NEW ZEALAND CITIZENSHIP AND WESTERN SAMOA: A LEGACY OF THE MANDATE

F M BROOKFIELD*

I INTRODUCTION

From 1920 until 1 January 1962 when the Western Samoa Act 1961 came into force, Western Samoa was administered by New Zealand first (until 1947) as an "integral portion" of its own territory under mandate of the League of Nations and then as a trust territory under the United Nations Charter. The reality and extent of New Zealand power, particularly in the 27-year period of the mandate, and its expression in legislation, not surprisingly created legal problems. Most of them arose from the Mau disturbances of the 1920s and early '30s and were dealt with by the courts of the day.[1] But one problem, appearing as it were out of due season, has latterly confronted the courts and the legislature of the one-time mandatory: that of the national status of the inhabitants of Western Samoa under the mandate and trusteeship.

The problem was this. Under the transitional provisions of s 16 (3) of the British Nationality and New Zealand Citizenship Act 1948 ("the Act of 1948"), British subjects who had been born in Western Samoa became New Zealand citizens; and males who were New Zealand citizens under that subsection transmitted (by s 7 (1)) citizenship by descent to their children born after the Act of 1948 came into force.[2] Two Acts of the New Zealand Parliament of the 1920s had successively provided for the (otherwise common law) status of British subject in New Zealand law: the British Nationality and Status of Aliens (in New Zealand) Act 1923 ("the Act of 1923") and the British Nationality and Status of Aliens (in New Zealand) Act 1928 ("the Act of 1928") which replaced it with similar effect and was in force until repealed by the Act of 1948. The Act of 1923 and the Act of 1928[3] had either (i) a limited or (ii) a wider application to Western Samoa:

(i) The two Acts effectively applied to the Territory only to enable the naturalization of aliens resident there; or

(ii) they applied to it not only for that purpose but to make British subjects by birth those persons who were born in Western Samoa while the two Acts were successively in force.

*BA, LLB (NZ), D Phil (Oxon), Associate Professor of Law, University of Auckland. For help in the preparation of background and obtaining material, I am grateful to the late Mr Justice Spring, to Vaimasanuu Apa (Western Samoan Consul-General at Auckland), Mr Charles Johnson, the Revd John Ker, and Dr Hugh Laracy. I remain of course alone responsible for the substance and conclusions of the article.

1 *Tagaloa* v *Inspector of Police* [1927] NZLR 883; *Re Tamasese* [1929] NZLR 209; *Nelson* v *Braisby (No 2)* [1934] NZLR 559.

2 On 1 January 1949.

3 Together conveniently called "the Acts of 1923 and 1928".

The Court of Appeal in *Levave* v *Immigration Department*,[4] concerned with the Act of 1923, decided in accordance with the generally accepted view for (i), the limited application; then, in *Lesa* v Attorney-General,[5] it followed its own decision, concerned now with the essentially similar provisions of the Act of 1928.

On appeal in *Lesa's* case,[6] the Privy Council preferred (ii)—the wider application of the Acts of 1923 and 1928 — allowing the appeal and disapproving the Court of Appeal's judgment in *Levave's* case. As the result of Miss Lesa's successful litigation many thousands of Western Samoans were found to have New Zealand citizenship, some transitionally under s 16 (3) and others by descent under s 7 (1) of the Act of 1948; and hence to have it under s 13 of the Citizenship Act 1977.

Overtly resentful of the possibly embarrassing effects of the Privy Council's decision on immigration policy, the New Zealand Government moved rapidly to introduce countervailing legislation. The effect of the Citizenship (Western Samoa) Act 1982 on nearly all those having citizenship under the decision was to deprive them of it unless they were in New Zealand at any time on 14 September 1982.[7]

Few judgments in New Zealand's legal history have had so much public impact or caused so much public controversy as the Privy Council's rejection in *Lesa's* case of the long-held view that inhabitants of Western Samoa, unless naturalized, had no higher or other status in New Zealand municipal law than that of first British protected persons at common law and then New Zealand protected persons under the Western Samoa New Zealand Protected Persons Order 1950.[8] The inconvenience of the decision as apprehended by some politicians prompted their confident assertions that the Privy Council had got the law wrong — assertions by no means necessary to justify the remedial action that the Government felt required to take. And that action in turn incurred criticism; first, of the speed with which the Government acted in introducing the Citizenship (Western Samoa) Bill and negotiating somewhat forcefully, it was thought, the protocol of 21 August 1982 with Western Samoa that secured that State's agreement to the legislation; and secondly, and more seriously, taking from thousands of Western Samoans the New Zealand citizenship which the Privy Council had held them to have.

The decision in *Lesa's* case and the Act of 1982 have probably ended the legal problems which arose from New Zealand's occupation and administration of the Territory of Western Samoa. This article may suitably consider the decision against the background of the association between the two countries, especially the legal machinery of the mandate under which the problems arose and the basis of that machinery in New Zealand municipal law. Turning to the issues in the decision itself, we

4 [1979] 2 NZLR 74.
5 [1982] 1 NZLR 165.
6 *Lesa* v *Attorney-General* [1982] 1 NZLR 165, 169.
7 Being the day of enactment and the day before that on which the Act came into force. See s 1 (2), s 7 (1). See further below p 394.
8 SR 1950/158, made under the British Nationality and New Zealand Citizenship Act 1948, s 2 (1) and s 31.

shall conclude emphatically that the Privy Council got the law right beyond doubt; but that, on the other hand, whatever criticism can be made of the speed with which it became law, the provisions of the Citizenship (Western Samoa) Act 1982 ("the Act of 1982") were not on the whole unreasonable.

If there was an independent State of Samoa, at least in the latter part of the 19th century, it ceased to exist upon its partition in 1900 between Germany and the United States.[9] What became the Territory of Western Samoa began a separate existence as a German protectorate, a part of the German Empire. It is scarcely possible to suggest (with whatever implications for the later national status of Western Samoans) that a "semi-sovereign" Samoan State survived under the German administration. All German colonial possessions were referred to as protectorates *(Schutzgebiete)* and for most purposes, including from 1888 the acquisition and loss of German nationality, were treated as German territory.[10] To the extent that indigenous political institutions as well as customary law existed under the German administration, they did so consistently with and permitted by the paramount power of the latter.[11] The formal assertions of German authority, the proclamation of the Islands as German territory on 2 March 1900,[12] and the Kaiser's assumption of the kingly title *"der Tupu Sili von Samoa"*,[13] were by and large made effective in the reality of that paramount power.

The indigenous inhabitants were then, in general, German nationals, latterly under the Nationality Law of 22 July 1913. They remained so until the Versailles Treaty of Peace came into force on 10 January 1920: throughout the wartime occupation which, beginning with the seizure of German Samoa by New Zealand military forces in 1914 on behalf of the Crown, lasted until Germany renounced sovereignty in favour of the

9 For the historical background, see J W Davidson, *Samoa Mo Samoa* (1967); F M Keesing, *Modern Samoa* (1934) and P J Hempenstall, *Pacific Islanders Under German Rule* (1978); and Ellison "The Partition of Western Samoa: A Study in Imperialism and Diplomacy" (1939) 8 Pacific Historical Review 259, Boyd (i) "The Record in Western Samoa to 1945" in *New Zealand's Record in the Pacific Islands in the Twentieth Century* (ed Ross 1969) 115 and (ii) "The Military Administration of Western Samoa, 1914-1919" (1968) 2 New Zealand Journal of History 148, and Glover "The Western Samoa Bill — Background and Unanswered Questions" [1983] NZLJ 355. See also Hon B C Spring "The Judicial System of Western Samoa" (which includes an historical summary) in *Record of the Fourth Asian Judicial Conference* (Canberra 1970) 204. The unpublished LLB Hons dissertation of S Muli'aumaseali'i *The Quest for Sovereignty: Western Samoa 1800-1962* (University of Auckland 1973) foreshadowed some of the criticism of the Privy Council's judgment in *Lesa*. His case for an indigenous Samoan sovereignty which survived under the German and the New Zealand administrations can scarcely be reconciled with the paramount power exercised (as is amply recorded) successively by each of the latter. See further p 379 (n 76), and pp 390 and 392.

