect in Samoan culture, it represents their heritage and identity.

Before the introduction of western religions and the arrival of missionaries to Samoa they worshipped their own traditional Gods. According to *Meleisea*, there were two main categories of gods: those gods of non-human origin, *Atua* and those of human origin, *Aitu*.²⁶ The *Atua* did not participate in everyday life and were believed to reside in *Pulotu* (the afterworld) or in *Lagi* (the heavens).²⁷ “*Tagaloa-a-lagi* was the supreme *Atua* who created the universe, earth and mankind”.²⁸

The Samoan people believe in spirits and that they may appear in many forms whether as birds, animals or trees. Certain spirits are respected by families who are descendents of *Aitu*. This is still a practice in modern Samoa. Certain places in Samoa are sacred and *tapu* and must be respected. Disrespect of certain protocol attracts unwanted consequences. Religion was a great social control method.

²³ *Ibid*, 32.

²⁴ *Tafa'ifa* – ‘the four-sided one’ meaning the holder of the four titles.

²⁵ B Lal (ed), *Robert Louis Stevenson: A Footnote to History, Eight years of trouble in Samoa* (1996) ix.

²⁶ *Supra* n 21 at 35.

²⁷ *Ibid*, 36.

²⁸ *Ibid*.

When illnesses happened it was because of a curse or punishment by ancestral Gods for spoiling the honour of the family or misbehaviour.²⁹ Although the introduction of Christianity has precipitated the extinction of Samoan's traditional religions, most Samoans still believe in the spirits of the dead and continue to respect protocols involved with these beliefs.

“Samoans will be seen to have well-defined leadership and mechanisms of decision-making and public opinion formation”.³⁰ They have good oratory skills and much of the history is retained orally and passed on to future generations. Respect is of the highest value in Samoan society and is given to the elders of the family, village and community. Similar to many Polynesian cultures, wisdom is sought from the elders especially when conflict arises. The young are guided by the decisions of their elders.

B. COLONIAL CONTACTS:

Samoa like many other Pacific nations started to experience the influence from outside contacts. Most of these outsiders travelled to see the world, to seek trade and resettle in the islands to prosper economically and socially. The first outsider to discover Samoa was a Dutchman by the name Jacob Roggeveen who visited Samoa in 1722 but did not go ashore. He described Samoans as:

a harmless good sort of people and ever brisk and lively; for they treated each other with visible marks of civility, and had nothing in their behaviour that was wild or savage.³¹

Roggeveen was followed by “Frenchman Louis de Bougainville who arrived in 1768 and like Roggeveen, did not bother to go ashore”.³² The first foreigner to set foot in Samoa was Jean Francois Prouse who arrived off the coast of Tutuila, American Samoa in 1787.³³

(i) Arrival of Christian Missionaries:

²⁹ Ibid, 37.

³⁰ F Keesing & M Keesling, *Elite Communication in Samoa. A Study of Leadership* (1956) 1.

³¹ M Field, *Black Saturday: New Zealand's tragic blunders in Samoa* (2006) 16.

³² Ibid.

³³ Ibid.

Samoa's initial formal foreign contact came through missionaries; the London Missionary Society (L.M.S.) who settled within the Samoan population and exposed them to western ideals in 1830.³⁴ It was in July 1830 that a vessel by the name *Messenger of Peace* arrived in Samoa carrying the Reverend John Williams, a member of the L.M.S., and a party of Polynesian mission teachers.³⁵ Upon arrival, Williams set up in the village of Sapapali'i located in the biggest island of Samoa, Savai'i.³⁶ The missionaries' main objective was the introduction of Christianity and establishing mission schools to educate Samoans.

The missionaries of the L.M.S. were first received in Samoa by the Malietoa family, one of the paramount chiefly families in Samoa.³⁷ This made the work of L.M.S. easier as they had established important connections who easily influenced other families and villages to convert to Christendom. L.M.S. has now been renamed as the Congregational Christian Church of Samoa. They were later followed by the Methodists in 1835 and the Catholics in 1848.³⁸ These were the three main religious denominations in Samoa during the 1800s. Today however there are various religious denominations found in Samoa. Christianity is a main element in Samoan society. It now intertwines with Samoan culture and operates simultaneously in any special event held in Samoa. The influence of Christianity in Samoa is evident in Samoa's motto found on its coat of arms emblem where it states 'Faavae i le Atua Samoa' translating to 'Samoa is founded on God'. By the mid 1800s religious contact had spread throughout Samoa and Samoa had also opened its doors to the outside world becoming a busy port for trade and exchange.³⁹

(ii) Initial Impacts of Colonisation:

From the time of contact with the missionaries in 1830, there was also ongoing civil conflict over the traditional kingship movement of Samoa.⁴⁰ Samoa was

³⁴ J.W.Davidson, *Samoa mo Samoa: The Emergence of the Independent State of Western Samoa* (1967) 31.

³⁵ Ibid.

³⁶ Ibid.

³⁷ M Meleisea, *Lagaga: A Short History of Western Samoa* (1987) 58.

³⁸ Ibid, 60.

³⁹ Supra n 32.

⁴⁰ J.W.Davidson, *Samoa mo Samoa: The Emergence of the Independent State of Western Samoa* (1967) 66.

immersed in much debate and conflict regarding the true and most worthy ruler of Samoa. Samoa continued to have struggles with its own traditional kingship movement and civil unrest.⁴¹ While Samoa continued with its civil unrest, traders continued to arrive in Samoa and were introducing new economic measures into Samoa changing Samoa's economic dynamics. The Samoans struggled with their traditional leadership and by the late 1870s the Samoans realised the predicament they faced as a result of the demands of the settlers. Samoan leaders agreed that what they needed was for one of the great powers to establish a protectorate over Samoa.⁴²

This was strongly decided as new settlers mainly traders arrived in Samoa and slowly changed the country for its supposedly better economic development.

In 1879 Great Britain began negotiating a Treaty with Samoa to achieve some form of agreement on the relations between the two countries. At the same time Samoa was approached by Germany demanding a Treaty.⁴³ Great Britain was at an advantage because of the L.M.S influence and possibly had information through the L.M.S missionaries about Samoan traditional rule. The arrival of settlers from Great Britain, Germany and the United States in search of cheap labour and land had a significant effect on Samoan culture and society.⁴⁴ In 1883 real trouble between Samoa and the foreign powers began as different foreign powers favoured different traditional paramount chiefs to rule Samoa.⁴⁵

The western influence and interests challenged traditional forms of leadership where one paramount chief was measured against the other.⁴⁶ "The rejection of Mata'afa, one of the paramount chiefs, as King caused a split among the Samoans in which support was divided between the Sa Tupua and the Sa Malietoa".⁴⁷ Some say that the rejection of Mata'afa was due to anti-Catholic attitudes from the

⁴¹ Ibid, 67.

⁴² M Meleisea, *Lagaga: A Short History of Western Samoa* (1987) 100.

⁴³ O.F. Nelson, *The Truth about Samoa: A Review of Events leading up to the Present Crisis* (1928) 4.

⁴⁴ C Macpherson & L Macpherson, *The Warm Winds of Change: Globalisation in Contemporary Samoa* (2009) 37.

⁴⁵ Supra n 38.

⁴⁶ Supra n 40 at 99.

⁴⁷ Ibid, 90.

London Missionary Society, (the strongest church in Samoa) because Mata'afa was a Roman Catholic.⁴⁸ Conflicting interests of the foreign elements, together with struggles due to rival claimants for the native throne proved a fruitful source of difficulties.⁴⁹

(iii) Competition among Colonial Powers:

The objectives of the three powers were both economically and strategically driven. The three colonial powers relationship had become tense and bitter.⁵⁰ “There was a desire of the industrialising powers of Western Europe and America to gain control of new sources of raw materials”.⁵¹

In the Pacific Islands this meant gaining control of land for tropical crops and in the case of America, control of strategic mid-Pacific harbours to service naval, merchant and passenger ships.⁵²

By 1889 civil war was ongoing in the Samoan islands where the three colonial powers relationship had become competitive. The three colonial powers themselves were on the brink of a war over the ownership of Samoa and warships of the different colonial powers arrived in the Apia harbour in preparation for combat.⁵³ Before a battle could occur the Great Hurricane of 1889 arrived destroying all the warships but one which escaped into the open waters.⁵⁴ It was then the colonial powers agreed to hold a conference at Berlin and its outcome was the Treaty of Berlin 1889.⁵⁵

“The Berlin Act passed by the conference of the three powers, Germany, Britain and the USA in 1889 avoided war over Samoa”.⁵⁶ After deliberation and negotiation it was agreed that the United States of America would administer the eastern islands of Samoa and thereby changing its name to American Samoa becoming a territory of the United States of America as it remains today. They developed the strategically important Pago Pago Harbour as a naval coaling

⁴⁸ Supra n 8 at 90.

⁴⁹ General Report of the results of a census of the Dominion of New Zealand taken for the night of the 17th April 1921 (1925) 73.

⁵⁰ O.F.Nelson, *The Truth about Samoa: A Review of Events leading up to the Present Crisis* (1928) 4.

⁵¹ M Meleisea, *The Making of Modern Samoa* (1987) 43.

⁵² Ibid, 43.

⁵³ Supra n 46 at 91.

⁵⁴ Supra n 49 at 40.

⁵⁵ Supra n 46 at 100-01.

⁵⁶ Ibid.

station.⁵⁷ Germany assumed a protectorate over the commercially important islands of Western Samoa which were renamed German Samoa.⁵⁸

Britain, at the time was involved in the Boer War and was busy in South Africa and did not want to annex Samoa, so she agreed to give up any rights she had in favour of Germany and in return was granted certain rights in the Solomon Islands and in Tonga.⁵⁹

This may have been due to the fact that Britain did not take Samoa seriously because South Africa, Solomon Islands and Tonga had more economic potential. This was an unexpected move given Samoa's initial contact with the western world was through their L.M.S. missionaries. "To all of this the consent of the Samoan people was neither sought nor given".⁶⁰ "It was agreed...that all three great powers should continue to enjoy equal commerce and shipping rights in Samoan ports".⁶¹ Although the Samoan people did voice their opinions, their voice was not heard and the three powers solely made decisions without seeking any Samoan contribution or approval.

(iv) Consequences of Competition for Samoan people:

Many changes occurred during the period between the time of the arrival of John Williams in 1830 and the establishment of colonial rule in 1900. The most significant change was that the Berlin Treaty had divided Samoa into two parts: the western and eastern islands. This eventually undermined Samoan's influence by virtue of the fact that Samoa was now two smaller countries instead of being one large country. Today, both islands operate on different education and political systems even though they speak the same language and are of the same race. Although Samoa had been divided into German and American Samoa both peoples still share the same cultural beliefs and most Samoans continue to have genealogical connections and family ties in both countries that are now currently known as the Independent State of Samoa and American Samoa. Whilst American Samoa is likened to their American parent and speak with an American accent those in the Independent State of Samoa are likened to New Zealand with a more

⁵⁷ N.A.Rowe, *Samoa under the Sailing Gods* (1930) 81.

⁵⁸ Ibid.

⁵⁹ S Masterman, *An Outline of Samoan History* (1980) 42.

⁶⁰ Supra n 55.

⁶¹ Supra n 38 at 74.

British accent. Most Samoans who reside in American Samoa travel to Hawaii or the United States of America for education, employment and/or medical care. Samoans residing in the Independent State of Samoa most common first point of travel would be to New Zealand and Australia. Although both countries operate differently politically with American Samoa following the American mode of representation and Samoa adopting the Westminster model family ties and connections are still strong and maintained.

(v) Germany's Arrival:

In early 1900 the German flag was raised in Samoa renaming the islands German Samoa. The Samoan people were about to experience their first taste of colonial administration. The primary concern of the German administration in Western Samoa was the German company by the name Deutsche Handels-und-Plantagen Gesellschaft der Sudsee Inseln zu Hamburg ("DHPG"). This German company was interested in the Samoan plantations whose main focus was the development of the copra industry.⁶² This also saw the introduction of indentured labourers from China and the Melanesian group into Samoa because as stated in much of the literature "the Samoans were unwilling to work on plantations".⁶³ The Germans pushed themselves on Samoa for commercial reasons and the development of the copra industry was initiated.

The German administrator appointed to look after Samoa was "Dr Wilhelm Solf who had a paternalistic approach and was appointed Governor of German Samoa".⁶⁴ "Solf gave the interests of the company (DHPG) high priority in his administration".⁶⁵ Samoa was introduced to a new administration system by Solf, who stated he would consider the Samoan customs and traditions.⁶⁶ He set up departments and advisory committees where he selected the representatives of these groups. Solf was careful with his selection of representatives, aware of the past civil wars of Samoa and that⁶⁷:

⁶² M Meleisea, *The Making of Modern Samoa* (1987) 46.

⁶³ M Field, *Black Saturday: New Zealand's Tragic Blunders in Samoa* (2006) 25.

⁶⁴ Supra n 40 at 76.

⁶⁵ M Meleisea, *Lagaga: A Short History of Western Samoa* (1987) 108.

⁶⁶ Ibid.

⁶⁷ L Meti, *Samoa: The Making of the Constitution* (2002) 8.

the concept of kingship stayed in the minds of the Samoan people and the German administration was sensitive to the delicacy of the situation.

He had to be careful with selection that he chose according to the Samoan traditional hierarchy especially in relation to the four paramount chiefly titles known as the Tama-a-aiga who consisted of Malietoa, Tupua Tamasese, Mata'afa and Tuimaleali'ifano. Solf stated that he would incorporate the *fa'asamoa* into his administration only for the Samoans to find out that it was administered according to what suited the German administration.⁶⁸

Solf set himself three immediate objectives: to reconcile the opposing parties, to abolish the kingship, and to break the power of the chiefs and speakers presuming to speak as the government of Samoa.⁶⁹

Some Samoans challenged Solf's administration and as a result they were exiled to German controlled Saipan in the North Pacific.⁷⁰ The German administration also saw the birth of the movement called the 'Mau a Pule' translating to the resistance from Savai'i, the biggest island in Samoa in the early 1900s.⁷¹ "The Mau a Pule was an attempt by Samoans to reinstate their independence and assert their authority in their own country".⁷² Namulaulu Lauaki, an influential matai at the time was at the forefront of this movement along with other members of his extended family, village and district. Lauaki challenged Solf and his administration when he asserted that Tumua and Pule⁷³ were the rulers of Samoa.⁷⁴ As a result, Solf extradited Namulaulu Lauaki and his followers to Saipan where they stayed for eight years.⁷⁵ They were later permitted to return to Samoa however Namulaulu passed away en route back to Samoa due to illness.⁷⁶

Germany continued to administer Samoa for fourteen years and its relationship with Samoa came to an end on the 29 August 1914 when in the course of World War I, the New Zealand expeditionary force arrived upon Samoa's shores. The

⁶⁸ Supra n 63.

⁶⁹ P Hempenstall, *Pacific Islanders under German Rule: a study in the meaning of colonial resistance* (1978) 33.

⁷⁰ Supra n 63 at 27.

⁷¹ Ibid.

⁷² Supra n 63 at 118.

⁷³ Tumua and Pule – referring to the people of Samoa, the main islands of Upolu and Savaii.

⁷⁴ Supra n 44 at 44.

⁷⁵ Supra n 65 at 119.

⁷⁶ Ibid.

Germans were aware of the New Zealand troop's arrival through their wireless radio.⁷⁷ Much could not be done as they were outnumbered and resistance was out of the question.⁷⁸ "World War I ended for German Samoa just twenty-five days after it began, by afternoon it was an allied possession".⁷⁹

C. NEW ZEALAND'S ARRIVAL:

It was the very beginning of World War I that the "New Zealand troops arrived in Samoa under Lieutenant-Colonel Robert Logan on the 29 August 1914".⁸⁰ This was the beginning of Samoa and New Zealand's longstanding relationship. New Zealand was quick to enter upon Samoa's shores aware that it had become a German colony. Colonial powers were extending their borders and powers and New Zealand was not comfortable with the idea of a German colony being so close to their country in the Pacific. "When Samoa became a German colony in 1900, New Zealand was unhappy about it".⁸¹

The wish to include Samoa among New Zealand's territories was still strong in 1914, which is why the New Zealand government lost no time in sending an expeditionary force to capture Samoa from Germany.⁸²

The New Zealand government had repeatedly requested Britain to annex Samoa or to establish a protectorate over it in the early 1900s.⁸³ New Zealand did not want a major enemy power to have a colony close to its shores.⁸⁴ New Zealand itself was contended to be well qualified to administer the islands on behalf of the British Crown, since its politicians and administrators were already experienced in governing the Māori.⁸⁵ Instructions from New Zealand's Department of Defence prior to departure to Samoa, to Colonel Robert Logan stated:

You will proceed to the German Islands of Samoa and seize them...when you have seized the Islands you will take such measure as you may consider necessary to hold them, and to control the inhabitants.⁸⁶

⁷⁷ F Alailima, *Aggie Grey: A Samoan Saga* (1988) 124.

⁷⁸ Ibid.

⁷⁹ Ibid, 125.

⁸⁰ M Meleisea, *The Making of Modern Samoa* (1987) 102.

⁸¹ M Meleisea, *Lagaga: A Short History of Western Samoa* (1987) 126.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ J.W.Davidson, *Samoa mo Samoa: The Emergence of the Independent State of Western Samoa* (1967) 91.

⁸⁶ S Smith, *The Samoa (NZ) Expeditionary Force 1914-1915* (1924) 27.

New Zealand troops took over the administration of Samoa from Germany without any protest or violence from the German administration. This was made possible because the German administration were outnumbered and the voice of the Samoan natives was totally ignored. They had no say over the administration of their own country at the time. New Zealand proceeded by administering military rule on Samoa although the government system established by the Germans was allowed to continue.⁸⁷ The deportation of German settlers who did not have any Samoan affiliation was carried out. Those not married to Samoans or half-caste Samoans were deported.⁸⁸ New Zealand did not change much of the German Samoan administration.

Neither the New Zealand government nor the local[formerly German] administration had the time or the talent available for the making of major changes.⁸⁹

(i) New Zealand Administration in Samoa:

Administrators such as Robert Logan, who was the first New Zealand administrator to arrive in Samoa, were not well prepared for what was ahead of them. Those who administered Samoa under the New Zealand regime in 1914 had military backgrounds.

Under military law, the administrator had the authority to modify, suspend or add to this law for the purposes of efficient administration, the security of the occupation and the effective conduct of the military operations.⁹⁰

Logan imposed many rules which collided with Samoan norms during his administration in Samoa. His proclamation declaring Samoa to be occupied in the name of King George V of Great Britain included regulations which included a ban on travelling by boat or canoe.⁹¹ This was Samoa's main means of transportation, the other alternative being by foot. "Curfews were enforced upon Samoan citizens from ten at night until six in the morning, which included a ban on movement from one village to another".⁹² Liquor was forbidden amongst

⁸⁷ L Meti, *Samoa: The Making of the Constitution* (2002) 8.

⁸⁸ N.A. Rowe, *Samoa under the Sailing Gods* (1930) 97.

⁸⁹ *Supra* n 83 at 92.

⁹⁰ S Smith, *The Samoa (NZ) Expeditionary Force 1914-1915* (1924) 85.

⁹¹ M Meleisea, *The Making of Modern Samoa* (1987) 106.

⁹² *Ibid.*

Samoans although allowed with restriction among Europeans.⁹³ Perhaps the assumption was that Europeans could handle their alcohol and not the Samoans. It was advantageous to be a European during these times. They were allowed numerous benefits in comparison to the Samoan people.

Samoan leaders were becoming dissatisfied with New Zealand administration, and a telegram was sent to Solf while he was German Ambassador to Japan, requesting him to return to Samoa.⁹⁴

The difference in leadership had become noticeable amongst the Samoan people. Logan, in comparison to Solf, was very unsympathetic to Samoans beliefs and ideals. Although Solf also expelled any critics and ignored fa'asamoa in his own administration he at least protected Samoan land rights and prevented Samoans from being forced to labour on plantations.⁹⁵ Logan's actions were discriminatory against the Samoan people where he treated the Samoan people unfairly and his careless actions led to his major downfall in the handling of the Influenza epidemic in 1918.

(ii) Influenza 1918:

The influenza has been historically earmarked as one of the major downfalls of New Zealand's administration in Samoa. The influenza, also known as the Spanish flu, was a worldwide epidemic that occurred towards the end of the First World War. Samoa lost a significant number of people and this caused much animosity amongst the Samoans because of New Zealand's irresponsible handling of this epidemic.

The Influenza epidemic arrived in Samoa via the *Talune*⁹⁶ on the 7 November 1918 at 9.35am on a Thursday morning.⁹⁷ When the *Talune* departed Auckland there were already cases of influenza onboard. The influenza had already surfaced in New Zealand. Samoa had not been informed that the deadly disease had

⁹³ Ibid.

⁹⁴ P J Hemenstall, *Pacific Islanders' under German rule: a study in the meaning of colonial resistance* (1978) 102.

⁹⁵ Supra n 81 at 120.

⁹⁶ M Field, *Mau: Samoa's struggle for against New Zealand's oppression* (1984) 36. "Talune" is the name of the vessel.

⁹⁷ Ibid.

reached the Pacific.⁹⁸ The mail onboard the Talune would have informed Samoa of the spread of the disease.⁹⁹ Before the ship reached Samoa it stopped in Fiji and was quarantined at both Suva and Levuka.

The captain (who was a New Zealander) had failed to inform the port medical officer (also a New Zealander) at Apia of this fact (the spread of the influenza flu); the latter had learnt of the action at Suva from the chief steward, but ignored it.¹⁰⁰

The Talune was cleared without quarantine in Samoa which was the beginning of a great loss of the Samoan population.¹⁰¹ The passengers, some who were already sick, disembarked and returned to their respective families and villages spreading the disease amongst the local community.¹⁰² “Within a few days time the epidemic was raging in Western Samoa and the natives were dying like flies”.¹⁰³ The Papauta girls’ boarding school was a L.M.S. school set up in Samoa and “when the epidemic hit the school only one of its 120 boarders escaped illness”.¹⁰⁴ This was a poor start for New Zealand’s administration. The disastrous event was blamed on poor administration by New Zealand officials. It was a catastrophe that could have been prevented. As a result, a substantial number of people died, nearly every family had a death.¹⁰⁵ Initially, New Zealand officials did not take responsibility for their actions.

The Samoan people blamed Logan for failing to quarantine the Talune as it had been done successfully in American Samoa and Fiji.¹⁰⁶ Logan in response pushed the blame onto the Samoans themselves for the high death rate. Logan stated that it was the Samoans themselves who did not tend to their sick.¹⁰⁷ He said they made matters worse by just laying down next to the sick, closing the shutters of the house containing the disease within the walls of their house, and causing the

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid, 95.

¹⁰¹ Ibid, 48.

¹⁰² N.A.Rowe, *Samoa under the Sailing Gods* (1930) 93.

¹⁰³ Ibid.

¹⁰⁴ Supra n 94 at 52.

¹⁰⁵ Twenty-Two percent of the population perished during the Influenza epidemic. From: M Field, *Mau: Samoa’s struggle for against New Zealand’s oppression* (1984) 36.

¹⁰⁶ M Meleisea, *The Making of Modern Samoa* (1987) 121.

¹⁰⁷ Ibid.

disease spread.¹⁰⁸ Available medical officers that were on the island tended to the Europeans first and many Samoans did not get any medical attention.¹⁰⁹ American Samoa who was not affected by the epidemic offered assistance stating they would send over a medical team to assist local doctors.¹¹⁰ This request was made known to Logan who completely ignored it and furthermore shut off all communication with American Samoa.¹¹¹ As a result many who may have been saved, continued to die.¹¹²

People were buried in mass graves by New Zealand soldiers and officials which caused more distress for Samoans as they could not carry out the traditional rituals of a burial.¹¹³ Long trenches were dug and the dead stacked in them. “Locals believe some people were buried still alive”.¹¹⁴

Logan’s response to the discontent of the Samoans and the local Europeans was so unapologetic that a petition was drawn up by traditional Samoan leaders requesting that the administration of Samoa be transferred from New Zealand to the United States Government.¹¹⁵

This disastrous event marked Logan’s downfall and the end of his administrative career in Samoa. He returned to New Zealand in 1919 and was replaced by Colonel Robert Ward Tate, yet another military administrator. Meanwhile, New Zealand had set up a Royal Commission to inquire into the epidemic in Samoa. The Inquiry report condemned Logan for his response to the epidemic in refusing assistance. The Samoan people were dying at a startling rate, and the call for any type of outside assistance was completely ignored by Logan.¹¹⁶

A 1948 United Nations study said Samoa’s experience was one of the most disastrous epidemics recorded anywhere in the world during the present century.¹¹⁷

¹⁰⁸ M Field, *Black Saturday: New Zealand’s tragic blunders in Samoa* (2006) 52.

¹⁰⁹ *Ibid.*

¹¹⁰ *Supra* n 96 at 50.

¹¹¹ *Supra* n 106.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*, 51.

¹¹⁵ M Meleisea, *Lagaga: A Short History of Western Samoa* (1987) 130.

¹¹⁶ *Supra* n 108 at 57.

¹¹⁷ *Ibid.*, 56.

Not only did people die from the influenza itself but the after-effects of the epidemic led to more deaths, resulting in Samoa losing twenty-two percent of its population in comparison to New Zealand who lost 0.5 percent of its population.¹¹⁸ The aftermath of the epidemic was an intense time for many Samoans; death affected a considerable number of families' especially adult males who were the highest percentage of people to have been taken by the disease. The Fono a Faipule who were the Council of Chiefs had thirty-one members when *Talune* arrived; only seven survived the epidemic.¹¹⁹

Many or most of the older chiefs and orators who had an accurate knowledge of Samoan tradition and ceremonial protocol fell victims – a great blow to conservatism-leaving their titles to a younger generation with imperfect knowledge and a much less effective authority.¹²⁰

Samoa experienced a great loss in leadership. The ongoing colonial experience contributed to the loss of authority. The influenza had stabbed at the heart of Samoan culture where the structure of traditional authority was hit at its hardest. A generation of orators, chiefs and grandparents rich in oral lore had been wiped out before they could transmit their treasures.¹²¹ The epidemic also wiped out all the senior pastors of the L.M.S. and left the church leaderless.¹²²

The influenza epidemic was a real test to the New Zealand-Samoan relationship. The result of the epidemic led Samoans to become untrusting of the New Zealand administration. It caused even more distress to the Samoans when they discovered that they were to continue to be administered by New Zealand under the Mandate endorsed by the League of Nations in December, 1920.

D. LEAGUE OF NATIONS MANDATE 1920: SAMOA'S INTERGRATION INTO NEW ZEALAND.

¹¹⁸ Ibid, 55.

¹¹⁹ Supra, 40.

¹²⁰ F Keesing, *Modern Samoa: The Government and Changing Life* (1934) 96-7.

¹²¹ F Alailima, *Aggie Grey: A Samoan Saga* (1988) 153.

¹²² C Macpherson & L Macpherson, *The Warm Winds of Change: Globalisation in Contemporary Samoa* (2009) 47.

The League of Nations Mandate was established under Article 22 of the Covenant of the League of Nations on the 28 June 1919.¹²³ The New Zealand Parliament passed the Samoa Act 1921 (NZ) which was enacted pursuant to the Treaty of Peace with Germany, signed at Versailles on the 28th day of June 1919.¹²⁴ The League of Nations mandate gave New Zealand colonial responsibility for Western Samoa. The mandate was divided into three classes depending on its level of development and population.¹²⁵ Samoa was classed under the final group, Class C of the Mandate which consisted of South West Africa and South Pacific islands. They were considered the best administered under the laws of the Mandatory as integral parts of its territory.¹²⁶

The mandate saw the introduction of rights and obligations for countries such as Samoa. The mandate required New Zealand to adopt a more just and humanitarian approach to its relationship with Samoa. The mandate was finally confirmed by the Council of the Leagues of Nations in December, 1920.¹²⁷ New Zealand had described its principal objective in Samoa, when it had accepted the mandate, as being that of promoting ‘the welfare of the native race’.¹²⁸ The New Zealand administration argued that they had acquired through dealings with Māori, a reputation for unique success in native administration.¹²⁹ This can be strongly refuted as it is historically known that Māori also suffered many injustices through colonisation.¹³⁰ The New Zealand government declared that they would be the best country to administer Samoa given its experience with Māori. “Pākehā and Māori have lived long enough together to appreciate all that is meant by mutual respect”.¹³¹ “New Zealanders may have the gratification to accord to them like privileges to those now enjoyed by our Māori fellow-countrymen”.¹³² This was

¹²³ League of Nations Mandate www.economicexpert.com/a/League:of:Nations:Mandate.html [17 September 2009].

¹²⁴ Samoa Act 1921.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ J.W.Davidson, *Samoa mo Samoa: The Emergence of the Independent State of Western Samoa* (1967) 101.

¹²⁸ Ibid, 103.

¹²⁹ F Keesing *Modern Samoa: Its government and changing life* (1934) 97.

¹³⁰ C Orange, *Treaty of Waitangi* (1992) 1.

¹³¹ Sir J. Allen, *The Mandate for Western Samoa* (1920) 10.

¹³² Ibid, 11.

actually a far reality from how Māori were really treated in New Zealand during this colonial era.¹³³

(i) The Articles of the League of Nations Mandate 1920.

“The Samoa Act 1921 (N.Z.) was an assertion of New Zealand sovereignty over Western Samoa, under a League of Nations mandate”.¹³⁴ The League of Nations mandate states that in accordance with Article 22, Part I (Covenant of the League of Nations); a mandate should be conferred upon His Britannic Majesty, to be exercised on his behalf by the Government of the Dominion of New Zealand, to administer German Samoa. The terms included in the mandate were proposed in seven articles made at Geneva on the 17th day of December, 1920¹³⁵:

Article one states that the territory over which a mandate is conferred upon His Britannic Majesty for and on behalf of the Government of the Dominion of New Zealand...is the former German colony of Samoa.¹³⁶ This article gives recognition that New Zealand shall govern Samoa.

Article two provides that New Zealand shall have full power of administration and legislation over Samoa as an integral portion of the Dominion of New Zealand, and may apply the laws of the Dominion of New Zealand to Samoa. Of general importance is that New Zealand shall promote to the utmost, the material and moral well-being and the social progress of the inhabitants of Samoa. It affirms in this article that Samoa is part of the New Zealand Dominion.

Article three prohibits slave trade; no forced labour is permitted, except for essential public works and services, which will be adequately remunerated. Liquor and intoxicating spirits continue to be prohibited to Natives and ammunition is to be controlled according to the convention relating to the control of the arms traffic. The article reflects human rights that are incorporated in the Bill of Rights 1688, imperial legislation utilised by New Zealand’s Parliament.

¹³³ Supra n 128.

¹³⁴ *In re Father Ioane Vito* [1988] WSSC 3.

¹³⁵ W.A.G.Skinner, *Handbook of Western Samoa* (1925) 71-3; Refer to Appendix 1.

¹³⁶ League of Nations Mandate 1920; Refer to Appendix 1.

Article four provides that military training of the natives other than for purposes of local defence is prohibited. Furthermore, no military or naval base shall be established in Samoa. Article five provides for freedom of conscience and the free exercise of all forms of worship, and allows all missionaries, nationals of any State member of the League of Nations, to enter into, travel, and reside in Samoa for the purpose of prosecuting their calling.

Article six provides that New Zealand shall report to the Council of the League of Nations annually, containing full information with regard to Samoa, and indicating the measures taken to carry out the obligations assumed under Articles two, three, four and five.

Article seven requires that the consent of the Council of the League of Nations is required for any modification of the terms of the present mandate. This article also requires that New Zealand agrees that, if any dispute whatever should arise between itself and another member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, and cannot be settled by negotiation, it shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.¹³⁷

(ii) Discussion of League of Nations Mandate:

Under the mandate, the New Zealand administration through the New Zealand Parliament adopted the Samoa Constitution Order 1920 which established the basic framework for the setting up of organised government.¹³⁸ “This Samoa Constitution Order 1920 was superseded by the Samoa Act 1921”.¹³⁹ The Samoa Act 1921 was to make provision for the government of Western Samoa where the government of New Zealand shall have “full power of administration and

¹³⁷ League of Nations Mandate 1920.

¹³⁸ L Meti, *Samoa: The Making of the Constitution* (2002) 11.

¹³⁹ *Ibid.*

legislation over the said territory”.¹⁴⁰ This legislation was debated and passed in the New Zealand Parliament with no Samoan representation.¹⁴¹

The Samoa Act 1921 introduced a government system with a legislative council in which there was no representation of Samoan people.¹⁴² The Samoan voice was not welcomed nor heard and those Samoan leaders who tried to voice their opinions were ignored.¹⁴³ The Samoa Act 1921 (NZ) remained the basic law of Samoa till it became independent forty years later.¹⁴⁴ The Samoans residing in Samoa did not accept New Zealand administration under the League of Nations mandate. This was due to the maltreatment of their people over the initial years of New Zealand’s reign and the grave effects of the 1918 Influenza epidemic.¹⁴⁵ The gravest concern was Samoans were not accorded any voice in the management of their own country.¹⁴⁶

This mandate was the platform for New Zealand administration in Western Samoa. It was an official exertion of New Zealand sovereignty over Samoa which was endorsed by the Parliament of New Zealand. The rights incorporated into the articles of the mandate are incorporated from the Bill of Rights 1688 and the era of the League of Nations saw the emergence of human rights. Although New Zealand had administered German Samoa from 1914 it was only in 1920 that German Samoa was renamed Western Samoa and formerly recognised under the League of Nations auspices. New Zealand now had an obligation to administer Western Samoa according to the League of Nations mandate and the key point was the focus on “material and moral well being and social progress”. It was a step forward to the bad start of New Zealand administration. The New Zealand officials were required under the mandate to treat Samoan people in a fair manner.

¹⁴⁰ Samoa Act 1921.

¹⁴¹ Supra n 132.

¹⁴² Supra n 138.

¹⁴³ These Samoan leaders include O.F.Nelson who later forms the Mau movement so that the voices of the Samoans could be heard.

¹⁴⁴ Supra n 127.

¹⁴⁵ Infra n 143 at 24.

¹⁴⁶ Supra n 138.

New Zealand had described its principal objective in Samoa, when it had accepted the mandate, as being that of promoting the welfare of the native race.¹⁴⁷ Before the mandate was formalised, discussions were carried out between the relevant authorities on what it meant for Samoa to become a mandated territory. These discussions involved issues such as the potential qualification of a Samoan to become a member of the Legislative Council. This matter was considered and decided that in good time this would be accomplished but at the moment “it is not expedient in this initial stage of New Zealand administration in Western Samoa to invite Samoans to become Members of our Parliament”.¹⁴⁸ There was no Samoan representation in the governing of their own country. It was evident that Samoa’s interest laid in self government and although New Zealand was aware of this predicament they supported the League of Nations Mandatory system. The mandate indicated the introduction of civil administration in Samoa.¹⁴⁹

E. NEW ZEALAND ADMINISTRATORS IN SAMOA:

New Zealand administrators were appointed to oversee the welfare of Western Samoa and the majority of the administrators conflicted with the Samoan people.

(i) Robert Logan – 1914-1919

The first New Zealand administrator to arrive in Samoa, as mentioned previously was Robert Logan, who was in Samoa from 1914 to 1919 and relieved of his duties following the Influenza epidemic in 1918. His record as a colonial administrator in Samoa was not appealing and his negligence in dealing with the influenza epidemic was a clear indication of how ill prepared he was as a colonial administrator.

(ii) Robert Ward Tate – 1919-1923

Logan was succeeded by Robert Ward Tate who administered from 1919-1923 under the League of Nations Mandate. “He was quick to express his sympathy to

¹⁴⁷ Supra n 127 at 103.

¹⁴⁸ Sir J. Allen, *The Mandate for Western Samoa* (1920) 11.

¹⁴⁹ Ibid, 10.

the families of victims of the epidemic”.¹⁵⁰ His administration saw “the Fono of Faipule petition to King George V for self-government ignored”.¹⁵¹ Samoans continued to demand changes within the New Zealand administration of Samoa. This was mostly ignored and this “inactivity was a consequence of Tate’s own personality”.¹⁵² “Tate did not achieve much as his very inaction avoided creating any further animosity among the Samoans towards him”.¹⁵³ Tate’s practice was to refer important matters to Wellington, even though he was the most qualified person that had an adequate understanding of the Samoan situation. There was no one in the new Department of External Affairs in Wellington that had better knowledge of the situation than him.¹⁵⁴ On the contrary others found him to be a man of high principle.¹⁵⁵

(iii) George Spafford Richardson 1923 – 1928.

Tate was followed by George Spafford Richardson in 1923. When Richardson arrived he explained his intentions: to improve health, education and economic conditions in Samoa.¹⁵⁶ “Health was a special concern for New Zealanders, following the embarrassment of the 1918 epidemic”.¹⁵⁷ Richardson played a huge role in the set up of economic and political policies in Western Samoa.

The Fono o Faipule (Council of Chiefs) that already existed did not have much legal power under the New Zealand administration. In order for Richardson to get support from the Samoan people of his policies he had to give them some recognition. This he achieved through the Fono o Faipule. Richardson believed that the legal recognition of the Fono o Faipule given in the Samoa Amendment Act 1923¹⁵⁸ and the publication of its proceedings in Samoan provided a standing point for developing it into a genuinely representative assembly.¹⁵⁹ Richardson

¹⁵⁰ M Meleisea, *The Making of Modern Samoa* (1987) 123.

¹⁵¹ Supra n 145 at 101.

¹⁵² Ibid.

¹⁵³ Supra n 148 at 124.

¹⁵⁴ Supra n 145 at 101-2.

¹⁵⁵ N.A.Rowe, *Samoa under the Sailing Gods* (1930) 134.

¹⁵⁶ Supra n 152 at 104.

¹⁵⁷ Supra n 150 at 129.

¹⁵⁸ An amendment to the Samoa Act 1921 which remained the basic law of Samoa until its Independence in 1962.

¹⁵⁹ Supra n 152 at 105.

was wise in acknowledging the Fono o Faipule because by doing this he was able to gain support for his policies. This meant that all matters pertaining to Samoan affairs were referred to the Fono o Faipule for consideration. However whether the Fono o Faipule approved or not, was inconsequential as the Administrator retained the final say.¹⁶⁰

Richardson was another New Zealand administrator whose actions conflicted with Samoan norms of authority and civil society. If he found the Samoans to be disobedient he would strip them of their matai titles.¹⁶¹ Given he was the administrator and had full legislative and administration powers he was able to do this as it had been prescribed in the mandate and formalised in the Samoa Act 1921. Richardson's removal of matai titles was a clear insult to Samoan custom and tradition. One incident was the removal of the matai title of one of the paramount chiefs of Samoa, Tupua Tamasese Lealofi III. "The removal of the title was a strikingly arrogant action, high-handed and dangerous, for which there was no precedent in the fa'asamoa".¹⁶² The reason for the removal of his matai title was unjustifiable. Tupua Tamasese Lealofi III refused to remove his hibiscus hedge that he had planted on his own land. He was subsequently banished to New Zealand and imprisoned.¹⁶³

Richardson established model villages which were adopted by the village of Lepea, located on the outskirts of Apia. The new model villages were to provide a neater and more organised village layout. In essence it also highlighted the hierarchy of the village where the higher ranking matai had the biggest Samoan *fale*¹⁶⁴ and commonly situated in the centre of the modelled village. Although the intention was beneficial it was a huge expense. Faumuina, the paramount chief of Lepea "had his village torn down and remodelled at great expense to all the inhabitants".¹⁶⁵ The neighbouring village of Vaimoso was also remodelled. These villages today especially Lepea still reflect Richardson's model village structure.

¹⁶⁰ M Field, *Mau: Samoa's struggles against New Zealand oppression* (1984) 59.

¹⁶¹ *Supra* n 155.

¹⁶² *Supra* n 158 at 64.

¹⁶³ *Ibid.*

¹⁶⁴ *Fale* – means a traditional Samoan house.

¹⁶⁵ *Supra* n 160 at 63.

“Richardson had a powerful sanction to use against the Samoans who objected to his plans for improvement”.¹⁶⁶ The Samoan Offenders Ordinance 1922 passed by the New Zealand Parliament was imposed whereby the Administrator was granted discretionary powers to banish and forbid the use of chiefly titles.¹⁶⁷

The Administrator had the powers to ‘punish any Samoan in any village, district or place whom he deemed likely to be a source of danger to the peace, order or good government thereof.’¹⁶⁸

Richardson’s paternalistic policies and challenge to the Samoan traditional institutions resulted in the rise of the Mau movement.¹⁶⁹

(iii)(a) Resistance: Mau Movement.

This organisation came to birth during the German Samoa era. It was initially a Samoan organisation protesting against payment of taxes when they had not representation in the state of affairs of their own country.¹⁷⁰ The rebirth of the Mau movement under New Zealand administration was due to Samoan resistance of New Zealand administration in Samoa. It was initiated as an objection to unpopular measures carried out by New Zealand administrators which dominated the life of Western Samoa from the 1920s.¹⁷¹ The organisation included influential matai who were Samoan and part-Samoan matai. A considerable number of Samoans supported the objectives of the Mau movement.¹⁷²

The Mau has become such an important part of history in Samoa that it is studied in the history classes of many Samoan classrooms. It is the main record today of the relationship between Samoa and New Zealand during that century and documents the struggles experienced at the time. The movement re-introduced the concept of self-government of Samoa by Samoans. A public meeting held at the Apia market hall on the 15 October 1926 was a landmark event in Samoan

¹⁶⁶ M Meleisea, *The Making of Modern Samoa* (1987) 131.

¹⁶⁷ Ibid, 132.

¹⁶⁸ Samoan Offenders Ordinance 1922.

¹⁶⁹ Supra n 164.

¹⁷⁰ M Meleisea, *Lagaga: A Short History of Western Samoa* (1987) 117.

¹⁷¹ Department of External Affairs, *Western Samoa 1947: Report to the Trusteeship Council by United Nations Mission to Western Samoa* (1947) 13.

¹⁷² Supra n 158.

politics. It saw the coming together of Samoans and local Europeans where they were linked through kinship ties and traditional and marriage relationships.¹⁷³ It saw the coalition of people with mutual interests to discuss how Samoa could gain more autonomy in the affairs of their own country. Half-caste Samoans¹⁷⁴ were also involved in the Mau. Olaf Nelson was one half-caste who was at the forefront of the Mau movement and one of the key figures in the events of the Mau organisation.¹⁷⁵ It was a movement that actively challenged New Zealand's administrators and became a means to express grievances and to act as a nationwide group. Through this medium Samoans were heard more effectively because they had come together as a group and were now hard to be ignored by New Zealand administrators. The movement's main goal was to be self-governed so that Samoa would become independent from colonial power. During the time of the Mau movement Samoa was still a mandated territory under the League of Nations auspices under Richardson.