10 M F Lindley *The Acquisition and Government of Backward Territory in International Law* (1926) 205-206. Muli'aumaseali'i has argued for the semi-sovereign State: supra n 9 at 60 et seq.

11 Thus disputes concerning Samoan (customary) land and Samoan titles have since 1903 been determined according to Samoan custom in the Land and Titles Court of the paramount power for the time being (successively of Germany, New Zealand and (now) the independent State). See Spring, supra n 9 at 215-216.

12 See Ellison, supra n 9 at 287.

13 See Keesing, supra n 9 at 82.

principal Allied and Associated Powers, under Article 119 of the Treaty. Samoa and other colonial territories were abandoned so that, except perhaps for German subjects of European origin, the inhabitants lost German nationality under s 25 of the Law of 22 July 1913.[14]

II The Mandate

The New Zealand Mandate and the Crown's Prior Jurisdiction

The Crown, upon whose behalf the New Zealand military administration had been carried on, claimed jurisdiction in the Islands of Western Samoa under the agreement between the principal Allied and Associated Powers that the Islands should be "administered by His Majesty in His Government of His Dominion of New Zealand, subject to and in accordance with the provisions of the . . . Treaty". The latter reference was in particular to Article 22, in which the mandate system was foreshadowed.

The words last quoted from the preamble to the Western Samoa Order made by the King in Council on 11 March 1920[15] under the Foreign Jurisdiction Act 1890 (UK) show the Crown's view of the status of the Territory at the time the Order was made: that of a foreign land in which however jurisdiction was claimed. As the validity of that Order in Council may be in question,[16] it is as well to say that the same view was shown by Orders in Council of 1920 and 1925 under the Fugitive Offenders Act 1881 (UK).[17] Indeed, throughout the period of the mandate and the trusteeship, Western Samoa remained (apart from the effect of any "deeming" legislation) foreign territory, in which jurisdiction was claimed by the Crown first as an imperial unity and later in right of New Zealand (as shown by the terms in which Her Majesty's jurisdiction was abandoned by s 3 of the Western Samoa Act 1961).[18]

The nature of the Crown's jurisdiction in Western Samoa was necessarily related to the Territory's international status, first as a mandate and secondly as a trust territory under the United Nations Charter. As a C-class mandate, Western Samoa was in constitutional law akin to a protectorate rather than a protected state,[19] in that internal administra-

14 I rely here on Lindley, supra n 10; O'Connell "Nationality in 'C' Class Mandates" (1956) 31 British Yearbook of International Law 458, 460-461 (especially as to the effect of the German Law of 1913); and on the more general treatment in *Oppenheim's International Law* 8th ed 1955 (Lauterpacht) vol i, 221. The possible exception is in accordance with South African decisions criticised by O'Connell but apparently accepted by Oppenheim.

15 SRO 1920 No 569; 1920 New Zealand Gazette, vol ii, 1819.

16 See infra p 375.

17 Western Samoa (Fugitive Offenders) Order in Council 1920 (SRO 1920 No 2079) and Fugutive Offenders Order in Council 1925 (SRO 1925 No 1031; 1926 New Zealand Gazette, vol ii, 77). Both Orders, applying to Western Samoa *as if* it were a "British possession", were at least evidence of the Territory's status: *Ffrost* v *Stevenson* (1937) 58 CLR 528, 549, 552 (per Latham CJ). The Western Samoa Order in Council of 11 March 1920 would of course, if valid, be conclusive evidence of that status.

18 See infra p 391.

19 For the dual classification see K Roberts-Wray *Commonwealth and Colonial Law* (1966) 47-48. Western Samoa, as a mandated territory strictly outside the classification, was nevertheless under His Majesty's protection: ibid at 55-59.

tion as well as administration of external affairs was in New Zealand's hands on behalf of the Crown. But in municipal law the source and the extent of New Zealand power to legislate for the Territory were uncertain. We shall need to consider that uncertainty because it may affect directly or indirectly the matters dealt with by the courts in *Levave's* case[20] and in *Lesa's* case[21] and by the Act of 1982.

Consistently with its former imperialist aspirations in the Pacific, towards Samoa in particular,[22] New Zealand wanted outright annexation by the Crown of the islands its forces had occupied. In this the Prime Minister, W. F. Massey, made common cause with his counterparts in two other Dominions similarly concerned, W. M. Hughes of Australia and J. C. Smuts of South Africa, at the Peace Conference of 1919. These Dominion premiers urged that, on strategic and administrative grounds, it was essential that their countries should respectively annex Western Samoa, New Guinea and South West Africa, seized from Germany.[23] But their claims foundered on the opposition of President Wilson. New Zealand, Australia and South Africa were obliged to accept an extension of the proposed mandate system by way of a compromise solution: there was to be a group of C-class mandates of such ex-German territories as the three mentioned above which, under Article 22 of the Treaty, were to be "administered under the laws of the Mandatory *as integral portions of its territory* subject to the safeguards above mentioned [ie earlier in Article 22] in the interests of the indigenous population".

The three Dominions had then to accept this compromise, the emphasised words going some distance to satisfy their demands for annexation. But those words which, included in the New Zealand as in the other two Dominion mandates, would be commented on by the Privy Council over 60 years later in *Lesa's* case,[24] were ambiguous. The deliberate omission of "if" after "as" in those words pointed towards at least quasi-annexation, so that Hughes thought Australia was obtaining a 999-year lease of New Guinea.[25] Massey, explaining the mandate to the New Zealand House of Representatives, expected that Western Samoa would remain British indefinitely;[26] and, in the Legislative Council, Sir Francis Dillon Bell looked forward not to the independence of the Territory but to its becoming "in the ordinary course of events", on a favourable vote of its inhabitants, an integral part of New Zealand.[27] But

20 Supra n 4.

21 Supra nn 5 and 6.

22 See A Ross, *New Zealand Aspirations in the Pacific in the Nineteenth Century* (1964), especially ch 11 and pp 245 et seq.

23 Boyd "The Record . . . to 1945", supra n 9 at 123-124; and (more fully) Slonim "The Origins of the South West Africa Dispute: The Versailles Peace Conference and the Creation of the Mandates System" (1968) 6 Canadian Yearbook of International Law 115, 127 et seq.

24 Supra n 6 at 174 and 176. For text of the mandate see the Schedule to the Samoa Act 1921.

25 See Slonim, supra 23 at 143. Smuts thought there was annexation of South West Africa to the Union "in all but name": idem.

26 "[Samoa is] British today — that is — [it] is being handed over to New Zealand . . . and I hope and believe will remain British for all time." 1919 185 NZPD 518. (Second Reading of the Treaties of Peace Bill.) And see ibid at 520.

27 Ibid at 631.

to President Wilson and no doubt to many internationalists the implied aim of the mandate system, as well for the C-class mandates as the others, was independence and self-government of the territories concerned.

When the New Zealand legislature passed the Samoa Act 1921 it gave effect to the mandate for the purpose of executive government, in s 4[28]:

> "The executive government of Samoa is hereby declared to be vested in His Majesty the King in the same manner *as if* the Territory was part of His Majesty's dominions."

But, should the inclusion here of the word "if" (which was grammatically unavoidable in the context) be at all significant, the plenary power of the General Assembly to *legislate* was apparently assumed, in terms of Article 2 of the mandate itself, over Western Samoa "as [no "if"] an integral portion of the Dominion of New Zealand".

"As an integral portion." The patent ambiguity of that phrase, present in all three mandates, was partly responsible for the still unsolved South West African (Namibian) dispute.[29] It also explains how New Zealand legislation of the 1920s, whatever the true intent of those who drafted it, might not entirely unreasonably make persons born in Western Samoa British subjects. Without or (in s 4, even) with the "if", the Territory, though not part of New Zealand, was deemed part of New Zealand.

The Title of New Zealand as Mandatory

The legal title of New Zealand, Australia and South Africa as mandatories of the respective territories concerned has been explained as a "double one", derived both from the Allied and Associated Powers and from the League of Nations.[30] When the dereliction of German sovereignty took place on the coming into force of the Treaty of Peace on 10 January 1920, mandates already conferred by the Powers by international agreement to which those three Dominions (represented by the United Kingdom) were parties, took effect subject to confirmation by the Council of the League of Nations. That body formally issued the three mandates, in essentially similar terms, on 17 December 1920.

This describes sufficiently the international titles of the three Dominion mandatories. But the giving effect to the mandates in municipal law, at a time when the constitutional notion of the Crown as an imperial unity was still strong, caused difficulties which have (except perhaps in the case of Australia) never been entirely resolved; and which, so far as they affect New Zealand, will be found somewhat relevant to the main themes of this article.

28 Cf Samoa Constitution Order 1920 (1920 New Zealand Gazette, vol ii, 1623) clause 5, which preceded it.

29 See Slonim, supra n 23 at 143.

30 The origin of the title was described by Evatt J in *Jolley* v *Mainka* (1933) 49 CLR 242, 272.

In general, two views have been held about the means by which the mandates took effect in the systems of municipal law concerned. The contemporary New Zealand view[31] was to this effect: the Sovereign had acquired jurisdiction in Western Samoa under the Treaty of Peace and the agreement of the Allied and Associated Powers which allocated the mandate to the Sovereign to be exercised on his behalf by the New Zealand Government and by which the Sovereign on behalf of New Zealand agreed to accept the mandate. The prerogative acts here referred to did not of course consummate a cession by Germany (for there had been none)[32] but founded the Crown's jurisdiction in the Territory, a jurisdiction akin to that exercised by it in a protectorate. Hence the Imperial Order in Council under the Foreign Jurisdiction Act 1890 of 11 March 1920[33] was thought the appropriate means of empowering the New Zealand legislature and executive to govern the Territory. It conferred on the New Zealand Parliament "full power to make laws for the peace, order, and good government of" Western Samoa[34] and gave the like authority to the Executive Government of New Zealand to be exercised subject to that conferred on Parliament.[35] Accordingly the Samoa Constitution Order[36] was made for the government of the Territory by the Governor-General in Council on 1 April 1920, to come into force on 1 May following. After confirmation and issue of the mandate by the Council of the League on 17 December 1920, the Samoa Act 1921 replaced the Samoa Constitution Order and remained the basic law of the Territory for the next 40 years.

Whereas the Constitution Order was purportedly made under the Imperial Order in Council of 11 March 1920, the preamble to the Samoa Act rather indicated a direct reliance on the mandate. Nevertheless in *Tagaloa* v *Inspector of Police*[37] the majority of the Court of Appeal upheld the Imperial Order in Council as the source of New Zealand legislative and executive power in Western Samoa, in effect confirming the advice of Sir John Salmond as Solicitor-General upon which the New Zealand Government had so far proceeded. For, in Salmond's view, New Zealand and the other Dominions did not act internationally as independent states (although admitted to the League of Nations as members in their own right as if they were).[38] They participated in the Treaty of Peace and (through the United Kingdom) in the allocation of the mandates, merely as constituent portions of the British Empire. It followed from this that the prerogative acts by which the Crown assumed juris-

31 This account is (with some amplification) based on that of Boyd in (i) "The Record . . . to 1945", supra n 9 at 125-127 and (in more detail) (ii) "New Zealand's Attitude to Dominion Status 1919-1921" (1964-65) 3 Journal of Commonwealth Political Studies 64.

32 See eg *R* v *Christian* 1924 AD 101 (SA); *Oppenheim,* supra n 14 at 221.

33 Supra n 15.

34 Clause (3).

35 Clause (4).

36 Supra n 28.

37 Supra n 1.

38 See Salmond's *Report on the Washington Conference* 1922 Appendix to the Journals of the House of Representatives A-5, 14-16, cited by Boyd "New Zealand's Attitude . . .", supra n 31 at 65.

diction in the mandates were done by it as an imperial unity; so that further action on its part under prerogative or statute was necessary to delegate power to the Dominions designated as mandatories.

Opposed to this traditional view was another, which had the support not only of J. C. Smuts but of the English Law Officers of the Crown as well; and of which the New Zealand Government and its advisers had to take account. This view[39] was that no formal act or instrument on the part of the King, such as an Order in Council under the Foreign Jurisdiction Act, was necessary to enable any of the Dominions to make provision for the execution of its mandate. The Parliament of the Dominion concerned was competent to make provision for that, deriving its authority from the Treaty and the mandate. The King's consent was sufficiently shown by the Treaty, "to which His Majesty in his Dominion of [New Zealand, Australia or South Africa] is a party and by conferring of Mandate".[40]

In accordance with this view, no Order in Council, whether under the Foreign Jurisdiction Act or any other authority was obtained from the Sovereign to empower South Africa or Australia in their respective mandates of South West Africa and New Guinea. Here of course the conception is of prerogative acts taken by the Crown, not as an imperial unity, but *in right of* each of the Dominions in its participation in the Treaty and the allocation of the mandates; these being sufficient, together with local confirmatory legislation, to found in municipal law the jurisdiction of (the Crown in right of) each Dominion in the territory mandated to it.

The two views described were not always consistently held or expounded by those who generally adhered to them. For our purposes, however, it is enough to mention briefly the difficulties each view encountered when the legal adequacy of the legislative powers of the mandatories was called in question.

For called in question they were, and no less searchingly those of New Zealand than of the other two mandatories. One of the many points of interest of *Levave's* case[41] and *Lesa's* case[42] is that, concerned as they primarily were with legislation of the 1920s passed by the New Zealand General Assembly when it was a subordinate legislature, they revive old doubts of New Zealand's powers to legislate for the Territory. Until its adoption of the Statute of Westminster in 1947, the New Zealand General Assembly suffered from extra-territorial limitations[43] upon its power, admittedly of obscure nature and extent, but sufficiently strong on one view to cause the Full Court to hold in *Tagaloa* v *Inspector of Police* that the validity of the Samoa Act 1921 was based not on the New Zealand Constitution Act 1852 (because the doctrine of its territorial limitation prevented that), but upon the Imperial Order in Council of

39 See Boyd, ibid at 67.
40 Idem.
41 Supra n 4.
42 Supra nn 5 and 6.
43 For discussion and references, generally see Roberts-Wray, supra n 19 at 387 et seq.