(b) Deportation:

Richardson went to all efforts to suppress the Mau Movement. Richardson described the Samoans as if they "were like children and they needed to be dealt with firmly".¹⁷⁶ Those found to be involved in the resistance movement were banished from their villages or imprisoned.¹⁷⁷ Deportation was also another option that was recommended. Richardson requested Wellington to enforce deportation of Samoans and thus the Samoa Amendment Bill was introduced where Richardson would receive powers to order deportation.¹⁷⁸ Richardson wanted to deport Olaf Nelson who he believed to be the backbone of the Mau movement. There was opposition in Wellington to the recommendation of Samoan deportation orders.¹⁷⁹

¹⁷³ Supra n 167 at 139.

¹⁷⁴ Half-caste Samoans are those who were not of full Samoan blood but also have a parent of a different ethnicity. This may include a German, British, Swedish, English, French or Chinese parent.

¹⁷⁵ M Meleisea, *Lagaga: A Short History of Western Samoa* (1987) 134.

¹⁷⁶ M Field, *Mau: Samoa struggles against New Zealand's oppression* (1984) 82.

¹⁷⁷ Supra n 173 at 138.

¹⁷⁸ Supra n 174 at 99.

¹⁷⁹ Ibid.

Harry Holland, a Member of Parliament for New Zealand, stated that the deportation would not be to the credit of New Zealand. That it constitutes an outrage upon every principle of British liberty, and that is the reason today why there is so much resentment amongst Samoans and New Zealanders throughout New Zealand because of the events being carried out in Samoa.¹⁸⁰ The bill was still passed and made law. “Press criticism of its draconian measures embarrassed the Government, which in private had its own reservations about deportation without trial”.¹⁸¹ Samoan matai continued to be banished, imprisoned and deported under Richardson’s regime. One of the first to be deported was Olaf Nelson. “Richardson recommended to Wellington that Nelson be exiled from Samoa”.¹⁸² Conclusions were made and released and Nelson was banned from entering Western Samoa for five years.¹⁸³ Another paramount chief made a political prisoner and deported was Tupua Tamasese Lealofi III, under Stephen Shepherd Allen’s regime. Under New Zealand administration, those Samoans that were deported were deported to New Zealand and commonly ended up been housed in New Zealand prisons.¹⁸⁴

Deportation was the worst punishment any Samoan could receive. To be deported from one’s own country of birth was unthinkable. To deport a paramount chief from Western Samoa was a clear insult to Samoa custom. When New Zealand accepted the mandate they said they would promote the welfare of the native race. Deporting leaders of a country was clearly in contravention of promoting Samoa’s welfare. If one undertakes an act which is detrimental to their country, one could consider a charge of treason or imprisonment if one is a conscientious objector. Samoans were already being banished from their villages and deportation was stretching punishment too far. These actions went contrary to the focus of the League of Nations mandate where the material and moral well-being and social progress of the Samoan people were to be upheld. Richardson and the responsible New Zealand government were acting contrary to the spirit of the League of Nations mandate.

¹⁸⁰ Ibid.

¹⁸¹ Supra n 174 at 100.

¹⁸² Ibid, 108.

¹⁸³ Supra n 145 at 130.

¹⁸⁴ Supra n 179.

The Mau movement however continued to protest through non-violent marches in the capital of Apia. They continued to resist Richardson's policies and rules. Those Samoans who were wanted by New Zealand officials resorted to the bush and mountains for refuge. Richardson later requested Wellington that a show of force was important to settle the matter peacefully because

he was dealing with very primitive people with a peculiar psychology and his kindness was being looked upon as weakness.¹⁸⁵

The *Dunedin* and *Diomedes* arrived in Samoa in 1928.¹⁸⁶ The Mau support continued to grow and the "*Dunedin* and *Diomedes* left having done little to solve Richardson's problems".¹⁸⁷ Richardson's administrative career came to an end on 8 April 1928.¹⁸⁸ Although Richardson administered Samoa for only five years, his actions certainly left disturbing memories in Samoa's history.

(iv) Stephen Shepherd Allen 1928 – 1931.

More Maladministration:

Richardson was succeeded by Stephen Shepherd Allen who "inherited a potentially explosive situation".¹⁸⁹ Allen arrived at a time of conflict and he continued Richardson's policies. "By the middle of 1929, the Mau began to hold regular parades through Apia".¹⁹⁰ Many activities were held to try and claim autonomy of their country. This included members of the Mau movement petitioning King George V that the Mau was a national organisation that had the support of ninety percent of the Samoan people that addressed social, civil and political issues in Samoa.¹⁹¹ The Mandates Commission of the League of Nations ignored the Mau's petition.¹⁹² Furthermore, Tupua Tamasese Lealofi III was deported to New Zealand and imprisoned in Auckland.¹⁹³ Sir Maui Pomare,

¹⁸⁵ Supra n 174 at 111.

¹⁸⁶ Ibid, 120.

¹⁸⁷ Ibid, 122.

¹⁸⁸ Supra n 164 at 145.

¹⁸⁹ Ibid.

¹⁹⁰ M Field, *Black Saturday: New Zealand's tragic blunders in Samoa* (2006) 130.

¹⁹¹ Ibid, 136-7.

¹⁹² Ibid.

¹⁹³ Ibid.

former Minister of the Cooks Islands in the Reform Government paid a visit and said:

I looked into the countenance of a tama au Ariki – a prince indeed- lineal descendant of kings where genealogical lines reach back into the twilight fable – deprived of hereditary titles, degraded, deported and imprisoned.¹⁹⁴

Tupua Tamasese Lealofi III was permitted to return to Samoa in 1929.

(a) Black Saturday:

On the dawn of December 28 1929, a peaceful Mau procession set out which was led by three paramount chiefs, Tamasese, Tuimaleali’ifano and Faumuina and leaders of the Mau.¹⁹⁵ An attempt was made to arrest a member of the Mau which resulted in a scuffle. Both the New Zealand police and members of the Mau became physically violent towards each other. As a result of Allen’s indecision, the New Zealand police force opened fire on the peaceful procession.¹⁹⁶

A total of nine died, fifty wounded and of the nine who died was Tupua Tamasese Lealofi III. This day is now historically recorded as Black Saturday for the Samoans. This was the same chief that was ordered to remove his hibiscus hedge to make way for Richardson’s modelled villages, and as a result was imprisoned and stripped of his matai title. As mentioned beforehand, he was also deported during Allen’s administration, and now he was killed in a non-violent protest march where all Samoans were unarmed. “The Samoans had no doubt that the attack had been planned and that their leaders had been deliberately fired upon”.¹⁹⁷

As he lay dying Tupua Tamasese Lealofi III said¹⁹⁸:

My blood has been spilt for Samoa. I am proud to give it. Do not dream of avenging it, as it was spilt in maintaining peace. If I die, peace must be maintained at any price.

In January 1930, after the funerals of the victims of Black Saturday, Allen proclaimed the Mau a seditious organisation.¹⁹⁹ As a result many of the Mau fled

¹⁹⁴ Supra n 183 at 132.

¹⁹⁵ J .W.Davidson, *Samoa mo Samoa: The emergence of the Independent State of Samoa* (1969) 138.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Supra n 188 at 148.

¹⁹⁹ Supra n 193 at 139.

to the bush and remained there in fear of persecution. The following year Allen's administration years in Samoa came to an end.

When Allen departed in 1931, the status of the office of Administrator was very low in the eyes of the Samoans. In the popular mind he was responsible for the death of Tamasese as the words of a popular Samoan song indicates.²⁰⁰

He was succeeded by Robert Ernest Hart who administered Samoa from 1931-1935.

(v) Administrator: Robert Ernest Hart 1931-1935

Attempts at Reconciliation:

Hart was not given much opportunity to exercise any political action because of New Zealand's experience with Richardson and Allen.²⁰¹ New Zealand governments reached the conclusion that all future Administrators would be controlled from Wellington. This was a control of a negative kind.²⁰² Hart arrived when Samoa was at its lowest point. Hart therefore began negotiations with Mau leaders but these talks came to an end when he refused to accept Nelson as one of their representatives.²⁰³ Nelson was arrested and exiled again less than a year after his return because of fear that he might revive the Mau movement now that Tupua Tamasese Lealofi III had died.²⁰⁴ Nelson hoped that some day New Zealand would understand the wrongs done by her militaristic officers. Samoa had almost given up hope.²⁰⁵

In 1935 the New Zealand Labour party led by Michael Savage was elected to office. New Zealand has always been responsible for the administrative control of Polynesians and during the nineteenth century, when they had urged Britain to acquire Samoa on their behalf, they had boasted of their special talent for its exercise.²⁰⁶ Following the election of the New Zealand Labour party they sought

²⁰⁰ M Meleisea, *The Making of Modern Samoa* (1987) 147.

²⁰¹ J.W.Davidson, *Samoa mo Samoa: The emergence of the Independent State of Samoa* (1969) 142.

²⁰² Ibid.

²⁰³ M Meleisea, *Lagaga: A Short History of Western Samoa* (1987) 39.

²⁰⁴ Supra n 198 at 148.

²⁰⁵ Supra n 174 at 202.

²⁰⁶ Supra n 199 at 147.

to improve relations with the Samoans. To convince Samoa of New Zealand's goodwill they appointed a new administrator to replace Hart.²⁰⁷

(vi) Administrator – Alfred Clarke Turnbull 1935 – 1946

More Maladministration:

Hart was replaced by Alfred Clarke Turnbull who was the only administrator with no military background. Turnbull was Acting Administrator from 1935-1943 and then became Administrator from 1943-1946. Turnbull was known to be unsure of his purpose in Samoa and “emphasized he was merely the servant of Wellington, where real power resided”.²⁰⁸ Turnbull was indecisive on policy issues and was a man of old school.²⁰⁹ He had to deal with the Mau leaders and their issues which ended in more disagreement than agreement.

The Mau blamed Turnbull and his officers for its failure to win New Zealand acceptance of Samoan policies wherever disagreement still remained.²¹⁰

However Turnbull was acting according to Wellington's instructions. In July 1937 his wife held up a solemn procession commemorating the death of Tupua Tamasese Lealofi III when she drove her car into the middle of the road as the procession approached.²¹¹ A Samoan lad stopped her car at the same time damaging it and was imprisoned for his actions.²¹² This was a direct insult to Samoan traditional protocol and traditions. Turnbull like some of his predecessors was disliked by the Samoans and before his term ended he became despised and ignored.²¹³

(vii) Administrator – Francis William Voelcker 1946 – 1949.

²⁰⁷ Supra n 203 at 213.

²⁰⁸ J.W.Davidson, *Samoa mo Samoa: The emergence of the Independent State of Samoa* (1969) 151.

²⁰⁹ Ibid.

²¹⁰ Ibid, 154.

²¹¹ Ibid, 151.

²¹² Ibid.

²¹³ Ibid, 152.

Turnbull was succeeded by Francis William Voelcker from 1946-1949.²¹⁴ Voelcker was also the responsible administrator when Samoa's status was changed from being a League of Nations Class C mandate to the United Nations Trusteeship agreement.²¹⁵ He was a former officer of the British regular army and settled in New Zealand. He was involved in the unexpected Labour victory in 1938 and was quite successful in his career.²¹⁶ He was well liked in Samoa but was inexperienced in administration and relied on his senior officers. "In respect he was both unwise and unfortunate".²¹⁷

He was appalled by the lowly regard in which his position was commonly held by the Samoans and possessed the will and integrity which in other circumstances might have enabled him to revive its influence.²¹⁸

He was also involved in presenting to the Samoans the draft of New Zealand's proposal to the Trusteeship Council about Samoa's future.²¹⁹ This angered Samoan leaders because the proposal had been drawn without any consultation with the Samoan people. Some Samoan matai posed the question of how would New Zealanders' feel if Great Britain dictated their future to them?²²⁰ As a result Samoa came up with their own proposal which focused on two requests: the immediate Independence of Samoa and reunification of American and Western Samoa.²²¹ The two proposals led to a Trusteeship Council mission to Samoa in June 1947.²²²

Voelcker had begun his role as Administrator and completed as High Commissioner in February 1949. His successor was Sir Guy Richardson Powles' who arrived in Samoa in March 1949 and began his duties as High Commissioner.²²³ The Administrator position was now renamed High Commissioner. The persistence of the Samoan people for Independence led to the New Zealand administration acknowledging Samoa's goal to achieve

²¹⁴ L Meti, *Samoa: The Making of the Constitution* (2002) 11.

²¹⁵ *Infra* n 212 at 36; The change of Samoan status from the League of Nations mandate to the United Nations Trusteeship Agreement will be discussed shortly in detail at the provided reference.

²¹⁶ *Supra* n 206 at 159.

²¹⁷ J.W.Davidson, *Samoa mo Samoa: The emergence of the Independent State of Samoa* (1969) 171.

²¹⁸ *Ibid*, 168.

²¹⁹ F Alailima, *Aggie Grey: A Samoan Saga* (1988) 261.

²²⁰ *Ibid*, 262.

²²¹ *Ibid*.

²²² *Infra* at 36.

²²³ *Supra* n 215 at 192.

independence. This in turn led to the New Zealand administration changing their attitude towards the Samoans and supporting the cause for Samoa's independence. Hence, the name 'Administrator' was changed to 'High Commissioner' which reflects a less colonial meaning. The roles of the new High Commissioners were to assist Samoa in obtaining independence from New Zealand.

(viii) High Commissioner: Sir Guy Richardson Powles 1949-1960.

Move Towards Independence:

Powles' eleven years had a positive impact on Samoa's movement for independence.²²⁴ He was well respected by Samoans and was genuinely interested in the well-being of Samoa as a nation. He worked together with the Samoan Legislative Council and the New Zealand government to make sure that Samoa as an independent nation would have support economically and socially but at the same time giving Samoa autonomy over their nation.²²⁵ He assisted in transferring responsibility to Samoan representatives as well as establishing a Cabinet to act as the Executive of the Samoan government.²²⁶ He played an active role in assisting Samoa to achieve its goal of self-government. Of all the New Zealand administrators that had governed Samoa, he was the only one that truly worked for the best interests of the Samoan people fully validating his obligations under the Trusteeship Agreement and the former League of Nations mandate. At one stage he announced over Samoa's local radio station that:

racial discrimination is immoral and barbarous. It is based on ignorance and prejudice; it poisons the life of any community, and it degrades the people who practise it.²²⁷

Powles completed his duties in Samoa in February 1960 and was posted to India. His contribution to Samoa's movement to Independence is appreciated by the Samoan people.

(ix) High Commissioner: John Bird Wright 1960 – 1961.

²²⁴ G Powles (Sir), from *An Encyclopaedia of New Zealand*, edited by A. H. McIntock, originally published in 1966) [18-Sep-2007]

< <http://www.TeAra.govt.nz/1966/P/PowlesSirGuyRichardsonKbeCmgEd/en>> He went on to become the first New Zealand Chief Ombudsman in 1962.

²²⁵ *Supra* n 215 at 321.

²²⁶ *Ibid*, 366.

²²⁷ L Meti, *The Making of the Constitution of Samoa* (2002) 255.

John Bird Wright resumed his office in Samoa in March 1960 and remained there until 31 December 1961, the eve of Samoa's Independence. He was the former Secretary of the Government of Western Samoa and Secretary of Island Territories in Wellington.²²⁸ He was the last New Zealand High Commissioner under New Zealand administration in Samoa. He contributed most significantly to the relations between the governments of Samoa and New Zealand during the remaining stages in the transition to independence.²²⁹ His role continued from Powles role of ensuring that Samoa's dream of Independence became a reality and this was achieved on the 1 January 1962.

(x) CONCLUSION– New Zealand Administrators:

All the New Zealand administrators and/or High Commissioners impacted Samoa one way or the other. Logan and Richardson were probably the most disliked New Zealand Administrators. They could not accept that the Samoan point of view was a valid one.²³⁰ The Samoa experience of New Zealand administration (with the exception of the New Zealand High Commissioners) was not pleasant. Experiences of discrimination and racism were insulting. Not acknowledging traditional leadership and Samoan custom conflicted with Samoan norms and cultural identity. New Zealand's response to challenges in relation to desire for Independence was met with restrictions such as curfews, banishments, imprisonments, deportations and shooting of a paramount chief and others during a non-violent protest march. Although under Savage, New Zealand tried to be more benevolent it was ineffectual until Powles.

F. UNITED NATIONS TRUSTEESHIP AGREEMENT 1946-1961.

The League of Nations was replaced by the United Nations Organisation when the war ended in 1945.²³¹ Samoa continued to be a mandated territory under the administration of New Zealand until it was transferred to trusteeship in 1946.

²²⁸ Supra n 215 at 366.

²²⁹ Ibid.

²³⁰ M Field, *Mau: Samoa's struggle against New Zealand oppression* (1987) 221.

²³¹ Supra n 225 at 25.

The Trusteeship Agreement for the Territory of Western Samoa was approved by the General Assembly of the United Nations at the sixty-second plenary meeting of its First session on 13 December 1946.²³² The agreement stated that Western Samoa has been administered in accordance with Article 22 of the Covenant of the League of Nations and is to be exercised on behalf of His Britannic Majesty by the Government of New Zealand.²³³

Many events were discussed in the Trusteeship agreement; the main objective for Samoa was to become independent. The United Nations wanted to know if Samoa was ready to become an independent nation. They sent a visiting mission to Samoa to report on Samoa's potential to become an independent state.

The Trusteeship agreement for Samoa meant that Samoa would still be governed under New Zealand administration whilst in preparation to become an independent nation. New Zealand acting as Trustee is to assist Samoa to become an independent state as directed by the United Nations Trusteeship Agreement. The United Nations had to be sure that Samoa would be able to be independent politically, socially and economically. New Zealand in return supported Samoa's goal for self government whilst at the same time had an obligation to the United Nations to prepare for the administration of Samoa under the trusteeship agreement. The Trusteeship system was put in place to prepare countries for independence whilst a colonial country acted as Trustee. The trustee country was to continue to administer the country as well as assist in its transition in becoming an independent nation.

Despite New Zealand's disastrous experiences in Samoa over the past 32 years and the very modest achievements it had made during this period, the New Zealand government was confident it could fulfil the role of Trustee in Samoa.²³⁴

This emphasised the change in the relationship of Samoa and New Zealand. New Zealand was the coloniser and now assuming the role of trustee. The Trusteeship Agreement was an agreement drafted by the United Nations to assist in meeting

²³² Western Samoa Trusteeship Agreement of the Territory of Western Samoa 1946; Refer to Appendix 2.

²³³ Western Samoa Trusteeship Agreement of the Territory of Western Samoa 1946; Refer to Appendix 2.

²³⁴ M Meleisea, *Lagaga: A Short History of Western Samoa* (1987) 148.

the Samoans request to become an independent nation, like many other countries who were under the control of their colonisers.

(i) Articles of United Nations Trusteeship Agreement:

The Agreement indicated the willingness of the New Zealand government to apply the international trusteeship over Western Samoa and the United Nations approved the terms of the trusteeship for Western Samoa in substitution for the terms of the mandate through the following articles²³⁵:

Article one provides that the agreement applies to Western Samoa comprising the four main islands together with all other islands adjacent thereto. Article two designates the government of New Zealand as the administering authority for Western Samoa. Article three provides that New Zealand shall have full powers of administration, legislation and jurisdiction over Western Samoa.

Article four provides that New Zealand agrees to undertake to administer Western Samoa in such a manner to obtain the basic objectives of the international trusteeship system as expressed in Article 76 of the Charter of the United Nations such as: further international peace and security; promote political, economic, social and educational advancement of the Samoans; promote their progressive development towards independence, to encourage respect for human rights and fundamental freedoms, all without distinction as to race, sex, language or religion and to ensure equal treatment in the administration of justice without prejudice to the attainment of the foregoing objectives.

Article five provides that New Zealand shall promote the development of political institutions suited to Western Samoa and develop the participation of Western Samoans in advisory and legislative bodies to advance the political structure of Samoa.

²³⁵ Western Samoa Trusteeship Agreement of the Territory of Western Samoa 1946; Refer to Appendix 2.

Article six promotes social advancement of Samoans by prohibiting slavery and/or forced labour; by controlling ammunition and traffic in arms, importation and distribution of intoxicating spirits and beverages; and controlling the production, distribution and importation of narcotic drugs.

Article seven provides that New Zealand undertakes to apply in Western Samoa the provisions of any international conventions and recommendations as drawn up by the United Nations or its specialized agencies. Article eight requires that New Zealand take into consideration Samoan customs and usages and respect the rights and safeguard the interests of the Samoan population. No native land is to be transferred unless it is authorized from the competent public authority.

Article nine provides that New Zealand shall ensure Samoa's freedom of conscience and the free exercise of all forms of worship and allow missionaries, nationals of any State Member of the United Nations, to enter into, travel and reside in Samoa for the purpose of prosecuting their calling. This however shall not affect the right and duty of New Zealand to exercise such control as it may consider necessary for the maintenance of peace, order and good government.

Article ten states that New Zealand shall ensure the maintenance of international peace and security and is entitled to establish a naval or military base; to station and employ armed forces in the territory; to make use of volunteer forces, facilities and assistance from the trust territory in carrying out the obligations toward the Security Council undertaken in this regard by the administering authority, as well as for local defence and the maintenance of law and order within the trust territory; and to take all such other measures in accordance with the purposes and principles of the Charter of the United Nations as are in the opinion of the administering authority necessary to the maintenance of international peace and security and the defence of Western Samoa.

Article eleven provides that New Zealand will make provision for an education system including post-primary education and professional training. Article twelve guarantees Samoans freedoms of speech, of the press, of assembly and of petition.

Article thirteen arranges for the co-operation of Western Samoa in any regional advisory commission, regional technical organization, or other voluntary association of states, any specialized international bodies, public or private, or other forms of international activity not inconsistent with the Charter of the United Nations.

Article fourteen provides that New Zealand shall report annually to the General Assembly of the United Nations and shall arrange to be represented at sessions of the Trusteeship Council at which reports relating to Western Samoa will be discussed. Article fifteen provides that the terms of this agreement shall not be amended or altered except as provided for in Article 79 of the Charter of the United Nations.

Article sixteen provides that should any dispute arise between New Zealand and another member of the United Nations relating to the interpretation and application of the provisions of this agreement it shall be submitted to the International Court of Justice if it cannot be settled by negotiation or similar means.²³⁶ The Trusteeship Agreement was established and Western Samoa was to function accordingly until it could meet the requirements to become an independent nation.

A new Samoan flag was raised on the 1st of June 1948 alongside the New Zealand flag to mark the establishment of the new trusteeship system of government.²³⁷ The United Nations made their recommendation thus following the enactment of the Samoan Amendment Act 1947. This Amendment Act stated that²³⁸:

- i. The New Zealand Administrator was re-designated High Commissioner and the term Government of Western Samoa replaced that of Administration of Western Samoa.
- ii. A Council of State was established consisting of the High Commissioner and the Fautua who were Tupua Tamasese Mea'ole and Malietoa Tanumafili II.
- iii. The 'Legislative Council' was re-designated as the 'Legislative Assembly'. It had eleven Samoan members elected by the Faipule, five European members

²³⁶ Western Samoa Trusteeship Agreement of the Territory of Western Samoa 1946.; Refer to Appendix 2.

²³⁷ M Meleisea, *Lagaga: A Short History of Western Samoa* (1987) 149.

²³⁸ Ibid.

elected by Europeans and six official members representing heads of departments, the head of government, the Attorney General, the Treasury and the Council of State.

iv. The Assembly had wide powers in law-making but was subject to veto by the High Commissioner.

During this period Samoa was required to discuss its political and economic development to ensure its aim for self-government. Samoa was required to be economically and politically sustainable. They were aware of the United Nations mission visit to other states in the African territories who were also seeking self-government. These states were adopting constitutional frameworks from other countries. Samoa's first task was to establish a form of government and a constitutional framework that incorporates their culture and traditions and complied with the Trusteeship guidelines. The determination of Samoans to have a culturally appropriate constitution is also significant as it distinguishes Samoa from the African nations. It emphasizes the Pacific identity which is again significant to the relationship of Samoa and New Zealand.

Samoa has its own traditional hierarchy which was crucial to be incorporated into the new constitutional framework. For example, the four paramount families could be seen as a comparison to the Queen of England and the royal family and how they were implemented into the United Kingdom government structure. Samoa has its own traditional political hierarchy. The *fa'asamoa* was crucial in the drafting of the Constitution. In order for this to be incorporated the Constitutional Convention was set up.

G. CONSTITUTIONAL CONVENTION 1954:

Discussion of the written Constitution of Samoa in preparation for Independence.

The 1954 Constitutional Convention was established to begin the discussion of self-government with the assistance of the New Zealand government. It was the first genuine attempt to marry custom and tradition within a constitutional structure. Resolutions from this Convention were obtained covering core aspects of the Constitution. It also stated that "there would be a special relationship

between New Zealand and the self-governing State of Western Samoa”.²³⁹ The Convention agreed that the special relationship between Western Samoa and New Zealand should be maintained indefinitely; both parties also were aware that the form of this special relationship could change with changing circumstances and constitutional developments.²⁴⁰ Because of New Zealand’s influence on Samoa and the dynamics of both nations over the years, the relationship between both countries was one that will grow and develop into becoming a special one.²⁴¹ The Constitutional Convention of 1954 was a lengthy process which had to account for the different perspectives of all representatives involved in the decision-making process.²⁴²

The Convention decided that Tupua Tamasese Mea’ole and Malietoa Tanumafili II become joint chairmen of the Convention which was traditionally fitting because they represented two of the four paramount families of Samoa and were the *Tama-a-aiga*, an affiliation of the highest rank in accordance with Samoan traditions and culture.²⁴³ They later became the Joint Heads of the Independent State of Western Samoa. “The office of Head of State should be reserved for the Tama-a-Aiga was the statement made without question”.²⁴⁴ A Legislative Assembly was decided upon as well as a ministerial cabinet government.²⁴⁵ A new Legislative Assembly was elected in 1957. The tenure of their positions consisted of a three year term; the Samoan members were chosen by the matai in forty-one nominating electorates. Those who held a matai title had the right to vote and be nominated as a candidate.²⁴⁶ A matai represented the extended family so they represented a considerable number of members of their respective families.

A Working Committee on the Constitution was established in February 1959 to undertake the onerous task of drafting the constitution of Samoa. Two

²³⁹ L Meti, *Samoa: The Making of the Constitution* (2002) 37.

²⁴⁰ Ibid.

²⁴¹ The special relationship between Samoa and New Zealand will be discussed in detail in chapters 2 and 3.

²⁴² M Meleisea, *Lagaga: A Short History of Western Samoa* (1987)153.

²⁴³ Supra n 237 at 35.

²⁴⁴ Ibid, 94.

²⁴⁵ Supra n 240 at 153.

²⁴⁶ Ibid, 154-5.

constitutional advisors namely Professor C.C.Aikman and Professor J.W.Davidson worked with the working committee. Aikman was the constitutional adviser for the New Zealand government and Davidson was the constitutional adviser to the Samoan leaders.²⁴⁷ Upon completion of the working committee's work, they then reported back to members of the Constitutional Convention who included representatives from all districts of Samoa for their opinion and consensus in relation to the draft constitution.²⁴⁸

The purpose of the Convention was the enactment of the Constitution which will become effective upon termination of the Trusteeship Agreement and New Zealand's administration of Samoa.²⁴⁹ However before this could happen Samoa had to satisfy the United Nations trusteeship criteria for self-governing nations. Also of great importance was that there had to be a general consensus that the people of Samoa accepted the Constitution. In order for this to be made possible the United Nations suggested that a "plebiscite be held in which all persons over twenty-one, both men and women, both titled and untitled, shall have taken part".²⁵⁰ This suggestion was contrary to Samoan norms and custom where the head of the family is the matai (whether being male or female) who was the voice for the whole family. Despite this, Samoa was willing to waiver traditional protocol and accept the proposal if it meant a step closer to independence.

The plebiscite was held in May 1961 in which Samoans were asked two questions²⁵¹:

1. Whether they agreed on the Constitution adopted by the Constitutional Convention?
2. Whether they agreed that Western Samoa should become an independent state on the first of January 1962 on the basis of that Constitution?

The majority of voters voted in the affirmative to both questions. The Constitution was to come into operation on the day approved by the General Assembly of the United Nations. This was also the date of termination of the Trusteeship

²⁴⁷ Supra n 237 at ix.

²⁴⁸ Ibid, ix.

²⁴⁹ Ibid, 288.

²⁵⁰ Ibid, 303.

²⁵¹ Supra n 240 at 156.

Agreement for the Territory of Western Samoa.²⁵² The New Zealand government emphasised that they were prepared upon the Samoan government wishes, to continue providing substantial assistance in the post-independence period.²⁵³ This reflects New Zealand willingness to continue its relationship with Samoa, despite the change of status.

H. INITIAL STAGES OF INDEPENDENCE:

The Western Samoa Act 1961 was enacted to terminate the Trusteeship Agreement and was to take effect on the 1st day of January 1962.²⁵⁴ The Constitutional Convention at its final meeting came up with a few resolutions and recommendations.²⁵⁵ Resolutions made were that Western Samoa was to become an Independent state upon the termination of the Trusteeship agreement. Powers that were vested upon the New Zealand High Commissioner were to be transferred to the Council of State and Cabinet.²⁵⁶

There was to be a clear and friendly understanding between the governments of Western Samoa and New Zealand whereby the government of New Zealand will provide assistance to the Independent State of Western Samoa.²⁵⁷

The government of New Zealand upon request by the government of Western Samoa would provide administrative and technical assistance to Samoa.²⁵⁸ New Zealand's assistance to Samoa to gain independence was ongoing; their assistance extended to support Samoa when requested even though Samoa was now a sovereign state.

On the 1 January 1962 Samoa achieved independence and became the first Pacific Island nation to become independent from colonial power. Independence day witnessed many dignitaries in full attendance along with New Zealand's Prime Minister and Leader of Opposition further symbolising the growth of the

²⁵² L Meti, *Samoa: The Making of the Constitution* (2002) 245.

²⁵³ File PM 311/10/3 Correspondence from F.H.Cornier, Secretary of External Affairs to the High Commissioner (NZ) 31 May 1961.

²⁵⁴ Western Samoa Act 1961.

²⁵⁵ J.W.Davidson, *Samoa mo Samoa: The Emergence of the Independent State of Western Samoa* (1967) 401.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

relationship of both countries.²⁵⁹ The preamble of the Constitution declared that “Western Samoa should be an Independent state based on Christian principles and Samoa customs and traditions”.²⁶⁰ The objective of the Constitution was achieved; although Samoa utilised western methods to obtain independence, its customs and traditions is entrenched in the constitution.

I. POST INDEPENDENCE:

The ongoing relationship of Samoa and New Zealand after Samoa obtained Independence.

For Samoa and New Zealand to continue its relationship, it was decided that a Treaty of Friendship between the two sovereign states was to be drafted after Samoa’s independence on the 1st January 1962. Both countries agreed that a Treaty of Friendship be drafted to reflect their special relationship. The Trusteeship Council stated that the Treaty of Friendship should not be discussed until after independence because Samoa would not feel free to talk until independence was attained.²⁶¹ The Treaty of Friendship became an agreement between two sovereign states.

New Zealand’s historical affiliation with Western Samoa prompted this gesture to further develop the ongoing relationship of both countries. New Zealand was still willing to assist Western Samoa with its development. It is a continual sign that New Zealand wants to assist Samoa. New Zealand had been involved in Samoa’s affairs from 1914 and quite knowledgeable of Samoan customs. Although the relationship of both countries began as one of ignorance and miscomprehension it did grow to become one of more understanding especially during the time of Powles in the pre-independence era.

J. TREATY OF FRIENDSHIP 1962: The acknowledgement of the special relationship between Samoa and New Zealand.

Over the years Samoa and New Zealand have created close ties which has led to the development of its relationship. Some developments were positive although

²⁵⁹ Ibid.

²⁶⁰ M Meleisea, *Lagaga: A Short History of Western Samoa* (1987) 212.

²⁶¹ *Supra* n 250 at 318.

there are negative events that will be discussed in detail in chapters 2 and 3. The Treaty of Friendship between the governments of Samoa and New Zealand was signed on the 1st August 1962 by Mr J.B.Wright, the New Zealand High Commissioner in Samoa and Samoan Prime Minister Fiame Mataafa Faumuina.²⁶²

The Treaty of Friendship is stated as follows²⁶³:

The Government of New Zealand and Western Samoa,

AFFIRMING that their relations, as Governments of sovereign and equal states, are founded upon respect of fundamental human rights and for the purposes and principles of the Charter of the United Nations,

RECOGNIZING that friendship, confidence, and a mutual endeavour to obtain for their peoples fuller opportunities for social progress have established a specially intimate relationship between them,

AND DESIRING to maintain and strengthen the bonds of amity and goodwill which have hitherto existed between and to provide for continued cooperation,

HAVE AGREED AS FOLLOWS:

Article I

Relations between New Zealand and Western Samoa shall continue to be governed by a spirit of close friendship.

Article II

Where appropriate the two Governments shall consult each other on matters of mutual interest and concern.

Article III

Each Government shall ensure that citizens of the other living within its territory are, in accordance with the normal practice between friendly states, given equitable treatment and full legal protection and access to the Courts.

Article IV

The two Governments shall continue to work together to promote the welfare of the people of Western Samoa.
In particular the Government of New Zealand will consider sympathetically requests from the Government of Western Samoa for technical, administrative and other assistance.

Article V

The Government of New Zealand shall for as long as the Government of Western Samoa wishes, and in such manner as will in no way impair the right of the Government of Western Samoa to formulate its own foreign policies, afford assistance to the Government

²⁶² “Feagaiga Faauo i le Va o Niu Sila ma Samoa Sisifo” (Friendship Treaty between New Zealand and Western Samoa) Vol.58, No.7. August 1962.

²⁶³ Refer to Appendix 3; From Pacific Island Treaty Series (1998)
http://www.paclii.org/pits/en/treaty_database/1962/1.html

of Western Samoa in the conduct of its international affairs. In particular the Government of New Zealand will:

- (a) when requested, act as the channel for communications for Western Samoa and other Governments and international organizations;
- (b) when requested, and where permissible and appropriate, undertake the representation of the Government of Western Samoa at any international conference at which Western Samoa is entitled to be represented;
- (c) when requested, supply Western Samoa with information concerning international affairs;
- (d) undertake the diplomatic protection of nationals of Western Samoa in other countries and perform consular functions on their behalf.

Article VI

Either Government may at any time give to the other Government written notice of its desire to terminate this Agreement. In such case, this Agreement shall terminate upon the expiration of three months from the date on which the notice is received.

Article VII

This Agreement shall enter into force on the date of signature.

IN WITNESS WHEREOF, the representative of the Government of New Zealand, and the representative of the Government of Western Samoa, duly authorized for the purpose, have signed this Agreement.

DONE at Apia, this 1st day of August 1962 in four originals, two being in the English language, and two in the Samoan language, the texts of both languages being equally authentic.²⁶⁴

(i) Discussion of Treaty of Friendship:

The Treaty of Friendship is unique and is living proof of the special relationship between Samoa and New Zealand. New Zealand does not have any other kind of treaty relationship with any other country but Samoa. The New Zealand Prime Minister at the time, Right Honourable Keith Holyoake stated that “the signing of the Treaty is a fitting climax to the longstanding connection between our two countries”.²⁶⁵ Western Samoa became an independent state on 1st January 1962 and the signing of the Treaty of Friendship occurred on the 1st August of the same year. It is a reflection of both countries willingness to continue their special relationship.

²⁶⁴ Ibid.

²⁶⁵ Statement made by Prime Minister Right Honourable Keith Holyoake in the House of Representatives. Treaty of Friendship with Samoa [2 August 1962].

The Treaty affirms and recognises a special relationship between both countries. It contains seven articles which describes the spirit of the close relationship.²⁶⁶ Both countries are to work together to promote the welfare of the people of Western Samoa, an objective echoed from the League of Nations mandate and United Nations Trusteeship agreement.

Article VI of the Treaty contains a termination clause whereas “either Government may at any time give to the other Government written notice of its desire to terminate this Agreement”.²⁶⁷ To date neither country has exercised this right emphasising the willingness of both countries to continue to foster this special relationship. The articles of the Treaty of Friendship will be discussed in detail in chapter 3.

K. SAMOAN MIGRATION TO NEW ZEALAND:

The 1960s saw the high influx of Samoan migrants to New Zealand. Continuing ties between the two nations favoured the choice of New Zealand as the primary country of destination for Samoan emigrants.²⁶⁸ New Zealand was seen as a developed country in the Pacific and the closest one to Samoa. It was also the Polynesian connection which encouraged Samoans to migrate to New Zealand.

The demand for unskilled labourers in New Zealand was another incentive for most Pacific Islanders to migrate to New Zealand. Although the arrival of the first group of Samoans in New Zealand was as early as 1874, it was in the 1960s during the industrialisation period of New Zealand that the number of migrants started to increase significantly.²⁶⁹ By 1966 the number of Samoans that were resident in New Zealand were 11,842²⁷⁰ and this number continued to grow. “From 1966 to 1971 the total Samoan population in New Zealand rose by

²⁶⁶ Treaty of Friendship between the Government of Samoa and the Government of New Zealand, 1962; Refer to Appendix 3.

²⁶⁷ Ibid.

²⁶⁸ E Kallen, *The Western Samoan Kinship Bridge: A Study in Migration, Social change and the new Ethnicity* (1982) 53.

²⁶⁹ New Zealand Population Official Census 1874-1966 *Samoans Resident in New Zealand*.

²⁷⁰ Ibid.

87.4%”.²⁷¹ The Samoan group are currently the most populous Pacific Island nation in New Zealand.

Many Samoans who migrated to New Zealand in the early 1960s and 1970s entered with temporary permits, generally of three to six months duration.²⁷² Due to Samoa and New Zealand’s special relationship “and because of the Treaty of Friendship... there was no need for Samoan immigrants to register as ‘aliens’ when they arrived”.²⁷³ This was a significant gesture of the importance of the Samoan and New Zealand relationship. New Zealand was recognising its special commitment to Samoa and their special status within New Zealand.

The incentive for Samoans to move to New Zealand was better jobs and income to help support their families. This also matched New Zealand’s growing demand for unskilled workers during the 1960s. The New Zealand government welcomed Samoan migrants as workers in factories to fill the unskilled labour force. “Some employers, such as hospital laundries, became very dependent upon the labour of Samoan women”.²⁷⁴

(i) Immigration policies:

Samoans were not allowed automatic access into New Zealand. “As part of a Treaty of Friendship in 1962, immigrants from Western Samoa were admitted under an annual quota allowing 1,100 successful applicants to enter New Zealand”.²⁷⁵ The Samoan quota scheme was formally established in 1970 based on the spirit of close friendship embodied in the Treaty of Friendship.²⁷⁶ This is still the current practice today. This quota allows Samoan applicants from Western Samoa to be given the right to apply for New Zealand residency once they meet the relevant terms and conditions. All applicants have to be Samoan citizens. The

²⁷¹ Supra n 263.

²⁷² P Ongley, “Pacific Island Migration and the New Zealand Labour Market in P Spoonley et al *Nga Take: Ethnic relations and Racism in Aotearoa/New Zealand* (1991) 23.

²⁷³ M Meleisea, *Lagaga: A Short History of Western Samoa* (1987) 161.

²⁷⁴ Ibid.

²⁷⁵ Ann Beaglehole, 'Immigration regulation', Te Ara - the Encyclopedia of New Zealand, [21 September 2007]

<<http://www.TeAra.govt.nz/NewZealanders/NewZealandPeoples/ImmigrationRegulation/en>

²⁷⁶ New Zealand Department of Labour, “Migration Trends” 2006/7” [3 March 2010]. See: <http://www.dol.govt.nz/publications/research/migration-trends-0607/migration-trends-12.asp>.

Samoan quota scheme is operated by ballot and successful applicants are given a certain deadline for their applications to be processed, submitted and reviewed by New Zealand immigration.²⁷⁷

Today under New Zealand Immigration there is also a Pacific Access quota scheme allowing other countries like Kiribati, Tuvalu and Tonga to apply using the same process as the Samoan Quota scheme.²⁷⁸ The Pacific Access quota scheme was only established in July 2002 allowing 250 applicants from Tonga, and 75 applicants each from Tuvalu and Kiribati.²⁷⁹ Fiji was also included in this category before the occurrence of the Fiji military coup which saw its relationship with New Zealand deteriorate. Samoa has its own separate quota scheme acknowledging the special relationship between both countries and Samoa's maximum number of 1,100 applicants far exceeds the number of applicants under the Pacific Access category of 400 applicants' altogether.²⁸⁰ The expectation would have been that Samoa could have been included under the Pacific Access quota scheme, but because of the special relationship between both nations, Samoa has been designated a separate quota category.

However the special status given to the Samoan quota system is not always reflected in New Zealand immigration policies. The immigration policies enforced on Samoan applicants are rigid and do not reflect the special status given to the relationship. The New Zealand government set down a policy stating that Western Samoa, as a territory formerly administered by New Zealand holds a special place in the New Zealand immigration policies.²⁸¹ This was not reflected in future events. Samoan migrants began to overstay their visas and/or permits because of tight immigration policies. It was very difficult to extend a temporary visa for Samoan applicants.²⁸² At the time "no real fuss was created over the many

²⁷⁷ Samoa Quota Scheme, Immigration New Zealand. See: <http://www.immigration.govt.nz/migrant/stream/live/samoanquota>[7 April 2009].

²⁷⁸ Pacific Access Category, Immigration New Zealand. See: <http://www.immigration.govt.nz/migrant/stream/live/pacificaccess>[7 April 2009].

²⁷⁹ *Supra* n 274.

²⁸⁰ *Supra* n 273.

²⁸¹ *Supra* n 273.

²⁸² *Ibid.*

Samoans who overstayed their visas and remained in New Zealand to work”.²⁸³ “Pacific Island migrants provided convenient unskilled and semi-skilled labour pool for New Zealand”²⁸⁴ because the shortage of unskilled labourers satisfied the need to keep the Pacific Island migrants working and residing in New Zealand illegally.

The government in effect turned a blind eye to Samoans and other Pacific Islanders arriving on temporary visas and staying on, or arriving in greater numbers than the quotas allowed.²⁸⁵

As soon as the demand for the unskilled labour decreased, New Zealand started to become selective with migrants entering New Zealand, including Samoan migrants.

L. DAWN RAIDS: Discriminatory actions that took place in New Zealand.

The mid 1970s saw the emergence of a recession in New Zealand.²⁸⁶ The recession brought with it many social and economic problems. The job market started to fall apart, unemployment started to increase with employment opportunities becoming scarce. The increase of unemployment meant more pressure on limited resources and overstayers became a problem for the New Zealand government.

There were attempts by the New Zealand police to ‘flush out’ Western Samoan overstayers through the use of police dogs and ‘dawn raids’ on homes of Western Samoans and other Pacific Islanders suspected of harbouring illegal migrants.²⁸⁷

The Dawn raids commenced from the 1970s until the early 1980s included the exercise where New Zealand government officials who were mainly the Police and Immigration officers would enter the houses of suspected Pacific Island overstayers.²⁸⁸ The name “dawn raid” reflected the discriminatory acts carried out by Police and government officials. The raids were carried out in the early hours of the morning with the assurance that suspected overstayers would be home

²⁸³ M Meleisea, *Lagaga: A Short History of Western Samoa* (1987) 161.

²⁸⁴ B Macdonald, “The Lesa case, and the citizenship (Western Samoa) Act” in Trlin, A & Spoonley, P *New Zealand and International Migration: A digest and Bibliography, Number 1* (1986) 73.

²⁸⁵ *Supra* n 273.

²⁸⁶ *Supra* n 280.

²⁸⁷ Samoa Times, (Feb 4 1977).

²⁸⁸ M Field, *Black Saturday: New Zealand's Tragic Blunders in Samoa* (2006) 203.

asleep and repatriated immediately. The Labour government launched a series of dawn raids and other steps to seek out illegal immigrants.²⁸⁹

During the 1975 New Zealand general elections, where Labour lost office to National, the main feature of the campaign included immigration from the Pacific Islands and racial issues.²⁹⁰ Discrimination against Pacific Islanders in relation to immigration matters was evident. Once overstayers were identified, they were instantly removed from their families and deported to their respective island nation. The New Zealand immigration were authorised to deport these overstayers because they were residing illegally. The New Zealand politicians responded to the overstaying problem by cracking down on Samoan and other island overstayers.²⁹¹ The majority of Pacific Islanders that were affected were Samoans and Tongans.²⁹² New Zealanders began to resent island migrants for taking their jobs.

Although there were other Pacific Island nations affected by the dawn raids the fact that Samoa was primarily targeted was a clear insult to the special relationship between Samoa and New Zealand. It mirrored the colonial relationship both countries shared in the past. Singling out Samoan overstayers was unjust treatment and a breach of the Treaty of Friendship.²⁹³ Regardless of one's nationality and ethnicity they should not be treated in such a manner. Given the historical ties of Samoa and New Zealand, the actions exercised by New Zealand authorities were unacceptable in a formalised special relationship. New Zealand had taken a step back in its relationship with Samoa.

The Dawn raids displayed themes of discrimination and racism targeting only Pacific Islanders when there were also a significant number of non-Pacific Island overstayers in New Zealand.

A study carried out in 1985-86 showed that whereas Pacific Island people comprised only a third of overstayers, they made up 86% of all prosecutions for

²⁸⁹ Supra n 284 at 74.

²⁹⁰ Ibid.

²⁹¹ Supra n 279.

²⁹² Supra n 273.

²⁹³ Articles I, II, III, IV Treaty of Friendship between the government of Western Samoa and the government of New Zealand; Refer to Appendix 3.

overstaying. Citizens from the United States and the United Kingdom who also made up almost a third of those overstaying, represented only 5% of prosecutions.²⁹⁴

The statistics indicate the unfair targeting of Pacific Island people.²⁹⁵ But why? One reason stated is that “normal provisions favoured immigrants from traditional source countries mainly the white commonwealth nations”.²⁹⁶

The New Zealand public and its politicians had developed a disdain for Polynesians that showed a clear lack of understanding of the historical events between both countries that had gone on in the first half of the century.²⁹⁷

The impact of dawn raids has had a significant effect on many Pacific Islanders especially Samoans and Tongans, and has been painted as a low point in the history of the relationship of Samoa and New Zealand. The impact of the dawn raids is still felt by its victims today. Some observers say that the New Zealand dawn raids are reflective of discrimination and racism experienced in apartheid South Africa.²⁹⁸ What happened in South Africa was much more harsh and cruel and cannot be compared to New Zealand’s dawn raids but the bottom line is it does not matter whether it is extreme or minimal; it is still discrimination and should not be tolerated.²⁹⁹ Further, in light of the Treaty of Friendship such actions by the New Zealand government were unacceptable.

The Dawn raids led to many deportations and resulted in a frightful experience for many Pacific Islanders especially Samoans. Samoans however continued to arrive in New Zealand in search of employment opportunities. Samoa had a strong attachment to their families in Samoa and a sense of obligation and remitting money to families in the homeland became a norm for those working in New Zealand. “There was the continuing strength of fa’asamoa and that migration and remittances have reinforced fa’asamoa”.³⁰⁰ New Zealand has now become home to

²⁹⁴ Supra n 273.

²⁹⁵ S Maharey & P Spoonley (eds), *Racism and Ethnicity: Critical Issues in New Zealand Society* (1988) 15.

²⁹⁶ Supra n 272 at 23.

²⁹⁷ Supra n 288.

²⁹⁸ Morning Report “Samoan Law” with Jim Anderton (10 September, 1982), National Archives, Wellington.

²⁹⁹ Ibid.

³⁰⁰ D Pitt, *Tradition and Economic Progress in Samoa* (1970) 185.

over 100,000 Samoans. This has strengthened the links between the two countries far more than during the colonial period.³⁰¹ The number of Samoans living in New Zealand is significant.

As the 1970s progressed into the 1980s the prosecution of Samoan overstayers in the New Zealand courts continued. This led to many overstay cases such as the case of *Levave v Immigration Department*³⁰² (“*Levave*”) in 1978. This case involved a female, *Levave* born in Western Samoa in 1951 who claimed she was a New Zealand citizen by birth because her father, who was born in Western Samoa in 1926 was a British subject under the British Nationality and Status of Aliens (in New Zealand) Act 1923.³⁰³ Section 14 of that Act meant that her father was a natural-born British subject by birth according to New Zealand law.³⁰⁴ This proposition was rejected by the three Judges of that court and the case was dismissed in the District court and the Court of Appeal. This case could not be further appealed because it was a “criminal matter originating in the District court and in such cases the Court of Appeal is the final appeal authority”.³⁰⁵

M. PRIVY COUNCIL DECISION: *LESA v ATTORNEY-GENERAL*

Turning point of Samoa and New Zealand relationship:

A similar case that followed was *Lesa v Attorney-General*³⁰⁶ (“*Lesa*”). This was the case that truly tested the special relationship of Samoa and New Zealand.

The facts of the case include a young Samoan born lady by the name of Falema’i Lesa who was declared an overstayer (and thereby an illegal immigrant) in New Zealand. She had remained in New Zealand after her limited period permit expired. Lesa was born in Western Samoa on 28 November 1946 and migrated to New Zealand. She claimed that she was a New Zealand citizen by virtue of the British Nationality and Status of Aliens (in New Zealand) Act 1928 (“the Act of 1928”) and its repeal and replacement by the British Nationality and New Zealand

³⁰¹ *Supra* n 279.

³⁰² [1979] 2 NZLR 74.

³⁰³ *Levave v Immigration Department* [1979] 2 NZLR 74.

³⁰⁴ *Lesa v Attorney-General* [1982] 1 NZLR 165, 167.

³⁰⁵ New Zealand Ministry of Foreign Affairs, *New Zealand Citizenship and Western Samoans* (1983) 43.

³⁰⁶ [1982] 1 NZLR 165.

Citizenship Act 1948 (“the Act of 1948”).³⁰⁷ She claims that the construction of the Act of 1928 meant that she was a naturalised British subject and thereby a New Zealand citizen by virtue of s 16(3) of the Act of 1948.³⁰⁸

The previous case of *Levave* claimed to be a citizen of New Zealand by virtue of the British Nationality and Status of Aliens (New Zealand) Act 1928.

The decision of the Court of Appeal in the *Levave* case turned on the construction not of the Act of 1928 but of its predecessor, the British Nationality and Status of Aliens (in New Zealand) Act 1923.³⁰⁹

Section 14(1) of the Act of 1923 relied on by the appellant in *Levave* was identical to the wording of the corresponding section 7(1) of the Act of 1928 that is principally relied on by *Lesā* which reads as follows.³¹⁰

...this Act shall apply to the Cook Islands and to Western Samoa in the same manner in all respects as if those territories were for all purposes part of New Zealand; and the term ‘New Zealand’ as used in this Act shall, both in New Zealand and in the said territories respectively, be construed accordingly as including the Cook Islands and Western Samoa.³¹¹

“To enable *Lesā*’s case to be brought before the Privy Council she applied for a declaration as to the interpretation of the 1928 Act”.³¹² The case went to the Court of Appeal and because of the *Levave* precedent the Court of Appeal upheld the *Levave* decision. This was appealed and went to the highest court of New Zealand, the Privy Council. The issue of the *Lesā* case was whether Western Samoa should be treated as being “within His Majesty’s dominions and allegiance?”³¹³ The Privy Council declared that there is no escaping that section 7(1) of the Act of 1928 means:

what it so emphatically and unequivocally says: a person born or resident in Western Samoa is to be treated in the same manner in all respects for all the

³⁰⁷ *Lesā v Attorney-General* (1982) 1 NZLR 165.

³⁰⁸ *Ibid.*, 174.

³⁰⁹ *Ibid.*, 170.

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

³¹² New Zealand Ministry of Foreign Affairs, *New Zealand Citizenship and Western Samoans* (1983) 43.

³¹³ *Supra* n 307 at 173.

purposes of the Act of 1928 as if he had been born or resident in New Zealand proper.³¹⁴

This therefore meant that all persons who were born in Western Samoa while the 1928 legislation was in force are natural-born British subjects. They are to be treated in the same manner in all respects as if they had been born or resident in New Zealand proper.³¹⁵ Lesa was declared a New Zealand citizen by virtue of the British Nationality and Status of Aliens (in New Zealand) Act 1928. This decision affected at least 100,000 Samoan citizens.

The result was controversial and unexpected, leading to much debate within New Zealand. Samoans experience mixed feelings about the result. The government of New Zealand were quick to say that the decision was wrong especially that Samoa was now an independent country. The decision meant that a considerable number of Samoan citizens were now also New Zealand citizens.

New Zealand was quick to act and make arrangements for negotiations with the Samoan government. “It sparked political panic in Wellington with the Muldoon government rapidly despatching a ministerial team to Apia”.³¹⁶ New Zealand awaited the written decision so they could clearly see how the Lords of the Privy Council had come to this predicament. Most surprisingly was the fact that Lord Diplock who is known to be a conservative Judge was the one that delivered the *Lesa*³¹⁷ judgment. It was argued that the decision “was based solely on a legal construction of the relevant Acts of New Zealand Parliament and did not take into account any matters of international law and practice”.³¹⁸ At the time of the decision, Samoa was politically unstable due to election petitions, no confidence votes in Parliament leading to three different Prime Ministers for the year (1982) alone.³¹⁹

³¹⁴ Ibid, 175.

³¹⁵ Ibid, 165.

³¹⁶ M Field, *Black Saturday: New Zealand's Tragic Blunders in Samoa* (2006) 207.

³¹⁷ *Lesa v Attorney-General* [1982] 1 NZLR 165.

³¹⁸ New Zealand Ministry of Foreign Affairs, *New Zealand Citizenship and Western Samoans* (1983) 44.

³¹⁹ Legislative Assembly Debates (Official Report): 1982 Session of the 8th Legislative Assembly of the Independent State of Western Samoa. Vol.1, Sessions 13,20-21 April, Sessions 20-21,31 Dec 1987.

New Zealand authorities held meetings in Samoa with government officials to discuss the outcome of the *Lesā*³²⁰ decision. As a result, an agreement was reached which was recorded in the form of a protocol. It was called the Protocol to the Treaty of Friendship between the Government of Western Samoa and the Government of New Zealand 1982³²¹ (“Protocol”) which is to be read with, and form an integral part of the Treaty of Friendship that was signed in 1962.³²²

N. PROTOCOL & CITIZENSHIP (WESTERN SAMOA) ACT 1982: The Deprivation of New Zealand citizenship rights and overturning of the *Lesā* decision.

This Protocol was signed on the 21st August 1982 and came into force on the 13th September 1982, less than three months after the *Lesā*³²³ decision was delivered and it clearly overruled the *Lesā*³²⁴ decision. The Protocol was the document signed by both Samoa and New Zealand government officials to overrule the *Lesā* decision and deprive many eligible Samoans of their citizenship rights.³²⁵ The Protocol was signed in less than four months of the *Lesā* decision despite opposition from Samoan protest groups in Samoa and New Zealand. The New Zealand Human Rights Commission issued a statement *vis-a-vis* to the Citizenship (Western Samoa) Act 1982 stating that the legislation has “an unfortunate racist implication”.³²⁶ The deprivation of New Zealand citizenship was based on racial grounds given that dual citizenship was another option that may have been taken.³²⁷ The actions of the New Zealand government furthermore contravened their international obligations to International Human Rights Covenants.³²⁸ The urgent manner the Protocol was carried out indicated New Zealand’s willingness

³²⁰ Supra n 312.

³²¹ Protocol to the Treaty of Friendship between the Government of Western Samoa and the Government of New Zealand 1982; Refer to Appendix 4.

³²² Ibid.

³²³ Supra n 312.

³²⁴ Ibid.

³²⁵ Article II, Protocol to the Treaty of Friendship between the Government of Western Samoa and the Government of New Zealand 1982; Refer to Appendix 4.

³²⁶ New Zealand Ministry of Foreign Affairs, “New Zealand Citizenship and Western Samoans” Information Bulletin No.4, March 1983, 28.

³²⁷ Ibid.

³²⁸ Ibid; Article 1 of the International Covenant on Civil and Political Rights “No one shall be arbitrarily deprived of the right to enter his own country; Article 1 of the Convention on the Elimination of all Forms of Racial Discrimination dealing with citizenship provides that there shall be no discrimination against any particular nationality.

for the *Lesia* decision to be overturned. However both the New Zealand and Samoan governments played a role in depriving many Samoans of their citizenship rights. The Protocol however reaffirmed the Treaty of Friendship between Samoa and New Zealand claiming that Western Samoan citizens were to be given special treatment under the New Zealand law governing citizenship.³²⁹ Following the Protocol the Citizenship (Western Samoa) Act 1982 was enacted. This Act was enacted to legalise the Protocol that was signed in Apia. The rushed procedure in the signing of the Protocol and enactment of the Citizenship (Western Samoa) Act 1982 clearly indicated the unilateral approach that was taken.

The most significant part of the Protocol was Article II³³⁰ which stated that all Western Samoan citizens that were already in New Zealand on the 14th of September 1982 when the Citizenship (Western Samoa) Act 1982 came into force would have the right to become New Zealand citizens immediately upon application.³³¹ This also included those Western Samoan citizens who were illegally residing in New Zealand. As a result, many of the charges against Samoan overstayers were dropped. Further:

Citizens of Western Samoa who travel to New Zealand after the entry into force of this Protocol and who, pursuant to the policy and practice implemented by New Zealand prior to 19 July 1982, would have been granted permanent residence status either on arrival in New Zealand or subsequently, have the additional right to become New Zealand citizens immediately upon application after acquisition of permanent residence status.³³²

The Protocol was signed both by Jim McLay, the Minister of Justice and New Zealand Attorney General on behalf of the government of New Zealand and Tofilau Eti Alesana, the Deputy Prime Minister of Samoa, on behalf of the government of Western Samoa.³³³ The Protocol led to the speedy enactment of the Citizenship (Western Samoa) Act 1982 which meant those Samoans physically

³²⁹ Protocol to the Treaty of Friendship between the Government of Western Samoa and the Government of New Zealand 1982; Refer to Appendix 4.

³³⁰ Ibid.

³³¹ Article II(a), Protocol to the Treaty of Friendship between the Government of Western Samoa and the Government of New Zealand 1982; Refer to Appendix 4.

³³² Article II(b), Protocol to the Treaty of Friendship between the Government of Western Samoa and the Government of New Zealand 1982; Refer to Appendix 4.

³³³ *Supra* n 320.

located in Samoa were denied the right to New Zealand citizenship. There was opposition from Samoan delegations in New Zealand and Samoa on the enactment of the Citizenship (Western Samoa) Act 1982.³³⁴ They believed that the Citizenship (Western Samoa) Act 1982 was carried out without proper consultation.

Once the *Lesia* decision was handed down New Zealand Immigration services in Samoa were suspended.³³⁵ All pending applications for visas to travel to New Zealand were put on hold until negotiations regarding the future of immigration services were decided. The New Zealand government decided that a resolution had to be decided upon the outcome of the *Lesia* case before further immigration could be resumed.³³⁶ New Zealand saw the attempt to negotiate with Western Samoa over the outcome of the *Lesia* decision as a gesture of goodwill based on the special relationship of both countries which is encapsulated in the Treaty of Friendship agreement.³³⁷ Negotiation and discussion was the best way forward for both countries although it can be said that New Zealand pushed for the *Lesia* decision to be overruled by way of legislation. The *Lesia*³³⁸ case will be discussed in more detail in chapter 3.

O. CURRENT RELATIONS

(i) Apology 2002:

The year 2002 marked the fortieth anniversary of the Independence Day of Samoa. Helen Clark, the former New Zealand Prime Minister, decided to attend the celebrations and made a speech at the luncheon which turned out to be a formal public apology to Samoa for past grievances.³³⁹

³³⁴ New Zealand Ministry of Foreign Affairs, *New Zealand Citizenship and Western Samoans* (1983) 11-2.

³³⁵ Correspondence between New Zealand Minister of Immigration and Minister of Justice (McLay) and Mrs Low of the Crown Law/Prime Ministers Department [22 July 1982], National Archives, Wellington.

³³⁶ Ibid.

³³⁷ Ibid.

³³⁸ *Lesia v Attorney-General* [1982] 1 NZLR 165.

³³⁹ Ministry of Pacific Island Affairs, *Speech by the New Zealand Prime Minister Rt Hon Helen Clark at the official Government Luncheon in Apia 3rd June 2002 on the occasion of Samoa's fortieth anniversary of independence*, press release 2002; M Field, *Black Saturday: New Zealand's Tragic Blunders in Samoa* (2006) 211.

The crucial part of her speech was her apology on behalf of New Zealand for the “incompetent early administration of Samoa by New Zealand”.³⁴⁰ She acknowledged the incompetency of New Zealand authorities during the 1918 Influenza which claimed the lives of twenty-two percent of Samoa’s population.³⁴¹ She apologised for the shootings that occurred in Apia in December 1929 during a non-violent protest march where unarmed protesters were shot killing at least nine people including Tupua Tamasese Lealofi III who was one of the paramount chiefs of Samoa.³⁴² As a gesture of her sincere apology Clark also placed a wreath on the tomb of Tupua Tamasese Lealofi III. Clark ended her speech by presenting a taonga to the government of Samoa in recognition of their friendship and ended by saying that “our hope is that this apology, will enable us to build an even stronger relationship and friendship for the future on the basis of a firmer foundation”.³⁴³

Samoa’s Prime Minister responded saying that “the 1962 Treaty of Friendship had been a demonstration that both countries had put to rest the past and to concentrate on the future and on the ways in which New Zealand could assist with Samoa’s nation-building”.³⁴⁴

P. SUMMARY:

The position taken in this paper is that Samoa and New Zealand do have a unique special relationship which is reflected through its historical relationship. One may ask why Samoa did not have a special relationship with its German colonisers. Germany’s main interest in Samoa was commercially driven; the main interest was the copra industry. The policies they enacted focused around the copra industry. They even brought indentured labourers from Melanesia and China to work in Samoa to fulfil their main objective without forcing Samoans to work.³⁴⁵ They acted like the normal coloniser; they conquered Samoa and left when another power overpowered them. As for New Zealand their intentions were not

³⁴⁰ Ibid.

³⁴¹ Ibid.

³⁴² M Field, *Black Saturday: New Zealand’s Tragic Blunders in Samoa* (2006) 212.

³⁴³ Supra n 330.

³⁴⁴ Supra n 333 at 212-3.

³⁴⁵ Ibid, 8.

as commercially driven as Germany. New Zealand's motives were more of a political stance as well as the discomfort of having a Germany territory so close to home. New Zealand's first directive was to remove the Germans as was the Land War mentality during the First World War and managed to control Samoans through its administrators. This has had drastic impacts as evidenced by the influenza epidemic in 1918.

The Treaty of Berlin in 1899 saw the "unnatural division of the Samoan group enforced by the three powers in the past without the consent of the Samoans".³⁴⁶ This has undermined Samoa's international influence by virtue that there are now two vulnerable countries instead of one country which would have been able to exert more influence. A petition in 1929 to King George V, for the reunification of the eastern and western Samoa with a view towards local autonomy was ignored.³⁴⁷ Today the two Samoas still operate separately and American Samoa still remains a territory of the United States of America.

The poor administration of Samoa by New Zealand administrators has been recorded as historical downfalls in the Samoa- New Zealand relationship. As noted this maladministration led to the introduction of the League of Nations mandate which made New Zealand adopt a more just and humanitarian approach to the Samoa-New Zealand relationship. The significance of the Trusteeship agreement emphasises the Polynesian connection. New Zealand opted to be trustee of Samoa given their supposedly successful experience with Māori, the indigenous people of New Zealand. On the contrary, Māori also experienced many injustices and discrimination during the process of colonisation.³⁴⁸

The Treaty of Friendship signed in 1962 after Samoa's independence further validated the unique relationship of both countries. New Zealand was prepared and willing to represent Samoa internationally and give diplomatic protection to Samoan citizens in foreign countries.³⁴⁹ This is not a common act one country

³⁴⁶ M Meleisea, *Lagaga: A Short History of Western Samoa* (1987) 147-8.

³⁴⁷ *Supra* n 333 at 137.

³⁴⁸ C Orange, *The Treaty of Waitangi* (1992) 1.

³⁴⁹ Article V, Treaty of Friendship 1962; Refer to Appendix 3.

would do. Even today, when New Zealand and Samoa meet reference is always made to the Treaty of Friendship emphasising the special relationship of both countries. The question is what does the ‘special relationship’ mean?

The relationship of both countries is further extended through migration. The downfall of those migration patterns saw the effect of unjust immigration policies and the birth of Dawn raids. The *Lesa*³⁵⁰ case which is a landmark case in Samoa and New Zealand history validated that one hundred thousand Samoans were New Zealand citizens. The Protocol and the enactment of the Citizenship (Western Samoa) Act 1982 overruled *Lesa* and undermined the special relationship between Samoa and New Zealand. The failure to articulate the Treaty of Friendship has led to mistakes such as the dawn raids and *Lesa*.

Today many New Zealanders are unaware of the historical relationship of Samoa and New Zealand. It is important to rediscover the features of the special relationship shared between the two countries. The historical elements discussed in this chapter have contributed significantly to this relationship. Certain obligations and responsibilities arise out of the historical and ongoing relationship which I will argue is a relationship of a fiduciary nature.

³⁵⁰ *Lesa v Attorney-General* [1982] 1 NZLR 165.

CHAPTER 2: LEGAL FRAMEWORK

This chapter will discuss the legal framework of the thesis. As discussed in the previous chapter the special relationship between Samoa and New Zealand is apparent from historical events. To put this into legal context is to show that there is an equitable obligation that arises out of Samoa and New Zealand's special relationship. A special relationship between parties gives rise to a fiduciary duty. This chapter will set out the fiduciary law which encompasses relationships between parties where one party ought to act in the best interests of the other. The essential features and legal principles of a fiduciary relationship will be articulated.

An analysis of the extension of the fiduciary principles and relationship to the *sui generis* relationship will be discussed. A *sui generis* relationship is a fiduciary relationship that is unique and based on special circumstances. This thesis will focus on the *sui generis* extension of the fiduciary relationship to specifically encompass the relationship between Samoa and New Zealand. This analysis will demonstrate that fiduciary categories are not closed and are still a new area of law that continues to be developed. With this being said, courts have already found that relationships between the Crown and aboriginal peoples are fiduciary by nature because of its unique circumstances.³⁵¹ This has demonstrated that fiduciary categories are not closed. The point of difference in this thesis is that it aims to extend the application of fiduciary principles to a *sui generis* relationship to the special relationship between Samoa and New Zealand.

A. FIDUCIARY DUTY/OBLIGATION:

The fiduciary obligation is an equitable doctrine and consists of a special relationship between two or more parties.³⁵² Historically, equity arose out of the discretion of the monarch to grant relief when the strict application of the law caused hardship.³⁵³ Equity's function is to restrain the exercise of legal rights and powers in particular cases, whenever it would be unconscionable for them to be

³⁵¹ *Guerin v The Queen* (1984) 13 D.L.R. (4th) 321; *Mabo v Queensland (No.2)* [1992] 175 CLR 1.

³⁵² P Joseph, *Constitutional & Administrative Law in New Zealand* (3rd ed, 2007) 100.

³⁵³ M McDowell & D Webb, *The New Zealand Legal System: Structures and Processes* (4th ed, 2006) 49.

fully exercised.³⁵⁴ The law of equity also involves addressing power imbalances where vulnerability of a party must not be abused and to ensure that the powerful party does not take advantage of this vulnerability. The law of equity redresses power imbalances where certain steps are to be taken to ensure that all parties in the relationship have a full understanding of the undertaking they are entering into.

The role the law of fiduciaries play is for the legal system to recognise the more blatant abuses of trusts we place in each other.³⁵⁵ A widely used definition of a fiduciary relationship is found in the case of *Hospital Products Limited v United States Surgical Corporation and others*³⁵⁶:

The fiduciary undertakes or agrees to act on behalf or in the interests of another person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of another person who is accordingly vulnerable to abuse by the fiduciary of his position.

A fiduciary is someone who must bound himself or itself in some way to protect and advance the interests of the vulnerable party.³⁵⁷ Traditional relationships of a fiduciary nature consist of a solicitor and client, trustee and beneficiary, agent and principal and director and a company. Clearly in these roles one can see the imbalance of power and the reliance a beneficiary would have on the fiduciary to make an informed decision and to act in their best interests.

Such a definition of a fiduciary relationship clearly means that most relationships are of a non fiduciary nature. The common trait in a non-fiduciary relationship is that there is an absence of special circumstances.³⁵⁸ These special circumstances include a vulnerable party who is reliant on the more powerful party to act in their best interests. “For instance, the giving of a loan does not render the borrower a

³⁵⁴ G Watts, *Trusts & Equity* (2003) 13.

³⁵⁵ J Shepherd, *The Law of Fiduciaries* (1981) 6.

³⁵⁶ (1984) 156 CLR 41.

³⁵⁷ P.D.Finn, *Fiduciary Obligations* (1977) 9.

³⁵⁸ A Butler(ed), *Equity & Trusts in New Zealand* (2003) 436.

fiduciary to the lender”.³⁵⁹ Such relationships include the mortgagor-mortgagee³⁶⁰, receiver-creditor³⁶¹, and vendor-purchaser³⁶².

Fiduciary relationships focus on the nature of the relationship and are people-specific rather than object specific.³⁶³ “It is the nature and scope of the relationship between the parties that renders a relationship fiduciary and not the existence of a legally recognisable property interest”.³⁶⁴ In past case law, the existence of property is vital to determine the state of the relationship.³⁶⁵ Recent case law states differently. The existence of a property interest is not relevant in a relationship; it is the nature and historical journey the parties have shared in the relationship that determines whether it is a relationship of a fiduciary nature.³⁶⁶ Relationships where a fiduciary obligation has been imposed possess three general characteristics³⁶⁷:

- (1)The fiduciary has scope for the exercise of some discretion or power.
- (2)The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

These characteristics are the common denominators that determine whether a relationship is of a fiduciary nature. According to Rotman, fiduciary relationships exist either on a legal or extralegal relationship.³⁶⁸ These are two independent but interconnected planes. The legal fiduciary relationships are relationships that are recognised and acknowledged by law. These are essentially the relationships that fall within the traditional categories of the fiduciary relationship. The extralegal

³⁵⁹ A Butler(ed), *Equity & Trusts in New Zealand* (2003) 436.

³⁶⁰ *Elders Pastoral Ltd v BNZ* [1989] 2 NZLR 180, 192.

³⁶¹ *South Pacific Mfg Co Ltd v McKenzie* 21/11/94, CP23-94.

³⁶² *Gosper v Re Licensing (NZ) Ltd* 17/8/98. CP225/96.

³⁶³ L Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (1996) 115.

³⁶⁴ *Ibid.*

³⁶⁵ *Ibid.*, 116.

³⁶⁶ *Ibid.*, 115.

³⁶⁷ *Frame v Smith* [1987] 2 S.C.R. 99, 136.

³⁶⁸ *Supra* n 354 at 141.

plane is made up of relationships that are also known as pure fiduciary relationships.³⁶⁹

Pure fiduciary relationships include relationships which are properly recognised by law as fiduciary, as well as other relationships which are fiduciary in nature because of their facts and circumstances, but have yet to be recognised by the law as such.³⁷⁰

They emanate from the fact that they are fiduciary by reason of the interaction of the parties involved.³⁷¹ The interaction of the parties depending on certain circumstances determines whether a relationship of a fiduciary nature exists. It helps determine the essence of the relationship whether it is from an economic, historic or political context. “In contrast to pure fiduciary relationships, ‘applied’ fiduciary relationships include only those relationships which are deemed to be fiduciary by the judiciary”.³⁷² This is the case for the Crown-Aboriginal relationship which was deemed to be *sui generis* relationship in the *Guerin*³⁷³ decision.³⁷⁴

Fiduciary relationships are not all identical and come in different forms.³⁷⁵ Although traditional categories of fiduciary relationships have been established there are no limits to what a fiduciary relationship should be and like the categories of negligence, the categories of fiduciary relationships should not be considered closed.³⁷⁶

Where the case does not fall within one of the traditional (or new) categories it is still possible to argue that the case falls within the fiduciary principle on the basis of its own specific facts.³⁷⁷

This thesis aims at arguing that the Samoa-New Zealand relationship is of a fiduciary nature based on its own special features. A factual fiduciary claim is one based on specific facts of the case, it permits counsel to admit that fiduciary law

³⁶⁹ L Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (1996) 141.

³⁷⁰ Ibid.

³⁷¹ Ibid.

³⁷² Ibid.

³⁷³ *Guerin v The Queen* (1984) 13 D.L.R. (4th) 321.

³⁷⁴ *Infra* at 75. Discussion of *Guerin* case.

³⁷⁵ *Supra* n 360 at 142.

³⁷⁶ E.J. Weinrib, “The Fiduciary Obligation” (1975) 25(1) *University of Toronto Law Journal* 1,7.

³⁷⁷ *Coleman v Myers* [1977] 2 NZLR 225.

would not usually apply to the traditional sort of relationship in question, yet successfully maintain that the special facts of the case are sufficient to trigger the fiduciary principle.³⁷⁸ In order for a fiduciary relationship to be found, certain fiduciary principles are to be ascertained.

B. FIDUCIARY LEGAL PRINCIPLES:

Fiduciary relationships contain distinct legal principles. Through case law, the judiciary have developed the key legal principles that arise out of a fiduciary relationship. The legal principles of a fiduciary relationship are identified and articulated next.

(i) Trust and Confidence:

The fiduciary must act with complete honesty and propriety.³⁷⁹ “A fiduciary is someone who has undertaken to act for another in a particular manner in circumstances that give rise to a relationship of trust and confidence”.³⁸⁰ The fiduciary is obligated to be loyal to the vulnerable party in a relationship and to act for the betterment of that party. A relationship that demands trust and confidence is the relationship between an employer and employee. “The core obligation of a fiduciary of this kind is the obligation of loyalty. The employer is entitled to the single-minded loyalty of his employee”.³⁸¹ In employment situations, confidentiality is of utmost importance and this requires a relationship of trust. For a fiduciary to use resources and information already obtained whilst working for a previous employer for their own interests is breaching the fiduciary duty.³⁸² “The duty to respect confidence is a fiduciary duty, but it subsists only as long as the information remains confidential”.³⁸³

The relationship between duties of loyalty and confidentiality are not mutually exclusive because they create different obligations and their duration may be

³⁷⁸ *LAC Minerals Ltd v International Corona Resources Ltd* (1986) 61 DLR (4th) SCC.

³⁷⁹ *Boardman v Phipps* [1967] 2 AC 46.

³⁸⁰ *Bristol & West Building Society v Mothew* [1998] Ch 1.

³⁸¹ *A-G v Blake* [1998] 1 All ER 833, 842.

³⁸² *Canadian Services Ltd v O'Malley* [1974] S.C.R. 592.

³⁸³ *Supra* n 372.

different.³⁸⁴ Trust and Confidence can be in existence together with the same parties at the same time however it is not permitted to attach to one relationship an obligation which is properly derived from another.³⁸⁵ In Joint Venture and partnership arrangements a duty of loyalty and utmost good faith is crucial because they become reliant upon one another.³⁸⁶ They must put the interests of the partnership before their own personal interests.³⁸⁷

Beneficiaries become reliant on the fiduciary for guidance and advice.³⁸⁸ “Just as there may be a fiduciary relationship without direct reliance, there may be reliance without a fiduciary relationship”.³⁸⁹

(ii) To Benefit or Advance interests of other party:

Once, a party in a legal relationship has bound himself³⁹⁰ to act in the best interests of the other party, that party’s position is a fiduciary one.³⁹¹ Viscount Sankey in *Regal (Hastings) Ltd v Gulliver and Others*³⁹² stated that:

The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect.³⁹³

“The fiduciary must act honestly in what he alone considers to be the interest of his beneficiaries”.³⁹⁴ If there is a conflict of interest a declaration to the beneficiary must be declared. Whether the fiduciary proceeds with the relationship depends on the beneficiary’s informed consent once they know the details of the conflict of interest.

It is the rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal

³⁸⁴ *A-G v Blake* [1998] 1 All ER 833, 842.

³⁸⁵ *Ibid.*

³⁸⁶ *Chirnside Rattray Properties Ltd v Faye* [2006] NZSC 68.

³⁸⁷ *Ibid.*, 71.

³⁸⁸ *Lloyd’s Bank v Bundy* [1975] 1 Q.B. 326, 341.

³⁸⁹ J.C.Shepherd, *The Law of Fiduciaries* (1981) 58.

³⁹⁰ The use of “himself” is what is been stated in the case law in the development of the fiduciary principles. The writer is aware that the language is gendered and that it does not exclude the possibility of women also being in the fiduciary role.

³⁹¹ P.D.Finn, *Fiduciary Obligations* (1977) 9.

³⁹² [1967] 2 AC 134.

³⁹³ *Regal (Hastings) Ltd v Gulliver and Others* [1942] 1 All ER 378, 381.

³⁹⁴ *Supra* n 382 at 15.

interest conflicting or which possibly may conflict with the interests of those who he is bound to protect.³⁹⁵

In *Boardman v Phipps*³⁹⁶ a trust solicitor used information obtained in the course of occupying that position to acquire an interest in a company to his personal advantage as well as to the advantage of the trust beneficiaries.³⁹⁷ The estate held shares in a company that was having difficulties. The trustees' solicitor decided the only way to correct matters and help the estate was to get control of the company by purchasing shares personally.³⁹⁸ "During negotiations the solicitor said he represented the trust and obtained information not available to the public".³⁹⁹ The solicitor purchased the shares which were in the best interest of the trust. He held a fiduciary obligation to the trustees and by virtue of this obligation the solicitor was debarred from purchasing shares personally without the informed consent of the trustees and beneficiaries.⁴⁰⁰

Although he informed the trustees and the beneficiaries about the situation and there was no objection he did not receive their informed consent. The solicitor made a substantial profit as a result of his shareholdings. He was made to account for profits on his own shares to the trust. The Solicitor did not act in bad faith but the "liability arises from the mere fact of a profit having in the stated circumstances, been made".⁴⁰¹ The House of Lords by a narrow majority stated that:

It is an inflexible rule of a Court of Equity that a person in a fiduciary position...is not, unless otherwise expressly provided, entitled to make a profit he is not allowed to put himself in a position where his interest and duty conflict.⁴⁰²

This shows the strict approach of the fiduciary rule. The fiduciary is in a position for the benefit of the other party. In this case the solicitor was in a fiduciary position for the benefit of the trustees and beneficiaries. By making a profit

³⁹⁵ *Aberdeen Railway Co v Blaikie Brothers* (1854), [1843-1860] All E.R. Rep 249, 252 (H.L.).

³⁹⁶ [1967] 2 AC 46.

³⁹⁷ Ibid.

³⁹⁸ A Butler, *Equity & Trusts* (2003) 134.

³⁹⁹ Ibid.

⁴⁰⁰ *Boardman v Phipps*[1967] 2 AC 46.

⁴⁰¹ Ibid, 145 (HL).

⁴⁰² Ibid, 124-5.

himself, even when done with the best intentions is a breach of his fiduciary obligation. The only exception is when the fiduciary gets the informed consent of who he or she is acting for.

A fiduciary must not put himself in a position where his interest and duty may conflict with his beneficiaries.⁴⁰³ If the fiduciary acts to the detriment of the beneficiary, regardless of who benefits from his actions, a fiduciary breach has certainly occurred.⁴⁰⁴ The fiduciary has an affirmative obligation to act in the best interests of the beneficiary.⁴⁰⁵ A person holding a fiduciary duty being swayed by interest rather than duty prejudices those whom he is bound to protect.⁴⁰⁶ One of the foundation blocks of a fiduciary is they must not benefit from their position as fiduciaries.⁴⁰⁷ It defeats the purpose of the fiduciary role as they are expected to act according to the beneficiary's needs.

(iii) Power imbalance/Vulnerability:

The power imbalance between parties demands the fiduciary to act to the benefit, and not to the detriment of the vulnerable party. Clearly in such a relationship the powerful party has the ability to advance or undermine the vulnerable party's interests. That is the nature of relationships of power, which characterise fiduciary relationships. Fiduciaries must act in accordance with high standards of selflessness.⁴⁰⁸ Vulnerability is a common element in many relationships in which the law will intervene to protect one of the parties.⁴⁰⁹ It is the golden thread that unites causes of action such as the breach of a fiduciary duty and unconscionability.⁴¹⁰

Fiduciaries have the power and discretion to influence and affect the outcome of the beneficiaries' decision. As stated in *Norberg v Wynrid*⁴¹¹:

⁴⁰³ *Bray v Ford* [1896] AC 44, 51.

⁴⁰⁴ *Jordan v Global natural Resources Inc* (1983), 564 F. Supp. 59, 67-8.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ *Supra* n 394 at 52.

⁴⁰⁷ *Keech v Sandford* (1726) 25 E.R. 223 (Ch).

⁴⁰⁸ *Supra* n 360 at 159.

⁴⁰⁹ *Hodgkinson v Simms* [1994] 3 S.C.R. 377.

⁴¹⁰ *Ibid.*

⁴¹¹ (1992) 92 D.L.R. (4th) 449, 501.

It is as though the fiduciary has taken power which rightfully belongs to the beneficiary on the condition that the fiduciary exercise the power entrusted exclusively for the good of the beneficiary.

Not all relationships with power imbalances can be deemed to be a fiduciary relationship. A Judge in a court stands at a more powerful position than a convicted criminal. This does not mean that there is the existence of a fiduciary obligation for the Judge to act in the best interests of the convicted criminal.⁴¹² In positions of power, one is in an ascendant position than the other. This is not the only feature that determines a fiduciary relationship. Exercising discretion is also not the only feature that needs to be found to satisfy that there is a fiduciary relationship. Several features are to be present, those of trust and confidence, vulnerability, discretion, power imbalance, dependence, inequality and influence. It is also determined on the specific facts of each case; it cannot be classified into one category. The important fact is that the fiduciary principle is used to:

maintain the integrity, credibility and utility of relationships perceived to be of importance in a society. It is used to protect interests, both personal and economic, which a society is perceived to deem valuable.⁴¹³

As stated by Finn all the above features may be present in a transaction where the relationship may not be fiduciary at all.⁴¹⁴ The crucial part is the nature of the relationship, the facts of each case will determine whether there is a fiduciary nature or not.

(iv) Fiduciary must not profit:

The fiduciary must not profit from any transaction in the relationship even if the actions are done in the best interests of the company.⁴¹⁵ Liability for a business opportunity for personal gain can be avoided if the fiduciary has fully disclosed the opportunity to all relevant members and obtains their full consent.⁴¹⁶ However in the case of *Boardman v Phipps*⁴¹⁷ use of company information even without the objection of beneficiaries in a trust still breached a fiduciary relationship. This is

⁴¹² Supra n 394 at 175.

⁴¹³ Finn P, "The Fiduciary Principle" in Youdan, T.G., *Equity, Fiduciaries and Trusts* (1989) 26.

⁴¹⁴ Ibid, 46.

⁴¹⁵ *Regal (Hastings) Ltd v Gulliver and Others* [1942] 1 All ER 378.

⁴¹⁶ *Queensland Mines Ltd v Hudson and Others* (1978) 18 ALR 1 (PC).

⁴¹⁷ [1967] 2 AC 46.

because the fiduciary did not seek the informed consent of the beneficiaries and although he acted in good faith the liability arose from the mere fact of a profit being made in the circumstances.⁴¹⁸ In this scenario, there is an onus on the fiduciary to act to obtain consent rather than merely proving the absence of opposition.

Obtaining profit by using your position as a director and/or solicitor is a breach of fiduciary duty and fiduciaries will be held accountable for profits to the concerned company.⁴¹⁹ If the fiduciary profits from the beneficiary they have unjustly enriched themselves. The purpose of fiduciary relationships is to avoid conflict of interest and making profits at the expense of the beneficiary.⁴²⁰ It defeats the purpose of their role to play a leading role in the relationship because the issue of trust will be challenged.

(v) Unconscionability

A fiduciary is required to put aside their personal interests to pursue the best interest of the party to whom they owe an obligation. Not to do so whether deliberately or carelessly is unconscionable and amounts to a breach of the relationship. In such a situation a person is acting contrary to good conscience. Unconscionability may not be a direct legal principle that arises out of a fiduciary relationship but is a common characteristic that is found when a fiduciary breach exists.

A breach of a fiduciary duty can be described as unconscionable.⁴²¹ Equity intervenes in respect of unconscionable bargains when an unfair advantage is taken of persons who are poor and ignorant and are in need of special protection.⁴²² Unconscionability protects a party who labours under a special disadvantage such as the elderly who may be ignorant of commercial transactions, minors and intellectually challenged, in which the other party is able to exploit.⁴²³

⁴¹⁸ *Boardman v Phipps* [1967] 2 AC 46.