1920, made under the Foreign Jurisdiction Act 1890.[44] Ostler J in his separate judgment concurred with this view but added that, even without an Order in Council, he would have been content to follow the decision of the Appellate Division of the Supreme Court of South Africa in *R* v *Christian*[45] and find authority for the Samoa Act in the mandate itself.[46]

Unfortunately Evatt J in the High Court of Australia in *Jolley* v *Mainka*[47] was able to cast serious doubt on the validity of the Order in Council and also on Ostler J's additional ground of judgment. As to the Order His Honour pointed out that "on its fair construction, [it] purported to surrender all power in respect of Western Samoa to the Parliament or Government of New Zealand";[48] and he questioned whether the Act authorised "the permanent delegation of the foreign jurisdiction of His Majesty's Privy Council to the Parliament of a self-governing Dominion, and that Parliament's further delegating the jurisdiction to a local authority" under s 46 of the Samoa Act 1921.[49]

That criticism is substantial; so is that directed at Ostler J, though at first sight a little unfair in implying that that learned judge relied merely on New Zealand's new international status as a source of legislative authority over Western Samoa in municipal law[50] and not (as Ostler J clearly was relying, rather more tenably) on the conferring of power by the mandate. But Evatt J's criticism, when amplified, clearly applies to the latter point also:—

The allocation and confirmation of the mandate could not in themselves confer legislative authority in municipal law. Certainly the prerogative acts in those international transactions gave the Crown either (on the first view) as an imperial unity or (on the second) in right of New Zealand, jurisdiction in Western Samoa but (on either view) the constitutional power of the New Zealand Parliament must in Evatt J's words "be exerted within its Constitution".[51] If, as the Full Court held in *Tagaloa's* case, the extra-territorial limitation prevented the New Zealand General Assembly from legislating for the peace, order, and good government of Western Samoa, then the Constitution Act had to be amended if effect were to be given to the mandate. An implied amendment would have sufficed of course. But s 53 of the Act of 1852, which as

44 Supra n 1 at 893-896.

45 Supra n 32 at 110-111 (per Innes CJ), 119-120 (per de Villiers JA), 127-131 (per Kotze JA).

46 Supra n 1 at 900-901. See also Blair J's reliance on the mandate in *Re Tamasese* supra n 1 at 215.

47 Supra n 30 at 275-277.

48 Ibid at 275.

49 Idem; and see infra p 389 n 26. The Full Court in *Tagaloa* (at 896; cf *Nelson* v *Braisby (No 2)*, supra n 1 at 581-582) had also urged somewhat faintly the Treaty of Peace Act 1919 (UK) as "additional" statutory authority for the Order in Council of 11 March 1920. Evatt J did not deal with the point in *Jolley* v *Mainka* but in effect indicated an answer to it extra-judicially in "The British Dominions as Mandatories" (1935) 1 Proceedings of the Australian and New Zealand Society of International Law 27, 43. To adapt his reasoning somewhat: the Treaty did not assign the mandates or empower the mandatories; so the Imperial Act of 1919, passed to give effect to the Treaty, would give no basis for the Order in Council.

50 Supra n 30 at 276-277.

51 Ibid at 277.

it then stood[52] authorised the General Assembly to make laws (not repugnant to the law of England) for the peace, order, and good government of *New Zealand*, was a "reserved provision"; hence the amendment whether expressed or implied had to be made or authorised by the United Kingdom Parliament. The Order in Council under the Foreign Jurisdiction Act 1890 would have effected the necessary amendments and enlarged sufficiently the power of the General Assembly. But if Evatt J's criticism of the Order in Council was correct and the Full Court was correct on the extra-territorial point in *Tagaloa's* case, the basis for New Zealand legislation in Western Samoa was shaky indeed.

But Evatt J, in finding a constitutional solution for the exercise of the Australian Commonwealth mandate in New Guinea, proffered one for New Zealand and Western Samoa as well. He suggested that the Full Court was wrong about the extra-territorial limitation[53]:

> [In the case of Australia] the Parliament has authority over the peace, order and good government "of the Commonwealth with respect to . . . external affairs" (sec 51, xxix); [in the case of New Zealand] over the peace, order and good government of New Zealand without restriction of subject-matter [and hence including external affairs and the matter of the mandate] . . . . [I]n the decision in *Christian's Case,*[54] the supposed extra-territorial limitation placed upon a Dominion's competence was not mentioned. There, too, the same reasoning could be applied.

Evatt J made his point[55] by invoking the greater understanding of extra-territoriality brought about by the Privy Council's judgment in *Croft* v *Dunphy.*[56] He may well have been right in applying that case to the mandates, at least to that of New Guinea. But about New Zealand and Western Samoa, doubts may linger.[57] There is something strange in the notion that the New Zealand Parliament, empowered by s 53 of the New Zealand Constitution Act 1852 (as it then stood) to legislate for the peace, order, and good government of New Zealand, was thereby empowered to legislate for the peace, order, and good government of another territory.

Later New Zealand cases did not really resolve the difficulties. The Full Court in *Nelson* v *Braisby (No 2)*[58] resolutely followed the decision in *Tagaloa's* case, countering Evatt J's criticism only by in effect following Ostler J and emphatically calling in aid the mandate itself as a source of legislative power additional or alternative to the Order in Council. However, nothing said by the Full Court in *Braisby's* case satisfies the objection developed above from Evatt J's comments on Ostler J's judgment in *Tagaloa.*

The New Zealand courts appear to have created a novel exception[59] to

52 See infra n 60.
53 Supra n 30 at 281.
54 Supra n 32.
55 Supra n 30 at 288-289.
56 [1933] AC 156, 163.
57 As about South Africa and South West Africa. See Dugard "South West Africa and the Supremacy of the South African Parliament" (1969) 86 SALJ 194.
58 Supra n 1.
59 See Keith "International Law and New Zealand Municipal Law" in *The A G Davis Essays in Law* (1965 ed Northey) 130, 144-145.

the rule that treaties are not a source of municipal law unless enacted by legislation which, in regard to Western Samoa, would have had to be passed by the United Kingdom Parliament.

The effect of later legislation and constitutional development has been to put beyond doubt the validity of all legislation purporting to apply to Western Samoa and passed on or after 25 November 1947.[60]

But the argument and the doubts remain for all New Zealand legislation passed for Western Samoa before that date.

Of course the Samoa Act 1921 itself has the endorsement, however shaky, of *Tagaloa's* case and *Nelson* v *Braisby (No 2).* Both were decisions of the Full Court. For obvious reasons they are not likely to be overruled today. Nor would the proposition that, during the period of the mandate, the New Zealand General Assembly was no more than a de facto legislature in its government of Western Samoa, at any time have commended itself to the Crown's New Zealand advisers; though such a proposition, supported by arguments that the principle validating the Acts of de facto authorities[61] would not extend to the Acts of 1923 and 1928,[62] might have been some help to them in *Lesa's* case. One may, however, be reasonably certain that the validity of the Samoa Act 1921 and other New Zealand legislation of the mandate period would be upheld today, if not on the doubtful authority of the Imperial Order in Council of 11 March 1920 then on the view of the "peace, order, and good government" formula in s 53 of the New Zealand Constitution Act put forward by Evatt J. The validity of the Acts of 1923 and 1928 will then be assumed throughout the rest of this article.[63] [64]

60 The date of the adoption of the Statute of Westminster 1931, s 3 of which removed the extra-territorial limitation. Remaining doubts (see *R* v *Fineberg* [1968] NZLR 119) were removed by the New Zealand Constitution Amendment Act 1973 (NZ), passed under the authority of the New Zealand Constitution Amendment Act 1947 (UK). (Section 2 of the 1973 Amendment Act substituted a new s 53 in the principal Act of 1852 and declared valid all legislation passed on or after 25 November 1947.)

61 For discussion of the doctrine, in recent New Zealand contexts, and for further references, see Brookfield "On Dissolved Houses and De Facto Ministers: *Ualesi's Case*" (1981) 9 NZULR 379 and "The MP and the De Facto Doctrine" [1983] NZLJ 86.

62 Acts of de facto officers or bodies in prejudice of lawful authority are excepted from validation by the doctrine: *Harris* v *Jays* (1599) Cro Eliz 699, 78 ER 934; *Adams* v *Adams* [1971] P 188 (where the exception was viewed far too widely). But it is unlikely that the Crown (as the lawful authority in Western Samoa) could be said to have been prejudiced by the Acts of 1923 and 1928, seen in their application to the Territory as acts of a de facto legislature.