⁴¹⁹ *Supra* n 406 at 380.

⁴²⁰ *LAC Minerals v International Corona Resources* [1989] 2 S.C.R. 574, 646-7.

⁴²¹ *O'Connor v Hart* [1985] 1 NZLR 159.

⁴²² *Ibid*, 171.

⁴²³ J Burrows, J Finn & S Todd, *Law of Contract in New Zealand* (2007) 369.

If one party takes advantage of the kindness of another party, unconscionability may also arise.⁴²⁴ However the assessment of all the circumstances, depending on the facts of each case, is required for an unconscionability inquiry.⁴²⁵ Elements that have to be satisfied to establish the presence of unconscionability are as follows⁴²⁶:

- (1) Serious disadvantage on the part of the weaker party known to the stronger party, and
- (2) The exploitation of that disadvantage by the stronger party in circumstances amounting to actual or equitable fraud.

For a fiduciary to defend any unconscionability accusation they firstly should recommend independent advice to be taken and prove that the decision in the circumstances is a fair one.⁴²⁷ “Equity will not countenance unconscionable behaviour in a fiduciary.”⁴²⁸

C. EXTENSION OF THE FIDUCIARY PRINCIPLE:

The extension of the fiduciary principle has seen a new outlook on fiduciary law. The inclusion of non-economic fiduciary relationships has seen equity playing a role of attempting to ensure fairness and justice in different societies and countries are upheld. This thesis focuses on this particular extension of the fiduciary relationship because it is arguing that the relationship of Samoa and New Zealand is analogous to the relationship of a fiduciary nature such as that of the Crown-Aboriginal peoples.

“A fiduciary obligation can arise as a matter of fact out of the specific circumstances of a relationship”.⁴²⁹ As Lord Browne-Wilkinson stated:

...the phrase “fiduciary duties” is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. This is not the case.⁴³⁰

⁴²⁴ *Nichols v Jessup* [1986] 1 NZLR 226.

⁴²⁵ *Contractors Bonding Ltd v Snee* [1992] 2 NZLR 157, 174.

⁴²⁶ *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 (CA) (on appeal [2004] 2 NZLR 577 (PC)).

⁴²⁷ P.D.Finn, “The Fiduciary Principle” in T.G.Youdan *Equity, Fiduciaries and Trusts* (1989) 7.

⁴²⁸ *Guerin v The Queen* (1984) 13 D.L.R. (4th) 321.

⁴²⁹ L Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationships in Canada* (1996) 157.

Fiduciary obligations can arise out of relationships between parties where it is not normally expected.⁴³¹ This is evident in case law. There are the traditional fiduciary categories and the extension of those categories to include non-economic and/or non-proprietary interests. “The different categories possess different characteristics and attract different kinds of fiduciary obligation”.⁴³² Fiduciary relationships discussed in the traditional categories usually involve the entrusting of property of one party to another like a Trust. The existence of a fiduciary relationship depends on the quality and characteristics of the relationship between parties which give rise to equitable obligations.⁴³³ This has been evident in the application of fiduciary relationships and obligations to relationships between the Crown and Aboriginal peoples in both Canada and Australia which will be discussed in more detail later in this chapter.

Fiduciary relationships have been found to extend beyond the formal relationship. This is evident in the case of *Canadian Aero Services Ltd v O’Malley*⁴³⁴. The two defendants in this case were previous employees of Aero Service Corporation. They resigned from their former employer and company and formed their own company. Under their newly formed company they pursued the same project the former employers were pursuing. Their former employers sued them for breach of their fiduciary duty. The court held that the two defendants were in breach of their fiduciary obligations that survived outside of their resignations.⁴³⁵ They had formally resigned from their previous occupations and had started anew with another company. Their knowledge of the previous company’s structure and policies meant that they could use this to their advantage. Eventually they would have profited from the new contract at the expense of the previous company. This case involves a commercial relationship which does not fall within the traditional categories of the fiduciary obligation. Just as in some commercial relationships the fiduciary relationship extends beyond the termination of the relationship. This is further indication that the categories of fiduciary relationships are not closed.

⁴³⁰ *Henderson v Merrett Syndicates Ltd* (1994) 2 Lloyd’s Rep 468.

⁴³¹ *Supra* n 420.

⁴³² *A-G V Blake* [1998] 1 All ER 833, 842.

⁴³³ *Supra* n 420 at 166.

⁴³⁴ [1974] S.C.R. 592, 605.

⁴³⁵ *Canadian Aero Services Ltd v O’Malley* [1974] S.C.R. 592, 622.

Although the two former employees had resigned from the company they still had a fiduciary relationship to the former company because of the nature of their relationship to the previous employment.

It is crucial to look at the particulars of a relationship to ascertain whether it is fiduciary rather than simply to observe who the parties to it are.⁴³⁶ The scope and nature as well as the historical context of the relationship are characteristics that determine the essence of the relationship. This is significant in the case of *Guerin v The Queen*⁴³⁷.

D.THE CANADIAN CONTEXT:

The extension of the fiduciary principle is a development that is significantly strong in Canada where the Supreme Court held that the Crown has a fiduciary relationship with its Aboriginal peoples.

(i) Guerin v The Queen

The case to first explore this extension is *Guerin v The Queen (Guerin)*.⁴³⁸ In deciding this case the court recognised that a fiduciary relationship between the Crown and Aboriginal people can and does, in this instance legally exist.

The original argument of the case was that there was the existence of a trust relationship between the Crown and Musqueam band. The case however resulted in the Court finding that the relationship between the Crown and Musqueam band was a *sui generis* fiduciary relationship. The Crown and Aboriginal peoples' relationship did not fall within the traditional categories of a fiduciary relationship. The Judiciary therefore held that because the relationship is one of special fiduciary circumstances, it is therefore a *sui generis* fiduciary relationship.

The *Guerin* decision in Canada broadened the confined categories of fiduciary relationships to include the relationship of the Crown and Aboriginal peoples.⁴³⁹ It

⁴³⁶ *LAC Minerals v International Corona Resources Ltd* [1989] 2 S.C.R. 574.

⁴³⁷ (1984) 13 D.L.R. (4th) 321.

⁴³⁸ *Ibid.*

is also further indication that fiduciary categories are not closed and now have extended into a new jurisprudence. This type of relationship is found on the extralegal plane as discussed earlier in the chapter. It is an applied fiduciary relationship that was yet to be recognised as law. It was a relationship that consisted of fiduciary principles in its specific set of facts. This opened up the jurisprudence of what a fiduciary relationship is and also saw an influx of cases seeking to establish a fiduciary relationship between the Crown and Aboriginal peoples of Canada.

The issue of this case involved land owned by the Musqueam band that is held in trust by the Crown and to be leased to a Golf club. A lease proposal by a Golf Club to the Musqueam band had discrepancies that were unknown to the band. The terms and conditions of the lease were more favourable to the Golf club and the full lease was not read out in full to the Musqueam band by the relevant authorities.⁴⁴⁰ They were not fully aware of the terms of the lease. It is also important to note that under Canadian law, Section 18(1) of the Indian Act 1952 provides⁴⁴¹:

that reserves shall be held by Her Majesty for the use and benefit of the respective (Indian) bands for which they were set apart.

An Indian band is not permitted to transfer land by sale or lease without a surrender document from the Crown.⁴⁴² The Crown acts on behalf of the Indian band by in this case authorising the surrender to the Golf club.⁴⁴³ The Indian band accepted this lease arrangement unaware that the terms and conditions of the lease that were presented to the Indian band were significantly different from what was disclosed to them at a previous meeting.⁴⁴⁴ The Band was not given a copy of the lease and only received one twelve years later.⁴⁴⁵ The important aspect of the

⁴³⁹ M Stevenson & A Peeling, “Probing the Parameters of Canada’s Crown-Aboriginal Fiduciary Relationship” in Law Commission of Canada, *In Whom we Trust: A Forum on Fiduciary Relationships* (2002)9.

⁴⁴⁰ *Guerin v The Queen* (1984) 13 D.L.R. (4th) 321, 327.

⁴⁴¹ Section 18(1), Indian Act 1952.

⁴⁴² *Supra* n 431 at 334.

⁴⁴³ *Ibid.*

⁴⁴⁴ *Guerin v The Queen* (1984) 13 D.L.R. (4th) 321, 329-30.

⁴⁴⁵ *Ibid.*

Guerin case is the nature of the relationship between the Crown and the Musqueam band.

Dickson J stated that the Indian Act gave rise to a duty on the Crown to act in the best interests of the Musqueam band.⁴⁴⁶ The fact that the duty of the Crown to act in the best interests of the Musqueam band is stated in the Act makes these obligations legal and enforceable in a court of law. Wilson J concurred with Dickson J in finding that a fiduciary relationship did exist between both parties which is statutorily acknowledged by section 18 of the Indian Act. The nature of the relationship is what renders it fiduciary not the parties involved or subscription to particular rules or regulations.⁴⁴⁷ Dickson J's judgment stated that the fiduciary obligation of the Crown to the Musqueam band arose from three sources: the nature of Aboriginal title, the requirements of the Royal Proclamation 1763 and the Indian Act.⁴⁴⁸ However Dickson J does add that the emphasis on the Crown's historical obligation to Natives people shows that the Crown's obligation predates the Indian Act and exists independently of the Act.⁴⁴⁹

The Crown's fiduciary obligation found in *Guerin* cannot be restricted in its application to Indian land interests but extends to all aboriginal interests; in its broadest form, it is a general all encompassing duty.⁴⁵⁰ The fiduciary duty extends beyond the context of surrenders of Indian land.⁴⁵¹ Its application does depend on the facts of each individual case. The decision in *Guerin* does state that the Crown's duty to the Musqueam band, likewise to the aboriginal people stems from its historical relationship. The historical relationship between both parties sets out the parameters of where the fiduciary relationship arises from.

Understanding the historical relationship within a conceptual framework befitting its many facets is the key to understanding the nature of modern Crown-aboriginal relationship and the fiduciary obligations which are an integral part of them.⁴⁵²

⁴⁴⁶ Ibid.

⁴⁴⁷ L Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationships in Canada* (1996)105.

⁴⁴⁸ Ibid, 106.

⁴⁴⁹ Ibid, 108.

⁴⁵⁰ Ibid, 110.

⁴⁵¹ *R v Gladstone* [1996] 4 C.N.L.R. 65, 89-90.

⁴⁵² *Supra* n 438 at140.

Given the unique character both of the Indians' interest in land and of their historical relationship with the Crown, there is no occasion of surprise.⁴⁵³ The historical relationship of both the Crown and Aboriginal people provides the essence of the nature of the relationship. "It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty".⁴⁵⁴ The Crown and the indigenous people of Canada have a long-standing historical relationship dating back to contact with colonisers.

E. APPLICATION OF FIDUCIARY PRINCIPLES TO THE CROWN-ABORIGINAL RELATIONSHIP:

As set out previously, the key legal principles of a fiduciary relationship is the presence of: trust, confidence, influence, abuse of power, reliance, inequality, loyalty, vulnerability, selflessness, fiduciary care.⁴⁵⁵ In applying these key legal principles of a fiduciary relationship to the relationship between the Crown and the Musqueam indigenous peoples of the *Guerin* case, the duty of the Crown is to protect the interests of the Indian band from being exploited. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763.⁴⁵⁶ "The Proclamation placed responsibilities upon the Crown that could be enforced by the application of fiduciary principles".⁴⁵⁷

The Indian Act is confirmation of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians to protect their interests in transactions with third parties.⁴⁵⁸ The Musqueam band is recognised as a vulnerable group who depend on the Crown to make decisions to benefit their interests. There is a power imbalance between the two parties. The characteristic of trust and confidence is present where the Musqueam band relied on the Crown to make the best decision that serves their interests. Vulnerability of the Musqueam band is evident when the lease was signed and they were unaware of the real terms of the lease. The Crown is obligated to make the best informed decision that advances the interests

⁴⁵³ *Guerin v The Queen* (1984) 13 D.L.R. (4th) 321, 343.

⁴⁵⁴ *Ibid*, 341.

⁴⁵⁵ P.D.Finn, "The Fiduciary Principle" in T.G.Youdan *Équity, Fiduciaries and Trusts* (1989)2.

⁴⁵⁶ R.S.C. 1970, App.II, No.1.

⁴⁵⁷ McNeil K, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (2001) 307.

⁴⁵⁸ *Supra* n 444 at 340.

of the Musqueam band. From a legal position they are at the mercy of the fiduciary's discretion.⁴⁵⁹ The inequality between both parties is significant.

There is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.⁴⁶⁰

Furthermore, Dickson J adds that:

Where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary.⁴⁶¹

The Crown has an obligation to act for the benefit of the Musqueam band. The surrender requirement, and the responsibility it entails, is the source of a distinct fiduciary obligation owed by the Crown to the Indians.⁴⁶² Its purpose is to protect the Musqueam band from being exploited.

These legal principles led the Supreme Court to find that the fiduciary obligation which is owed to the Indians by the Crown is *sui generis*. It is not improper to regard the Crown as a fiduciary in a *sui generis* relationship.⁴⁶³ In this way the State can be held accountable for its actions. A relationship which is *sui generis* in nature is one that contains fiduciary characteristics but because it is applied in a new situation, makes it unique and special. Such relationships do not necessarily fall within the traditional categories of the fiduciary relationship.

The court also held that there was a breach of fiduciary duty on the part of the Crown. This was because the Crown was aware of the terms of the lease. They obtained different terms after the surrender was granted and therefore had knowledge of the discrepancies in the terms of the lease. "The Crown's agents had induced the band to surrender its land on the understanding that the land would be leased on certain terms."⁴⁶⁴ They had an obligation to inform the Musqueam band of the terms of the lease. It was unconscionable for the Crown to ignore the terms

⁴⁵⁹ E.J. Weinrib, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1,7.

⁴⁶⁰ Ibid, 4.

⁴⁶¹ *Guerin v The Queen* (1984) 13 D.L.R.(4th) 321, 341.

⁴⁶² Ibid, 334.

⁴⁶³ A Frame, "The Fiduciary Duties of the Crown to Māori: Will the Canadian Remedy travel?"(2005) 13 Wai L Rev 70, 75.

⁴⁶⁴ *Supra* n 452 at 344.

of the lease knowing that there were discrepancies in the lease that was enforced.⁴⁶⁵ “The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty”.⁴⁶⁶ “Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal”.⁴⁶⁷ Although the Crown officials did not act dishonestly, their actions were still unconscionable in relation to the fiduciary relationship the Crown owed to the Musqueam band.⁴⁶⁸

(i)Duty of Consultation:

The duty of consultation becomes relevant where the Crown had a duty to consult with the Indian band before entering into the lease.⁴⁶⁹ They were to promote the interests of Aboriginal peoples – and to act in the best interests of this vulnerable party, which is a key feature of the fiduciary obligation.

The significance of *Guerin* is that it provides the stimulus and essential material for reflection on the fundamental nature and origins of aboriginal law.⁴⁷⁰ *Guerin* confirmed that the Crown can be held accountable for its actions. This illustrates how the fiduciary obligation has extended into the public law sphere. *Guerin* essentially opened the door to the legal recognition of a fiduciary relationship in a public law context that had never been seen before. Fiduciary relationships have its origins in the private law context. It was further testament that fiduciary relationships are not limited to traditional categories that have been defined by previous courts.

Wilson J concluded that by virtue of the native title the Crown was bound to deal with the land subject to the fiduciary duty.⁴⁷¹ This case acknowledged the historic and contemporary reality; namely that Indian bands have a beneficial interest in

⁴⁶⁵ Ibid.

⁴⁶⁶ Ibid.

⁴⁶⁷ Ibid.

⁴⁶⁸ Ibid, 345.

⁴⁶⁹ J Reynolds, *The Impact of the Guerin case on Aboriginal and Fiduciary Law* (2005)367.

⁴⁷⁰ B Slattery, “Understanding Aboriginal Rights” (1987) 66 Can. Bar Rev. 727, 728-31.

⁴⁷¹ *Guerin v The Queen* (1984) 13 D.L.R.(4th)321.

their reserves and that the Crown has a responsibility to protect that interest and not interfere with it.⁴⁷²

This historical context was very important in deciding the nature of this relationship. The historical perspective of the relationship determined the nature and scope of the relationship resulting in it becoming one of a *sui generis* fiduciary nature. Although I state here that the relationship of the Musqueam band to their land is historical, at the same time it is still presently a reality and am not only referring to the past but the present and future relationship of the Musqueam band to its land and the Crown.

(ii) *R v Sparrow*:

The case that follows and incorporates the principles that arise from *Guerin* is *R v Sparrow*.⁴⁷³ This case involves Sparrow who was caught fishing with a drift net that was in contravention of the Fisheries Act. Sparrow admitted to this but argues that he was exercising his aboriginal right that is stipulated in s 35(1) of the Constitution Act 1982. This led the Supreme Court to interpret s 35 of the Constitution Act 1982 and held that Sparrow was exercising an inherent fishing right that existed before legislation. The judiciary interpreted section 35(1) word by word.

The words "recognition and affirmation", however, incorporate the government's responsibility to act in a fiduciary capacity with respect to aboriginal peoples and so import some restraint on the exercise of sovereign power.⁴⁷⁴

The case also stated that there must be a legislative objective attained to uphold the honour of the Crown and in keeping with the unique relationship between the Crown and Canada's aboriginal peoples which is grounded in history.⁴⁷⁵

The similarity between *Guerin* and *Sparrow* is that in these decisions the courts held that a fiduciary relationship existed because of the historical elements involved in the relationship between the parties. The nature of the relationships

⁴⁷² Ibid.

⁴⁷³ [1990] 1 S.C.R. 1075.

⁴⁷⁴ *R v Sparrow* [1990] 1 S.C.R. 1075, 1079.

⁴⁷⁵ Ibid.

were the crucial point. *Sparrow* discussed the *sui generis* fiduciary relationship and stated that:

The *sui generis* nature of Indian title, and the historic powers and responsibilities assumed by the Crown constituted the source of such a fiduciary obligation. The relationship between the government and Aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship.⁴⁷⁶

Sparrow recognises the legal principles discussed in *Guerin* although there is not much detail on it. The case also recognises that the relationship between the Crown and the Aboriginal peoples is rooted in Aboriginal rights, treaties and nation to nation relations.⁴⁷⁷ The emphasis is protecting the rights of the Indians and it is the government's responsibility to do so, because of the special relationship that has been formed over the years through historical sources, treaties and legislation.⁴⁷⁸

The reality at the time is the Crown did ignore its own legal responsibilities as contained in treaties, legislation and common law. However, it did not ignore any fiduciary responsibility because at that time, it didn't have any towards Aboriginal peoples and the Aboriginal people were powerless to do anything about it.⁴⁷⁹ The significance of the *Guerin* case is the recognition of the fiduciary relationship and the realisation that based on the facts of the case, fiduciary principles were apparent and now deemed legally valid by the courts.

The true *sui generis* fiduciary relationship in *Guerin* was that the ultimate title vested in the Crown meant the Musqueam band were reliant on the Crown to consult with them in land matters. This gives rise to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians.⁴⁸⁰

Sparrow supports the proposition that the fiduciary concept should not be confined to land related issues but can be seen as addressing other issues that may

⁴⁷⁶ Ibid, 1108.

⁴⁷⁷ Supra n 438 at 55.

⁴⁷⁸ Supra n 465 at 1110.

⁴⁷⁹ Supra n 468 at 54.

⁴⁸⁰ *Guerin v The Queen* (1984) 13 D.L.R. (4th) 321, 339.

arise under the Crown – Aboriginal people’s relationship.⁴⁸¹ This case took a further step away from *Guerin* where the fiduciary relationship was based on a discrepancy between a land lease and a surrender. The Crown assumed ‘historic powers and responsibilities’ from the Indians when they entered Canada and this constitutes one of the sources of fiduciary obligation.⁴⁸²

F. THE AUSTRALIAN CONTEXT:

(i) *Mabo v Queensland (No.2)*

Another case that acknowledges the *sui generis* relationship is *Mabo v Queensland(No.2)*.⁴⁸³ This is an Australian case and the first *sui generis* fiduciary relationship that was found by the Australian courts. The case involves the Merriam people (who originated from the Murray Islands or Mer in the Torres Strait) who brought an action to determine their legal interests in their land and the obligation of the Crown to protect their interests. Eddie Mabo and other members of his clan initiate proceedings in 1982 against the State of Queensland claiming ownership of land on Mer.⁴⁸⁴

In *Mabo v Queensland (No.1)*⁴⁸⁵ the High Court held that the Queensland Act 1879 discriminated against the people of the Murray Islands in the enjoyment of their right to own property, assuming that the traditional rights of ownership existed. The Queensland Act stated that the islands were vested in the state of Queensland “freed from all rights, interests and claims whatsoever”.⁴⁸⁶ On that assumption, the Queensland Act was inconsistent with the Racial Discrimination Act.⁴⁸⁷ “Under the Australian Constitution, a state law that is inconsistent with a law of the Commonwealth is, to the extent of the inconsistency, invalid. The Queensland Act thus failed in its purpose”.⁴⁸⁸

⁴⁸¹ P Walker, “Crown-Aboriginal Fiduciary relationships: False optimism or realistic Expectations?” (1992) 74.

⁴⁸² *Supra* n 465 at 1108.

⁴⁸³ [1992] 175 CLR 1.

⁴⁸⁴ G Brennan(Sir), *Aboriginal Land Claims: An Australian perspective* (1995)1.

⁴⁸⁵ (1988) 166 CLR 186.

⁴⁸⁶ Queensland Coast Islands Declaratory Act 1985.

⁴⁸⁷ *Supra* n 475 at 2.

⁴⁸⁸ *Ibid*.

In *Mabo v Queensland (No.2)*⁴⁸⁹ Toohey J and Dean J accepted that a fiduciary obligation existed with regards to the Crown having the obligation to recognise and protect the rights and interest of the Merriam people in the Murray Islands.⁴⁹⁰ The obligation arises out of the right of the Crown to alienate the land. The Crown is in a position of power and the Merriam people in a position of vulnerability. The Merriam people rely on the Crown to make the best possible decision for them in *vis-a-vis* their lands. Equity requires that the Crown acts to advance the interests of the Merriam people.⁴⁹¹

Toohey J in obiter, states that this case may suggest that it is possible to extend the obligation to the overall relationship which exists between the Crown and Aboriginal peoples of Australia.⁴⁹² This arises out of the general presumption that the Crown is obligated to protect the rights of its Aboriginal people and not make decisions that may be to the detriment of aboriginal rights. The Crown should be cautious when making decisions and avoid making any decisions that are potentially detrimental to the welfare of the aboriginal people.

“This case emphasised the overall power/vulnerability relationship between the Crown and Aboriginal people as evidencing a broad-based fiduciary relationship”.⁴⁹³ In Toohey J’s judgment he relied heavily on *Guerin* to establish that a fiduciary obligation owed by the Crown to the Musqueam band was due to the inalienability of Aboriginal title which was subject to the Crown’s authorisation.⁴⁹⁴ In these circumstances the fiduciary may exercise a discretion which can affect the legal position of the weaker party. The more powerful party has the special opportunity to abuse the interests of the vulnerable party.⁴⁹⁵ Toohey J stated that:

The power to destroy or impair a people’s interests in this way is extraordinary and is sufficient to attract regulation by Equity to ensure that the position is not

⁴⁸⁹ Supra n 474.

⁴⁹⁰ *Mabo v Queensland (No.2)* [1992] 175 CLR 1.

⁴⁹¹ Ibid, 121.

⁴⁹² *Mabo v Queensland (No.2)* [1992] 175 CLR 1, 120.

⁴⁹³ A Frame, “The Fiduciary duties of the Crown to Māori: Will the Canadian Remedy travel?”(2005) 70, 82.

⁴⁹⁴ R Cross “The Future of International Indigenous Trust and Fiduciary Law: A Comparative Analysis” in *In whom we Trust: A forum on Fiduciary Relationships* (2002) 254.

⁴⁹⁵ Supra n 483 at 200.

abused. The fiduciary relationship arises, therefore, out of the power of the Crown to extinguish traditional title by alienating the land or otherwise; it does not depend on an exercise of power.⁴⁹⁶

The practical effect of this fiduciary obligation on the Crown⁴⁹⁷:

...does not limit the legislative power of the Queensland Parliament, but legislation will be a breach of that obligation if its effect is adverse to the interests of the titleholders, or if the process it establishes does not take into account those interests.

Similar to *Guerin*⁴⁹⁸ there is a special relationship between the Crown and the Merriam people. Because of the special circumstances and historical events it gives rise to a *sui generis* fiduciary relationship. The Merriam people are reliant on the Crown to make the best informed decision in their best interests. There is an unequal equilibrium in the relationship of power between the two parties which therefore gives rise to a fiduciary relationship.⁴⁹⁹ Both these cases deal with land rights in relation to aboriginal title. Both decisions have found that a *sui generis* fiduciary relationship exists due to the unique circumstances and in particular because of the historical relationship between the Crown and Indigenous people.

A fiduciary duty that may arise out of a special relationship depends significantly upon the historical relationship of the Aboriginal people and the Crown. It is important to seek the true nature and scope of the relationship that will help determine whether a special relationship exists. The historical relationship may consist of prior agreements that are later reflected in treaties, statute and in the case of Canada, the Constitution, which are used as legal sources to officiate the relationship between the two parties. As stated in *R v Taylor and Williams*⁵⁰⁰ the importance of Indian history and tradition as well as the perceived effect of a treaty at the time of its execution are matters that are to be considered. The late Associate Chief Justice Mackinnon cautioned against determining Indian rights in

⁴⁹⁶ Ibid, 203.

⁴⁹⁷ Ibid, 205.

⁴⁹⁸ *Guerin v The Queen* (1984) 13 DLR (4th) 321.

⁴⁹⁹ Supra n 489.

⁵⁰⁰ (1981), 34 O.R. (2d)360.

a vacuum.⁵⁰¹ *Guerin*, together with *R v Taylor & Williams*,⁵⁰² ground a general guiding principle that the Crown has the responsibility to act in a fiduciary capacity with respect to Aboriginal peoples.⁵⁰³

G. THE NEW ZEALAND CONTEXT:

(i) *New Zealand Māori Council v Attorney-General*:

In *New Zealand Māori Council v Attorney-General*⁵⁰⁴ (also known as the Lands case) the Court of Appeal regarded Māori and the Crown as being in a relationship which creates responsibilities analogous to fiduciary duties.⁵⁰⁵ This case is analogous to *Guerin*⁵⁰⁶ and *Mabo*⁵⁰⁷ where the common element is that it involves the rights of its Indigenous people and their historic relationship with the Crown. Special obligations give rise to a fiduciary relationship. The historical relationship is significant in the New Zealand Crown and Māori peoples' relationship where Māori continue to be situated in a vulnerable position.

It may be only a matter of time when the New Zealand judiciary will apply the Canadian and Australian approach to New Zealand. The judicial view might be thought to be strengthened by similarities between the historical factors regarded by the Canadian Supreme Court as favouring the imposition of a fiduciary duty on the Crown in Canada on the one hand, and those found in New Zealand on the other.⁵⁰⁸ However Dr Paul McHugh stated otherwise⁵⁰⁹:

In New Zealand the possibility of any such extension of the 'fiduciary-like' obligations of the Crown...was stemmed after *New Zealand Māori Council v Attorney General*⁵¹⁰ reaffirmed the orthodox rule that Treaty rights required a statutory basis.

The fiduciary doctrine therefore failed to take root in New Zealand public law. This does not mean that the fiduciary branch cannot be developed by the New

⁵⁰¹ *R v Taylor and Williams* (1981), 34 O.R. (2d)360.

⁵⁰² *Supra* n 490.

⁵⁰³ *R v Sparrow* [1990] 1 S.C.R.1075.

⁵⁰⁴ [1987]1 NZLR 641.

⁵⁰⁵ *Ibid.*

⁵⁰⁶ *Supra* n 489.

⁵⁰⁷ *Supra* n 483.

⁵⁰⁸ *Supra* n 490 at 78.

⁵⁰⁹ P McHugh, "What a Difference a Treaty makes – The Pathway of Aboriginal Rights Jurisprudence in New Zealand Public Law" (2004)15 Public L Rev 87,94.

⁵¹⁰ [1996] 3 NZLR 140.

Zealand judiciary. It is a reminder that New Zealand and its Judiciary are still remaining compliant to the colonial interests and assertions of power by the Crown. In comparison to Canada, section 35 of the Constitution Act 1982 states that ‘the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed’.⁵¹¹ The Supreme Court of Canada has found that the words “reorganise” and “affirm” in the section incorporate the government’s responsibility to act in a fiduciary capacity.⁵¹²

The 1840 Treaty of Waitangi defines the relationship of Māori and the Crown. A significant number of traditional grievances Māori have made to the Crown is made through the Treaty. The fact that the fiduciary obligation has not been used to pursue traditional grievances does not mean that it does not exist although clearly it has been used by Cooke P to say that it creates responsibilities analogous to fiduciary duties. The Treaty is the founding document of the relationship of Māori and Crown and is continuously used to govern transactions that occur between both parties.

The Treaty of Waitangi has two versions, the Māori and English versions. They are not literal translations of one another. The Treaty consists of three main articles with articles one and two being the articles whose versions are largely in dispute. According to article one of Te Tiriti o Waitangi, hapū⁵¹³ ceded *Kawanatanga*⁵¹⁴ to the Crown whereas in the English version it states that hapū ceded absolutely and without reservation, all of the rights of sovereignty.⁵¹⁵ Governorship and Sovereignty are two totally different concepts.

Article two of Te Tiriti o Waitangi guaranteed to Māori *Tino Rangatiratanga*⁵¹⁶ whereas the English version guaranteed “full exclusive and undisturbed possession of Māori Lands and Estates, Forests, Fisheries and other properties.”⁵¹⁷

⁵¹¹ Section 35, Constitution of Canada.

⁵¹² *R v Sparrow* [1990] 1 S.C.R. 1075, 1079.

⁵¹³ *Hapu* means sub-tribe, part of extended family.

⁵¹⁴ *Kawanatanga* – means governorship.

⁵¹⁵ D Hall, “The Fiduciary Relationship between Māori and the Government in New Zealand” in *In Whom we Trust: A Forum on Fiduciary Relationships* (2002)126.

⁵¹⁶ *Tino Rangatiratanga* – means sovereignty.

⁵¹⁷ Article 2 of the Treaty of Waitangi, 1840.

From both these articles the concepts of ‘protection’ and ‘rights’ are apparent. The Crown guaranteed to the Māori protection of their rights and resources whilst the Māori guaranteed governorship while colonisation was taking place. Between these two parties there is evidence of a power imbalance, the vulnerability of the Māori is evident. In the Treaty of Waitangi, Māori have entrusted to the Crown the protection of their properties and rights and expect the Crown to act in their best interests. They have put their trust and loyalty in the Crown. Recent case law has seen the Crown’s many breaches of its treaty obligations and therefore it can be said that they also breached the Crown’s fiduciary obligation to protect the Māori “just rights and property”.⁵¹⁸

The Supreme Court of Canada has affirmed that aboriginal treaties with the Crown such as the Treaty of Waitangi are sacred agreements and have *sui generis* features.⁵¹⁹ It is also important to note that aboriginal rights are different from treaty rights.⁵²⁰ “Aboriginal rights embody the right of native people to continue living as their forefathers lived”.⁵²¹ Treaty rights are those contained in official agreements between the Crown and aboriginal people.⁵²² They are contracts that create enforceable obligations based on mutual consent of the involved parties.⁵²³

(ii) Summary:

These cases have provided the authority that a fiduciary relationship can exist between the government and the Aboriginal peoples of a country. The fiduciary legal principles are of course vital to establishing if such a relationship exists but at the same time the historical relationship is a key feature that determines the special relationship of both parties.

“Before *Guerin* the law was not entirely clear but the widely held view was that the Crown could not be held liable in law for the way in which it managed reserve

⁵¹⁸ Supra n 505 at 126.

⁵¹⁹ *R v Simon* (1982), 49 N.S.R.(2d) 404.

⁵²⁰ Henderson, J (Sakej) Y, Benson, M.L. & Findlay, I.M., *Aboriginal Tenure in the Constitution of Canada* (2000) 242.

⁵²¹ *R v Badger* [1996] 1 S.C.R. 771 at para 76.

⁵²² Ibid.

⁵²³ Supra n 510 at 243.

lands or other assets of Indian bands”.⁵²⁴ To determine whether a fiduciary relationship does arise the historical relationship of both parties has become important and relevant. This area of law is fairly new and still developing. What has been confirmed through *Guerin* is that if a fiduciary relationship should arise due to special circumstances, it is highly likely to be a *sui generis* fiduciary relationship.

H. CRITICISM OF FIDUCIARY LAW:

The development of the *sui generis* fiduciary relationship has not been one without criticism. Although fiduciary law addresses injustices there are also criticisms of the doctrine. The former Chief Justice of British Columbia described *Guerin* as part of a flawed experiment that ought to be abandoned.⁵²⁵ Professor Robert Flannigan states that *Guerin* “has had a profound and problematic significance in the Canadian jurisprudence”.⁵²⁶ He recommends that the fiduciary relationship between the Crown and Aboriginal peoples be formally disconnected from general fiduciary law.⁵²⁷ Flannigan states that the Supreme Court has created new boundaries for fiduciary responsibilities in the Crown-Aboriginal context.⁵²⁸ He argues that the fiduciary jurisdiction has been hijacked to prove the conceptual foundation for the positive regulation of Crown-Aboriginal relations.⁵²⁹ Flannigan further states that the regulation of Crown-Aboriginal relations is found in conventions, treaties, legislation and case law. Part of this regulation has now been labelled ‘fiduciary’.⁵³⁰

Presumably, the conventional⁵³¹ form of fiduciary obligation continues to apply to nominate obligations meaning certain fiduciary obligations of the Crown will be suspended if the Crown is able to justify.⁵³²

⁵²⁴ L.C.Green, “Trusteeship and Canada’s Indians” (1976)3 Dal. L.J. 104.

⁵²⁵ *A(C) v Critchley* (1996) 138 A.L.R. 259 (H.C.A) at paras 24,40.

⁵²⁶ J Reynolds, *The Impact of the Guerin case on Aboriginal and Fiduciary Law* (2005) 370.

⁵²⁷ *Ibid.*

⁵²⁸ R Flannigan, “The Boundaries of Fiduciary Accountability” 2004 NZ Law Rev 215, 245.

⁵²⁹ *Ibid.*, 244.

⁵³⁰ *Ibid.*, 245.

⁵³¹ *Conventional Position* – arrangement that attracts fiduciary regulation, is limited access, or in traditional terms, the undertaking to act wholly or partly in the interest of another. From R Flannigan, “The Boundaries of Fiduciary Accountability” 2004 NZ Law Rev 215, 217.

⁵³² *Supra* n 518 at 246.

Flannigan recommends that the Crown-Aboriginal *sui generis* fiduciary relationship should be separated from the general fiduciary jurisprudence. He acknowledges that fiduciary obligations of the Crown to protect aboriginal interests is unquestionably *sui generis* but it is time for the Crown to openly declare so and create its own *sui generis* jurisprudence.⁵³³ This will allow the regulation of Aboriginal-Crown relations to develop its own terms and free from the strict and narrow structure of the conventional or traditional fiduciary structure.⁵³⁴ The basis for Flannigan's claims is that the conventional fiduciary structure has not demonstrated any credibility to serve as a framework for political exchange and compromise.⁵³⁵ The concern of Flannigan is that the *sui generis* fiduciary relationship which usually involves political characteristics should not be determined in the same framework as fiduciary relationships found in the traditional categories. The *sui generis* fiduciary relationship should have its own framework to enable its jurisprudence to develop in its own special way.

The fact remains that all fiduciary relationships give rise to the problem of abuse and power, and that the purpose of fiduciary law should be to solve that problem.⁵³⁶ James Reynolds disagrees with Flannigan's criticism and states that the:

development of fiduciary law by the Supreme Court of Canada in *Guerin* and subsequent cases has been an outstanding example of the use of law to achieve justice for Canadians.⁵³⁷

Since the origins of Equity derive from a body of law in the English Court of Chancery which enforces justice and fairness this development is appropriate to address issues of aboriginal title and Crown protection.

Flannigan's concern rests in allowing a *sui generis* fiduciary relationship, a public law duty to be interpreted following the rigid structure of conventional fiduciary structure which has always been utilised in a private law context. He argues that it

⁵³³ Ibid, 245.

⁵³⁴ Supra n 518 at 246.

⁵³⁵ Ibid, 247.

⁵³⁶ T Frankel, "Fiduciary law" (1983) 71 Calif L Rev 795, 807.

⁵³⁷ J Reynolds, *The Impact of the Guerin case on Aboriginal and Fiduciary Law* (2005) 370.

may lead to the fiduciary jurisprudence becoming complex and existing outside of its prescribed boundaries. The introduction of the Crown-Aboriginal people's genre has brought a new extension to fiduciary relationships. However, the *sui generis* relationship is one based on fiduciary principles and arguably should still be interpreted in light of the existing fiduciary law. The actual circumstances of the relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship.⁵³⁸ The *sui generis* fiduciary relationship highlights the nature of the relationship which is emphasised through historical events.

I. MISAPPLICATION OF FIDUCIARY LAW:

There has been the misapplication of the fiduciary law in certain relationships. For instance in the case of *Chase Manhattan Bank v Israel British Bank (London) Ltd*⁵³⁹ a fiduciary relationship was found to exist by the courts to allow for tracing of funds. This case did not consider that the fiduciary obligation may have arisen because of the relationship of the parties concerned. The fiduciary relationship was used to address unjust enrichment that occurred in the case. The court's inability to use the principle of unjust enrichment resulted in the artificial creation of a fiduciary relationship in order to provide a remedy.⁵⁴⁰ Fiduciary law provides for proprietary remedies and this is why this line of reasoning was adopted because ordinary common law principles do not clearly authorise proprietary remedies.⁵⁴¹

The misapplication of the fiduciary doctrine usually relates to cases where there is unjust enrichment or to right a wrong and resort to using the doctrine of the fiduciary law as a remedy because it imposes penalties when there is a breach. A good example is the case of *Reading v Attorney-General*⁵⁴² which involved an Army Sergeant who assisted smugglers in transporting drugs by riding in the same vehicle as the smugglers and thereby avoiding police inspections. In the process

⁵³⁸ P Finn *Fiduciary Obligations* (1977) 46.

⁵³⁹ [1981]Ch 105.

⁵⁴⁰ L Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationships in Canada* (1996)161.

⁵⁴¹ A Butler, *Equity & Trusts in New Zealand* (2003) 364.

⁵⁴² *Supra* n 529.

he made a substantial profit himself from the smuggled drugs. He sought an action to have his seized money returned upon his release from his prison term. The Court of Appeal held that he held a fiduciary relationship to the Crown by virtue of his position in the Army and therefore the money he received from his illegal activities was deemed as profit he earned through the breach of his fiduciary duties to the crown. As a result of this breach he was ordered to disgorge all his profit to the Crown as his beneficiary.⁵⁴³

The similarity in both these cases is that the courts sought to find a remedy for the situation and were willing to stretch the fiduciary doctrine to find a basis of liability. “A fiduciary duty is to be found in the nature of the particular relationship. The finding of fiduciary obligations is not remedy-led”.⁵⁴⁴ These two cases held that a fiduciary obligation existed in order to remedy the problem. These cases are an illustration of the fiduciary principle being extended to the point it has been misapplied to suit the circumstances.

Earlier case law only recognised fiduciary relationships that fell within the traditional categories. The legal principles discussed were crucial components in establishing if a fiduciary relationship existed but those relationships that fell within the traditional categories were clearer. The extension of the fiduciary principle in the Crown –Aboriginal peoples’ relationship is due to the historical context between the parties and the presence of fiduciary principles in unique circumstances. Another argument states that:

“fiduciary duties are not special duties; they have no moral footing; they are the same sort of obligations derived and enforced in the same way, as other contractual undertakings”.⁵⁴⁵

I disagree with this comment because fiduciary relationships are different from contractual undertakings. Contractual agreements consist of particular criteria such as offer, acceptance, consideration and many other elements. They are clear decisions made openly between two or more parties whether orally or in written form. Fiduciary relationships’ come under the umbrella of equitable obligations

⁵⁴³ *Reading v Attorney-General* [1982] Ch 105.

⁵⁴⁴ *Maclean v Arklow Investments Ltd* [1998]3 NZLR 680, 690.

⁵⁴⁵ F Easterbrook & D Fischel, *Contract and Fiduciary Duty* (1993) 36 J.Law & Eco 425, 427.

and equity requires that the interests and/or position of the vulnerable party are advanced. As stated in one case “What is a fiduciary relationship? It is one in respect of which if a wrong arises, the same remedy exists against the wrong-doer on behalf of the principal as would exist against a trustee on behalf of the cestui que trust”.⁵⁴⁶ The essential point is that while the fiduciary relationship may have been inappropriately applied when property applied, it does prove a very useful way of analysing relationships and the obligations arising from them. It goes to depths to determine the initial beginnings of the relationship and whether in the process of the relationship did the parties act according to their required duties. Through the analysis of the relationship, fiduciary principles come to light and assist in interpreting the type of relationship that actually exists.

J. APPLICATION OF FIDUCIARY PRINCIPLES TO THE SAMOA-NEW ZEALAND RELATIONSHIP:

In this section the application of fiduciary principles to the relationship of Samoa and New Zealand will be discussed. Is this a relationship of unique circumstances and therefore a *sui generis* relationship attracting fiduciary obligations?

Firstly to reiterate what a fiduciary relationship consists of is a relationship of trust and confidence where the fiduciary is to exercise the utmost loyalty to the beneficiary. In this special relationship the fiduciary must advance the interests of the beneficiary. This includes the fiduciary not profiting from the transaction and not being involved in any conflict of interest. It is also important to note that there is an evident power imbalance in the relationship and therefore the fiduciary must not use his discretion to take advantage of the beneficiary’s vulnerability. The beneficiary is at the discretion of the fiduciary and is reliant on the fiduciary to act with utmost good faith.

The application of the fiduciary relationship has been extended from its traditional categories, to commercial cases,⁵⁴⁷ and extended further to judicial recognition of the Crown-Aboriginal peoples relationship – a fiduciary relationship of *sui*

⁵⁴⁶ *Re West of England and South Wales District Bank, Es parte Dale and Co* (1879) 11 Ch.D 772, 778.