63 But it will be necessary to refer again to the doubts mentioned above. See infra p 391.

64 Of the three Dominion mandatories, Australia had under its Constitution the securest basis in municipal law for giving effect to its mandate, either in the external affairs power (s 51 (xxix): preferred by Evatt J) or the territories power (s 122). The High Court on the whole preferred the latter and did so conclusively in *Fishwick* v *Cleland* (1960) 106 CLR 186. See also *Jolley* v *Mainka,* supra n 30 and *Ffrost* v *Stevenson,* supra n 17; and Castles "International Law and Australia's Overseas Territories" in *International Law in Australia* (1965 ed O'Connell) 292, 321-323, 333 et seq. In the case of South Africa (like New Zealand, lacking any constitutional power with a specifically external thrust), the emergence of its Parliament as a sovereign legislature under the Status of the Union Act 1934 must have solved the problem, if the Statute of Westminster 1931 (immediately in force in the Union) did not do so. See *S* v *Tuhadelini* 1969 (1) SA 153 (AD); and Dugard "South West Africa and the Supremacy of the South African Parliament" (1969) 86 SALJ 194.

Extent of New Zealand's Power as Mandatory

In International Law the New Zealand Government had full power under the mandate to administer Western Samoa as an integral portion of its own territory. Whatever the source in municipal law, a corresponding extension of power was claimed there also. Executive government was, as we have seen, declared to be vested in the King "in the same manner as if the Territory was part of His Majesty's dominions".[65] Consistently with that, all land was vested in the Crown[66] and in general English law as it existed on 14 January 1840 was declared to be in force.[67] Though the distinction between the Territory and actual possessions of the Crown was formally maintained, the approximation of the status of the former to that of a colony must have been generally as great as in any protectorate in the strict sense. That statement, which holds true of New Guinea and of South West Africa as well, can cause no surprise if one recalls the annexationist predilections with which the three Dominions accepted their respective mandates.[68] Inevitably the nature and status of the obligations of the mandatories came in question. After some uncertainty, at least in South Africa, the answer of the courts there and in Australia was that the validity of legislation of the administering power could not be tested either against the terms of the mandate or (in the case of Australia) the trusteeship agreement which replaced it.[69] In New Zealand the Full Court was able to leave the question unanswered in *Nelson* v *Braisby (No 2)*.[70] But its answer would likely have been the same: obligations under the mandate and the trusteeship were of the nature of treaty obligations, not binding on the Crown in municipal law unless incorporated by legislation.

In *R* v *Christian*[71] the Appellate Division of the Supreme Court of South Africa concluded in effect that, to whatever extent the limitations imposed by its obligations under the mandate affected its external sovereignty over South West Africa, the Union government as mandatory had internal sovereignty, sufficient to possess majestas and claim the allegiance of inhabitants of the territory, breach of which would be treason. The Crown claimed a like allegiance from Western Samoans as the terms of s 100 of the Samoa Act show.[72] True that this was consistent with the claim to allegiance generally made by the Crown from the inhabitants of protectorates, a claim the more significant in Western Samoa (as in New Guinea and South West Africa) where there was no indigenous government of the Territory to which allegiance would be owed by the inhabitants.

Decisions of high authority have emphasised that the degree of control exercised in a protectorate by the protecting power "may render it difficult to draw the line between a protectorate and a possession [of the

65 Samoa Act 1921, s 4.
66 Though subject to existing Samoan titles. See ss 277 and 278.
67 Section 349.
68 See supra pp 371-372.
69 *S* v *Tuhadelini,* supra n 64; *Fishwick* v *Cleland,* supra n 64.
70 Supra n 1 at 583.
71 Supra n 32.
72 Imposing liability for treason on the inhabitants of the Territory.

Crown].''[73] Thus in *Ex Parte Myenya*[74] the writ of habeas corpus was held to be available in a protectorate as if it were part of the possessions of the Crown — the Court looking to the reality of the power exercised by the Crown in the territory concerned rather than to any distinction in its status. As we shall see,[75] the tendency has not been carried so far by the courts that protected persons cease to be distinguished from British subjects for immigration purposes. But otherwise it has generally been the reality and effectiveness of the Crown's power in a protectorate which have been legally significant in municipal law. In the case of the New Zealand administration of Western Samoa that power amounted at least, as the South African Court in *R* v *Christian* held of the Union's power in South West Africa, to internal sovereignty.[76]

Western Samoans were then treated virtually as though they were subjects. But apart from the effect of the Acts of 1923 and 1928, their status during the mandate and trusteeship periods was in New Zealand law undoubtedly that of British protected persons until they became New Zealand protected persons under Order in Council[77] made under s 2 (1) and s 31 of the British Nationality and New Zealand Citizenship Act 1948. That Act, it will be recalled, as part of a general nationality and citizenship scheme adopted in Commonwealth countries, first provided for New Zealand citizenship as the primary national status of New Zealanders. Before the Act came into force, New Zealanders shared generally with the inhabitants of the possessions of the Crown the status of British subject. But for the effect of the Acts of 1923 and 1928 inhabitants of Western Samoa did not share that status, however great the reality of the Crown's power through the New Zealand administration of the Territory. On the view accepted here, they had lost their status as German Nationals when the Treaty of Peace came into force on 10 January 1920, except perhaps for those whose place of origin had been the German Fatherland.[78] All of them became British protected persons and, except for the class just mentioned, had no other national status. First the Act of 1923 and then that of 1928 provided them with the means to become naturalized as British subjects. But did those Acts go further and make persons, born in the Territory after the Acts were respectively passed, British subjects by birth, with consequentially New Zealand citizenship for themselves and the children of those of them who were males?

The legal issue, decided finally in the affirmative by the Privy Council in *Lesa's* case, is looked at more closely below. The decision is accepted

73 *Sobhuza II* v *Miller* [1926] AC 518, 523. Cf *In Re Southern Rhodesia* [1919] AC 211 and *Ex parte Mwenya* [1960] 1 QB 241.

74 Supra n 73.

75 See infra p 389.

76 This may be confidently asserted despite the degree of indigenous political structure in the Territory which proved resistant to New Zealand (as to German) domination and also the limited and temporary successes of the Mau movement in setting up alternative de facto organs of government (as to which, see Keesing, supra n 9 at 182-183, Davidson, supra n 9 at 136, 142 and 145, and Boyd "The Record . . . to 1945", supra n 9 at 172, 174. See also supra p 369 and infra pp 390 and 392.

77 Supra n 8.

78 See supra pp 369-370.

as undoubtedly correct and the legal criticisms answered. But we are concerned to show, too, that quite apart from the decisive point of law upon which the appellant succeeded in *Lesa's* case,[79] the Privy Council's decision was essentially fair if one fully takes into account the background of the Acts of 1923 and 1928.

Admittedly, what evidence there is from the debates in the House of Representatives and the Legislative Council of the intentions of the individual legislators in 1928 (which of course the courts could not take account of)[80] might point the other way, to the extent of showing that they did not realise either that the 1923 Act had made Western Samoans born after it came into force British subjects or that the Bill before them would do likewise. Thus, in the House of Representatives the Minister introducing the Bill, F J Rolleston, referred to the possible "legal and difficult question as to the exact citizenship of the Samoans under the mandate given to New Zealand" and declined to express an opinion on it.[81] He implied that the only effect of the proposed legislation in the relevant respect would be to provide a procedure for the naturalization of those who might apply. More clearly, in the Legislative Council, Sir James Allen for the Government quoted the resolution of the Council of the League of Nations of 1923 against any general acquisition by the inhabitants of mandated territories of the nationality of the mandatory power.[82] He did so in reply to Sir Francis Dillon Bell's expressed view that Western Samoans "are subjects within the Sovereignty of His Majesty now and are as much British subjects as anybody";[83] although Bell then accepted "in the legislation [sic] the curious position that the New Zealand Government agreed to accept".[84] Bell appears to have thought that the proposed legislation would effectively define all Western Samoans as aliens by making provision for their naturalization. In that of course he was wrong.[85] For our purposes, however, the point is not that, but his reason for the opinion he was prepared to abandon. This clearly was not that the Act of 1923 had made Western Samoans born after it came into force British subjects, but the effective sovereignty of the Crown over the Territory. Here he failed to distinguish between a British possession (which Western Samoa was not) and a quasi protectorate (which as a mandated territory it certainly was). But that failure can be excused just because of that effective sovereignty: the Territory was administered for the Crown by the New Zealand mandatory *as* an integral part of New Zealand and therefore of the possessions of the Crown. Though this in itself did not make Western Samoans British subjects, still one could not see it as extraordinary if the New Zealand legislature, constituted by the Crown in Parliament of the United King-