⁵⁴⁷ *Canadian Aero Services v v O'Malley* [1974] S.C.R.592.

generis nature. A relationship which is *sui generis* still has fiduciary characteristics but its application in a new situation is what makes it special. This was reflected in *Guerin*⁵⁴⁸ and *Mabo*,⁵⁴⁹ although these cases relate to land loss where the Crown has been held to have a fiduciary obligation to the respective aboriginal peoples in relation to the managing of the land. *Sparrow*⁵⁵⁰ suggests that fiduciary obligations should not be limited to land issues but extended to other matters pertaining to the relationship between the Crown and Aboriginal people. What is therefore the relevance to the Samoan-New Zealand relationship? The Samoan case is not dealing with land loss. It is bringing to light the emphasis of the historical and current relationship; the events that have occurred during the process of that relationship which may reflect fiduciary principles and obligations; the nature of the relationship that gives it special meaning; and whether this in its truest sense makes it a unique relationship of a *sui generis* fiduciary character.

(i) Proximity:

This part of the chapter attempts to discuss in depth the special relationship between Samoa and New Zealand looking at the historical to present day relationship. Notably the relationship of Samoa and New Zealand has had its positive and negative features. There is a clear power imbalance between the two nations and this has been realised historically and up to the present day. This power imbalance is evident from New Zealand's administration of Samoa when Samoa was governed by New Zealand under the League of Nations mandate and the Trusteeship Agreement. At present there is a continuous close interaction between Samoa and New Zealand. Travel between both countries is on a regular basis with a significant number of Samoans having a strong New Zealand connection of some kind. The population of Samoa is 180,000⁵⁵¹ and there are another 131,100 Samoans residing in New Zealand who are New Zealand citizens.⁵⁵² This is a significant number of Samoans living in New Zealand and

⁵⁴⁸ *Guerin v The Queen* (1984) 13 DLR (4th) 321.

⁵⁴⁹ *Mabo v Queensland(No.2)* [1992] 175 CLR 1.

⁵⁵⁰ *R v Sparrow* [1990] 1 S.C.R. 1075.

⁵⁵¹ Report of the Population and Housing Census 2006, Samoa Bureau of Statistics, Apia, July 2008.

⁵⁵² "Samoan Population in New Zealand 2006" in C Macpherson & L Macpherson, *The Warm Winds of Change: Globalisation in Contemporary Samoa* (2009) 53.

therefore interaction between the two countries is to be expected. Many Samoans that have settled in New Zealand continue to maintain strong links to Samoa. Likewise in Samoa, many Samoans who have settled in Samoa are also New Zealand citizens thereby maintaining strong links with New Zealand. Both countries permit dual citizenship making allowance for ongoing travel and interaction between the two countries. Ties of history, friendship and law between both countries have developed into a unique ongoing relationship.

Historically, New Zealand has been influential in exercising the most colonial influence on Samoa. New Zealand colonised Samoa for forty-eight years. The beginning of this relationship saw New Zealand take its role as the Colonist exercising military administration upon Samoa from 1914 to 1920. During the early years of New Zealand administration, Samoa was made dependent upon the New Zealand government to make decisions for Samoa in a social, political and economic context. This has been discussed in detail in chapter one where Samoa became a mandated territory under the New Zealand administration therefore the New Zealand administration made decisions dealing with the welfare of the Samoan people and Samoa itself. Samoan traditional leaders did not have much or any say in the administration of Samoa. Samoans as a people were clearly vulnerable to the New Zealand administration and were required to put their total trust in the New Zealand administration to do what was supposedly best for Samoa.

(ii) New Zealand administration:

Samoa experienced one of the most significant downfalls in its relationship with New Zealand through the influenza epidemic of 1918. The negligent actions of New Zealand administration resulted in the deaths of twenty-two percent of the Samoan population. The profound effect this significant event had on the Samoan people is well discussed in much detail in chapter one. New Zealand, in recognition of its failures surrounding the 1918 epidemic replaced the New Zealand administrator at the time and tried to improve the relationship with Samoa. The League of Nations acknowledged the failures of the New Zealand administration and intervened by endorsing a Mandate upon New Zealand to

administer Samoa under the League of Nations. The main objective under the Mandate was New Zealand was to work to promote the welfare of the Samoan people.⁵⁵³ Even under the mandate, Samoa continued to experience many injustices such as discrimination and punishment for those who resisted New Zealand's policies.⁵⁵⁴ The relationship between Samoa and New Zealand continued under the Trusteeship Agreement. New Zealand accepted the Trusteeship Agreement endorsed by the United Nations (previously known as the League of Nations) to continue to administer Samoa in a democratic manner and to assist Samoa in achieving independence as well as working for the benefit of the Samoan people.

New Zealand was placed in an authoritative position where although they administered Samoan affairs, at the same time they were responsible for its upkeep and furthering the interests of the Samoan people. They were in a position to exert influence and discretion where the Samoan people had relied on them to make decisions to advance Samoan interests. Laws during the time of New Zealand's administration were based on their own "expert" understanding with no consultation with the Samoan people. The lack of consultation with the Samoan people illustrates the power imbalance between both parties.

(iii) Ongoing relationship: Samoa was a part of New Zealand:

Samoa was not only a colony of New Zealand; it was part and parcel of New Zealand. This distinguishes it from most other colonial relationships where one country that colonises another labels that country a colony. Samoa was part of the realm of New Zealand⁵⁵⁵ like Niue and the Cook Islands are today. New Zealand's relationship with Samoa has been ongoing from the time New Zealand landed on Samoa's shores in 1914. This relationship continued after independence as sovereign states and the Treaty of Friendship further acknowledges the continuing relationship. The Treaty of Friendship is a unique international instrument stipulating obligations and rights of both parties. Some Treaty obligations have been breached but yet remain to be addressed. The Protocol to the Treaty of

⁵⁵³ League of Nations mandate 1920; Refer to Appendix 1.

⁵⁵⁴ See chapter 1 for further discussion.

⁵⁵⁵ *Les v Attorney –General* [1982] 1 NZLR 165.

Friendship 1962 although a document that deprives many Samoan of their citizenship rights is in fact an indication of the maturity of the Samoa-New Zealand relationship.⁵⁵⁶

Despite Samoa being a sovereign state, the New Zealand government wanted to continue a relationship with Samoa where New Zealand will continue to assist Samoa in certain areas. This would be a nation-to-nation relationship that is based on mutual need, respect and trust.⁵⁵⁷ Correspondence between the Prime Minister's offices in Wellington to the New Zealand High Commissioner of Western Samoa prior to Samoa's independence, clearly stated the wish to "create a new relationship between New Zealand and independent Western Samoa".⁵⁵⁸ The same correspondence states that the New Zealand government "must also endeavour to ensure that Western Samoa continues to look to New Zealand as its most intimate friend".⁵⁵⁹ This is also an indication of the willingness of the New Zealand government to maintain its relationship with Samoa. Despite past events and the current independent status of Samoa, New Zealand was still determined to maintain and continue a relationship with Samoa. Creating an ongoing relationship should reflect fairness in future communications between both nations. Some instances after the treaty of Friendship was signed only demonstrated discrimination and unjust measures.⁵⁶⁰

However most of the documents and correspondence between the New Zealand officials state that it was the wish of the Samoan people and government that there should be an agreement which will give formal effect to Western Samoa's special relationship with New Zealand.⁵⁶¹ It is not quite clear which party raised the notion of an ongoing relationship but the obvious fact is that both countries agreed

⁵⁵⁶ Debate in the House of Representatives on the Citizenship (Western Samoa) Bill [24 August 1982] 2511, 2514.

⁵⁵⁷ L Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (1996) 13.

⁵⁵⁸ Correspondence letter PM311/3/2, From Prime Minister office, Wellington, New Zealand to Mr J.B. Wright, New Zealand High Commissioner of Western Samoa [8 July 1960], National Archives, Wellington.

⁵⁵⁹ Ibid.

⁵⁶⁰ Such instances include tight immigration policies, the execution of Dawn raids and deprivation of citizenship rights through the Citizenship (Western Samoa) Act 1982.

⁵⁶¹ Record of discussions between the Prime Minister of Western Samoa and the Prime Minister of New Zealand, Wellington, 7-9 August 1961. National Archives, Wellington.

that there will be a special relationship and neither country has sought to end this relationship. This wish marked the birth of the Treaty of Friendship.

The significance of the Treaty of Friendship is that the special relationship has been formalised through a treaty document. The signing of the agreement meant New Zealand has now entered a formal treaty relationship which confirms the close relationship that exists between the two countries and provides a sound basis for the continued cooperation that both governments desire.⁵⁶² The Treaty of Friendship was thoroughly discussed between both governments. The then New Zealand Prime Minister stated that⁵⁶³:

...because of its special relationship with Samoa they were prepared, if Samoa wished, to treat Samoan citizens coming to New Zealand after independence “as if” they were British subjects, in the same way as Irish citizens are treated at present.

This is further indication that the New Zealand government regarded their relationship to the Samoan people different from their relationships with other states. The problem of the Treaty is the special relationship is acknowledged but there is no clear interpretation of what this special relationship means. It could be suggested that the failure to articulate the relationship has allowed actions to occur which have clearly undermined the spirit of the Treaty. The special features of the Treaty of Friendship create obligations which mirror those of a Crown-Aboriginal relationship. These special features will be articulated in chapter 3 under the discussion of Treaties.

It can be stated that colonial relationships can be seen as one of a fiduciary nature. The fiduciary principles are present: the power imbalance, relationship of trust and confidence, vulnerability as well as the requirement to advance the interests of the vulnerable party. Unconscionability of certain conduct leads to the breach of the fiduciary duty. Recent case law has held that the Crown-Aboriginal people relationship is one of a fiduciary nature.⁵⁶⁴ This is due to the vulnerability of the Aboriginal people to the Crown through the process of colonisation. The power

⁵⁶² Ibid.

⁵⁶³ Ibid.

⁵⁶⁴ *Guerin v The Queen* 13th D.L.R. (4th) 321.

imbalance in such cases is significant where the Crown is held to be in a position of the fiduciary in advancing the interests of the Aboriginal people.⁵⁶⁵ Similarly, this would have been the case for Samoa and New Zealand prior to independence. However the fact remains that this thesis is dealing with two sovereign states, hence extending the fiduciary principle further. This thesis is considering the fiduciary nature of a relationship on a nation-to-nation basis. It can also be stated as a relationship of past colonist and territory.

New Zealand no longer has any obligations to burden itself with Samoa's administration. However, New Zealand chooses to continue to act for Samoa to further its interests and this is acknowledged in the Treaty of Friendship. The Treaty of Friendship is not a document that is to be taken lightly it is a document that regulates the relationship of two countries based on close links although in some instances the New Zealand government ignores the Treaty of Friendship.

Notwithstanding these special features is the fact that the New Zealand government's actions illustrate that there is an ongoing special relationship that exists beyond the formal relationship of Samoa and New Zealand. It is a relationship of mutual trust and confidence between parties that give rise to an obligation of loyalty.⁵⁶⁶ Fiduciary relationships have been found to exist beyond the formal relationship and similarly this may be the case for the Samoa and New Zealand relationship.⁵⁶⁷

K. DIFFICULTIES IN THE RELATIONSHIP OF SAMOA AND NEW ZEALAND:

As stated in much of chapter one, the relationship between Samoa and New Zealand has not been one without difficulties. The conflicts and tension experienced during New Zealand administration has left a negative impact on the relationship. However with all relationships there are the positives and negatives. New Zealand maladministration during the colonial era is well remembered by many Samoans but is a history that not many New Zealanders are aware of.

⁵⁶⁵ *Ibid*; *Mabo v Queensland (No.2)* [1992] 175 CLR 1.

⁵⁶⁶ *Canadian Aero Services Ltd v O'Malley* [1974] S.C.R.592.

⁵⁶⁷ *Ibid*.

There are also still current tensions that exist in the relationship. The main difficulty that many Samoans currently face is immigration matters. The rigid immigration policies against Samoan migrants and travellers are not a reflection of a special relationship. Travel between both countries will always be continuous because of the number of Samoans who reside in New Zealand and those in Samoa. For a Samoan to travel to New Zealand for a short trip involves procedural hurdles to obtain a visa. This is highly because of the problem of overstayers. New Zealand Immigration has become critical of Samoan migrants because of the problem of overstayers.

When the New Zealand government required unskilled labourers to fill the job market, there was an influx of Samoan migrants (as a partner to the Treaty) to meet New Zealand's unskilled labour shortage in the 1970s.⁵⁶⁸ To request people to fulfil employment opportunities and brush them aside when things go wrong is unfair treatment and an unconscionable act on the part of the New Zealand government. The power imbalance and vulnerability of the Samoan people are once again significant and self-evident. The New Zealand government seemed to have forgotten at that point that although the Samoans may have overstayed, this did assist New Zealand in filling the employment shortage when they demanded it. To turn a blind eye to the overstaying issues for a number of years leading those Samoan overstayers to believe that it was alright and then to turn around and prosecute people for it was unconscionable. It was a clear abuse not only of the employment relationship but the special relationship between the two countries.

The implementation of the Dawn raids to eradicate overstayers only reflected discrimination and prejudices against Pacific Islanders and especially Samoans.

Immigration authorities raided homes in which they believed illegal immigrants lived and factories in which they believed overstayers were employed and conducted a series of mass and apparently random checks on Pacific Islanders in public places.⁵⁶⁹

⁵⁶⁸ Refer to chapter 1 at 48, 49 for further discussion.

⁵⁶⁹ P Spoonley, C Macpherson, D Pearson, *Nga Patai: Racism and Ethnic Relations in Aotearoa/New Zealand* (1996) 132.

It was definitely an unconscionable exercise of power by the New Zealand government to inflict such measures on the Samoan people given there was a Treaty to guide the relationship between both governments. The power imbalance and discretion exercised by New Zealand in this event was considerable. The exercise of Dawn raids certainly did not advance the interests of Samoan people it only undermined their rights and integrity. The vulnerability of the Samoan people was taken advantage of by the New Zealand government. The New Zealand government had a Treaty obligation to promote the welfare of the Samoan people, the events that occurred during the Dawn raids did not reflect this Treaty obligation.

The issue of overstayers had become a serious matter for the New Zealand governments and eventually led to a Privy Council decision⁵⁷⁰ which declared New Zealand citizenship to some 100,000 Samoan citizens.⁵⁷¹ The *Lesā*⁵⁷² decision led to the signing of the Protocol⁵⁷³ and the enactment of the Citizenship (Western Samoa) Act 1982. Consultations and negotiations conducted between both countries to discuss the Protocol were not meaningful and were very one-sided. The signing of the Protocol deprived many Samoans of their citizenship rights. This kind of exercise clearly undermines the interests of many Samoans. The Citizenship (Western Samoa) Act 1982 overturned a Privy Council decision which is a very rare occasion. The enactment of the statute advanced the interests of the New Zealand government and not the Samoan people. As a result of the New Zealand government's response to the *Lesā* case the Human Rights Commission statement strongly maintains that the Citizenship (Western Samoa) Act 1982 is a denial of a basic human right and the statute has an unfortunate racist implication.⁵⁷⁴

⁵⁷⁰ *Lesā v Attorney-General* [1982] 1 NZLR 165.

⁵⁷¹ *Ibid*, 175.

⁵⁷² *Ibid*.

⁵⁷³ Refer to Appendix 4.

⁵⁷⁴ Submission to the Foreign Affairs Select Committee from the Human Rights Commission [6 September 1982] in the *New Zealand Citizenship and Western Samoans* Ministry of Foreign Affairs, Wellington, NZ, Information Bulletin No.4, March 1983, 28.

Arguments raised were that citizenship rights are a personal choice and that the decision of an individual's citizenship was not one to be decided by the government of a country.⁵⁷⁵ The power imbalance throughout the process of the citizenship argument is quite significant and the unconscionable exercise of power exerted by the New Zealand government is evident.

Questions continue to arise over the reasons why New Zealand reacted in the manner it did to the *Lesā* decision. New Zealand was quick to justify their actions stating that it was never the objective for Samoa to have or retain New Zealand citizenship after Independence. The New Zealand government explained at lengths that Samoa's initial intention in striving for independence⁵⁷⁶ was to be self-governed and retain Samoan citizenship. Obtaining New Zealand citizenship would never have been considered for an independent Samoa by its forefathers.⁵⁷⁷

The New Zealand government's main concern was the influx of new migrants that would come into the country and put unwanted pressure on resources. The thought of 100,000 potential Samoans migrating to New Zealand was not a reality they wanted to comprehend. The method they utilised was a way to remedy the situation for them with the provision of amnesty and other alternatives available to apply for citizenship. They were not able to explain the discrimination between the Samoans resident in New Zealand and Samoans resident outside New Zealand.⁵⁷⁸ They also did not present any basis in law or precedent to support the proposed deprivation of citizenship.⁵⁷⁹

L. Conclusion:

The Samoa and New Zealand special relationship is one between two sovereign nations. It is without a doubt that although Samoa is now an independent state their relationship with New Zealand continues to be ongoing. There are special

⁵⁷⁵ Correspondence between Hon Taisi Tupuola Efi, MP and the New Zealand Attorney-General, Hon. J.K. McLay [20 August 1982] in *New Zealand Citizenship and Western Samoans* Ministry of Foreign Affairs, Wellington, Information Bulletin No.4, March 1983.

⁵⁷⁶ Refer to chapter 1 at 40 "Constitutional Convention 1954".

⁵⁷⁷ *Supra* n 553 at 2512.

⁵⁷⁸ *Supra* n 575.

⁵⁷⁹ *Ibid.*

features that facilitate the special relationship and the argument of this thesis is that Samoa and New Zealand have a *sui generis* fiduciary relationship. The Samoa-New Zealand relationship is similar to that of a Crown-Aboriginal relationship. The relationship of the Crown and Aboriginal people were initially conducted on a nation-to-nation basis.⁵⁸⁰ When colonisers and settlers came in to contact with Aboriginal people they entered relations with a sovereign group of people who existed with their own laws, government and boundaries.⁵⁸¹ This can also be compared to the relationship of Samoa and New Zealand between the years 1914 to 1962, the time of New Zealand administration. Although with Samoan independence, New Zealand is no longer obligated to be responsible for Samoan affairs, both countries still have close and linked ties. The New Zealand government is still able to influence the Samoan people. It is a relationship that exists beyond the formal relationship and is confirmed by the Treaty of Friendship.

The Samoa-New Zealand relationship contains special features that points to a relationship of a fiduciary nature. These special features will be discussed in detail in the following chapter. The fiduciary principles of power imbalance, vulnerability, trust, discretions and influence remain present in the relationship especially in matters that have occurred following Samoa's independence in 1962. Samoa being a sovereign state is not an excuse for the New Zealand government to say that such a relationship does not exist.

The abuse of power is evident in historical events and the unconscionability that arises out of it must be addressed. The unconscionability signifies the breach and thereby strengthening the ongoing obligation to rectify. The imposition of unjust immigration policies, Dawn raids and the aftermath of *Lesá* is a reflection of the breaches of the special relationship.⁵⁸² The enactment of the Citizenship (Western Samoa) Act 1982 prompted the New Zealand Human Rights Commission to clearly state that the Samoan people were being denied an inherent basic human

⁵⁸⁰ L Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (1996) 13.

⁵⁸¹ *Ibid.*

⁵⁸² *Infra* at Chapter 3 at 154. Refer to Chapter 3 for further discussion.

right - the right of citizenship to enter one's own country. This is a significant example of New Zealand undermining citizenship rights of many Samoans. The unconscionable exercise of power in the *Lesa*⁵⁸³ situation is evident. This is the most significant breach in the special relationship of Samoa and New Zealand. The New Zealand government has a Treaty obligation to promote the welfare of the Samoan people.⁵⁸⁴ Equity requires that the rights of the Samoan people are advanced and not undermined.⁵⁸⁵

Continuous interaction between the two countries will remain ongoing. Whether that relationship will continue to grow in strength or amount to unconscionable breaches still remains to be seen. It is evident from historical events that at times the relationship only served the interests of the New Zealand government. The next chapter will analyse the special features of the relationship of Samoa and New Zealand to point out its *sui generis* fiduciary nature.

⁵⁸³ *Lesa v Attorney-General* [1982] 1 NZLR 165.

⁵⁸⁴ Article III, Treaty of Friendship 1962; Refer to Appendix 3.

⁵⁸⁵ *Mabo v Queensland(No.2)* [1992] 175 CLR 1.

**CHAPTER 3: ARTICULATION OF SPECIAL FEATURES OF THE
SAMOA-NEW ZEALAND RELATIONSHIP.**

The focus of this chapter will discuss the structuring of the special relationship between Samoa and New Zealand. The previous chapters have presented the historical and legal context of this thesis and this chapter will look at analysing these contexts in order to articulate the features of the special relationship. The aim of this chapter is to address the meaning of the Treaty of Friendship between Samoa and New Zealand so the special features of the Treaty are identified. To begin, the meaning of a 'treaty' will be discussed. This will be followed by a discussion that will focus on the significance the 'Treaty' carries in terms of the significance of the Treaty of Friendship. I will also consider other jurisdictions that utilise and incorporate treaties into their constitutional frameworks. Comparative analysis will be drawn with the Māori (also known as Tangata Whenua) and Pākehā relationship in New Zealand emphasising the changes of attitude in regards to Tangata Whenua, when all parties came to appreciate the history and the meaning of the principles of the Treaty of Waitangi. This chapter will then discuss why the relationship of Samoa and New Zealand is different from other relationships.

Samoa's relationship with New Zealand has its own unique foundations in which it can be seen to be of a *sui generis* fiduciary nature. This thesis aims to incorporate the cumulative impact of historical events and the ongoing relationship between Samoa and New Zealand to show that the relationship of both countries is of a *sui generis* nature. The importance of the Treaty of Friendship between Samoa and New Zealand is central to the discussion of my thesis because the articles of this Treaty need to be examined and scrutinised like the articles of the Treaty of Waitangi. This will assist in identifying the features of this special relationship. Once the features of the special relationship are articulated, they may be addressed. Through addressing these features, breaches of the special relationship become evident. A way forward for the relationship of Samoa and New Zealand is to address these breaches so improvement in the affairs of both countries will continue.

A. WHAT IS A TREATY?

The key issues for this section of the chapter include the following: What is a treaty? What is its role in the constitutional make-up of a country? And what power does it carry in regards to international relations with other countries?

First of all, what is a treaty? A definition provided in Article 2(1)(a) of the Vienna Convention defines a ‘treaty’ as:

An international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.⁵⁸⁶

This is a modern definition that has been provided for although treaties have existed for a number of centuries. However, there are certain limitations to the Vienna Convention. The Convention only includes treaties between states, which is to be in written form and is limited to international agreements.⁵⁸⁷ It does not take into account treaties between states and international organisations. Treaties between nation states are common and treaties are generally bilateral or multilateral.⁵⁸⁸ They are documents achieved by negotiation between two or more parties that record agreements, rights, promises and obligations between parties.

Treaties have many uses; they also “cede the sovereignty of territories, grant port privileges and navigation rights to states, and give protectorate powers and extra territorial powers”.⁵⁸⁹ Treaties are utilised in international circles to facilitate protocol and agreements. The general common law position is that although they may not be viewed as ‘law’ in common law jurisdictions (unless they are incorporated into domestic law⁵⁹⁰) they are influential and compliance with international treaty obligations is highly regarded. In New Zealand, a “treaty only

⁵⁸⁶ Article 2(1)(a), The Vienna Convention on the Law of Treaties 1969. See: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

⁵⁸⁷ I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed, 1969) 6.

⁵⁸⁸ A Aust, *Modern Treaty Law and Practice* (2nd ed, 2007) 17.

⁵⁸⁹ T Bennion, *Treaty-Making in the Pacific in the Nineteenth Century & The Treaty of Waitangi* (1987) 35.

⁵⁹⁰ The New Zealand government will not take binding treaty action until the treaty is implemented in New Zealand’s domestic law. See: New Zealand Foreign Affairs and Trade: “The Treaty making process in New Zealand” <<http://www.mfat.govt.nz/Treaties-and-International-Law/03-Treaty-making-process/index.php>.

becomes enforceable as part of the municipal law if and when it is made so by Legislative authority”.⁵⁹¹ “Treaties remain the most important instrument for regulating international affairs”.⁵⁹² Treaties are binding on States that have assented to them at International law.⁵⁹³ A material breach of a bilateral or multilateral treaty by one of the parties is a ground for terminating the treaty or suspending its operation in whole or in part.⁵⁹⁴ To breach international obligations without any justification is considered to be serious by the majority of the international community thereby causing embarrassment for the country concerned and is not encouraged at all.⁵⁹⁵

Ratification of international covenants by states does give legal effect to international obligations.⁵⁹⁶ It is not encouraging for a state to ratify an international covenant and then not apply the context of the international covenant within its domestic framework. This shows that the state is neither serious nor committed to its international obligations and if this position is taken it is contrary to the purpose of the international convention. Signing and ratifying an international treaty means committing to the principles of the international convention or treaty.⁵⁹⁷

The case of *Tavita v Minister of Immigration*⁵⁹⁸ demonstrates how international obligations do have effect. Tavita was an overstayer in New Zealand. His wife and child were both New Zealand citizens and he was the primary caregiver for

⁵⁹¹ *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1939] NZLR 107, 120.

International Convention of Civil and Political Rights is now incorporated into the New Zealand Bill of Rights Act 1990 and thereby making it law.

⁵⁹² G Ulfstein, *Making Treaties Work: Human Rights Environment and Arms Control* (2007) 3.

⁵⁹³ Articles 26 & 29, The Vienna Convention on the Law of Treaties 1969. See: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

⁵⁹⁴ S Rosenne, *Breach of Treaty* (1985) 28. Also refer to Article 60 of the Vienna Convention on the Law of Treaties 1969. See:

http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

⁵⁹⁵ M Jackson, “The United Nations on the Foreshore: A Summary of the Report of the Special Rapporteur” (5 April 2006) Refer to: <http://www.converge.org.nz/pma/mj050406.htm>.

⁵⁹⁶ Articles 11 -17 of the Vienna Convention on the Law of Treaties 1969; New Zealand Ministry of Foreign Affairs & Trade, “Treaty-making process in New Zealand” See: <http://www.mfat.govt.nz/Treaties-and-International-Law/03-Treaty-making-process/index.php> [12 February 2010].

⁵⁹⁷ The Vienna Convention on the Law of Treaties 1969. See:

http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

⁵⁹⁸ [1994] 2 NZLR 257.

their child while the mother of the child works.⁵⁹⁹ The New Zealand department of Labour initiated removal orders to have him deported to his country of birth. Tavita appealed on humanitarian grounds with reliance on the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child which New Zealand had ratified.⁶⁰⁰ Tavita's argument was that the responsible Minister should have considered the relevant conventions when making his decision.⁶⁰¹ The Crown argued that the responsible Minister at his ministerial discretion did not have to take into consideration the Conventions when making his decision.⁶⁰²

This stirred up a strong response from the Bench where Cooke P (as he then was) stated⁶⁰³:

That is an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing.

The responsible Minister was instructed to reconsider his decision in light of the international treaties and conventions.⁶⁰⁴ The important point from this case is that although international treaties may not be incorporated into domestic law, the Courts will take a very dim view of an argument that suggests New Zealand does not have to adhere to them and may intervene to encourage the compliance with these treaties. The Minister was obligated to take consideration of the relevant treaties and conventions especially when the States are a party to the treaty and/or convention. This further implies that relevant considerations must be given to treaties when crucial decisions are made.

Treaties between colonial powers and aboriginal peoples were a popular forum to document initial agreements between colonising powers and aboriginal people. This was common in Canada, the United States of America and New Zealand. However such treaties may not be acknowledged as international treaties under

⁵⁹⁹ *Tavita v Minister of Immigration* [1994] 2 NZLR 257.

⁶⁰⁰ *Ibid.*

⁶⁰¹ *Ibid.*, 260.

⁶⁰² *Ibid.*, 265.

⁶⁰³ *Ibid.*, 267.

⁶⁰⁴ *Ibid.*

the definition prescribed in article 2(1)(a) of the Vienna Convention on the Law of Treaties 1969. This is due to the fact that they are not international treaties, meaning they are not treaties between different states but are treaties between the new colonising state and the first peoples of that territory. They are however still treaties that are highly important and are still a basis used to regulate the relationship between the government and the indigenous people of that particular country.

The New Zealand Treaty of Waitangi, although strongly debated throughout New Zealand is a treaty that has continuously been used to articulate the relationship between the New Zealand government and Tangata Whenua and attracts international attention.⁶⁰⁵ Relevant to the discussion of this thesis is the importance of Indigenous treaties. Although the Treaty of Friendship between Samoa and New Zealand fits the description of an international treaty, the historical and ongoing relationship between Samoa and New Zealand is at least partially analogous to that of a Crown-Aboriginal peoples' relationship. The two countries at one stage did experience a Crown-Aboriginal relationship during colonisation between 1914-1962; and is still reflected today in their relationship as sovereign countries. It is therefore appropriate for the Treaty of Friendship to be also discussed in light of Indigenous treaties given their similar background.

(i) Indigenous Treaties:

Treaties between Aboriginal peoples and the Crown have become of the utmost importance in the relationship between the two parties. Indigenous treaties are vital instruments to the establishment of the relationship of aboriginal people and the Crown. The importance of indigenous treaties is a reflection of the historical importance of these documents that were initially used between colonists and aboriginal peoples to come to an agreement during the early processes of colonisation and make some attempt to clarifying and regulate the relationships between them. They were also mechanisms by which the colonising states sought to assert control. Nevertheless, they are of great importance especially to Canada

⁶⁰⁵ R Stavenhagen, "Human rights and indigenous issues" Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. See: <http://daccess-dds-y.un.org/doc/UNDOC/GEN/G06/118/36/PDF/G0611836.pdf?OpenElement>

and New Zealand where there is significant attention focussed on aboriginal rights and its relationship to the Constitution of the country. Treaties have existed for many years and still exist today in many countries. In Canada there have been over 500 treaties.⁶⁰⁶ In New Zealand the treaty of great significance is the Treaty of Waitangi 1840. Indigenous treaties are unique and although they have existed for many years, they have become more important over the last century where the present and future relationships between parties are now being engaged.

Parties of a treaty are also the beneficiaries of the treaty, meaning that they “are recipients of promises and bearers of obligations made in the negotiation process”.⁶⁰⁷ This is what is expected when treaties are signed although it is not at all times the experience or reality for indigenous peoples in Canada or New Zealand. Reciprocity is a common theme in treaties where fairness and mutual respect for each recipient is crucial.

As noted, this mutuality is frequently overlooked because Indigenous peoples are most often striving to assert their rights. The Crown has had an easier time because they control the legislative and judicial process.⁶⁰⁸

In the Privy Council case *Attorney-General for Canada v Attorney-General for Ontario*⁶⁰⁹ it was found that the making of the treaty is an Executive act.⁶¹⁰ Parliament has a constitutional role over the Executive by checking and monitoring its decisions, but the form and quality of a treaty is at the Executive’s discretion.⁶¹¹ Parliament has minimal power to give approval to treaties as this is mainly an Executive role where they have control over implementation of a treaty.⁶¹² There is no certainty about the existence of Parliament’s right to approve or disapprove or supervise the executive’s treaty actions.⁶¹³ In the judicial process,

⁶⁰⁶ J Borrows “Ground-Rules: Indigenous treaties in Canada and New Zealand” (2006) 22 NZULR 188, 189.

⁶⁰⁷ *Ibid*, 197.

⁶⁰⁸ *Ibid*.

⁶⁰⁹ [1937] AC 326.

⁶¹⁰ Law Commission Report, “The Treaty Making process Reform and the Parliament of New Zealand” (Dec, 1997) 8. See: <http://www.lawcom.govt.nz>. Also refer to *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326.

⁶¹¹ *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326, 347, 348.

⁶¹² *Supra* n 599.

⁶¹³ Keith K, “New Zealand Treaty Practice: the Executive and the Legislature” in Law Commission Report, “The Treaty Making process Reform and the Parliament of New Zealand” (Dec, 1997) 46. See: <http://www.lawcom.govt.nz>.

their decision is based on the primary sources of law: statutes and case law. International treaties that have been incorporated into domestic law are given relevant consideration because legislation has legitimised its relevance. A treaty duly ratified does not, by virtue of the treaty alone, have the force of law.⁶¹⁴ If the performance of treaty obligations involves changes to existing domestic law, actions are required by legislation.⁶¹⁵ However as previously discussed in the case of *Tavita v Minister of Immigration*⁶¹⁶ even though international treaties are not incorporated into domestic law, they must be given consideration especially if the country is a party to the treaty. The fact that they are not incorporated into domestic law does not minimise its importance when it comes to crucial decisions concerning the applicable treaty. Comments in *Tavita*⁶¹⁷ are equally applicable to interstate treaties as international conventions. Some international obligations are of such importance that no reasonable Minister could fail to take them into account.⁶¹⁸

(ii) Treaties of Peace and Friendship:

The most common treaties between sovereign nations, aboriginal peoples and the Crown are treaties of peace and friendship. This is because they are regulating the relationship. The Treaty of Friendship between Samoa and New Zealand also falls within this category. These peace and friendship treaties are attained with mutual respect for the recipients. Treaties create mutual obligations that alternately constrain and benefit each party.⁶¹⁹ Although treaties are instruments that have been implemented in the past, they are an ongoing process where they are living agreements, promises about a future to which both parties aspire.⁶²⁰ “Treaties are even more relevant today than when they were signed”.⁶²¹ They are about the future as much as the past. As Borrows stated:

⁶¹⁴ *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326,347, 348.

⁶¹⁵ *Supra* n 599 at 22. See: <http://www.lawcom.govt.nz>.

⁶¹⁶ [1994] 2 NZLR 257.

⁶¹⁷ *Supra* n 588 at 257.

⁶¹⁸ *Ashby v Minister of Immigration* [1981] 1 NZLR 222.

⁶¹⁹ *Supra* n 595 at 199.

⁶²⁰ K Coates & P McHugh, *Living Relationships, Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (1998).

⁶²¹ J Borrows, “Ground-Rules: Indigenous Treaties in Canada and New Zealand” (2006) 22 NZULR 188, 203.

Treaties are perhaps the most significant nation-founding event in Canada and New Zealand because they produced promises that the pre-existing population would live together in peace and order with those who followed. This is weighty stuff; not many countries in the world today are founded on such high principles.⁶²²

The treaties general purpose is to establish an agreement between the colonists and aboriginal people. In peace and friendship treaties, agreements were created to further the special relationship between parties. Such treaties were created to help prevent future conflict so that the relationship did not become tense and uncomfortable. Likewise in the Samoan context, the Treaty of Friendship between Samoa and New Zealand was established to continue to acknowledge and advance the special relationship between both countries. It is a relationship that began in the form of colonisation; it is a relationship that continued under the League of Nations mandate and the United Nations Trusteeship Agreement. It still continues to be a special relationship in the post-independence era governed by a Treaty of Friendship. It is of considerable significance that the Treaty of Friendship was not formulated during the time of New Zealand's forty-eight years of administration; it was only established after Samoa had become a sovereign state in 1962. This acknowledges that the special relationship is one that is ongoing and of special significance.

In regards to treaties between two nation states, such as Samoa and New Zealand, both parties must benefit from the treaty. Although at times one party benefits more at the expense of the other, such as the case of Samoa and New Zealand. What is important is the purpose and content of the treaty and how the objectives stated in the content are implemented. Effective implementation requires careful interpretation. Interpretation of treaties should take into account factors beyond their historical genesis and be reinterpreted at times to capture the changes of the future.⁶²³

From the analysis of the above types of treaties: international, indigenous and treaties of friendship and peace, the Treaty of Friendship between Samoa and

⁶²² Ibid, 211.

⁶²³ Ibid, 188.

New Zealand fits comfortably in all these categories. However the Treaty of Friendship is best approached by following the interpretation of indigenous treaties because of the historical relationship between Samoa and New Zealand. Although the relationship of Samoa and New Zealand is not a Crown-Aboriginal peoples relationship (although it once was for forty-eight years), it is analogous to this type of relationship. It is a relationship between an indigenous race and its past colonising power. The Treaty of Friendship reflects that of an indigenous treaty.

B. INTERPRETATION OF TREATIES:

The Treaty of Friendship between Samoa and New Zealand would be best served by utilising the treaty interpretation principles associated with other *sui generis* treaties like Aboriginal treaties that are set out below.

Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation.⁶²⁴ The interpretation of such treaties should promote fairness and mutuality. Mutuality in this context refers to the acknowledgment of a reciprocal relationship between two parties where there is dependence and influence. The special principles encompassed in aboriginal treaties are of a *sui generis* nature as it has been found in Canadian case law.⁶²⁵

*R v Marshall*⁶²⁶ summarised the principles involved in treaty interpretation. A key goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed.⁶²⁷ In searching for the common intention of the parties, the integrity and honour of the Crown is presumed.⁶²⁸ The Crown's representations should be taken seriously, "resolving ambiguities in the

⁶²⁴ *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 24; *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 78; *R. v. Sioui*, [1990] 1 S.C.R. 1025, 1043; *Simon v. The Queen*, [1985] 2 S.C.R. 387,404. See also: J. [Sákéj] Youngblood Henderson, "Interpreting *Sui Generis* Treaties" (1997), 36 *Alta. L. Rev.* 46; L. I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test" (1997), 36 *Alta. L. Rev.* 149.

⁶²⁵ *Guerin v The Queen* (1984)13 D.L.R. (4th) 321.

⁶²⁶ [1993] 3 SCR 456, para 78.

⁶²⁷ *R v Sioui* [1990] 1 S.C.R. 1025, 1068-69.

⁶²⁸ *R v Badger* [1996]1 S.C.R. 771, at para. 41.

favour of the Indians because of differences in legal language and technicalities in the written versions”.⁶²⁹ Treaties should be interpreted with an open-mind and any ambiguities should be resolved in favour of the aboriginal signatories.⁶³⁰ This principle is known as the doctrine of *contra proferentum*⁶³¹ which is used when there are texts of treaties in different languages. It prescribes that in cases of ambiguity a treaty is to be interpreted against the party drafting it which usually means that it is to be interpreted against the colonising power who are the drafters of such instruments and in favour of the text in the indigenous language.

This point is important in relation to the interpretation of the Treaty of Waitangi. There are two different versions of the treaty which are not direct translations of one another. The *contra proferentum* principle if applied to the Treaty of Waitangi would mean that the Māori text would prevail over the English text. However as Ani Mikaere argues the interpretation of the Māori text of the Treaty of Waitangi states that cession of Tino Rangatiratanga meaning sovereignty did not occur.⁶³² Regardless of this Pākehā choose to believe cession of sovereignty did occur and therefore ensuring that “Tino Rangatiratanga⁶³³ was subsumed beneath the sovereignty ceded to Queen Victoria in the English text.”⁶³⁴ This did not reflect the mutual partnership between the two parties because the Crown, who represented Pākehā became the absolute sovereign law-making power in the nation.⁶³⁵

⁶²⁹ *R v Nowegijik* [1983] S.C.R. 29,36.

⁶³⁰ *Simon v The Queen* [1985] 2 S.C.R.,387, 402;*R v Sioui* [1990] 1 S.C.R. 1025,1035; *R v Badger* [1996] 1 S.C.R. 771, at para. 52.

⁶³¹The words of written documents are construed more forcibly against the party using them. The Rule is based on the principle that a man is responsible for ambiguities in his own expression, and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a construction by which they would mean another thing more to his advantage. From Anson’s Law of Contract version approved by SCC in *Hillis Oil* (1986), 71 N.S.R.(2d) 353,360. See: <http://www.utnz.org.nz/resources-law/contra%20proferentum%20rule.pdf>.

⁶³² A Mikaere, “Book Review –A Question of Honour? Labour and the Treaty 1984-1989 by J Kelsey”(1990) 270.

⁶³³ *Tino Rangatiratanga* means Sovereignty.

⁶³⁴ *Supra* n 621.

⁶³⁵ D Williams, “Myths, National Origins, Common Law and the Waitangi Tribunal” See: http://www.murdoch.edu.au/elaw/issues/v11n4/williams114_text.html[12 February 2010].

The court is required to be sensitive to unique cultural and language differences between the parties in determining the parties' intentions.⁶³⁶ It is important for the court to be inclined to have knowledge of the customs and practices of the parties involved. This will assist in determining how each party is influenced by their belief system and culture in the decisions they make. Oral promises made when the Treaty was signed may also form part of the Treaty especially when one party is reliant on an oral tradition.⁶³⁷ Treaties are living instruments to which parties to it must aspire.⁶³⁸ This includes interpreting the treaty right in its modern context.⁶³⁹ Treaties must also be interpreted in the spirit, in which they were drawn, taking into account the surrounding circumstances and any declared or apparent objects and purposes.⁶⁴⁰

(i) Indigenous Treaties to give effect:

Once again the argument that arises is if the treaty is not one of an international status as stated in the Vienna Convention on the Law of Treaties 1969 how can it be given legal and practical effect? Indigenous treaties are not treaties between two different sovereign states. Indigenous treaties require a binding or 'higher' law to state that the government of a country will consider indigenous rights which are commonly stipulated in formalised treaty agreements. For example, Canada has treaties which facilitate protocols and Indigenous laws between First Nations in early North America legal relationships.⁶⁴¹ Canada has acknowledged the treaty rights of its aboriginal peoples in section 35(1) of the Canadian Constitution Act 1982 where it states:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are recognised and affirmed.⁶⁴²

⁶³⁶ *R v Badger* [1996] 1 S.C.R. 771, at paras. 52-54; *R. v. Horseman*, [1990] 1 S.C.R. 901, 907.

⁶³⁷ E.T.J.Durie, "The Treaty in Māori History" in Renwick, W., (ed) *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (1991) 163.

⁶³⁸ K Coates & P McHugh, *Living Relationships, Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (1998).

⁶³⁹ *R. v. Sundown*, [1999] 1 S.C.R 393, at para. 32; *Simon v The Queen*, [1985] 2 S.C.R. 387,402.

⁶⁴⁰ *Supra* n 626.

⁶⁴¹ V Lytwyn, "A Dish with One Spoon: The Shared hunting grounds Agreement in the Great Lakes and St Lawrence Valley Region" in David H Pentland (ed), *Papers of the 28th Algonquian Conference* (1997) 210-227.

⁶⁴² Section 35(1), Canadian Constitution Act 1982.

This gives the power of Parliament to regulate the aboriginal and treaty rights contained within it; and the historical relationship between the Crown and aboriginal peoples in Canada, gives constitutional protection of aboriginal and treaty rights.⁶⁴³ “This provision, at the very least, constitutionalised those rights which aboriginal peoples possessed at common law”.⁶⁴⁴

In New Zealand, the Treaty of Waitangi is a fundamental constitutional document.⁶⁴⁵ It is an instrument that marks the relationship of Tangata Whenua and Pākehā, who were represented by the Crown, but is not incorporated into domestic law. This was emphasised in the Privy Council decision of *Hoani Te Heuheu Tukino v Aotea District Māori Land Board*⁶⁴⁶ that rights conferred by the Treaty of Waitangi cannot be enforced in the courts except in so far as a statutory recognition of the rights can be found.⁶⁴⁷ Even though the Treaty of Waitangi has not been incorporated into domestic law, the New Zealand Court of Appeal has seen fit to articulate the principles of the Treaty of Waitangi,⁶⁴⁸ although this is not accepted by some academic writers. Kelsey states that although Parliament and the courts were to protect Māori through the promise of the Treaty of Waitangi, respecting the authority of both mutual parties’ remains unfulfilled.⁶⁴⁹ “The Court’s interpretation of the principles bore no resemblance to the Māori text of the Treaty.”⁶⁵⁰ “The Court of Appeals’ interpretation of the principles of the Treaty, were always within the parameters set by the Crown”.⁶⁵¹ I acknowledge the concerns raised but for the purpose of this thesis it does show that articulating the

⁶⁴³ Section 35(1), Canada Constitution Act 1982. Also refer to L Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (1996) 123.

⁶⁴⁴ J (Sakej) Y. Henderson, M.L.Benson & I.M.Findlay, *Aboriginal Tenure in the Constitution of Canada* (2000) 239.

⁶⁴⁵ As per Cooke P, in *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 656.

⁶⁴⁶ [1941] AC 308.

⁶⁴⁷ *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308 in *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 656.

⁶⁴⁸ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641. Also see s 9 of State Owned Enterprises Act 1986 where it states a firm declaration by Parliament that nothing in that Act shall permit the Crown to act inconsistently with the principles of the Treaty of Waitangi and overrides the rest of the Act. Also refer to s 27 of the State Owned Enterprises Act 1986. Also refer to s 6, Waitangi Tribunal Act 1975 and its long title "An Act to provide for the observance, and confirmation, of the principles on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty".

⁶⁴⁹ J Kelsey, *Rolling Back the State: Privatisation of Power in Aotearoa/New Zealand* (1993) 12.

⁶⁵⁰ A Mikaere, “Book Review – A Question of Honour? Labour and the Treaty 1984-1989 by J Kelsey” (1990) 270.

⁶⁵¹ *Supra* n 638 at 253.

principles arising out of the articles does still illustrate breaches of the treaty and historic injustices. The articulation of the principles has elevated the status of the Treaty of Waitangi to recognition and acknowledgment. This in turn has enabled some addressing of past grievances in relation to the Treaty of Waitangi. These principles identified by the New Zealand Court of Appeal have been included in some domestic legislation.

The Treaty of Friendship between Samoa and New Zealand is not legally enforceable in New Zealand because it is not incorporated into domestic law. It is an agreement that facilitates and regulates the special relationship between both countries and will hopefully give legal and practical effect to the relationship. This will be discussed in more detail later on in the chapter.

C. THE MĀORI-PĀKEHĀ RELATIONSHIP:

The reason for the comparative analysis with the Māori-Pākehā relationship is to demonstrate how the Treaty of Waitangi came through a gradual journey often shaky to recognition. The focus of the Treaty of Waitangi to address historical grievances has resulted in articulation of the articles and their application upon present and future relationships between the New Zealand Crown and Māori people. Given the extent of the historic grievances it is not surprising that the attempts to articulate the Treaty of Waitangi have been criticised. This being acknowledged has led to redress and settlements through the Treaty of Waitangi Amendment Act in 1985.⁶⁵² The aim is to demonstrate how the Treaty of Friendship may follow the steps of the Treaty of Waitangi where the features of the Treaty of Friendship text may be identified and better articulated like the New Zealand Court of Appeal identified the principles of the treaty of Waitangi. The aim being that the status of the Treaty of Friendship may be acknowledged as it did for the Treaty of Waitangi. Articulating the text of the Treaty of Friendship will be effective in presenting its legal and practical effect to the Samoa-New Zealand relationship.

⁶⁵² Ibid, 254.

(i) The Treaty of Waitangi 1840:

The signing of the Treaty of Waitangi on 6 February 1840 marked the official recognition of a formalised relationship of Māori and Pākehā represented by the Crown. The two texts of the Treaty of Waitangi are not direct translations of one another.⁶⁵³ The discrepancies in the first two articles of both the Māori and English text continue to be debated in New Zealand. Although the Treaty of Waitangi is not recognised as law it has been described as “of the greatest constitutional importance to New Zealand”.⁶⁵⁴ Furthermore, Sir Robin Cooke described the Treaty as simply the most important document in New Zealand’s history.⁶⁵⁵ The treaty contains language “correspondingly redolent of a fiduciary burden”.⁶⁵⁶

The Treaty of Waitangi was largely ignored by the New Zealand government until the establishment of the Waitangi Tribunal in 1975. The new settlers and colonisers who initially formed a government gave no notice or significance to the Treaty. There were so many debates on the validity of the Treaty of Waitangi that led to several Māori land claims advocating their land rights as stipulated in Te Tiriti o Waitangi.⁶⁵⁷ Such cases brought to light the discussion of the validity of the Treaty of Waitangi. Prendergast CJ in the case of *Wi Parata v The Bishop of Wellington*⁶⁵⁸ declared that the Treaty of Waitangi was a “simple nullity”.⁶⁵⁹ Furthermore the Treaty of Waitangi could not be seen as law because it is not incorporated into domestic law.⁶⁶⁰ The Treaty of Waitangi had no official legal status until the passing of the Waitangi Tribunal Act 1975 and then it was only the principles of the Treaty that were included in the Act. Even so, the Māori text of the Treaty of Waitangi continued to be ignored. It became apparent that the Treaty was interpreted in a way that restricted the rights of Māori.⁶⁶¹ Māori continued to protest the importance of the Treaty of Waitangi, a formal agreement made

⁶⁵³ Refer to Appendix 5 for Māori and English texts of Treaty of Waitangi.

⁶⁵⁴ *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513, 516.

⁶⁵⁵ J Williams, “Treaty Making in New Zealand/Te Hanga Tiriti ki Aotearoa” in M Langton (ed) *Honour among Nations? Treaties and Agreements with Indigenous People* (2004) 164.

⁶⁵⁶ A Frame, “The Fiduciary Duties of the Crown to Māori: Will the Canadian Remedy travel?” (2005) 13 Wai L Rev 70, 78.

⁶⁵⁷ Article 2, Te Tiriti o Waitangi/Treaty of Waitangi 1840; Refer to Appendix 5.

⁶⁵⁸ (1877) 3 NZ Jur (NS) 72 (NZSC).

⁶⁵⁹ *Ibid.*

⁶⁶⁰ *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308.

⁶⁶¹ C Orange, *The Treaty of Waitangi* (1992) 189.

between two parties who are both beneficiaries to the Treaty. It is a document that is a record of the relationship of Māori and Pākehā and yet was not utilised for the mutual benefit of both parties. The continuous lack of attention given to the Māori text of the Treaty of Waitangi especially when it is different from the English text did not improve the relationship of Māori and Pākehā. For Māori the Treaty was seen from a Māori point of view.⁶⁶² The Māori view was generally unknown outside Māoridom.⁶⁶³ The 1970s saw the emergence of activist and protests groups by young Māori fighting for their rights under the Treaty of Waitangi. This new generation of Māori were better able to articulate their grievances to force some response from the Pākehā majority and New Zealand government.⁶⁶⁴

(ii) Recognition and Identification of the principles of the Treaty of Waitangi 1840:

The Treaty of Waitangi was gradually revived and Pākehā did acknowledge that the signing of the Treaty was an historical event but it was the Māori peoples' insistence that gave it real meaning.⁶⁶⁵ The Treaty of Waitangi was starting to be acknowledged and from the articles of the Treaty, the principles of the Treaty were identified and developed by the New Zealand Court of Appeal.⁶⁶⁶ These principles included that the two parties must act reasonably towards each other and in utmost good faith.⁶⁶⁷ The Crown must make informed decisions and must not unreasonably impede its capacity to provide redress for proven grievances.⁶⁶⁸ The Crown must actively protect Māori interests.⁶⁶⁹ There was and still is concern from Māori about the identification and development of the principles of the Treaty of Waitangi by the New Zealand Court of Appeal because although principles of the Treaty of Waitangi are being articulated there are still limitations in relation to Maori.

⁶⁶² E.T.J.Durie, "The Treaty in Māori History" in W Renwick(ed), *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (1991) 156.

⁶⁶³ Ibid.

⁶⁶⁴ Supra n 650 at 245.

⁶⁶⁵ M Stenson, *The Treaty: Every New Zealander's Guide to the Treaty of Waitangi* (2004) 24.

⁶⁶⁶ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641.

⁶⁶⁷ Section 8, Resource Management Act 1991 Commentary, Brookers. See:

<http://www.brookersonline.co.nz.ezproxy.waikato.ac.nz/databases/modus/lawpart/statutes/ACT-NZL-PUB-Y.1991-69~BDY~PT.2~S.8?si=1610670095>.

⁶⁶⁸ Ibid.

⁶⁶⁹ Ibid.

However, acknowledging the existence of the Treaty of Waitangi in New Zealand as well as articulating the principles of the treaty of Waitangi by the New Zealand Court of Appeal has provided a step forward in their relationship. The articulation of the principles of the treaty of Waitangi has allowed the New Zealand government to address a few of the many injustices experienced by Tangata Whenua. On the contrary even though the New Zealand government is articulating and addressing the principles of the Treaty of Waitangi, in some instances they continue to breach its treaty obligations to Māori. This was significant in the passing of the Foreshore and Seabed Act 2004.⁶⁷⁰ This legislation transferred ownership of all foreshores and seabed of New Zealand to the Crown depriving Māori of the ability to establish their customary and Treaty rights to their foreshore and seabed in Court, a right that was guaranteed in the Treaty of Waitangi.⁶⁷¹

Treaty jurisprudence has changed since the principles of the Treaty of Waitangi have been identified, developed and incorporated throughout New Zealand. Although the Treaty of Waitangi document is not law, the principles of the Treaty have been acknowledged in a number of pieces of legislation. This is evident in the Waitangi Tribunal Act 1975; Te Ture Whenua Māori Act 1993; section 9 of the State Owned Enterprises Act 1986;⁶⁷² and section 8 of the Resource Management Act 1991.⁶⁷³ “New Zealand domestic statutes are increasingly making express reference to the Treaty and its principles”.⁶⁷⁴

The cases *Attorney-General v New Zealand Māori Council*⁶⁷⁵ and *Taiaroa v Attorney-General*⁶⁷⁶ support the proposition that even if a statute conferring an

⁶⁷⁰ Foreshore and Seabed Act 2004, New Zealand legislation Acts [12 February 2010] See: <http://www.legislation.govt.nz/act/public/2004/0093/latest/DLM319839.html>.

⁶⁷¹ Article 2, Te Tiriti o Waitangi/Treaty of Waitangi 1840; Refer to Appendix 5.

⁶⁷² Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the *Treaty of Waitangi*.

⁶⁷³ In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

⁶⁷⁴ J Burrows, *Statute Law in New Zealand* (1992) 239.

⁶⁷⁵ [1991] 2 NZLR 129.

⁶⁷⁶ High Court, Wellington Registry, CP 99–94 (unreported October 1994).

administrative discretion makes no reference to the Treaty, the Treaty principles may be a relevant consideration.⁶⁷⁷

The Court of Appeal has stated that “the treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas”.⁶⁷⁸ The identification and development of the principles of the Treaty is the beginning of a long journey in acknowledging the existence of the Treaty of Waitangi. The principles of the Treaty of Waitangi have started to be incorporated into policies and regulations which is a big step forward in comparison to the past where the Treaty was given no recognition at all.⁶⁷⁹

The year 1986 led to greater recognition of the status of the Treaty of Waitangi.⁶⁸⁰ The Lands case⁶⁸¹ is a historical landmark in New Zealand where the fiduciary nature of the relationship of Māori and the New Zealand crown was articulated. The importance of this case is the significance of the Treaty of Waitangi in the fabric of New Zealand’s constitution. The Court of Appeal in the Lands⁶⁸² case concluded that the transfer of such assets without safeguarding potential Treaty claims of Māori breached the principles of the Treaty of Waitangi.⁶⁸³ Further it held that the Treaty must extend to consultation on truly major issues.⁶⁸⁴ Consultation is vital in the discussion of past grievances especially when it concerns claims made in the past. This allows partners of the Treaty to consult openly on matters of great concern. The court left it to the “treaty partners”, whom were the representatives of the government and the New Zealand Māori Council to come to an arrangement as to how Māori land claims were to be safeguarded.⁶⁸⁵ This is a clear example of the Judiciary recognising and acknowledging the

⁶⁷⁷ Law Commission, “Māori Custom and Values in New Zealand” (2001) 80. See: http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_112_288_SP9.pdf [12 February 2010].

⁶⁷⁸ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 663.

⁶⁷⁹ *Wi Parata v Bishop of Wellington* [(1877) 3 NZ Jur (NS) 72 (NZSC)]; *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308.

⁶⁸⁰ C Orange, *The Treaty of Waitangi* (1992) 252.

⁶⁸¹ *Supra* n 667 at 641.

⁶⁸² *Ibid.*

⁶⁸³ *Ibid.*

⁶⁸⁴ *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142.

⁶⁸⁵ *Supra* n 667.

importance of the Treaty of Waitangi. The Lands case further emphasised that the spirit of the Treaty was important.⁶⁸⁶

The Treaty of Waitangi has come a long way where in the past Māori tikanga⁶⁸⁷ was not acknowledged and Māori were encouraged to resort to the law in order to settle difficulties and grievances.⁶⁸⁸ The Treaty, restored to prominence by the Waitangi Tribunal Act 1975 and 1986 Amendment Act has been the basis of more genuine sharing of ideas and understanding.⁶⁸⁹ The recognition of the Treaty created a continuing relationship between its parties of a fiduciary nature, akin to partnership.⁶⁹⁰ “There is a positive duty to each party to act in good faith, fairly, reasonable and honourably towards the other”.⁶⁹¹

The importance of the Treaty principles as well as Māori culture is now being utilised in policies and regulations in government ministries as well as being incorporated into education systems. This is a big change from the past where the Māori language was not even to be spoken in schools in the early nineteenth century.⁶⁹² Although these changes have been made, the Treaty of Waitangi still remains uncertain in where it truly stands in the New Zealand constitutional framework. Without a doubt it is part of the New Zealand fabric and will remain an important instrument in the present and future but it is still unlikely that it will become entrenched as the Constitution of New Zealand. The greatest significance of the Treaty of Waitangi is its standing status as an icon⁶⁹³ of where New Zealand comes from and continues to help articulate matters pertaining to the relationship of Māori and the New Zealand government.

⁶⁸⁶ Ibid, 663.

⁶⁸⁷ *Tikanga* – Māori traditional law and custom.

⁶⁸⁸ C Orange, *The Treaty of Waitangi* (1992) 186.

⁶⁸⁹ Ward, Alan “Land and law in the Making of National Community” in Renwick, W.,(ed) *Sovereignty and indigenous Right: The Treaty of Waitangi in International Contexts* (1991) 127.

⁶⁹⁰ *New Zealand Māori Council and Ors v Attorney-General And Ors* HC WN CIV-2007-485-000095 [4 May 2007].

⁶⁹¹ Ibid.

⁶⁹² Waitangi Tribunal *Report of the Waitangi Tribunal on Te Reo Māori Claim – Wai 11* (Wellington, 1996). See also Judith Simon (ed); Linda Tuhiwai Smith et al, *The native schools system 1867–1969 – Ngā Kura Māori* (1998).

⁶⁹³ D Baragwanath, “The Evolution of Treaty Jurisprudence” 2007 Harkness Henry Lecture [24 September 2007].

(iii) Summary of Māori-Pākehā relationship and Treaty of Waitangi:

The role the Treaty of Waitangi has played in determining Māori rights and in particular the relationship to the crown and other peoples has become relevant. The Treaty of Waitangi sets out a fair relationship between the two parties if it had been honoured accordingly. It was the Crown's numerical strength which enabled it to enforce its position. This is also a reflection of the Crown undermining its fiduciary obligation to Māori.

Those who were non-Māori and questioned why Māori should be given preferential treatment over other ethnic groups are coming to realise the reasons through the principles of the Treaty of Waitangi. Knowledge of the relevance of the Treaty of Waitangi gave Pākehā and the general public a deeper acknowledgement of its existence and significance. It was when the relationship of Māori and Pākehā were articulated through the articles and principles of the Treaty of Waitangi that breaches of the Treaty which are clearly unconscionable were realised and addressed. It established gradual articulation of human rights principles. The Treaty of Waitangi is now being used by many hapū and iwi to address unresolved grievances.

D. "TREATIES SHOULD BE SEEN AS LAW"⁶⁹⁴

The importance and influence treaties carry whether they are international, indigenous, friendship or peace treaties cannot be understated. Borrows argues that "treaties should be seen as law."⁶⁹⁵ Aboriginal treaties with an imperial crown are sacred agreements.⁶⁹⁶ "Treaties between Indigenous peoples and the Crown are not just history they are law and thus deserved to be interpreted not just by historical methods, but by legal methods".⁶⁹⁷ Perhaps in time this may happen. Otherwise incorporation of treaties into domestic law will be the only alternative that may be relied on. It can not be forgotten the statement of Cooke P in the case of *Tavita v Minister of Immigration*⁶⁹⁸ where international obligations in treaties

⁶⁹⁴ J Borrows, "Ground-Rules: Indigenous Treaties in Canada and New Zealand" (2006) 22 NZULR 188.

⁶⁹⁵ Ibid.

⁶⁹⁶ *R v Badger* [1996] 1 S.C.R. 771 at para 41 (S.C.C.).

⁶⁹⁷ P G McHugh, "Law, History and the Treaty of Waitangi" (1997) 31 NZ Journal of History 38.

⁶⁹⁸ [1994] 2 NZLR 257.

should not be viewed as ‘window-dressing’ they should be given appropriate legal recognition even if not incorporated into domestic law. The fact remains that the Treaty of Waitangi does carry a significant amount of force with it. As Baragwanath stated⁶⁹⁹:

The Treaty should, like any other treaty, be a mandatory consideration when it is relevant to decision-making including adjudication. It is not simply a protection for Māori; it has been used by the High Court to protect a Dutch New Zealander from having to carry the burden of Treaty breach that should be spread more widely.⁷⁰⁰

Although the interpretation of the principles of the Treaty of Waitangi continues to be the source of debate, it is an instrument that has been used by Māori to assert their rights and identify the Crown's obligations to Māori. Māori have sought to use the Treaty of Waitangi as the basis of their claims since 1846 in the case of *R v Symonds*.⁷⁰¹ A more formalised body has now been set up to hear grievances and provide redress, this is the Waitangi Tribunal. This is an indication that acknowledging and recognising the Treaty of Waitangi as well as its principles has raised the status of the Treaty of Waitangi in New Zealand.

E. WHAT IS THE RELEVANCE OF THE DISCUSSION OF THE TREATY OF WAITANGI TO THE TREATY OF FRIENDSHIP BETWEEN SAMOA AND NEW ZEALAND?

The discussion above has provided a basis that is crucial to articulating the special features in the text of the Treaty of Friendship between Samoa and New Zealand. The Treaty of Waitangi itself has developed its Treaty jurisprudence that has been analysed and integrated by New Zealand courts, parliament and executive. It is no longer a Treaty that has been forgotten or disregarded. It has started to gain meaning and be given legal and practical effect in New Zealand. Although there is still a long journey ahead there has been a step forward in recognising and acknowledging the principles of the Treaty of Waitangi. Samoa can learn from the

⁶⁹⁹ Supra n 682.

⁷⁰⁰ *Ngati Maru Ki Hauraki v Kruitof* [2005] NZRMA 1.

⁷⁰¹ (1847) NZPCC 387.

history of the Treaty of Waitangi and from the relationship of the New Zealand Crown and Māori, on how to articulate the features of the text of the Treaty of Friendship. As previously stated academic criticism in the identification and application of the principles of the Treaty of Waitangi is noted.⁷⁰² However from the perspective of the Treaty of Friendship the gradual adoption of the Treaty of Waitangi has enabled articulation of the articles and principles and has enabled the parties and people to realise and address the breaches. It has led to a better understanding of the relationship between Māori and Pākehā. Such a process is of particular significance for the Treaty of Friendship.

The Canadian Treaties and the Treaty of Waitangi are similar to the Treaty of Friendship, yet the Samoa-New Zealand Treaty has its own uniqueness. Treaties are instruments that have existed in societies for many years and continue to be incorporated by many countries and therefore are an instrument that carries much force. At international law, the status of Treaties means that they are recognised to be binding upon the signatories to that Treaty. So entering into a Treaty is not taken lightly and States do so, knowing and accepting that this is a binding covenant.

The interpretation of Indigenous Treaties that have been discussed are based on the interpretation of Indigenous Treaties in Canada. However this framework also fits well with the Samoan-New Zealand relationship. Although Samoa and New Zealand do not currently share a Crown-Aboriginal or colonial relationship, it did at one time in history before Samoa achieved Independence. In fact Samoa was part of the realm of New Zealand at one point in history.⁷⁰³

Samoa was administered by New Zealand for forty-eight years under three designated authorities. Firstly, New Zealand governed Samoa as a colonist and the style of administration that was exerted during those years was a true reflection of

⁷⁰² J Kelsey, *Rolling Back the State: Privatisation of Power in Aotearoa/New Zealand* (1993) 254; A Mikaere, "Book Review –A Question of Honour? Labour and the Treaty 1984-1989 by Jane Kelsey"(1990) 270.

⁷⁰³ *Lesa v Attorney-General* [1982] 1 NZLR 165.

a Crown-Aboriginal relationship.⁷⁰⁴ Secondly in 1920 under the League of Nations mandate, the New Zealand administration continued to have full power of administration and legislation to make decisions for Samoa.⁷⁰⁵ They were to “promote to the utmost the material and moral well-being and social progress of the inhabitants of Samoa.”⁷⁰⁶ However during the years Samoa was administered by New Zealand authorities under the League of Nations mandate, many unjust and unfortunate incidents occurred; such as impractical curfews, arrests, deportations, banishments, shootings, stripping of chiefly titles, which was clearly a reflection of a colonial relationship. When the Samoans demonstrated resistance to New Zealand administration the response was harsh. This was reflected in the shooting of innocent Samoans at a peaceful protest march.⁷⁰⁷ This did not reflect how an administration should conduct itself under the auspices of the League of Nations. Thirdly Samoa was transferred under the United Nations Trusteeship Agreement to be further administered by New Zealand. Samoa’s independence relinquished New Zealand’s administration ties to Samoa however the relations of both countries were to continue into a post-colonial era.

Even when Samoa had become an independent nation, the New Zealand government was still able to exert influence on Samoa. The signing of the Treaty of Friendship in a sense ensured that any affiliations with Samoa post-independence would be peaceful. The Treaty ensured that future relations between both countries will be carried out in a proper manner reflecting the close relations of both countries.

If conflict arose, the Treaty of Friendship would be a starting point for negotiation. The result of the 1970s migration led to overstaying and eventually led to the Dawn raids. New Zealand having a Treaty of Friendship with Samoa should have utilised this instrument to address the dawn raids and other immigration issues. However the New Zealand government ignored working together with the Samoan government to remedy the situation and took matters

⁷⁰⁴ Refer to chapter 1.

⁷⁰⁵ Article 2, League of Nations Mandate 1920; Refer to Appendix 1.

⁷⁰⁶ Ibid.

⁷⁰⁷ Supra at 30; “Black Saturday” in chapter 1.

into their own hands. The result of the *Lesia*⁷⁰⁸ decision declared that Samoa was at one time part of the New Zealand realm. While the situation had changed, the effects of being part of the realm were continuing for a significant number of people. This is truly a unique feature in itself. A country that is now a sovereign state had also retained its former coloniser/administrators (New Zealand) citizenship rights. The *Lesia*⁷⁰⁹ decision with the enactment of legislation⁷¹⁰ overturned that right which once again demonstrated the power the New Zealand government can exert over Samoa's citizenship issues. The point is even though Samoa and New Zealand are now two sovereign nations, its colonial history and that of its current relations as independent states still reflect that of a Crown-Aboriginal relationship at least partially.

F. APPLICATION OF TREATY OF FRIENDSHIP TO INDIGENOUS TREATIES.

Interpretation of indigenous treaties has special principles: that the common intention of the parties should reconcile interests of all parties; if there is any ambiguities in the interpretation of the texts the principle of *contra proferentum* will prevail. This principle is not relevant to the Treaty of Friendship because both texts in Samoan and English are a direct translation of one another. There are no discrepancies in the content of both texts. The main argument of this thesis is identifying the special features of the Treaty of Friendship so they can be developed to address the special relationship between the two countries. An important principle is that the Treaty is interpreted in its modern context, in the spirit it was drawn taking into account surrounding circumstances and any declared or apparent objects and purposes.⁷¹¹ This will be discussed shortly in reference to the articles of the Treaty of Friendship.

G. TREATY OF FRIENDSHIP IN THE SAMOAN CONTEXT:

In relation to the Samoa-New Zealand relationship, it has been continuously stated that Samoa and New Zealand enjoy a special relationship and this has been

⁷⁰⁸ *Supra* n 692.

⁷⁰⁹ *Ibid.*

⁷¹⁰ Citizenship (Western Samoa) Act 1982.

⁷¹¹ *R v Marshall* [1993] 3 SCR 456, para 78.

formalised through the Treaty of Friendship.⁷¹² The questions that are posed in this part of the thesis is what does this special relationship really mean? What are its features? How does it benefit the parties to the Treaty? And what are the limitations on the parties?

Chapters one and two have provided some general information on the important articles of the Treaty of Friendship. As stated in previous chapters, New Zealand only has one Treaty of Friendship and that is with Samoa. With friendship treaties both parties to the bilateral relationship are expected to benefit.⁷¹³ Friendship treaties provide for the opportunity of consultation and negotiation between countries to make its relationship more effective and positive for both parties.⁷¹⁴ The most important aspect of the friendship treaties is its symbolic value.⁷¹⁵ It is a symbol of parties being able to work together for mutual benefit.⁷¹⁶ Friendship and peace treaties were agreements that were carried out between aboriginal peoples and the crown to enforce a more harmonious approach to affairs and to avoid any future conflict and tension.⁷¹⁷ Given Samoa and New Zealand's colonial past the creation of the Treaty of Friendship was a symbolic gesture to assure both parties that that colonial history would not be repeated. Should future conflicting issues arise between both nations, the Treaty of Friendship would be the platform where both countries could work from.

⁷¹² Debate in the House of Representatives on the Citizenship (Western Samoa) Bill [24 August 1982] 2511, 2514; New Zealand Ministry of Foreign Affairs and Trade, See: <http://www.mfat.govt.nz/Countries/Pacific/Samoa.php>; New Zealand Ministry of Foreign Affairs, "Correspondence between Hon. Taisi Tupuola Efi and New Zealand Attorney-General, Hon. J.K. McLay in *New Zealand Citizenship and Western Samoans* (March, 1983); A record of discussions between the Prime Minister of Western Samoa and the Prime Minister of New Zealand, Wellington (7-9 August 1961) National Archives, Wellington New Zealand; Department of External Affairs, "Relations between New Zealand and Samoa: Treaty of Friendship (General) Western Samoa: International and Commonwealth Aspects folder" National Archives, Wellington;

⁷¹³ M Light(ed), *Troubled friendships: Moscow's Third World Ventures* (1993)201.

⁷¹⁴ Ibid, 202.

⁷¹⁵ Ibid.

⁷¹⁶ New South Wales Aboriginal Land Council "Northern Region Sign Unique Friendship Treaty" [10 Feb 2009]. See: <http://www.alc.org.au/events/friendship-treaty-2009.aspx>

⁷¹⁷ "Peace and Friendship Treaties" in Canada in the Making: Aboriginal Treaties and Relations [10 Feb 2010] See: http://www.canadiana.org/citm/themes/aboriginals/aboriginals2_e.html#peace

(i) The Articles of the Treaty of Friendship 1962:

In the preamble of the Treaty of Friendship there are the three bold and highlighted descriptive words describing the relations of Samoa and New Zealand: “AFFIRMING, RECOGNISING, and DESIRING”.⁷¹⁸ *Affirming* that both governments are sovereign states founded upon respect under the United Nations Charter;⁷¹⁹ *Recognising* that the special relationship between both countries obtain fuller opportunities for social progress;⁷²⁰ and *Desiring* to maintain and strengthen bonds of amity and goodwill which have existed between them and to provide for continued cooperation between both nation states.⁷²¹ The common theme in the preamble is that both countries have a special relationship which will continue to be advanced and strengthened.

Article I of the Treaty of Friendship provides that New Zealand and Samoa shall continue to be governed by a spirit of close friendship.

What does this mean? Reflection of past events may assist in determining what this article truly means. The fact that a Treaty of Friendship has been signed between both Samoa and New Zealand reflects its close ties. The reality that New Zealand has no other friendship treaty with any other state is significant as well. Perhaps this treaty provides a way for Samoa and New Zealand to continue to be connected even though one is no longer under the administration of the other. That the relationship has now approached a new beginning as separate states and that despite historical events, both countries will prosper to agree on and resolve issues in a spirit of close relationship. In effect, this article is affirming and recognising the close ties of both countries.

Article II provides that the two governments shall consult each other on matters of mutual interest and concern.

This clearly means that any matters or issues that involve citizens of each country will require that both governments consult especially when it affects both nations. The duty of consultation is a crucial element when decisions are being made

⁷¹⁸ Preamble of Treaty of Friendship between the government of Western Samoa and the government of New Zealand 1962. Refer to Appendix 3.

⁷¹⁹ Ibid.

⁷²⁰ Ibid.

⁷²¹ Ibid.

involving two nations. Parties to a treaty should be left to openly consult on matters of great concern. In the Lands case⁷²² the court left it to the Treaty partners, to come to an arrangement as to how Māori land claims were to be safeguarded.⁷²³ Both parties were to consult on a way forward. In the case of *Guerin v The Queen*⁷²⁴ the duty of consultation becomes relevant where the Crown had a duty to consult with the Musqueam band before entering into the lease.⁷²⁵ The lack of consultation on the part of the Crown led the Musqueam to agree to a lease that was unfavourable to their band. Furthermore, the terms and conditions of the lease were not the same as what was previously agreed upon.

In application to the Samoan context, the first main incident where this article could have been invoked was during the infamous Dawn raids. The New Zealand government chose to handle the situation on their own without any consultation with the Samoan government. The matter was of mutual interest and concern and the New Zealand government should have consulted with the Samoan government on the immigration issue of overstaying. Some Samoans who overstayed their temporary permits travelled to New Zealand to fill the high demand for unskilled labourers to work in the factories. Initially when the demand for unskilled labourers was still high, and there were Samoan overstayers, Immigration services ignored the issue and initially did not do anything.⁷²⁶ “As long as the demand for labour was strong, the regulations were not enforced”.⁷²⁷ Perhaps the Dawn raids situation would have been preventable had the New Zealand government chosen to consult with the Samoan government to consider the most appropriate means of addressing the issue. In this event of mutual concern the New Zealand government breached its treaty obligation to the Samoan government.

However, a few years later, the New Zealand government chose to consult with Samoa when the outcome of the *Lesau*⁷²⁸ decision was delivered. When the Privy

⁷²² *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142.

⁷²³ *Ibid.*

⁷²⁴ (1984) 13 D.L.R. (4th) 321.

⁷²⁵ *Guerin v The Queen* (1984) 13 D.L.R.(4th) 321, 344.

⁷²⁶ Misatauveve Melani Anae. 'Samoans - History and migration', Te Ara - the Encyclopedia of New Zealand, See:URL: <http://www.TeAra.govt.nz/en/samoans>[13 February 2010].

⁷²⁷ *Ibid.*

⁷²⁸ *Supra* n 692.

Council decision was handed down, the New Zealand government swiftly communicated with the Samoan government so that negotiations and consultations could take place. The New Zealand government claimed that in view of the close relationship between Samoa and New Zealand rather than bring down instant legislation, they decided to consult the government of Samoa to find a solution that both countries could accept.⁷²⁹ Hon. J.K.McLay who was the Attorney-General of New Zealand at the time stated:

that in the spirit of the 1962 Treaty of Friendship between Samoa and New Zealand we sat down to talk to each other.⁷³⁰

It seems that when it is suitable for the government of New Zealand they will identify with the articles of the Treaty of Friendship like they did with *Lesā*.⁷³¹ Even if the Treaty of Friendship was non-existent, given the historical ties of both countries, they would be obliged to consult with the government of Samoa regardless because the decision was a major issue that largely affected the Samoan population. It would not have been a good reflection of the special relationship of both countries, if the New Zealand government legislated instantly. The New Zealand government was obligated to consult with the Samoan government given their historical ties. Perhaps the New Zealand government had learnt their lesson from the Dawn raids incident where they chose to act alone and not consult with the Samoan government. Speculation continues to arise in relation to consultation methods used in relation to *Lesā*,⁷³² when at heart the New Zealand Governments main objective, (that the decision be overturned by legislation)⁷³³ was obtained eventually through a very rushed and unilateral process. Consultation must be genuine and meaningful and not superficial.

Article III provides that the citizens of the other living within its territory are given equitable treatment and full legal protection and access to the courts.

The Dawn raids did not reflect the intention of this article. As stated in the previous chapters, victims of Dawn raids did not receive equitable treatment or

⁷²⁹ McLay, J.K.(Hon), “Debate in the House of Representatives on the Citizenship (Western Samoa) Bill (Hansard, 24 August 1982) 2511, 2513.

⁷³⁰ Ibid.

⁷³¹ *Lesā v Attorney-General* [1982] 1 NZLR 165.

⁷³² Ibid.

⁷³³ Citizenship (Western Samoa) Act 1982.

access to courts and ‘full’ legal protection.⁷³⁴ Once they were caught they were issued deportation orders regardless of the fact that they would be given the opportunity to defend themselves. The discrimination and racism experienced during the dawn raids carried on for a few years.

Incidences that occurred during the 1970s and 1980s of the New Zealand government’s enforced immigration policies that discriminated against Samoans in New Zealand and Samoans in Samoa seeking entry to New Zealand.⁷³⁵

Such actions reflected a significant breach of New Zealand’s Treaty obligations to Samoa. Article III is not only a treaty obligation under the Treaty of Friendship it is also a obligation guaranteed in International treaties. This article is included under the International Convention of Civil and Political Rights (ICCPR). Articles 9⁷³⁶ and 10⁷³⁷ of the ICCPR include the right to liberty and security of a person and the right to be treated with humanity and respect. New Zealand only incorporated this international covenant (ICCPR) into domestic law through the current New Zealand Bill of Rights Act in 1990. Article III of the Treaty of Friendship would have come under sections 23⁷³⁸ and 24⁷³⁹ of the New Zealand Bill of Rights Act

⁷³⁴ Refer to “Dawn Raids”, chapter 1 at 51; and chapter 2.

⁷³⁵ Petition 2002/44 of Dr George Paterson Barton Vaitoa Sa and 100,000 others: Report of the Government Administration Committee, Forty-seventh Parliament to Chairperson Dianne Yates [May 2004] 35.

⁷³⁶ *Everyone has the right to liberty and security of person.* No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment. 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

⁷³⁷ *All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.* 2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

⁷³⁸ *Rights of persons arrested or detained;* Everyone who is arrested or who is detained under any enactment (a) Shall be informed at the time of the arrest or detention of the reason for it; and (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and (c) Shall have the right to have the validity of the arrest or detention determined without delay by way of *habeas corpus* and to be released if the arrest or detention is not lawful. (2) Everyone who is arrested for an offence has the right to be charged promptly or to be released. (3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal. (4) Everyone who is (a) Arrested; or (b) Detained under any

1990. This legislation was not enacted at the time of the discriminatory immigration policies, the Dawn raids debacle and *Lesia*⁷⁴⁰ where many Samoans were not given equitable treatment and full legal protection and access to courts.

However, New Zealand became a member of the United Nations in 1945⁷⁴¹ the ICCPR came into force on the 23 March 1976⁷⁴² and New Zealand ratified the ICCPR in 1978.⁷⁴³ Article 7 of the United Nations Trusteeship Agreement between the government of Samoa and the government of New Zealand 1946 provides that⁷⁴⁴:

New Zealand undertakes to apply in Western Samoa the provision of any international conventions and recommendations as drawn up by the United Nations or its specialised agencies.

The United Nations Trusteeship Agreement between the governments of Samoa and New Zealand terminated on the 1st January 1962 therefore the New Zealand government is not liable under the Trusteeship Agreement. However Article III of the Treaty of Friendship between Samoa and New Zealand is an extension of article 7 of the United Nations Trusteeship Agreement between the government of Samoa and the government of New Zealand 1946. The right has just been

enactment for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right. (5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person; Refer to New Zealand Bill of Rights Act 1990 See:

See:<http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

⁷³⁹ *Rights of persons charged* - Everyone who is charged with an offence(a) Shall be informed promptly and in detail of the nature and cause of the charge; and (b) Shall be released on reasonable terms and conditions unless there is just cause for continued detention; and (c) Shall have the right to consult and instruct a lawyer; and (d) Shall have the right to adequate time and facilities to prepare a defence; and (e) Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months; and (f) Shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance; and (g) Shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court; Refer to New Zealand Bill of Rights Act 1990

See:<http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

⁷⁴⁰ *Lesia v Attorney-General* [1982] 1 NZLR 165.

⁷⁴¹ Office of the United Nations High Commissioner for Human Rights. See: <http://www.ohchr.org/EN/Countries/Pages/HumanRightsintheWorld.aspx>

⁷⁴² International Convention of Civil and Political Rights See:

<http://www2.ohchr.org/english/law/ccpr.htm>[13 February 2010].

⁷⁴³ Human Rights Commission See: http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/13-May-2009_15-41-33_20090424_Submission_on_sentencing_and_parole_reform_bill-1.doc[13 February 2010].

⁷⁴⁴ Article 7, United Nations Trusteeship Agreement between the government of Western Samoa and the government of New Zealand. 1946. Refer to Appendix 2.

transferred into another instrument and is now more specific, stating that citizens of both territories are to be given equitable treatment and full legal protection and access to the courts. Article III of the Treaty of Friendship is a right incorporated in the ICCPR under articles 8 and 9. The New Zealand government not only breached its Treaty obligation through the Treaty of Friendship, it also acted in contravention of a right stipulated in the ICCPR, an instrument the government of New Zealand had ratified in 1978.

Regardless of the above international conventions and legislation, Samoans who were affected by unfair immigration policies, the dawn raids and the *Lesa* decision should have been granted equitable treatment through the Treaty of Friendship. What is the purpose of stipulating this guaranteed right in an article of the Treaty when it is not utilised nor enforced?

Article IV provides that the two governments will continue to work together to promote the welfare of the people of Samoa.

What does it mean to promote the welfare of the people of Samoa? This can only be answered with reflection to past instances. In promoting the welfare of Samoa, New Zealand's main contribution to Samoa has been through financial aid.⁷⁴⁵ New Zealand has contributed to financial aid over the past years; focus will be given to the most recent statistics to demonstrate the New Zealand government's aid contribution. New Zealand is not the only major aid donor to Samoa. Australia, China, Japan and the European Union also make aid contributions to Samoa. None of these other major donors have a Treaty of Friendship with Samoa, only New Zealand does.

The New Zealand International Aid and Development Agency (NZ Aid) has allocated \$253.3million to Pacific countries for 2009-2010.⁷⁴⁶ It is the second largest Aid programme that contributes to Pacific countries. Australia offers the

⁷⁴⁵ New Zealand International Aid and Development Agency, "Samoa" See: <http://www.nzaid.govt.nz/programmes/c-samoa.html> [10 February 2010].

⁷⁴⁶ For the year 2008-2009, NZ Aid allocated \$471.3million. Refer to: NZ Aid's Overseas Development Assistance See: <http://www.nzaid.govt.nz/library/docs/factsheet-nzaid-overview.pdf> [13 February 2010].

largest Aid programme to Pacific nations.⁷⁴⁷ For Samoa alone, the core areas that New Zealand aid (along with Australia)⁷⁴⁸ is concentrating on for the specified period 2009-2010 are: Human resource development, Education, Health, Private Sector development, Governance and Public Sector Reform, community development and regional assistance.⁷⁴⁹ These areas will be funded by the New Zealand government with a total allocation of \$14million for 2009/2010.⁷⁵⁰

There are at least twelve Pacific countries who receive New Zealand aid.⁷⁵¹ A comparison with the aid given to other Pacific countries for the period 2009/2010 shows that the aid received by Samoa is awarded according to population, size and economic objectives. Samoa will receive the same amount of aid as the Cook Islands for the specified period.⁷⁵² The difference is the Cook Islands is a New Zealand territory and its people are New Zealand citizens and has a much smaller population than Samoa. Tonga who does not have a special relationship with New Zealand will receive \$16million from New Zealand aid for the same period.⁷⁵³ The Pacific Island countries that receive the most aid from New Zealand for the period 2009/2010 are from the Melanesian group who are Papua New Guinea, Solomon Islands and Vanuatu.⁷⁵⁴ I will not go into full detail of aid received by other Pacific countries but this is just to give an indication that Samoa receives aid just like many other Pacific countries. The formula to determine aid entitlements to Pacific and Melanesia being applied to Samoa in the same manner that it is applied to other Pacific countries is not reflective of a special relationship.

⁷⁴⁷ New Zealand International Aid and Development Agency, "Pacific Countries" See: <http://www.nzaid.govt.nz/programmes/c-pac-countries.html> [13 February 2010].

⁷⁴⁸ Joint Samoa Program Strategy 2006 – 2010 between the Governments of Samoa, Australia and New Zealand (November 2006) See: <http://www.nzaid.govt.nz/library/docs/samoa-jsps-program-strategy-2006-2010.pdf>.

⁷⁴⁹ New Zealand International Aid and Development Agency, "Samoa" See: <http://www.nzaid.govt.nz/programmes/c-samoa.html> [10 February 2010].

⁷⁵⁰ Ibid.

⁷⁵¹ Supra n 736.

⁷⁵² New Zealand International Aid and Development Agency, "Cook Islands" See: <http://www.nzaid.govt.nz/programmes/c-cook-islands.html> [10 February 2010].

⁷⁵³ New Zealand International Aid and Development Agency, "Tonga" See: <http://www.nzaid.govt.nz/programmes/c-tonga.html> [10 February 2010].

⁷⁵⁴ Papua New Guinea will receive \$27million, Solomon Islands \$36million and Vanuatu \$18million for 2009/2010. See: <http://www.nzaid.govt.nz/programmes/c-pac-countries.html> [13 February 2010].