79 Supra n 6.
80 See infra p 388.
81 1928 218 NZPD 568.
82 1928 217 NZPD 941-942. (The resolution is quoted infra p 385.)
83 Ibid at 939. For the contrary, accepted view in the mandates (apart from any effect of legislation), see *Wong Man On* v *Commonwealth* (1952) 86 CLR 125.
84 Supra n 82 at 939.
85 In thinking that Parliament's misapprehension of the existing law, legislatively demonstrated, necessarily changes it. See, eg, *Commissioner of Inland Revenue* v *Auckland Savings Bank* [1971] NZLR 569.

dom, should legislate to make them so. And certainly not extraordinary if one has regard to the annexationist sentiments expressed in the House of Representatives and the Legislative Council when the Treaty of Peace Bill was debated in 1919.[86]

Nor is the resolution of the Council of the League of Nations of 1923 as significant as it might appear. No doubt New Zealand was in some sense morally bound by it not to make Western Samoans British subjects otherwise than through naturalization procedures. But the weight and significance of that obligation is much less when one considers that allegiance was exacted from them virtually as if they were subjects and that legal status as such would have been advantageous to them, however inconsistent with nationalist aspirations.[87]

Certainly those aspirations had the effect that, when independence was approaching in the last years of the trusteeship period, members of the Constitutional Convention were generally hostile to the idea of dual citizenship. They feared that "a person who retained a foreign citizenship might not give undivided allegiance to Samoa, that he might, for example, exercise his political rights in a way contrary to Samoan interests . . . ."[88] But J W Davidson records the explanation of the matter which was finally accepted by the Convention[89]:

> It was explained that rigorous conditions regarding the assumption and retention of Western Samoan citizenship could be imposed on persons possessing a second citizenship but that Samoa could not determine the status these persons might still possess in relation to the citizenship law of another country.

That advice was reflected in the Citizenship of Western Samoa Ordinance 1959, passed in preparation for independence. Section 10 set out the events in any of which Western Samoan citizenship was liable to be automatically lost. Among them were included the acts of voting in a foreign political election and of travelling under the passport of a foreign country, in which one was described as a national of that country. Since independence, somewhat similar provisions have been included in the Citizenship Act 1972 (WS) which replaced the Ordinance of 1959. Hence, since the passing of the latter, it has not been possible for any Western Samoan possessed of New Zealand citizenship to exercise it effectively without imperilling his or her Western Samoan citizenship.

Of course, had it been known that, as a result of the Acts of 1923 and 1928, a large number of Western Samoans were New Zealand citizens,

86 See supra p 371.

87 The Mau leader, O F Nelson, in effect complained that Western Samoans suffered burdens of quasi-annexation without the advantages of annexation proper. Thus he accused New Zealand Ministers and officials of fostering the idea that "Western Samoa is now an annexed part of the Dominion" (Nelson, *The Truth About Samoa* (1928) 8). But he also wrote, in contrasting the uncertainties of the "mandatory system":
> Direct annexation, though an assumption of power by the greater over the smaller, at least gives the people of an annexed territory the rights of citizenship, with whatever privileges may accrue from the same, with or without certain limitations, under the laws of the annexing power. — *Samoa at Geneva* (1928) 4.

88 See Davidson, supra n 9 at 362.

89 Idem.

then the Western Samoa Act 1961 would, with the approval of the new State, have contained provisions (modelled on those in British independence legislation) by which citizens of the new State would generally lose New Zealand citizenship.[90] But all this, while relevant to a justification of the Citizenship (Western Samoa) Act 1982 (NZ) is not relevant to the proper interpretation of the Acts of 1923 and 1928.

III New Zealand Nationality Acts and Samoan National Status

The British Nationality and Status of Aliens (in New Zealand) Acts of 1923 and 1928

The general scheme of both Acts was —

(a) to bring into statute the common law status of the natural-born British subject, and —

(b) to make provision for the naturalization of persons as British subjects in New Zealand law.

As to (a), the effect of both Acts was generally the same for the purposes of this article. Persons born in any part of the Crown's dominions were (with exceptions not relevant here) to be British subjects, as at common law. This codificatory purpose was achieved by declaring certain provisions in Part I of the British Nationality and Status of Aliens Act 1914 (UK) to be part of the law of New Zealand. As to (b), the two New Zealand Acts were somewhat different. The Act of 1923 made special provision for naturalization in New Zealand law; the Act of 1928 adopted Part II of the Imperial Act of 1914. Both Acts contained provisions for their application in the Cook Islands and Western Samoa. It was the nature and extent of that application which were in question in *Levave's* case[91] and *Lesa's* case.[92] The relevant parts of the main provisions relevant were these, with vital words emphasised:

Subjects by Birth

> Section 3 (1) of the Act of 1923:
> 3. (1) The several sections forming part of the British Nationality and Status of Aliens Acts, 1914 to 1922 (Imperial), as the said several sections are set forth in the First Schedule to this Act, are hereby, save only as modified by this Act, declared to be part of the law of New Zealand, and shall, save as so modified, be read together with and be deemed to form part of this Act . . . .
>
> Section 6 of the Act of 1928:
> 6. The several provisions of the Imperial Acts set forth in the Second Schedule to this Act, in so far as the said provisions are capable of application in New Zealand, are hereby declared to be part of the law of New Zealand.

Both ss 3 and 6 refer to the same Imperial provisions which included s 1 (1) (a) of the Imperial Act of 1914:

> 1. (1) The following persons shall be deemed to be natural-born British subjects namely:
> (a) Any person *born within His Majesty's dominions* and allegiance; and . . . .

90 See infra p 393.
91 Supra n 4.
92 Supra nn 5 and 6.

Subjects by Naturalization

Sections 4 and 5 of the Act of 1923 provided for the naturalization of "any alien friend residing in New Zealand" desiring to be naturalized "as a British subject in New Zealand". Under s 5 (1) the Minister of Internal Affairs was empowered to grant a certificate of naturalization if he was satisfied —

> (a) That the applicant has either *resided within New Zealand* for a period not less than the prescribed time or has been in the service of the Crown in any part of His Majesty's dominions for not less than five years within the last eight years; and
> (b) . . . .
> (c) That the applicant intends, if his application is granted, *to continue to reside in His Majesty's dominions,* or to enter, or continue in, the service of the Crown; and
> (d) . . . .

Those conditions for naturalization had been largely modelled on s 2 (1) of the Imperial Act of 1914 which (as applicable in New Zealand on the adoption of Part II of that Act by the Act of 1928) required an applicant alien to satisfy the Minister —

> (a) That he has either *resided in His Majesty's dominions* for a period of not less than five years in the manner required by this section, or been in the service of the Crown for not less than five years within the last eight years before the application; and
> (b) . . . .
> (c) That he intends if his application is granted either to *reside in His Majesty's dominions* or to enter or continue in the service of the Crown.

It was added by s 2 (2) (as applicable in New Zealand) that —

> The residence required by this section is *residence in [New Zealand]* for not less than one year immediately preceding the application, and previous residence, either *in [New Zealand] or in some other part of His Majesty's dominions,* for a period of four years within the last eight years before the application.

"Application of Act to Cook Islands and Western Samoa"

Under this heading and with the marginal note "Naturalization of aliens in Cook Islands and Western Samoa", s 14 (1) and s 7 (1) of the Acts of 1923 and 1928, respectively, each provided as follows:

> Subject to the provisions of this section, 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.

In both sections there followed a subsection (2) (s 14 (2); s 7 (2)) which (fulfilling the promise of the marginal note) indeed dealt only with naturalization and began —

> (2) In the application of this Act to the Cook Islands and Western Samoa —
> (a) The power to grant certificates of naturalization shall be vested in the Governor-General . . . .

But what of the generality of s 14 (1) and s 7 (1)? Was each of those subsections to be construed narrowly to refer (in substance) to naturalization only? Or more widely to include also the acquisition of the status of British subject by birth within the territories named?

Of course neither the heading nor the marginal note could control the meaning.[93] But if the two sections were intended by those who drafted them to refer, in relation to Western Samoa, in substance to the naturalization provisions of the Act only,[94] they were certainly misdrafted. It was not "this Act" but "the provisions of this Act relating to naturalization" that should have applied to Western Samoa "in the same manner in all respects" as if it were "for all purposes part of New Zealand". Further, if the distinction between the Cook Islands (which were already within the dominions and allegiance of the Crown) and Western Samoa (which was outside them) was to be maintained, the drafting was again defective. Still, Western Samoa was under the mandate administered as if part of His Majesty's dominions. That and annexationist sentiment might have combined to confuse both those who drafted and those who instructed them. And of course it is possible that s 7 (1) of the Act of 1928 was modelled uncritically on s 14 (1) of the Act of 1923, in the drafting of which the confusion originally occurred.

However that may be, the inappropriate generality of the words was apparently not noticed by members of the House of Representatives and of the Legislative Council, in the debates on the Bills of 1923 and 1928. This was especially strange in the 1928 debates where the national status of Western Samoa was discussed.[95] Members may of course have been influenced by the misleading marginal note. Then again, likely annexationist sentiment would not per force alert them to the consequences (for nationality) that would flow if Western Samoa, as a mandated territory, was not treated separately from the Cook Islands.

The Court of Appeal in Levave and Lesa

Yet the words are general only. Could one read them down to save Western Samoans from ultimately acquiring national status as citizens of the former mandatory power? The Court of Appeal in *Levave's* case felt able to do so and to adopt a restricted interpretation of s 14 (1)[96]:

> . . . the declaration . . . that "this Act shall apply to the Cook Islands and to Western Samoa . . . as if those territories were for all purposes part of New Zealand" has its natural meaning (so far as is relevant to the present issue) that the provision deeming a person born within His Majesty's dominions and allegiance to be a natural-born British subject is to be part of the law of the Cook Islands and Western Samoa. But it does not postulate that either is a place properly so described. Nor does the second part of s 14 (1) go so far. It affords an extended definition of the term New Zealand "as used in" the 1923 Act. It does not purport to make the Cook Islands or Western Samoa a territory within the dominions of or owing allegiance to the Crown.

93 As the Court of Appeal (dealing with the side note) indirectly observed in *Lesa's* case (supra n 5 at 168). See Acts Interpretation Act 1924, s 5 (f), (g).

94 This is to put aside the Court of Appeal's necessarily forced effort to give effect to the generality of s 14 (1). See infra, n 96 and accompanying quotation, and also p 387.

95 See supra nn 81 and 82, and accompanying text.

96 Supra n 4 at 77.

In the Court's view, s 14 (1) of the Act of 1923 was directed to the residential prerequisite for naturalization, for without that provision naturalization under the Act would not be possible for aliens resident in either of the two territories.

The Court's restrictive interpretation was based on its understanding of "the general background of the relations between [Western Samoa] and New Zealand up to the time of the passing of the Act" of 1923.[97] Here the most important points were the Territory's status as a mandate and the resolutions adopted by the Council of the League of Nations in April 1923 (about three months before the Bill was introduced which passed into law as the Act of 1923)[98]:

> (i) The status of the native inhabitants of a mandated territory is distinct from that of the nationals of the Mandatory Power, and cannot be identified therewith by any process having general application.
> (ii) The native inhabitants of a mandated territory are not invested with the nationality of the Mandatory Power by means of the protection extended to them.
> (iii) It is not inconsistent with (i) and (ii) above that individual inhabitants of the mandated territory should voluntarily obtain naturalization from the Mandatory Power in accordance with arrangements which it is open to such Power to make, with this object, under its own law.
> (iv) It is desirable that native inhabitants who receive the protection of the Mandatory Power should in each case be designated by some form of descriptive title which will specify their status under the mandate.

The Court considered that "[i]n the absence of unequivocal language it is not to be supposed that the New Zealand Parliament would intend to legislate in a manner inconsistent with moral, if not legal, international obligations in this sphere".[99]

The apparent generality of s 14 (1) was read down so that the subsection effectively included naturalization only; and one could, as the same Court then did in *Lesa's* case, by like reasoning perform the same interpretative operation on s 7 (1) of the Act of 1928.[1]

The Privy Council Decision in Lesa

But the unequivocal language which showed that the Act of 1923 made Western Samoans, born while it was in force, into British subjects despite any inconsistency with the (moral rather than legal) international obligations of New Zealand in the matter, was there — though to an important extent in provisions which apparently were not drawn to the at-

97 Ibid at 77-78.
98 Quoted ibid at 79.
99 Idem.
1 Of other reasons given by the Court of Appeal (supra n 4 at 77-79) two require brief mention. These were (i) the uneven operation of s 14 (1) which would (on the appellant's argument) make Western Samoans British subjects when Cook Islanders were already that [but the uneven operation was inevitable in some form when the draftsman failed to distinguish between the two territories]; and (ii) the lack of uniformity with the Empire as a whole, since the Western Samoans affected would not be British subjects except in New Zealand law. With respect, neither reason is of substance, at least when considered in the whole context.

tention of the Court of Appeal either in *Levave's*[2] or in *Lesa's* case.[3] The Privy Council,[4] in deciding in favour of the appellant overstayer Miss *Lesa,* found that language in the legislation both of 1923 and 1928, though the more strongly in the latter with which it was directly concerned. The arguments of interpretation are essentially simple (once the vital provisions are identified), as Lord Diplock's cogent exposition shows. The emphasised words in the sections quoted above were primarily relied on. The reasoning and conclusion of the Privy Council reached in respect of the Act of 1928 may be briefly stated:—

First, the Privy Council gave effect to the straightforward generality of the first part of s 7 (1) which, in their Lordships' view, "appears to state emphatically and unequivocally that the whole of the Act, subject only to such modifications as are contained in s 7 itself, ie in subs (2), are to apply both 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".[5]

The Privy Council found in those last words an echo in the case of the Cook Islands of the Order in Council of 1901[6] (under which it was ordered that the Cook Islands "shall form part of New Zealand"); and, in the case of Western Samoa, of Article 2 of the Mandate under which the Territory was to be administered "as an integral portion of the Dominion of New Zealand".[7]

Secondly, any reading down of the general words of s 7 (1) (like that adopted by the Court of Appeal in interpreting s 14 (1) of the Act of 1923 in *Levave's* case) so that they applied to a person's acquiring the status of British subject by naturalization only and not to acquiring it by birth "within His Majesty's dominions and allegiance", was impossible because (so to speak) the geography was essentially the same for both.[8] The prerequisites for naturalization under Part II of the Imperial Act of 1914 involved *residence* within New Zealand or otherwise within "His Majesty's dominions". For that purpose Western Samoa must by virtue of s 7 (1) be deemed part of New Zealand and within those dominions (since otherwise the conditions for naturalization could not be satisfied by residence in the Territory as the legislation plainly intended). But then "the emphatic generality" of s 7 (1) requires[9]

> that the territory of Western Samoa is to be treated as included in the description "His Majesty's dominions and allegiance" in the definition of persons who shall be deemed to be natural-born British subjects in s 1 of the Imperial Act set out in the second schedule and declared to be part of the law of New Zealand by s 6 of the Act of 1928.