There have certainly been times where the welfare of the Samoan people has not been promoted as stipulated in article IV of the Treaty of Friendship since coming into force in 1962. The effect of the Dawn raids in the early 1970s to the early 1980s has left disturbing memories for its victims. The actions of state officials during the dawn raids were clearly discriminatory and racist exhibiting no acknowledgement that the New Zealand government owed special obligations to Samoa. Samoans were targeted in immigration policies to identify overstayers in New Zealand displaying New Zealand's discriminatory and racist attitude towards those Samoans in New Zealand.

Such treatment did not reflect the close ties of both countries. Why Pacific Islanders were singled out and especially Samoans was an act of discrimination. Immigration officials should have been identifying all overstayers in New Zealand regardless of race. "Citizens from the United States and the United Kingdom who also made up almost a third of those overstaying, represented only 5% of prosecutions".⁷⁵⁵ Pacific Island overstayers made up a third of overstayers but made up 86% of all prosecutions for overstaying.⁷⁵⁶

This was certainly not promoting the welfare of the people of Samoa. It only led to the degradation of those affected and family separation. The discrimination and racism experienced by many Samoans residing in New Zealand during the 1970s and 1980s did not reflect the wellbeing of Samoa being promoted. The New Zealand government chose to ignore this Treaty obligation as stipulated in Article IV of the Treaty of Friendship. Promoting the welfare of the Samoan people was not a new obligation to the New Zealand government. The administration of Samoa by New Zealand under the Leagues of Nations mandate 1920 and the United Nations Trusteeship Agreement 1946⁷⁵⁷ advocated that the welfare of the people of Samoa be improved and promoted.⁷⁵⁸

⁷⁵⁵ A Beaglehole, "Immigration regulation - Controlling Pacific Island immigration", Te Ara - the Encyclopedia of New Zealand, updated 4-Mar-09 See:

URL: <http://www.TeAra.govt.nz/en/immigration-regulation/6>.

⁷⁵⁶ Ibid.

⁷⁵⁷ Refer to Appendices 1 and 2.

⁷⁵⁸ Article 2, League of Nations mandate 1920; Articles 4,5 and 6 United Nations Trusteeship Agreement 1946. Refer to Appendices 1 and 2.

Then the effect of the *Lesā* decision left many Samoans deprived of their citizenship rights which is a fundamental human right⁷⁵⁹ and should not be one determined by heads of governments. International law also protects the citizenship rights of citizens of countries. Such rights are acknowledged in Article 12 of the International Covenant on Civil and Political Rights⁷⁶⁰ and Article 1 of the Convention on the Elimination of all Forms of Racial discrimination.⁷⁶¹ It should be a personal choice rather than at the discretion of two government states. The enactment of the Citizenship (Western Samoa) Act 1982 contravenes these citizenship rights by foregoing the citizenship rights of those Samoan citizens who were eligible. The significance of such contravention has never been fully appreciated by both the New Zealand and Samoan governments.

In the case of *Mabo*,⁷⁶² Toohey J found that the fiduciary obligation arises out of the fact that the Crown has the right to alienate the land. It can either advance or undermine the interests of the Merriam people in relation to their customary land. Equity requires that the Crown acts in the best interests of the Merriam people.⁷⁶³ Similarly in the case of Samoa as stipulated in the article of the Treaty of Friendship, the New Zealand government is to act in the best interests of the Samoan people.

When the New Zealand government promises to promote the welfare of the people of Samoa this statement should not be taken lightly. It is an undertaking that that should be taken seriously especially by the New Zealand government who have consented to it. In essence, it means that the New Zealand government should positively promote the welfare of the Samoan people. New Zealand's failure to promote the welfare of Samoa (as evidenced in the Dawn Raids and the *Lesā* decision) in light of the Treaty of Friendship requirement was

⁷⁵⁹ Article 13, Constitution of Samoa 1962 "Rights regarding freedom of speech, assembly, association, movement and residence".

⁷⁶⁰ Article 12 provides that no one shall be arbitrarily deprived of the right to enter his own country.

⁷⁶¹ Article 1 provides that there shall be no discrimination against any particular nationality. Article 5 contains a guarantee for all citizens regardless of race, colour or national origin, of the right to residence within, and the right to leave or return to one's country.

⁷⁶² *Mabo v Queensland No.2* (1982) 175 CLR 1.

⁷⁶³ *Ibid.*

unconscionable and forms a fiduciary obligation upon the New Zealand government to act in the best interests of the Samoan people.

Article V provides for assistance in international affairs such as formulation of foreign policies, and New Zealand has undertaken to act as a channel for communication in international organisations as well as represent Samoa in international affairs when requested by the Samoan government. The New Zealand government further undertakes to offer diplomatic protection of nationals of Samoa in other countries and perform consular functions on their behalf.⁷⁶⁴

This article clearly states that the government of Samoa has its own discretion to formulate its own foreign policies but if they request assistance from the New Zealand government it shall be granted. This indicates New Zealand's willingness to further assist Samoa in political, economic and foreign relations. The New Zealand government was well aware of the political, social and economic climate in Samoa when the Treaty of Friendship was drafted. They were Samoa's administrators for almost five decades and perhaps chose to include this article out of their awareness of Samoa's needs.

A undertaking to commit to assist and represent another country in international relations is not to be taken lightly and must be applied carefully and sensitively. In essence, this article implies that the New Zealand government is taking a guardianship role in the relationship between both countries. According to this article, the New Zealand government is willing to protect other Samoan nationals in other countries as if they were New Zealand citizens. It can be further implied that the New Zealand government has taken a fiduciary role where they will act in the best interests of the Samoan government in international matters. It is not common for one country to extend diplomatic protection of other nationals who are not citizens of its own country.

⁷⁶⁴ Refer to Appendix 3.

It is clearly stated in the beginning of the article that the government of New Zealand shall in no way impair the right of the government of Western Samoa to formulate its own policies.⁷⁶⁵ Samoa may formulate their own foreign policies but should they choose to consult or seek advice, it is the New Zealand government that will grant these requests. If the New Zealand government replied to the request for assistance, they must with the best of their abilities make sure that the advice and/or assistance offered is to promote Samoa's interests. This role is reflective of a fiduciary role this is because it can advance or undermine Samoa's rights. The New Zealand government is willing to act for and represent Samoa in situations when requested.

The New Zealand government also recognises that the Samoan government may not be well equipped in international matters and is willing to offer support and promote the interests of the Samoan people. The fiduciary principle of vulnerability as evidenced through Samoa's lack of economic resources is that the Samoan people have put their trust and confidence in the New Zealand government in such matters. However the question that arises is what if Samoa's policy conflicts with New Zealand's policy? What will happen then? Then is an issue which was not and should have been addressed in the Treaty. This amounts to a significant omission.

Articles VI and VII:

The remaining two articles of the treaty of Friendship are the termination and enforcement clauses.⁷⁶⁶ Either government may terminate the Treaty of Friendship with written notice. This has not occurred which indicates both countries want to continue their special relationship. The Treaty of Friendship between Samoa and New Zealand has been in force for thirty-eight years since the prior relationship of forty-eight years of colonial administration. Both countries truly have a long-standing relationship. Despite the issues of unjust immigration policies, dawn raids and *Lesa*⁷⁶⁷ both countries have expressed an ongoing commitment to the

⁷⁶⁵ Article V, treaty of Friendship between the government of Western Samoa and the government of New Zealand 1962. Refer to Appendix 3.

⁷⁶⁶ Articles VI and VII. Refer to Appendix 3.

⁷⁶⁷ *Lesa v Attorney-General* [1982] 1 NZLR 165.

Treaty. As the New Zealand government affirmed its special relationship with Samoa as reflected in the Treaty.

(ii) Special features of the Treaty of Friendship Text:

The Treaty of Friendship consists of articles that state great undertakings by the government of New Zealand. The special features that stand out in the text of the Treaty is that firstly it is a relationship that will be governed by a spirit of close friendship.⁷⁶⁸ The duty of consultation is important when it comes to matters of mutual interest.⁷⁶⁹ Both countries are expected to work together with the utmost good faith. The protection of citizens of both Samoa and New Zealand is crucial and both groups of citizens shall be granted equitable treatment.⁷⁷⁰ Importantly, the governments of Samoa and New Zealand shall continue to work together to promote the welfare of the people of Samoa.⁷⁷¹ Note that this Treaty only advocates to promote the welfare of the Samoan people and does not include New Zealand citizens. The New Zealand government is openly committing themselves to actively protect Samoans wherever they may reside. The New Zealand government also offers further diplomatic protection to Samoan nationals residing in other countries and will assist Samoa in foreign and international relations.⁷⁷²

This Treaty clearly has been drafted to assist Samoa and the obligations specified in the Treaty of Friendship indicate New Zealand and Samoa's special relationship. The New Zealand government has not offered this kind of treaty to any other Pacific sovereign nation apart from Samoa. The reason for this is because New Zealand's historical relationship with Samoa is significant. New Zealand has not had such a direct influence in the affairs of other Pacific countries like it has with Samoa. This historical relationship has given the New Zealand government has a sense of responsibility to Samoa as reflected in the Treaty of

⁷⁶⁸ Article I, Treaty of Friendship between government of Samoa and government of New Zealand 1962; Refer to Appendix 3.

⁷⁶⁹ Article II, Treaty of Friendship between government of Samoa and government of New Zealand 1962; Refer to Appendix 3.

⁷⁷⁰ Article III, Treaty of Friendship between government of Samoa and government of New Zealand 1962; Refer to Appendix 3.

⁷⁷¹ Article IV, Treaty of Friendship between government of Samoa and government of New Zealand 1962; Refer to Appendix 3.

⁷⁷² Article V, Treaty of Friendship between government of Samoa and government of New Zealand 1962; Refer to Appendix 3.

Friendship. Identifying the features of the Treaty of Friendship will assist in interpreting the relationship of both countries. Identifying other special features of the relationship in good faith will also raise awareness amongst both parties and generally have an impact on the status of the relationship through the implementation of the articles.

The Treaty of Friendship is unique; it is a sacred agreement that reflects principles of *sui generis* treaties attracting a fiduciary obligation because it is one of a kind. It is a reflection of a former Crown-Aboriginal relationship. A relationship where there continues to be a power imbalance between the governments of Samoa and New Zealand with New Zealand having positive duties to promote the welfare of the Samoan people and being willing to assist upon request. Samoa's lack of economic resources prompts them to reach out to New Zealand for assistance. It is a relationship of trust and loyalty where both countries have consented to great undertakings. The vulnerability element is evident in article IV⁷⁷³ where the welfare of the Samoan people will be promoted (and not the New Zealand people). Article V⁷⁷⁴ provides that when the Samoan government requests assistance, the New Zealand government will be there to assist. It is a relationship of influence where both governments will be able to influence the other in future decisions especially in decisions of foreign and international nature.⁷⁷⁵ It is the argument of this thesis that if the features of the Treaty of Friendship are correctly articulated, obligations and responsibilities between the two nations will set a much clearer framework for future relations between both countries.

Other special features, apart from the Treaty of Friendship, will be discussed shortly to consolidate my argument that the Samoan and New Zealand relationship is one of a *sui generis* fiduciary nature.

⁷⁷³ Treaty of Friendship between government of Samoa and government of New Zealand 1962; Refer to Appendix 3.

⁷⁷⁴ Ibid.

⁷⁷⁵ Article V, Treaty of Friendship between government of Samoa and government of New Zealand 1962; Refer to Appendix 3.

H. OTHER SPECIAL FEATURES OF THE SAMOA-NEW ZEALAND RELATIONSHIP:

Apart from the Treaty of Friendship that was signed between both countries in 1962, there are other special features that point to a relationship of a *sui generis* fiduciary nature.

(i) Historical relationship:

Chapter one of this thesis has discussed in detail the historical relationship of Samoa and New Zealand. It is a relationship that began in 1914 when the New Zealand revolutionary force arrived upon Samoa's shores. Samoa and New Zealand's historical journey started as a colonial relationship.⁷⁷⁶ The New Zealand government wished to seize the Samoan Islands from its former colonist, Germany.⁷⁷⁷ It was a period during World War I where the colonial powers were competing to claim ownership of islands in the Pacific to meet the quest for raw materials. The importance of human rights in the aftermath of the Second World War saw the establishment of the League of Nations who became the authority to govern the colonial administrators of conquered Pacific nations. The League of Nations gave New Zealand colonial responsibility for Western Samoa.⁷⁷⁸ Samoa and New Zealand continued their relationship under the League of Nations mandate for twenty-six years. The establishment of the United Nations with the emphasis of advancing human rights transferred Samoa to a Trusteeship Agreement⁷⁷⁹ to be continually administered by New Zealand authorities until Independence. In the history of New Zealand's administration of Samoa, they have governed under three designated titles: as a Coloniser, Administrator and Protector.

It is a relationship that is reflective of a Crown-Aboriginal peoples' relationship. Despite the influence of the League of Nations and then the United Nations, the New Zealand administration had full legislative and administration power.⁷⁸⁰

⁷⁷⁶ Refer to chapter 1 at 12.

⁷⁷⁷ S Smith, *The Samoa (NZ) Expeditionary Force 1914-1915* (1924) 27.

⁷⁷⁸ Refer to chapter 1 at 19.

⁷⁷⁹ Refer to Appendix 2.

⁷⁸⁰ Article 2, League of Nations mandate 1920; Refer to Appendix 1. Article 3. United Nations Trusteeship Agreement 1946; Refer to Appendix 2.

There was a clear power imbalance throughout the relationship. Although Samoa was guaranteed certain rights stipulated in the League of Nations mandate and the Trusteeship Agreement,⁷⁸¹ the New Zealand administration continued to exercise full authority and power. The final say for any decision would be made by the New Zealand administrator.⁷⁸² The power imbalance is a reflection of the nature of a colonial relationship and a key feature of a relationship of a fiduciary nature.

Historical incidents that occurred during New Zealand's administration reveal the vulnerability of the Samoan people to the misuse of the colonial relationship. These historical incidents have been discussed in full detail in chapter 1. Such incidents have resulted in the deaths of twenty-two percent of the population, deportations, banishments, shootings and degradation of cultural practices.⁷⁸³ Most New Zealand administrators that governed Samoa treated the Samoan people unfairly and there was no shortage of maladministration during the early years of the relationship.⁷⁸⁴ These events are examples of the historical downfalls in the relationship of Samoa and New Zealand.

The positive and mostly negative aspects in the historical relationship between the two countries are what have defined the relationship. Colonial relationships are reflective of fiduciary relationships because these are relationships of power where one country is at the discretionary of the other. The Samoan people were dependent on the New Zealand administration to govern their country and had to trust the New Zealand administration to make the right decisions to advance the rights of the Samoan people. They had no power or authority to make decisions for their own country. If power was given the final decision was at the discretion of the New Zealand administrator. The power imbalance was quite evident as it would be with any colonial relationship.

⁷⁸¹ Refer to Appendices 1 and 2.

⁷⁸² J.W.Davidson *Samoa mo Samoa: The Emergence of the Independent State of Western Samoa* (1967) 105.

⁷⁸³ Refer to chapter 1 to sub-headings "Influenza 1918" at 15; "Resistance: Mau Movement" at 26; "Deportation" at 27; "Black Saturday" at 30.

⁷⁸⁴ Refer to chapter 1 to "New Zealand Administration in Samoa" at 14.

(ii) Ongoing relationship:

This historical relationship has become an ongoing one. Samoa gaining independence meant New Zealand authorities relinquished administering Samoa. But New Zealand continues to influence Samoa through the treaty of Friendship. The New Zealand government was very keen to maintain an ongoing relationship with Samoa hence the birth of the Treaty of Friendship. The relationship would remain ongoing through several factors such as history, migration, intermarriage, financial assistance and the significant number of Samoans who have worked and are living in New Zealand.

(iii) Migration:

After the Treaty of Friendship was signed in 1962, the New Zealand government introduced a special immigration quota scheme to allow Samoans to migrate to New Zealand.⁷⁸⁵ The introduction of the immigration quota system gave preferential treatment to Samoa over any other country.⁷⁸⁶ Why was Samoa accorded preferential treatment? It is in recognition of the close ties shared by both countries and because of the longstanding historical relationship between the two countries. The New Zealand government does not offer any other sovereign country a special category where they may gain access to New Zealand.⁷⁸⁷ Hon McLay emphasised that the quota system is unique.⁷⁸⁸

There is no other country whose residents are not New Zealand citizens but who are nonetheless, regardless of their skills, accorded entry into New Zealand as part of a quota that is over and above the tight immigration criteria that would otherwise normally apply to their application.⁷⁸⁹

The Samoa quota system offers 1,100 applicants the opportunity to apply for New Zealand residency on an annual basis. Other Pacific Islands applicants have to apply under the Pacific Access category which was only established in 2002 while Samoa has had its own special quota system since 1970. Even though the criteria

⁷⁸⁵ A Beaglehole, 'Controlling Pacific Island Immigration in *Immigration Regulation* (New Zealand: Te Ara- the Encyclopedia of New Zealand, 2007) See:

<http://www.TeAra.govt.nz/NewZealanders/NewZealandPeoples/ImmigrationRegulation/en>

⁷⁸⁶ Refer to chapters 1 and 2.

⁷⁸⁷ Immigration New Zealand, "Entry Options" See:

[http://www.immigration.govt.nz/migrant/stream/live/\[13 February 2010\].](http://www.immigration.govt.nz/migrant/stream/live/[13 February 2010].)

⁷⁸⁸ J.K.McLay(Hon), Debate in the House of Representatives on the Citizenship (Western Samoa) Bill (24 August 1982) 2511.

⁷⁸⁹ Ibid.

is the same of the Samoan and Pacific Quota schemes the fact that Samoa has been allocated a separate category acknowledges the relationship between the two countries. This again is another unique feature of the Samoa-New Zealand relationship.

Migration continues between the two nations; the significant number of Samoans residing in New Zealand almost matches those who reside in the homeland. Constant travel between both countries is frequent. Inter-marriage and family connections remain the main reasons of travel for many Samoans to New Zealand and vice-versa. Other young Samoans also migrate to New Zealand for higher education made available in tertiary institutions. Many Samoans are employed under the Recognised Seasonal Employment (RSE) scheme where companies in New Zealand offer seasonal employment to Samoans for a limited period of time.⁷⁹⁰ The Recognised Seasonal Employer (RSE) Work Policy is a multi-governmental initiative that was introduced in 2007 to address the shortage of local workers in the New Zealand horticulture and viticulture industry.⁷⁹¹ Samoa along with five other kick start countries⁷⁹² are involved in the RSE programme. These types of programmes will further encourage migration between the two countries even though it is on a temporary basis.

(iv) Political and Governance effects:

Samoans have struggled to protect their social and political institutions from colonial interference whilst under New Zealand administration.⁷⁹³

As a result Samoa entered into independence without looking critically at these institutions and enshrined them, almost defiantly, in our constitution, where they have caused us lots of problems ever since.⁷⁹⁴

⁷⁹⁰ New Zealand Department of Labour, "International Migration, Settlement & Employment Dynamics, IMSED Research (2009).
See: <http://www.immigration.govt.nz/NR/rdonlyres/C2222267-E10A-461F-ADF4-7FFED28BFB8A/0/lowresDOL11060SummaryofEvaluationofRSEPolicyFirstSeason200708040609.pdf>. [13 December 2009].

⁷⁹¹ Ibid.

⁷⁹² Five kick start countries include Vanuatu, Tonga, Samoa, Tuvalu and Kiribati.

⁷⁹³ M Meleisea, "The Past in the Present" in Renwick, W.,(ed) *Sovereignty and Indigenous Right: The Treaty of Waitangi in International Contexts* (1991) 132.

⁷⁹⁴ Ibid.

The numbers of Samoans residing in New Zealand is a substantial number. The proximity of both countries is a contributing factor but is also evidence of the very close relationship between Samoa and New Zealand. Samoans through the Immigration quota system introduced after the signing of the treaty of Friendship in 1962 were encouraged to migrate to New Zealand to seek employment.⁷⁹⁵ This is reflected in the number of Samoan migrants in New Zealand during the 1970s and 1980s.⁷⁹⁶ Shankman argues that this arrangement benefitted New Zealand acquiring a steady supply of production workers when there was a high labour demand.⁷⁹⁷ The question posed is what did Samoa obtain from this arrangement? Employment opportunities to generate an income to support family members but the downside meant that a significant number of Samoans migrating to New Zealand who would have otherwise stayed in Samoa to develop Samoa for its own benefit.

Other dubious effects of emigration from the Samoan end have been the transformation of economic values in Western Samoa, the increase of external dependency which has led to a chronic balance of trade, and the removal from Samoa of those who might, if they had nowhere else to go to, have changed our political and economic system.⁷⁹⁸

However there is no longer the demand for Samoan workers in New Zealand with the current economic climate with the exception of the RSE programme. The RSE programme only caters for horticultural jobs and has a limited number of job opportunities. It is a seasonal job where most Samoan workers are on temporary work visas. Whereas during the 1970s, permanent employment opportunities was available to Samoans and it was not limited to one particular skill such as horticulture.

Shankman further adds that any suggestion of changes to the Treaty of Friendship is unwelcome because emigration has become the cornerstone of Samoa's economy and social and political system.⁷⁹⁹ "Samoans have become aware of the

⁷⁹⁵ P Shankman , *Migration and Underdevelopment: The case of Western Samoa* (1976) 132.

⁷⁹⁶ P Ongley, "Pacific Island Migration and the New Zealand Labour Market in P Spoonley et.al *Nga Take: Ethnic relations and Racism in Aotearoa/New Zealand* (1991) 23.

⁷⁹⁷Supra n 784 and 786.

⁷⁹⁸ Ibid.

⁷⁹⁹ Supra n 788.

importance of migration and remittances for their well-being that any suggestion to restrict migration will be met with resistance.⁸⁰⁰ Samoans prefer to migrate to New Zealand primarily due to economic considerations”.⁸⁰¹ This means that the remittance system which is an important part of the close ties will be ongoing. Samoan families residing in New Zealand identify with their cultural obligations in Samoa and remitting money is their form of contribution to family and the community. Remittances are important for Samoa’s economy and growth. Many families have come to depend on remittances due to unemployment and lack of resources in Samoa.

Many Samoan families are now divided between the two lands. Both countries have indefinite ties with one another through almost half of the Samoan population residing in New Zealand and with family members in Samoa. The overwhelming majority of Samoan families have close ties with New Zealand which is reinforced through regular travel and visits, intermarriage, financial assistance through remittances and the percentage of Samoans who have worked in New Zealand at some stage. In terms of Polynesian groups, Samoa has the highest percentage of population next to Māori whom are the indigenous people of New Zealand. All these special features plus the Treaty of Friendship do point to a relationship of a *sui generis* fiduciary nature.

(v) What makes the Samoa-New Zealand relationship different from other relationships?

Why is the Samoa-New Zealand relationship so different from other relationships with other countries and/or Pacific Island states? What makes the Samoa-New Zealand relationship special? Critics may ask why the New Zealand government should assist Samoa. What makes their obligation to the Samoan people different from others?

The ties of colonisation, history, law and friendship between both countries cannot be easily forgotten or erased. The New Zealand government has an

⁸⁰⁰ Supra n 786 at 103.

⁸⁰¹ Ibid.

obligation to act in the best interests of Samoa because they have undertaken to do so in the Treaty of Friendship. Treaties are not documents that should be thought of lightly, otherwise there would be no reason for their existence. In the Samoa-New Zealand context, the closeness of the interaction between both countries has been ongoing, from its initial colonial relationship, to its current relationship as two sovereign states. Even as independent sovereign states, Samoa was found to still be a part of the New Zealand realm by the highest court of New Zealand.⁸⁰²

There have been conflicts, mistakes and misunderstandings that bind together a significant relationship.⁸⁰³ The mistakes and misunderstandings have created tensions and injustices which require ongoing attention. The addressing of these mistakes require both countries to act together in good faith. Intermarriage, provision of labour and migration between both countries is part of the fabric of the relationship and further strengthens their close ties. The Treaty of Friendship was negotiated after a number of mistakes had been made and before the making of others occurred. Had the meaning of friendship within the context of the Treaty been more effectively disseminated and articulated it might have lessened the likelihood of mistakes such as *Lesa*⁸⁰⁴ occurring.

The relationship between both countries remains to be ongoing and is quite apparent with the number of Samoans residing in New Zealand. The New Zealand administration's direct involvement in Samoan affairs has led it have a good understanding of Samoa, its people and the future relations it may build. It is fair enough to say that New Zealand and Samoa are now sovereign nations where one no longer is at the discretion of the other. However, New Zealand continues to have a significant influence on Samoans through its people that reside in New Zealand and through its immigration policies. The Quota system continues to keep both countries connected and is recognition of Samoa's special status amongst other countries. The New Zealand government continues to have some form of power and discretion over Samoans which was evident in the dawn raids and the

⁸⁰² *Lesa v Attorney-General* [1982] 1 NZLR 165.

⁸⁰³ Refer to chapter 1.

⁸⁰⁴ *Supra* n 793.

*Lesia*⁸⁰⁵ decision. Decisions also in relation to visa provisions are at the discretion of the New Zealand government.

Although the New Zealand government has relationships with other Pacific Island states, its relationship with Samoa is of the closest type as sovereign nations. New Zealand does not have a Treaty of Friendship with any other Pacific Island state but Samoa. The willingness of both countries to sign a Treaty of Friendship which stipulates undertakings is of great consequence. Treaties should be seen as law giving rise to clear binding obligations and adherence of its obligations is of the utmost importance. It reflects that although both are now sovereign nations, New Zealand continues to assist Samoa in particular matters. Samoa is also able to consult the New Zealand government for advice and assistance when the occasion arises.

(vi) Cumulative Impact of the special relationship:

The special relationship is the cumulative impact of history, Samoa being a part of New Zealand for a period, Treaty of Friendship and the close and ongoing interaction between both countries. All of these points when considered together or cumulatively establish a clear and significant special relationship. It certainly can be suggested that certain aspects individually also establish a special relationship such as the Treaty of Friendship. The Treaty of Friendship itself is a unique agreement outlining obligations and rights shared between both countries. The cumulative impact of the issues stated above establishes a special relationship. All the special features that have been discussed are significant and together contribute to a founding relationship of a *sui generis* fiduciary nature.

The articulation of the special features of the relationship has revealed breaches in the relationship. This issue should be taken seriously and addressed in good faith taking into account its surrounding circumstances and any declared or apparent objects and purposes.⁸⁰⁶

⁸⁰⁵ *Ibid.*

⁸⁰⁶ *R v Marshall* [1993] 3 SCR 456, para 78.

I. BREACHES OF SPECIAL RELATIONSHIP:

The breaches of the special relationship have been discussed in some lengths in the section explaining the articles of the Treaty of Friendship. Failing to honour the Treaty of Friendship is an insult to the relationship. The breaches of the New Zealand administration during its time in Samoa have again been continuously referred to in this thesis.⁸⁰⁷ The important breaches I will focus on are the ones that occurred after the signing of the Treaty of Friendship in 1962.

(i) Immigration policies:

The imposition of unfair immigration policies during the 1970s and 1980s was a clear breach to the relationship. “Imposing immigration requirements on Samoan citizens who seek entry to New Zealand caused distress to Samoan citizens”.⁸⁰⁸ “These immigration policies discriminated against Samoans in New Zealand and Samoans in Samoa seeking entry to New Zealand to satisfy its need for labour.”⁸⁰⁹ The New Zealand government introduced a quota system inviting Samoans to migrate to New Zealand after independence. The migration of successful applicants under the quota system led to more family migrating to New Zealand on temporary visas leading some family members to overstay their visas and/or permits. Other countries that did not have special relations with New Zealand did not require visas or permits to enter New Zealand for temporary stays. Germany who was an enemy of New Zealand during World War I is accorded visa free entry to New Zealand for up to three months.⁸¹⁰

(ii) Dawn Raids:

The Dawn raids are an evident breach of the Samoa and New Zealand special relationship and the Treaty of Friendship. It was an incident that could have well been preventable had the New Zealand government chosen to exercise its treaty obligations as stated in the Treaty of Friendship. The duty of consultation should

⁸⁰⁷ Refer to chapter 1.

⁸⁰⁸ Petition 2002/44 of Dr George Paterson Barton Vaitoa Sa and 100,000 others: Report of the Government Administration Committee presented to the House of Representatives, Forty-seventh Parliament to Chairperson Dianne Yates [May 2004] 35.

⁸⁰⁹ Ibid.

⁸¹⁰ Immigration New Zealand, “Visa-free countries” See:

<http://www.immigration.govt.nz/migrant/stream/visit/visitors/LinkAdministration/ToolboxLinks/visafreecountries.htm?level=1> [14 February 2010].

have been exercised. Measures that were carried out should have been done in good faith, this was not the case. The treatment of the Samoan people was extreme and discriminatory given the special relationship both countries share. It was simply a repetition of the colonial relationship and “left a deep-set sense of grievance amongst many Samoans”⁸¹¹ and is a clear breach of Articles II, III and IV of the Treaty of Friendship.⁸¹²

(iii) Citizenship issue:

The *Lesā*⁸¹³ decision has been continuously mentioned throughout the thesis. This decision became a very controversial decision where it declared that all Samoans born in Samoa between the years 1928 and 1948 are New Zealand citizens. This meant that many Samoans had obtained New Zealand citizenship by a Privy Council decision. The decision was overturned with the implementation of a Protocol and then implementing legislation in New Zealand, making concessions for some and depriving other Samoans of their citizenship rights. The manner the matter was handled was one-sided with the New Zealand government dictating the outcome of the decision. Although the Samoan government also agreed to the Protocol they were not given sufficient time or opportunity to consult with those affected and recommend other options. It was merely the New Zealand government offering their best possible option, persuading the Samoan government to agree to the Protocol. It was a ‘take it or leave it’ approach. Such actions did not mirror the intentions of the Treaty of Friendship or the special relationship that exists between the two countries. True and meaningful consultation is important. Such consultation involves both parties coming together as equal parties to discuss possible options. The consultation process should not be rushed as illustrated in the *Lesā* case. More time should be spent consulting those affected by the decision allowing all parties concerned the opportunity to be heard. Consultations should not be rushed to satisfy the needs of one party especially the party in power.

⁸¹¹ *Supra* n 799.

⁸¹² Refer to Appendix 3.

⁸¹³ *Lesā v Attorney-General* [1982] 1 NZLR 165; Refer to chapter 1 at 55.

(iv) Protocol:

The Protocol⁸¹⁴ signed between both countries to overturn the *Lesa*⁸¹⁵ decision is a good example of the New Zealand government using its discretion and power to advance its position to the detriment of others who were deprived of their citizen rights. The New Zealand government may argue that they used the proper channels to consult and negotiate with the Samoan government and this agreement was documented in a protocol which is to be read together with the Treaty of Friendship.⁸¹⁶ However the timeframe (of less than four months) in which the decision was handed down, the Protocol was signed and legislation enacted clearly indicates the unilateral approach that was taken. This manner only demonstrated rushed negotiations and forced consultations where the Samoan government were made to believe that they were given the best possible offer.

Although the New Zealand government argues that they took proper measures in relation to the *Lesa* case,⁸¹⁷ it was evident from the start that the Privy Council decision was to be overturned. The New Zealand government limited New Zealand citizenship to all Samoans in New Zealand at the time of the Act. The offer of amnesty to Samoan overstayers who were illegally in New Zealand is reflective of the guilt the New Zealand government had in relation to the Protocol and the Citizenship (Western Samoa) Act 1982.⁸¹⁸ Those who were illegally in New Zealand were offered New Zealand citizenship whilst those that obeyed the New Zealand immigration authorities and left were deprived of their citizenship rights.

The content of the Protocol focuses on immigration and citizenship issues; the duty of consultation is apparent with particular reference to immigration and

⁸¹⁴ Refer to Appendix 4.

⁸¹⁵ *Lesa v Attorney-General* [1982] 1 NZLR 165.

⁸¹⁶ Article IV, Protocol to the Treaty of Friendship between the Government of Western Samoa and the Government of New Zealand (21 August 1982). Refer to Appendix 4.

⁸¹⁷ Legislative Assembly Debates (Official Report): 1982 Session of the 8th Legislative Assembly of the Independent State of Western Samoa. Vol.1. Office of the Clerk – Legislative Assembly, Apia Western Samoa. Sessions – 13,20-21 April. Sessions 20-21,31 December 1982.

⁸¹⁸ Article II, Protocol to the Treaty of Friendship between the Government of Western Samoa and the Government of New Zealand (21 August 1982). Refer to Appendix 4.

citizenship matters.⁸¹⁹ The effect of the Protocol is it focuses on immigration issues where Samoa has been put in a special position in relation to New Zealand immigration policies. The New Zealand government is therefore obligated to provide Samoans assistance in immigration and citizenship matters. This is not reflected in the current immigration policies where many Samoans face procedural hurdles to obtain entry into New Zealand.⁸²⁰ It is very difficult for a Samoan to apply for permanent residence under the present Immigration scheme due to the lack of skills and not being able to obtain the required points to satisfy the New Zealand Immigration criteria.

The question is does the Protocol advance the rights of the Samoans or the New Zealand government? If the Protocol has guaranteed the rights of illegal migrants and disadvantaged law-abiding citizens from a basic human right, it surely does not go in favour of the Samoan people. It clearly indicated discrimination between Samoans residing in New Zealand and Samoans resident outside New Zealand.⁸²¹ The Samoan government was not given enough time to reflect on the Privy Council decision nor the opportunity to suggest other possible solutions. This clearly breaches the special relationship and the Treaty of Friendship. The Samoan government was placed in a vulnerable position and felt that what was offered was the only solution. When the Attorney-General of New Zealand travelled to Samoa to negotiate, the message was clear from the beginning, that the outcome of the decision could not be supported.⁸²² Consultation must be genuine. The existence of the Protocol remains to be a clear manifestation of the breach of the special relationship.

J. CONCLUSION:

The Treaty of Friendship is an important document for the Samoa-New Zealand relationship. The importance of treaties is signified in the Treaty of Waitangi and

⁸¹⁹ Article I, Protocol to the Treaty of Friendship between the Government of Western Samoa and the Government of New Zealand (21 August 1982). Refer to Appendix 4.

⁸²⁰ *Supra* n 799..

⁸²¹ Correspondence between Hon. Taisi Tupuola Efi, M.P. and the New Zealand Attorney-General, Hon. J.K.McLay (20 August 1982).

⁸²² Debate in the House of Representatives on the Citizenship (Western Samoa) Bill (Hansard) (24 August 1982) 2511, 2513.

its impact in New Zealand society. Treaty rights are of a public nature that create enforceable obligations based on the mutual consent of the parties.⁸²³ The Treaty of Waitangi itself establishes a fair and just relationship thereby making it an appropriate means of addressing grievances. In a similar way, the Treaty of Friendship can serve the same purpose for the Samoa and New Zealand relationship. It should not just be a document that is quoted from time to time; it needs to be given practical and legal effect. This can be done if the special features of the Treaty of Friendship are articulated in a more coherent manner. The Samoan-New Zealand relationship is more than a colonial relationship; its special features which is formalised through its treaty relationship holds stronger obligations and is reflective of a *sui generis* fiduciary relationship in a number of different ways.

The Treaty of Friendship should be used as a vehicle to address grievances that have occurred in the relationship as well as significant decisions that are to be made in the future. The closeness of Samoa and New Zealand can no longer be ignored; their paths will forever cross through the cumulative impact of history, migration, international and economic relations. Articulating and addressing the special relationship between the two countries has made allowance for realising the breaches that have occurred and how these breaches can be remedied in order for the relationship to foster and grow in a positive manner.

The unconscionable acts which have resulted in breaches of this special relationship must be acknowledged such as the Dawn raids and the consequences of the *Lesá* decision. The *Lesá* case especially signifies that there was no genuine consultation, a decision was forced on Samoa by the New Zealand government as the stronger party and the inappropriateness of the decision is evidenced by virtue of the fact that people living in New Zealand illegally were rewarded while those complying with the law were penalised.

⁸²³ Henderson, J (Sakej) Y, Benson, M.L. & Findlay, I.M., *Aboriginal Tenure in the Constitution of Canada* (2000) 242; *R v Badger* [1996] 1 S.C.R. 771 at para 41 (S.C.C).

Samoa's Treaty of Friendship with New Zealand is just as important as any other Treaty. The importance of honouring treaty obligations is emphasised in this thesis. The relationship of Samoa and New Zealand is a unique one that is signified by the special features that have been argued in this thesis. Equity requires that the New Zealand government should advance the interests of the Samoan people; this is confirmed in the Treaty of Friendship and should remain as a guiding principle in both countries interactions.⁸²⁴

The following chapter will look at addressing the breaches of the special relationship between Samoa and New Zealand and suggest ways to improve the relationship of both countries.

⁸²⁴ Article III, Treaty of Friendship between the government of Western Samoa and the government of New Zealand 1962. Refer to Appendix 3.

**CHAPTER 4: ADDRESSING THE BREACHES AND FUTURE
OUTLOOK**

This last chapter aims at bringing together what has been discussed in the first three chapters: the history, legal framework and articulation of the special features of the Samoan and New Zealand relationship. This chapter also looks to address the breaches of the relationship and recommend ways that may improve the special relationship between the two countries.

Although Samoa and New Zealand have a historical relationship their relationship remains ongoing through the close ties of both countries and the Treaty of Friendship. Treaties are binding documents that should be utilised correctly especially in matters of mutual interest. Treaty obligations should be upheld in good faith for the benefit of all parties involved. To ensure decision-making in special relationships is fair, consultation is vital especially when it is stipulated in the Treaty. Equal interaction between parties to a Treaty is imperative to ensure that one party is not overpowering the other. The past instances that have happened in Samoa's relationship with New Zealand need to be addressed and recommendations made to strengthen the relationship for the mutual benefit of both countries.

Incidents where breaches of the Samoan relationship have been brought to attention include actions that occurred both during the colonial period and post-colonial period. These include: the influenza epidemic that killed twenty-two percent of the Samoan population in 1918;⁸²⁵ maladministration conducted by New Zealand administrators;⁸²⁶ the unfair immigration policies during the 1970s and 1980s targeting Samoan migrants; the infamous Dawn raids;⁸²⁷ failing to honour the Treaty of Friendship; and the deprivation of citizenship rights through the signing of the Protocol and enactment of the Citizenship (Western Samoa) Act 1982.⁸²⁸

⁸²⁵ Refer to chapter 1 at 15.

⁸²⁶ Refer to chapter 1 at 14 onwards.

⁸²⁷ Refer to chapter 1 at 51; Refer also to chapter 2.

⁸²⁸ Refer to Appendix 4.

A. ADDRESSING BREACHES:

An attempt must be made to address the above breaches because history very much defines the future. Acknowledging past events and making changes to improve the relationship will only assist in implementing future interaction between the two countries.

(i) A more equitable approach to the *Lesa* decision:

The *Lesa*⁸²⁹ decision that was handed down by the Privy Council granted New Zealand citizenship to Samoans born between the years 1928 and 1949. Rather the choice of citizenship being made between the heads of governments of Samoa and New Zealand, another option could have been offered. An individual choice made by each Samoan affected by the *Lesa* decision. Many Samoans were disappointed with the deprivation of their citizenship rights, a decision that was made by heads of both governments with little consultation with the majority of those affected.⁸³⁰ A citizenship right is a personal choice and one that is now stipulated in the New Zealand Bill of Rights Act 1990.⁸³¹ It is a core human right and this was not properly acknowledged by the New Zealand government in the discussions. However to be fair citizenship rights at the time had not been properly articulated as they have as the result of such cases as *Ding v Minister of Immigration*⁸³² and *Minister of Immigration v Al Hosan*.⁸³³

There were protests against the handling of the *Lesa*⁸³⁴ decision both in Samoa and New Zealand. Consultation is one of the features that arise out of the text of the Treaty of Friendship, and although consultation was carried out between the heads of government it was not a reflection of many Samoan's opinion.⁸³⁵ The consultation was not meaningful. The New Zealand government manipulated its position of power to its own advantage therefore making its actions in this situation unconscionable. They were more worried about the potential influx of

⁸²⁹ *Lesa v Attorney-General* [1982] 1 NZLR 165.

⁸³⁰ "Dr Barton's Opinion" in *Lamepa Samoa* Vol.1, No.36, (10 November 1982).

⁸³¹ Section 18 of NZBORA 1990, "Freedom of Movement".

⁸³² (2006) 25 FRNZ 568 (HC). Discusses and articulates citizenship rights.

⁸³³ [2008] NZCA 462. Discusses and articulates citizenship rights.

⁸³⁴ *Supra* n 820.

⁸³⁵ *Supra* n 821.

Samoan migrants who were now legally recognised as New Zealand citizens although there was no evidence to suggest that this would be the case. Ironically reacting in the manner they did, they favoured those who were illegally in New Zealand, legalising the illegal status while discriminating against those who were not breaking the law.

The loss of New Zealand citizenship was significant to those affected by the *Lesa* decision because of the benefits that come with New Zealand citizenship. A fairer approach to the *Lesa* decision was to leave it as it is. Obviously this was not the case and the New Zealand government certainly made sure that it would not happen. The point is careful and genuine consultation should have taken place. If someone had sat down and carefully considered the situation most of those who would be eligible for citizenship under *Lesa*⁸³⁶ could gain citizenship through other means – coming out to New Zealand under the family category and staying in New Zealand for a sufficient period of time and then applying for citizenship.⁸³⁷ The knee jerk reaction meant that such matters were not considered.

Meaningful consultation would have meant more genuine consultations which would be consistent with the special features of the Treaty of Friendship. Passing a law overturning the *Lesa*⁸³⁸ decision less than four months after the decision had been handed down reflects the urgency and rushed procedure that was used. More time should have been given to both parties so that meaningful consideration could be given to the best possible solutions.

B. APOLOGY:

There has been redress for the wrongful actions of the New Zealand government since the time of the New Zealand administration in Samoa. The former Prime Minister of New Zealand, Helen Clark, formally apologised to the Samoan government and its people in 2002 at an address given at Samoa's fortieth

⁸³⁶Supra n 820.

⁸³⁷ Immigration New Zealand "Family Categories" See: <http://www.immigration.govt.nz/migrant/stream/live/familycategories.htm>[10 February 2010]; "Working in New Zealand" See: <http://www.immigration.govt.nz/migrant/stream/work/>[10 February 2010].

⁸³⁸ Supra n 827.

Independence celebrations.⁸³⁹ Her apology was symbolic and welcomed by Samoa and its people.

There are events in our past which have been little known in New Zealand, although they are well known in Samoa. Those events relate to the inept and incompetent early administration of Samoa by New Zealand...The focus has come about because my government believes that reconciliation is important in building strong relationships.

On behalf of the New Zealand government, I wish to offer today a formal apology to the people of Samoa for the injustice arising from New Zealand's administration of Samoa in its earlier years, and to express sorrow and regret for those injustices.

We are truly sorry. It is our hope that this apology, will enable us to build an even stronger relationship and friendship for the future on the basis of a firmer foundation.⁸⁴⁰

This apology specifically addressed the historical downfalls of the influenza epidemic in 1918 and maladministration exercised by New Zealand administrators from 1914 to the 1950s. The unfair treatment of the Samoan people was addressed and in particular the shooting of Samoans at a peaceful protest march killing one of Samoa's paramount chiefs during the times of the Mau resistance.⁸⁴¹ This apology was symbolic of the relationship between Samoa and New Zealand. It was well received by the Samoan government and its people and provided closure for past historical grievances. A simple apology acknowledging the mistakes that were made was significant in the eyes of all Samoans. It meant that the New Zealand government was acknowledging its faults in the relationship and wanted to continue to renew the special connection of both countries. The apology assists in helping two parties reconcile over the past mistakes that have been made.

Sadly the apology did not extend to breaches of the special relationship during the post-independence era where injustices continued to occur. This includes: the unfair immigration policies targeting Samoans, the dawn raids debacle and the deprivation of citizenship rights which is an inherent basic human right. These

⁸³⁹ M Field, *Black Saturday: New Zealand's tragic blunders in Samoa*(2006) 211.

⁸⁴⁰ Ministry of Pacific Island Affairs, "Speech by the New Zealand Prime Minister Rt Hon Helen Clark at the official Government Luncheon in Apia 3rd June 2002 on the occasion of Samoa's fortieth anniversary of independence" press release 2002.

⁸⁴¹ Refer to chapter 1 at 14 onwards.

breaches may be addressed in a form of apology as well as suggested changes that will prevent such incidents from reoccurring. When the Prime Minister of Australia Kevin Rudd, apologised to the Aboriginal people of Australia it was a historical event that helped address the traumatic experiences of the Aboriginal people. Rudd stated in his apology to Australia's Indigenous people:

...there comes a time in the history of nations when people must become fully reconciled to their past if they are to go forward with confidence to embrace the future.⁸⁴²

The acknowledgement of maladministration practices of past Australian governments was vital in renewing the relationship between the two parties. Policies and laws imposed in earlier times which led to the removal of aboriginal children from their families, was a traumatic experience for many Aborigines. An apology was essential to provide closure for many victims and most importantly for Australians to take ownership of their wrongdoings. The same type of apology can also be delivered to Samoa in accordance with the Treaty of Friendship and in a manner reflecting New Zealand's *sui generis* obligations. The New Zealand government has already delivered an apology acknowledging mistakes made during the colonial era. Extending that apology to acknowledge mistakes made in the post colonial era is fitting, especially when treaty obligations have been breached in such instances.

(i). A Proposed Apology:

Both Samoa and New Zealand are committed to their ongoing special relationship. An apology addressing mistakes that have been made in the past since independence is a way forward in the relationship. Below is a proposed apology that may assist.

Today, the New Zealand government has come forward to extend its apology for unfair actions that have occurred in the historical relationship of Samoa and New Zealand as close friends. We are aware of the importance of the Treaty of Friendship and at times have not upheld our treaty obligations. We reflect on the mistreatment of Samoans in New Zealand: the unfair immigration policies that were enforced upon Samoans during the 1970s and 1980s. We apologise to the victims of the Dawn raids where unjust practices and discrimination was inflicted

⁸⁴² Rudd, K, *Apology to Australia's Indigenous Peoples* [13 February 2008].

on the Samoan people. We are sorry for the wrongful actions that occurred during the Dawn raids.

We acknowledge the *Lesā* case and recognise the unconscionable exercise of power demonstrated during consultations that were carried out at the time. We understand the unfairness that occurred where many Samoan people were deprived of their citizenship rights, an inherent basic human right. We continue to acknowledge the importance of the Treaty of Friendship between both countries and wish to continue to honour the treaty to the utmost good faith. It is our hope that this apology will help rebuild an even stronger relationship and friendship for the future on the basis of a firmer foundation.

Offering an apology to the Samoan government would address all breaches that were made and may lead to a discussion of how to progress. Actions should be taken to re-establish the special relationship, with trust and a more principled and fair approach.⁸⁴³ Open discussion of grievances should be encouraged as a form of healing. It raises awareness of the mistakes that were made and the possibility of redress. From here, realistic proposals for a way forward in the special relationship between Samoa and New Zealand may be attainable.

B. A WAY FORWARD: ADDRESSING SOME OF THE CRUCIAL ISSUES IN THE SAMOA-NEW ZEALAND RELATIONSHIP.

(i) Immigration policies:

Despite the special relationship between Samoa and New Zealand, the ability for Samoans to gain access to New Zealand still remains difficult. Travel between New Zealand and Samoa is quite frequent because of family and cultural obligations such as weddings and funerals. However many still experience hardship when trying to obtain a visa to New Zealand. Samoa does not have visa-free entry into New Zealand like many other countries. Forty-six countries have visa-free entry for the period of three months or less into New Zealand.⁸⁴⁴ Samoans who have to travel to New Zealand regularly on urgent matters face numerous procedural hurdles just to obtain a visa for a short visit.

⁸⁴³ *Supra* n 799.

⁸⁴⁴ Immigration New Zealand, “Visa-free countries” See: <http://www.immigration.govt.nz/migrant/stream/visit/visitors/LinkAdministration/ToolboxLinks/visafreecountries.htm?level=1> [14 February 2010].

The overstaying problem of Samoans in New Zealand has led to the New Zealand immigration officials imposing rigid immigration policies targeting Samoans.⁸⁴⁵ Such policies have penalised other innocent family members where one family member has overstayed.⁸⁴⁶ Rigid immigration policies have also led to families in New Zealand adopting relatives' children in Samoa to ensure an opportunity of education and a future in New Zealand.⁸⁴⁷ This in turn places considerable financial burden on families in New Zealand. The implementation by the New Zealand Government measures that allow better access for Samoans to travel frequently between both countries and be less rigid with immigration policies will assist many Samoans. This is an expected consequence arising out of the special relationship.

Flexibility is part of the special relationship offering assistance when it is needed. All that is being asked is that Samoa be treated in the same manner as the other forty-six countries with visa-free entry. The fact that Samoa is not included as one of the forty-six visa-free countries is a disgrace to the special relationship and does not reflect the close ties between both countries. A New Zealand citizen may enter Samoa visa free for a temporary visit. A Samoan citizen has to apply for a visa for a short visit to New Zealand.⁸⁴⁸ All that is requested is that Samoa receives the same treatment as the other forty-six visa-free countries. New Zealand only has one Treaty of Friendship and that is with Samoa. Surely allowing Samoa the same concession as the other forty-six visa free countries is not too much to ask; it only puts Samoa in the same position as the other visa-free countries.

(ii) Education opportunities:

Education is of top priority in Samoa. Most recently, New Zealand aid has appropriated \$2million towards education in assistance of Samoa's programme of

⁸⁴⁵ Supra n 799.

⁸⁴⁶ Ibid.

⁸⁴⁷ Ibid.

⁸⁴⁸ Immigration New Zealand, "Visa-free countries" See:

<http://www.immigration.govt.nz/migrant/stream/visit/visitors/LinkAdministration/ToolboxLinks/visafreecountries.htm?level=1>[14 February 2010].

reaching compulsory education in 2015.⁸⁴⁹ Both New Zealand and Australian governments are major funders for compulsory education in Samoa. This is assistance that is fully endorsed by Samoa and its government who aims to provide compulsory education for all children at primary level.

However there are certain limitations in trying to acquire tertiary education. Most Samoan students seek higher education in New Zealand Universities and institutions. This is very difficult if a student is not a New Zealand citizen or resident. The costs of tertiary education as an international student are substantial compared to domestic fees. They are at least double the domestic rates.⁸⁵⁰ This is a hindrance for many Samoan students who want to gain higher education. Had it not been for the enactment of the Citizenship (Western Samoa) Act 1982 many of those affected by the *Lesa* decision would have been eligible to study in New Zealand as a citizen by birth or descent.⁸⁵¹

It is noted that the New Zealand International Aid and Development Agency (NZAID) programme offers educational scholarships to Samoan students but this is highly dependent on academic merit.⁸⁵²

NZ AID prioritises educational scholarships to enhance the skills, training and knowledge of selected individuals and thereby build capacity to contribute to the sustainable development of key areas in their home country.⁸⁵³

The opportunity to gain an educational scholarship is competitive and limited. Applicants would have to be at least in the top of their class to be awarded such a scholarship. Providing higher education opportunities will create an up skilled population, create efficiency and provide a reasonable standard of living for Samoan families. Samoan students resident in New Zealand have greater access to tertiary education which is made possible through a number of scholarships

⁸⁴⁹ “Free Education embraced” in Samoa Observer [21 January 2009] See: http://www.samoobserver.ws/index.php?option=com_content&view=article&id=17937:free-education&catid=1:latest-news&Itemid=50.

⁸⁵⁰ University of Waikato Law School, “Domestic and International Students Tuition Fees” See: <http://www.waikato.ac.nz/international/feesAndCosts/>[10 February 2010].

⁸⁵¹ Sections 4, 5, 7, Citizenship (Western Samoa) Act 1982.

⁸⁵² New Zealand International Aid & Development Agency, “Scholarships” See: <http://www.nzaid.govt.nz/scholarships/>[14 February 2010].

⁸⁵³ *Ibid.*

available to students of Pacific Island descent.⁸⁵⁴ There are programmes in New Zealand Universities that offer programmes to non citizen and non resident students to undertake tertiary study on domestic rates, for example doctoral studies. This is provided they satisfy the prescribed criteria.⁸⁵⁵ This same provision can be applied to Samoan students seeking tertiary education in New Zealand provided that they achieve a basic standard and meet the required criteria. Samoan students should be able to study on domestic rates as well. This is clearly appropriate when many of the people who have to pay international fees would have been eligible for citizenship by birth or descent had it not been for the overturning of the *Lesia*⁸⁵⁶ decision. Also this initiative promotes the welfare of the Samoan people as undertaken by the New Zealand government in Article IV of the Treaty of Friendship.

(iii) Health:

Health is a core area in Samoa that still requires constant assistance. The NZAID programme targets health as one of the core areas for aid assistance. For the years 2009/2020 New Zealand is providing NZ\$700,000 annually in support of the Samoan Health Department.⁸⁵⁷ This amount will assist in funding the Medical Treatment Scheme and the Visiting Medical Specialist Scheme.⁸⁵⁸ The Medical Treatment scheme supports treatment costs in New Zealand hospitals for Samoan-based patients with life-threatening medical conditions.⁸⁵⁹ The Visiting Medical Specialist scheme supports medical practitioners and New Zealand specialists who travel to Samoa to treat patients and provide workshops and training for Samoan medical professionals.⁸⁶⁰

Samoan-based patients who are not eligible under the Medical Treatment scheme have to depend on families in New Zealand to fund any medical treatment that

⁸⁵⁴ *Supra* n 799.

⁸⁵⁵ Non citizen and non resident Ph.D students at the University of Waikato School of Law are offered domestic rates provided they satisfy the required criteria, See: "Fees and Financial Matters" http://www.waikato.ac.nz/law/postgraduate/financial_matters[10 February 2010].

⁸⁵⁶ *Lesia v Attorney-General* [1982] 1 NZLR 165.

⁸⁵⁷ New Zealand International Aid and Development Agency, "Samoa" See: <http://www.nzaid.govt.nz/programmes/c-samoa.html>[14 February 2010].

⁸⁵⁸ *Ibid.*

⁸⁵⁹ *Ibid.*

⁸⁶⁰ *Ibid.*

may be conducted in New Zealand. Due to the fact that they are non New Zealand residents or citizens they have to pay international fees which are unaffordable by most families. The health care provisions in Samoa are reflective of a developing country. The lack of resources and qualified and experienced medical staff is obvious with the many premature deaths that occur in Samoa.⁸⁶¹ If there is an area that Samoa really needs assistance it would be in health care.

At present, Samoa's main epidemic is heart diseases. This is due to the lifestyle and diet that Samoans have become accustomed to. Samoa is in dire need of intervention programmes and heart specialists to help educate the population on how to improve their health. A high number of the population suffer from diabetes, high-blood pressure and obesity.⁸⁶² Obesity in children has become prevalent and it is predicted that if Samoa continues along this path it will have long-term and inter-generational detrimental effects on the population. Support and expertise is needed to target this overwhelming problem in Samoa. The New Zealand government may chose to contribute to this preventative measure. Only a small percentage of the population are able to afford to travel to New Zealand for medical care. Even so they are required to pay international medical fees if they are non citizens or non residents. Again, the New Zealand government may assist by offering subsidies or incentives when it comes to very expensive health care such as surgeries that are vital to prevent the patient from dying prematurely. Offering domestic rates will assist such patients greatly as there is always the extended family that will always support in other ways such as accommodation, travel and transportation costs.

Such assistance would truly reflect the special relationship between the countries. New Zealand has undertaken to promote the welfare of Samoa, this is a way that obligation may be met.

⁸⁶¹ "Obesity problem alarming" in Samoa Observer 26 January, 2010 See: http://www.samoobserver.ws/index.php?option=com_content&view=article&id=18200:obesity-problem&catid=1:latest-news&Itemid=50 ; "MP backs medical lawsuit" in Samoa Observer 12 Feb, 2010 See:

http://www.samoobserver.ws/index.php?option=com_content&view=article&id=18918:mp-backs&catid=1:latest-news&Itemid=50;

⁸⁶² Ibid.

(iv) Revisiting the Immigration quota system & Recognised Seasonal Employment scheme:

The Samoa quota system allows 1,100 applicants per annum to migrate to New Zealand. Samoans have found it more difficult to gain entry into New Zealand than other countries especially when it is an application for permanent residence. This may be countered by the Samoan quota system, however successful applicants still struggle to meet the criteria as they do not commonly have the job skills and education level to satisfy the required ‘points’.⁸⁶³ The required minimum income requirement to be eligible under the Samoa quota system is \$29,939.52.⁸⁶⁴ Many applicants struggle to meet this requirement especially if they have no acquired skills or knowledge to obtain employment in New Zealand. Although the quota system may counter the difficult entry requirements to New Zealand, the quota system itself presents limitations to many successful applicants.

Measures can be suggested to help improve such complications where skill training incentives and education programmes may be offered to applicants to assist in securing a permanent job. There are Samoans citizens who travel to New Zealand under the Recognised Seasonal Employment (RSE) programme. The RSE Work Policy is a multi-governmental initiative that was introduced in 2007 to address the shortage of local workers in the New Zealand horticulture and viticulture industry.⁸⁶⁵ It is a programme which is supported by the New Zealand government which offers temporary employment opportunities to Pacific Island people. There are five countries involved in this scheme that are known as the kick-state countries. These countries include Vanuatu, Tonga, Samoa, Tuvalu and Kiribati. The RSE programme is restricted to these five Pacific countries and the Labour Department sets out the arrangements for the programme.⁸⁶⁶ The work

⁸⁶³ Supra n 799; Also refer to Immigration New Zealand “Samoa Quota Scheme” See: <http://www.immigration.govt.nz/migrant/stream/live/pacificaccess/residence/minimumincome.htm> [14 February 2010].

⁸⁶⁴ Ibid.

⁸⁶⁵ New Zealand Department of Labour, “International Migration, Settlement & Employment Dynamics, IMSED Research (2009).

See: <http://www.immigration.govt.nz/NR/rdonlyres/C2222267-E10A-461F-ADF4-7FFED28BFB8A/0/lowresDOL11060SummaryofEvaluationofRSEPolicyFirstSeason200708040609.pdf>.

⁸⁶⁶ Ibid.

made available to Pacific recruits is only available if no New Zealand workers are available.

To take the RSE programme a step further is to suggest that those who have had a good record in the programme and if they wish, may be extended a full work permit leading to residency. To a certain effect, this will enable those brought over on the RSE programme to be tied into the quota system that is currently offered for Samoan applicants. The RSE programme only employs workers temporarily, perhaps if they have worked long enough for a certain period of time (which could be years) and are of good character, they can be offered this opportunity. Other provisions could be offered such as full time accommodation, guaranteed job for a more permanent time period to make the transition smoother. With the RSE workers scheme one could say that this is creating opportunities for people who would not come within the quota system. Focusing on work record and character also considers the interests of New Zealand.

(v) Honouring the 1962 Treaty of Friendship.

Both the New Zealand and Samoan governments are willing to engage to develop the relationship between both countries. It is recommended that this may be achievable when both governments meet to consult on the special features of the Treaty of Friendship. This thesis has pointed out several special features of the Treaty of Friendship such as: the duty to consult with one another; the obligation of the New Zealand government to promote the welfare of the Samoan people; the provision of equitable treatment of people from both nations; the continuing provision of assistance by the New Zealand Government in matters of particular interest (foreign policies, international relations, immigration and citizenship issues); the strong historical and ongoing links between both countries. Once the special features of the Treaty of Friendship are identified and developed there will be a greater understanding to how the relationship can move forward. It will also assist in preventing future mistakes. As advocated in chapter 3 the journey of the Treaty of Waitangi and the relationship of Māori and Pākehā has been gradual and shaky but there has been some progress. In the same way the articulation of the obligations arising out of the articles of the Treaty of Friendship, will lead to

clarification of the expected relationship, identification of the breaches and how these can best be addressed.

D. Is the Samoa and New Zealand relationship one of a *sui generis* fiduciary nature?

This question in essence is the main focus point of this thesis. Can the relationship of Samoa and New Zealand be compared to that of a Crown-Aboriginal relationship where it has been found to have a *sui generis* fiduciary relationship?⁸⁶⁷ This thesis has aimed at providing a historical and legal perspective of the special relationship of Samoa and New Zealand. The colonial relationship between Samoa and New Zealand truly reflects a relationship of power imbalance and vulnerability. A colonial relationship reflects fiduciary principles where the treatment accorded to one party (the colonised) is largely dependent on the discretion of the other (the coloniser). A *sui generis* fiduciary relationship is one that encompasses fiduciary principles but consists of specific facts that make the relationship different from any other type of relationship.

What makes the Samoa-New Zealand relationship different from others? Sovereign countries are independent nations that are in control of their own affairs. They may be assisted by other countries but have their own discretion to make decisions for the well-being of its people. Samoa has strongly been and continues to be influenced by New Zealand. This may have begun from its earlier colonial relationship but it has extended to a post colonial relationship. The numbers of Samoans residing in New Zealand are significant, almost the same as the population of Samoans in Samoa itself. Samoans will of course choose to enter New Zealand on a regular basis because of family connections, economic and educational opportunities and close ties. The New Zealand government at their discretion is able to control the flow of Samoans into New Zealand. This is evidenced with the imposition of rigid immigration policies.

⁸⁶⁷ *Guerin v The Queen* (1984) 13 DLR (4th) 321; *Mabo v Queensland(No.2)* [1992] 175 CLR 1.

The elements of a fiduciary relationship are clearly evident in the relationship between New Zealand and Samoa as it has become clear that in a number of key areas New Zealand has the scope for the exercise of discretion. Fiduciary principles are highly relevant to the Samoan-New Zealand relationship. This is evident from historical and ongoing events. The New Zealand government may unilaterally exercise its power or discretion to advance or undermine the interests of Samoa. This is evidenced through the deprivation of citizenship rights post *Lesa*. Samoa is vulnerable to the New Zealand government holding discretion and power as evidenced in the handling of *Lesa*.⁸⁶⁸ The economic dependence of Samoa with the sending of money over to Samoa by the New Zealand government and Samoans residing in New Zealand represents an example of the ongoing fiduciary nature of the relationship and the vulnerability of Samoa.

The relationship of Samoa and New Zealand, although once colonial is now a special relationship between two independent countries governed by a Treaty of Friendship. If a country agrees and signs a Treaty, their obligations to the Treaty and its parties are undertakings that are imperative to the relationship. Treaties are the law that governs nations' affiliations therefore the Treaty of Friendship should also govern and regulate the relationship of Samoa and New Zealand.

The Treaty of Friendship is a sacred agreement between Samoa and New Zealand. It contains special features reflective of an indigenous Treaty that establishes a relationship of a *sui generis* fiduciary nature. Other special features discussed in chapter 3 also point to the uniqueness of the Samoa-New Zealand relationship. The existence of the Samoa Immigration quota system is a unique feature itself which continues to encourage the ongoing close ties of both nations. Although there is a Pacific Access quota scheme, allocating a separate category for Samoa only acknowledges the special relationship between both countries. Why does New Zealand offer this scheme to Samoa only? Because of many reasons: the historical relationship, its ongoing relationship recognising the close links between both countries, and a further guilt response to the *Lesa* decision. Other migration schemes such as the Regional Seasonal Employment programme

⁸⁶⁸ *Lesa v Attorney-General* [1982] 1 NZLR 165.

continue to foster the ongoing ties of both countries. The cumulative impact of the historical relationship through the League of Nations and Trusteeship agreement; Treaty of Friendship; the result of *Lesa* finding Samoa being a part of New Zealand for a period; close and ongoing interaction through migration and economic dependence when considered together clearly establish a special relationship. The Treaty of Friendship itself both acknowledges and is a manifestation of this special relationship.

The relationship has been volatile and has included unconscionable acts breaching the special relationship between both countries. The New Zealand government is obligated to promote the welfare of the Samoan people therefore not undermining Samoan interests. It is a relationship that will continue to grow and if the special relationship is not well articulated future mistakes may reoccur just as in the past. Therefore it is crucial for the special relationship of both countries to be articulated and addressed for a way forward in the relationship.

E. CONCLUSION

The aim of this thesis has been important to articulate the meaning of the special relationship between Samoa and New Zealand. The fiduciary principles encompassed in a *sui generis* fiduciary relationship are clearly relevant to the Samoa-New Zealand relationship. Throughout the relationship there has been an exercise of power and discretion of the New Zealand government upon Samoan people. The vulnerability of the Samoan people has been evident in past events such as the Dawn raids, the aftermath of the *Lesa*⁸⁶⁹ and rigid immigration policies. There has been a lack of meaningful consultation in relation to dire matters relating to both countries. Some unconscionable actions of the New Zealand government have yet to be acknowledged and recognised. However the aim of this study is not to condemn the New Zealand government about past events but to highlight how the relationship between both countries has played out in the last century, and how the relationship may be improved.

The fact is that a Treaty exists between both countries which can assist in regulating the relationship.

⁸⁶⁹ *Lesa v Attorney-General* [1982]1 NZLR 165.

The Treaty of Friendship between Samoa and New Zealand is a unique document reflective of a Crown-Aboriginal relationship. The Treaty of Friendship stipulates promises, responsibilities and obligations between two parties so that future interaction will be peaceful and in the spirit of close friendship. The Treaty of Friendship was signed a few months after New Zealand had relinquished its administration ties of Samoa. The relationship then was one of a Colonist and territory which is analogous to a Crown-Aboriginal relationship. The New Zealand government relinquishing their administration ties did not mean that they would not be able to exert any power or discretion over Samoa. They were still able to exert power and discretion which is clearly reflected in *Lesā*.⁸⁷⁰ The New Zealand government will continue to influence Samoa because of the significant number of Samoan people who reside and work in New Zealand. The relationship will remain ongoing with the Treaty of Friendship used as a form to regulate the relationship.

Treaty rights are enforceable obligations based on mutual consent of the involved parties.⁸⁷¹ Both Samoa and New Zealand should continue to uphold the obligations contained within the Treaty. It will definitely take time but it is always best to make a start. As Lord Cooke stated in reference to the Treaty of Waitangi, “a treaty is seen as an embryo rather than a fully developed and integrated set of ideas.”⁸⁷² Likewise in the Samoan context the Treaty of Friendship can be interpreted the same way as long as there is a start to articulating its special features and acknowledging the existence of the special relationship between both countries.

The historical and ongoing relationship between Samoa and New Zealand will only continue to develop through migration (i.e. Immigration quota system), international relations, social and economic factors. These features all clearly amount to a unique relationship. The cumulative impact of these features together with the Treaty of Friendship itself does point to a fiduciary relationship of a *sui generis* nature. The relationship between the two countries should be administered

⁸⁷⁰ Ibid.

⁸⁷¹ *R v Badger* [1996] 1 S.C.R. 771 at para 76.

⁸⁷² *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641.

to give legal and practical effect. In this way, both parties will have a much clearer understanding of what the special relationship between Samoa and New Zealand truly means.

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Appendix 1: League of Nations Mandate 1920

The Council of the League of Nations:

Whereas by Article 119 of the Treaty of Peace with Germany, signed at Versailles, on June 28th, 1919, Germany renounced in favour of the Principal Allied and Associated Powers all her rights over her overseas possessions, including therein German Samoa:

And whereas the principal Allied and Associated Powers agreed that, in accordance with Article 22, Part I (Covenant of the League of Nations), of the said treaty, a date should be conferred upon His Britannic Majesty, to be exercised on his behalf by the Government of the Dominion of New Zealand, to administer German Samoa, and have proposed that the mandate should be formulated in the following terms:

And whereas His Britannic Majesty, for and on behalf of the Government of the Dominion of New Zealand, has agreed to accept the mandate in respect of the said Territory, and has undertaken to exercise it on behalf of the League of Nations in accordance with the following provisions:

And whereas by the aforementioned Article 22, paragraph (8), it is provided that the degree of authority, control, or administration to be exercised by the Mandatory, not having been previously agreed upon by the members of the League, shall be explicitly defined by the Council of the League of Nations:

Confirming the said mandate, defines its terms as follows:

Article 1

The Territory over which a mandate is conferred upon His Britannic Majesty for and on behalf of the Government of the Dominion of New Zealand (hereinafter called the Mandatory) is the former Germany Colony of Samoa.

Article 2

The Mandatory shall have full power of administration and legislation over the Territory, subject to the present mandate, as an integral portion of the Dominion of New Zealand, and may apply the laws of the Dominion of New Zealand to the Territory, subject to such local modifications as circumstances may require.

The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory subject to the present mandate.

Article 3

The Mandatory shall see that the slave trade is prohibited, and that no forced labour is permitted, except for essential public works and services, and then only for adequate remuneration.

The Mandatory shall also see that the traffic in arms and ammunition is controlled in accordance with principles analogous to those laid down in the Convention relating to the control of the arms traffic, signed on September 10th, 1919, or in any convention amending the same.

The supply of intoxicating spirits and beverages to the Natives shall be prohibited.

Article 4

The military training of the Natives, otherwise than for purposes of internal police and the local defence of the Territory, shall be prohibited.

Furthermore, no military or naval bases shall be established or fortifications erected in the Territory.

Article 5

Subject to the provisions of any local law for the maintenance of public order and public morals, the Mandatory shall ensure in the Territory freedom of conscience and the free exercise of all forms of worship, and shall allow all missionaries, nationals of any State member of the League of Nations, to enter into, travel, and reside in the Territory for the purpose of prosecuting their calling.

Article 6

The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the Territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4, and 5.

Article 7

The consent of the Council of the League of Nations is required for any modification of the terms of the present mandate.

The Mandatory agrees that if any dispute whatever should arise between the Mandatory and another member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

The present declaration shall be deposited in the archives of the League of Nations. Certified copies shall be forwarded by the Secretary-General of the League of Nations to all Powers signatories of the Treaty of Peace with Germany.

Made at Geneva the 17th day of December, 1920.

JEAN MONNET,
Deputy Secretary-General.

Appendix 2: Trusteeship Agreement for the Territory of Western Samoa
1946.

Trusteeship Agreement for the Mandated Territory of Western Samoa, as approved by the General Assembly at the sixty-second Plenary Meeting of its First Session on 13 December, 1946.

WHEREAS the territory of Western Samoa has been administered in accordance with Article 22 of the Covenant of the League of Nations and pursuant to a mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of New Zealand;

[Article 75]

AND WHEREAS the Charter of the United Nations signed at San Francisco on 26 June 1945, provides for the establishment of an international trusteeship system for the administration and supervision of such territories as may be the subject of trusteeship agreements;

[Article 77]

AND WHEREAS under the said Charter the international trusteeship system may be applied to territories now held under mandate;

AND WHEREAS the Government of New Zealand have indicated their willingness that the said international trusteeship system be applied to Western Samoa;

AND WHEREAS the Government of New Zealand have indicated their willingness that the said international trusteeship system be applied to Western Samoa;

AND WHEREAS the said Charter provides further that the terms of trusteeship are to be approved by the United Nations⁸⁷³;

[Article 85)

NOW, THEREFORE, the General Assembly of the United Nations, hereby resolves to approve the following terms of trusteeship for Western Samoa, in substitution for the terms of the aforesaid mandate⁸⁷⁴:

Article I

The territory to which this agreement applies is the territory known as Western Samoa comprising the islands of Upolu, Savai'i, Manono, and Apolima, together with all other islands and rocks adjacent thereto.

Article II

The Government of New Zealand are hereby designated as the administering authority for Western Samoa.

⁸⁷³ In the original draft submitted to the United Nations this clause read as follows: "And whereas the said Charter provides further that the terms of trusteeship are to be *agreed upon by the States directly concerned, including the mandatory Power and* approved by the General Assembly." It was agreed during the discussion of the phrase "States directly concerned" that the italicised portion should be deleted.

⁸⁷⁴ The original draft contained the following additional words after "United Nations: in this clause: "*in accordance with the terms of the said Charter having satisfied itself that the provisions of Article 79 of the Charter have been complied with.*" These words were deleted at the same time as those mentioned in footnote 863.

Article III

The administering authority shall have full powers of administration, legislation and jurisdiction over the territory, subject to the provisions of this agreement, and of the Charter of the United Nations⁸⁷⁵, and may apply to the territory, subject to any modifications which the administering authority may consider desirable, such of the laws of New Zealand as may seem appropriate to local conditions and requirements.

Article IV

The administering authority undertakes to administer Western Samoa in such a manner as to achieve in that territory the basic objectives of the international trusteeship system, as expressed in Article 76 of the Charter of the United Nations, namely:

" (a) to further international peace and security;

" (b) to promote the political, economic, social and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;

" (c) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion, and to encourage recognition of the inter-dependence of the peoples of the world; and

" (d) to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80."

Article V

The administering authority shall promote the development of free⁸⁷⁶ political institutions suited to Western Samoa. To this end and as may be appropriate to the particular circumstances of the territory and its peoples, the administering authority shall assure to the inhabitants of Western Samoa a progressively increasing share in the administrative and other services of the territory, shall develop the participation of the inhabitants of Western Samoa in advisory and legislative bodies and in the government of the territory, and shall take all other appropriate measures with a view to the political advancement of the inhabitants of Western Samoa in accordance with Article 76 (b) of the Charter of the United Nations.

Article VI

In pursuance of its undertaking to promote the social advancement of the inhabitants of the trust territory, and without in any way limiting its obligations thereunder, the administering authority shall:

1. Prohibit all forms of slavery and slave-trading;

⁸⁷⁵ The original Article III contained the following words after "agreement": "as an *integral part of New Zealand*." This phrase was deleted and replaced by the phrase "and the Charter of the United Nations."

⁸⁷⁶ The original draft was changed by the addition of the word "*free*".

2. Prohibit all forms of forced or compulsory labour, except for essential public works and services as specifically authorized by the local administration and then only in times of public emergency, with adequate remuneration and adequate protection of the welfare of the workers;
3. Control the traffic in arms and ammunition;
4. Control, in the interest of the inhabitants, the manufacture, importation and distribution of intoxicating spirits and beverages; and
5. Control the production, importation, manufacture, and distribution of opium and narcotic drugs.⁸⁷⁷

Article VII

The administering authority undertakes to apply in Western Samoa the provisions of any international conventions and recommendations as drawn up by the United Nations or its specialized agencies which are, in the opinion of the administering authority, appropriate to the needs and conditions of the trust territory, and conducive to the achievement of the basic objectives of the international trusteeship system.

Article VIII

In framing the laws to be applied in Western Samoa the administering authority shall take into consideration Samoan customs and usages and shall respect the rights and safeguard the interests both present and future of the Samoan population. In particular, the laws relating to the holding or transfer of land shall ensure that no Native land may be transferred save with the prior consent of the competent public authority and that no right over Native land in favour of any person not a Samoan may be created except with the same consent.

Article IX

The administering authority shall ensure in the territory freedom of conscience and the free exercise of all forms of worship, and shall allow missionaries, nationals of any State Member of the United Nations, to enter into, travel and reside in the territory for the purpose of prosecuting their calling. The provisions of this Article shall not, however, affect the right and duty of the administering authority to exercise such control as it may consider necessary for the maintenance of peace, order and good government.

Article X

The administering authority shall ensure that the trust territory of Western Samoa shall play its part, in accordance with the Charter of the United Nations, in the maintenance of international peace and security. To this end the administering authority shall be entitled:

1. To establish naval,-military and air bases and to erect fortifications in the trust territory;
2. To station and employ armed forces in the territory;
3. To make use of volunteer forces, facilities and assistance from the trust territory in carrying out the obligations toward the Security Council undertaken in this

⁸⁷⁷ Clause 5 is an additional undertaking which was not contained in the draft submitted to the United Nations.

regard by the administering authority, as well as for local defence and the maintenance of law and order within the trust territory;

4. To take all such other measures in accordance with the Purposes and Principles of the Charter of the United Nations as are in the opinion of the administering authority necessary to the maintenance of international peace and security and the defence of Western Samoa.

Article XI

The administering authority shall, as may be appropriate to the circumstances of the trust territory, continue and extend a general system of education, including post-primary education and professional training.

Article XII

Subject only to the requirements of public order, the administering authority shall guarantee to the inhabitants of the trust territory, freedom of speech, of the press, of assembly and of petition.

Article XIII

The administering authority may arrange for the co-operation of Western Samoa in any regional advisory commission, regional technical organization, or other voluntary association of states, any specialized international bodies, public or private, or other forms of international activity not inconsistent with the Charter of the United Nations.

Article XIV

The administering authority shall make to the General Assembly of the United Nations an annual report on the basis of a questionnaire drawn up by the Trusteeship Council in accordance with the Charter of the United Nations and shall otherwise collaborate fully with the Trusteeship Council in the discharge of all the Council's functions in accordance with Articles 87 and 88 of the Charter.⁸⁷⁸ The administering authority shall arrange to be represented at the Sessions of the Trusteeship Council at which the reports of the administering authority with regard to Western Samoa are considered.

Article XV

The terms of this agreement shall not be altered or amended except as provided in Article 79 of the Charter of the United Nations.

Article XVI

If any dispute should arise between the administering authority and another Member of the United Nations, relating to the interpretation or application of the provisions of this agreement, such dispute, if it cannot be settled by negotiation or similar means, shall be submitted to the International Court of Justice.

⁸⁷⁸ The words "in accordance with Articles 87 and 88 of the Charter" were added to the text of the original draft.

Appendix 2(a): Appendix to Trusteeship Agreement for Western Samoa

Article 75

The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories.

Article 76

The basic objective of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

- (a) To further international peace and security;
- (b) To promote the political, economic, social and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;
- (c) To encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and
- (d) To ensure equal treatment in social, economic, and commercial matters for all members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

Article 77

1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements.
 - (a) Territories now held under mandate;
 - (b) Territories which may be detached from enemy states as a result of the Second World War; and
 - (c) Territories voluntarily placed under the system by states responsible for their administration.
2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms.

Article 78

The trusteeship system shall not apply to territories which have become members of the United Nations, relationship among which shall be based on respect for the principles of sovereign equality.

Article 79

The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held

under mandate by a member of the United Nations, and shall be approved as provided for in Articles 83 and 85.

Article 80

1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.
2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77.

Article 81

The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states of the Organisation itself.

Article 82

There may be designated, in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies, without prejudice to any special agreement or agreements made under Article 43.

Article 83

1. All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council.
2. The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area.
3. The Security Council shall, subject to the provision of the trusteeship agreements and without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political, economic, social and educational matters in the strategic areas.

Article 84

It shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security. To this end the administering authority may make use of volunteer forces, facilities, and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for local defence and the maintenance of law and order within the trust territory.

Article 85

1. The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly.
2. The Trusteeship Council, operating under the authority of the General Assembly, shall assist the General Assembly in carrying out these functions.

Appendix 3: Treaty of Friendship between the Government of Western Samoa and the Government of New Zealand (Samoa, 1 August 1962)

The Government of New Zealand and the Government of Western Samoa, **AFFIRMING** that their relations, as Governments of sovereign and equal states, are founded upon respect fundamental human rights and for the purposes and principles of the Charter of the United Nation,

RECOGNIZING that friendship, confidence, and a mutual endeavour to obtain for their peoples fuller opportunities for social progress have established a specially intimate relationship between them,

AND DESIRING to maintain and strengthen the bonds of amity and goodwill which have hitherto existed between and to provide for continued cooperation,

HAVE AGREED AS FOLLOWS:

Article I

Relations between New Zealand and Western Samoa shall continue to be governed by a spirit of close friendship.

Article II

Where appropriate the two Governments shall consult each other on matters of mutual interest and concern.

Article III

Each Government shall ensure that citizens of the other living within its territory are, in accordance with the normal practice between friendly states, given equitable treatment and full legal protection and access to the Courts.

Article IV

The two Governments shall continue to work together to promote the welfare of the people of Western Samoa.

In particular the Government of New Zealand will consider sympathetically requests from the Government of Western Samoa for technical, administrative and other assistance.

Article V

The Government of New Zealand shall for as long as the Government of Western Samoa wishes, and in such manner as will in no way impair the right of the Government of Western Samoa to formulate its own foreign policies, afford assistance to the Government of Western Samoa in the conduct of its international affairs. In particular the Government of New Zealand will:

(a) when requested, act as the channel for communications for Western Samoa and other Governments and international organizations;

(b) when requested, and where permissible and appropriate, undertake the representation of the Government of Western Samoa at any international conference at which Western Samoa is entitled to be represented;

(c) when requested, supply Western Samoa with information concerning international affairs;

(d) undertake the diplomatic protection of nationals of Western Samoa in other countries and perform consular functions on their behalf.

Article VI

Either Government may at any time give to the other Government written notice of its desire to terminate this Agreement. In such case, this Agreement shall terminate upon the expiration of three months from the date on which the notice is received.

Article VII

This Agreement shall enter into force on the date of signature.

IN WITNESS WHEREOF, the representative of the Government of New Zealand, and the representative of the Government of Western Samoa, duly authorized for the purpose, have signed this Agreement.

DONE at Apia, this 1st day of August 1962 in four originals, two being in the English language, and two in the Samoan language, the texts of both languages being equally authentic.

For the Government of New Zealand: For the Government of Western Samoa:

J.B.Wright
[Signed]

Fiame Mata'afa F.M.II
[Signed]

Appendix 4: Protocol to the Treaty of Friendship between the Government of Western Samoa and the Government of New Zealand(Samoa, 21 August 1982)

ENTRY INTO FORCE: 13 SEPTEMBER 1982

Depositary: New Zealand

The Government of Western Samoa and the Government of New Zealand,

REAFFIRMING that their relations are founded upon sovereign equality and continue to be governed by a spirit of close friendship,

RECOGNISING that the special relationship between Western Samoa and New Zealand requires that issues affecting the two countries and their citizens should be resolved on a cooperative basis,

HAVING considered the circumstances under which citizens of Western Samoa could appropriately acquire citizenship of New Zealand,

NOTING that, in accordance with international law and practice, it is for each country to determine under its own law who are its citizens,

RECOGNISING that a country normally grants citizenship only to those individuals having a close and effective link with it,

RECOGNISING further that the ties of history, friendship and law between Western Samoa and New Zealand are such as to give the citizens of Western Samoa a claim to special treatment under the New Zealand law governing citizenship,

HAVE AGREED AS FOLLOWS:

Article I

At the request of either, the two Governments shall consult on any issue relating to the operation of their respective laws governing citizenship and immigration.

Article II

The Government of New Zealand shall:

(a) grant to all citizens of Western Samoa in New Zealand on the date of entry into force of this Protocol the right to become New Zealand citizens immediately upon application;

(b) grant to those citizens of Western Samoa who travel to New Zealand after the entry into force of this Protocol and who, pursuant to the policy and practice implemented by New Zealand prior to 19 July 1982, would have been granted permanent residence status either on arrival in New Zealand or subsequently, the additional right to become New Zealand citizens immediately upon application after acquisition of permanent residence status.

Article III

For the purposes of this Protocol the term 'New Zealand' shall not include the Cook Islands, Niue or Tokelau.

Article IV

This Protocol shall be read with, and form an integral part of, the Treaty of Friendship between the Government of Western Samoa and the Government of New Zealand done at Apia on 1 August 1962.

Article V

This Protocol shall be subject to ratification. It shall enter into force on the date of the exchange of instruments of ratification.

IN WITNESS WHEREOF the representative of the Government of Western Samoa and the representative of the Government of New Zealand, duly authorised for the purpose, have signed this Agreement.

DONE at Apia this 21st day of August 1982

in four originals, two being in the Samoan language, and two in the English language, the texts of both languages being equally authentic.

**FOR THE GOVERNMENT OF
WESTERN SAMOA**

[Signed]

TOFILAU ETI

**FOR THE GOVERNMENT OF NEW
ZEALAND**

[Signed]

J. K. MCLAY

Appendix 5: Te Tiriti o Waitangi 1840/ The Treaty of Waitangi 1840.

Māori Text:

TE TIRITI O WAITANGI

Ko Wikitoria te Kuini o Ingarani i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira - hei kai wakarite ki nga Tangata māori o Nu Tirani - kia wakaaetia e nga Rangatira māori te Kawanatanga o te Kuini ki nga wahikatoa o te wenua nei me nga motu - na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kua ai nga kino e puta mai ki te tangata māori ki te Pākehā e noho ture kore ana.

Na kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aiane amua atu ki te Kuini, e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

Ko te tuatahi

Ko nga Rangatira o te wakaminenga me nga Rangatira katoa hoki ki hai i uri ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu - te Kawanatanga katoa o o ratou wenua.

Ko te tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu - ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te wenua - ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

Ko te tuatoru

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini - Ka tiakina e te Kuini o Ingarani nga tangata māori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

[signed] W. Hobson Consul & Lieutenant Governor

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu. Ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano e waru rau e wa te kau o to tatou Ariki.

Ko nga Rangatira o te Wakaminenga

English Text:

THE TREATY OF WAITANGI

Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favor the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any part of those islands - Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to Her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Article the first

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation of Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole sovereigns thereof.

Article the second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs, yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article the third

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

[signed] W. Hobson Lieutenant Governor

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord one thousand eight hundred and forty.

The Chiefs of the Confederation.

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