2 *Levave* [1979] 2 NZLR 74.
3 *Lesa* (CA) [1982] 1 NZLR 165. I shared in the oversight. See Brookfield "New Zealand Citizenship and Western Samoa" [1980] NZLJ 172 where the Court of Appeal's view is accepted, in oversight of the vital provisions relied on by the Privy Council.
4 *Lesa* (PC) [1982] 1 NZLR 165, 169.
5 Ibid at 173-174.
6 Referred to in the preamble to the Cook Islands Act 1915.
7 See supra, pp 370-372.
8 The additional words "and allegiance" were held immaterial because (in reliance on *Calvin's Case* (1608) 7 Co Rep 1 a, 77 ER 377) persons born within the Crown's dominions owe natural allegiance.
9 Supra n 4 at 174.

In short, Section 7 (1) of the Act of 1928 meant what it so emphatically and unequivocally said — that "a person born or resident in Western Samoa is to be treated in the same manner in all respects for all the purposes of the Act of 1928 as if he had been born or resident in New Zealand proper".[10]

Their Lordships' conclusion was the same for the Act of 1923,[11] though they acknowledged that there were less formidable obstacles to the reading down of the general provisions of s 14 (1), which found favour with the Court of Appeal in *Levave's* case,[12] than with the corresponding s 7 (1) of the Act of 1928. However, the obstacles were there nevertheless and of the same sort as in relation to the Act of 1928. The Act of 1923 contained its own provisions for (so far as immediately relevant) the naturalization of aliens[13] (i) who had "resided within New Zealand" and (ii) who, as well as complying with other conditions, under s 5 (1) (c) intended "to continue to reside in His Majesty's dominions . . . ." Necessarily (i) residence in Western Samoa for the prescribed time, and (ii) intention to continue to reside there, must satisfy the relevant prerequisites for naturalization; to that end the extended definition of New Zealand applied to deem Western Samoa part of New Zealand for the purpose of (i) and part of New Zealand *and therefore of His Majesty's dominions* for the purpose of (ii). Then the emphatic generality of s 14 (1) of the Act of 1923 required also that Western Samoa be deemed part of New Zealand and His Majesty's dominions for the purpose of s 1 (1) (a) of the Imperial Act of 1914.

The Privy Council pointed out[14] that, in referring to s 14 (1), the Court of Appeal had omitted the emphatic words "in the same manner in all respects"; and it had not suggested how its view,[15] that the effect of the subsection in relation to natural-born British subjects was only that they were to be treated as such under the law of the Cook Islands and Western Samoa, could affect the status of such persons in either territory.

The Privy Council found the strongest argument for the Court of Appeal's limited construction of the Act of 1923 in New Zealand's moral obligation to legislate consistently with the resolution of the Council of the League adopted in April 1923.[16] That would have been relevant in resolving any ambiguity in the language of s 14 (1) of the Act of 1923 and s 7 (1) of the Act of 1928. But there was no "ambiguity or lack of clarity in that language in its application to s 1 of the Imperial Act adopted as part of the law of New Zealand" by both the New Zealand Acts concerned.[17]

10 Ibid at 175.
11 Ibid at 175-177.
12 Supra n 2 at 77. And see supra, pp 384-385.
13 Instead of adopting Part II of the Imperial Act of 1914.
14 Supra n 4 at 176.
15 See supra n 96 and quotation in accompanying text.
16 See supra n 98 and quotation in accompanying text.
17 Supra n 4 at 176-177.

Reaction to the Decision: The Attempted Criticisms

The Privy Council's decision showed all Western Samoans who were born, or had fathers who were born, in the Territory after the Acts of 1923 and 1928 respectively came into force and before January 1949, to be New Zealand citizens. Immediately the decision attracted great controversy because of its feared impact on the operation of the immigration laws. The Citizenship (Western Samoa) Act 1982 was the legislative solution to the problem that was thought to exist — a problem that was blamed on the Privy Council.

According to opinion in high places, there were "very considerable objections to [the decision], both on grounds of law and practice".[18]

In reality the objections were far from cogent. They follow, italicised, with answers to each.

1. *"The Privy Council decision . . . did not take into account any matters of international law and practice . . . ."*[19] But there was no breach of international law in making Western Samoans British subjects. There was no breach of the mandate which contained the only international legal obligations relevant. Even if there had been, clearly expressed legislative intention would still have prevailed;[20] so much the more over the international moral obligation created by the League Council's resolution of April 1923 and duly noted by the Privy Council. If proper account is taken of the statutory provisions not considered by the Court of Appeal, how was the legislative intention other than clear?

2. *". . . nor . . . the law of Western Samoa."*[21] But that could not possibly be taken into account. As had been explained long ago in the Constitutional Convention before independence,[22] the status any Western Samoans might enjoy under the nationality laws of another country was not a matter Western Samoan law could affect.

3. *The Parliamentary debates were not considered.*[23] By what authority could they be? The Acts of 1923 and 1928 were not basic constitutional instruments, in the construction of which courts in some jurisdictions may resort to the proceedings of constitutional conventions and the like.[24]

18 The Prime Minister, *New Zealand Herald,* 14 August 1982.

19 Hon J K McLay "The Western Samoan Bill: Background and Explanation" [1982] NZLJ 353, 354. Cf the apparently similar view of Geoffrey Palmer MP (now Deputy Leader of the Opposition) addressing the Christchurch Civil Liberties Association, 30 August 1982: ". . . the decision was contrary to the law of Western Samoa and contrary to international law relating to mandated and trusteeship territories" (notes of address supplied through David Lange MP and the Revd John Ker).

20 See *Ashby* v *Minister of Immigration* [1981] 1 NZLR 222 and (particularly in relation to obligations of a mandatory or trustee state) *Fishwick* v *Cleland* (1960) 106 CLR 186, 196 and *S* v *Tuhadelini* 1969 (1) SA 153, 176-177. And see supra p 378.

21 McLay, supra n 19 at 354. Cf Palmer, quoted at supra n 19.

22 See supra p 381.

23 Mr McLay (supra n 19 at 354) implies this should have been done. Presumably the Privy Council was in any event not asked by the Solicitor-General to depart from the orthodox rule, now emphatically re-affirmed by the House of Lords in *Hadmor Productions Ltd* v *Hamilton* [1983] AC 191.

24 As was done by the Western Samoan Court of Appeal recently. See *Re The Constitution of Western Samoa: Attorney-General v Saipa'ia Olomalu* (16 July 1982; Cooke P and Mills and Keith JJ; at Apia).

4. *The decision was contrary to the law as long understood by New Zealand and Western Samoa and which formed part of the basis upon which the independence of the latter was negotiated.*[25] If this criticism is an appeal to the common opinion of lawyers as evidence of the law, or to the maxim *communis error facit ius,* it is especially hard to make out on a narrow point of construction of a modern statute. This is not a real property case where the practice of conveyancers can be invoked; nor the case (rare indeed) where a long history of constitutional practice appears to have enlarged statutory powers of government so that it is too late to urge a limited construction.[26] But anyway, (i) common opinion or common error would be difficult to show in view of *Annandale* v *Collector of Customs*[27] (where the same or a very similar issue was argued but was left undecided by Hutchinson J in the Supreme Court); and (ii) the legislative error uncovered by the Privy Council's decision could be simply corrected by the New Zealand Parliament's making, in 1982, the nationality adjustment in respect of Western Samoans which it failed to make in 1961, at the attainment of independence.

5. *The decision was made in ignorance of New Zealand conditions and hence in disregard of its inconvenient consequences.*[28] The Privy Council is indeed geographically remote and its long record of dealing with overseas appeals shows some instances of ignorance of local law or conditions. In this case its knowledge of New Zealand immigration policies and problems and of the effect of the decision on them might (perhaps) have been imperfect. But what argument based on those matters could possibly have been relevant?

True that often judges properly and necessarily have regard not only to the law as it is but also to the present or future practical consequences of their decisions.[29] Thus in *R* v *Secretary of State for the Home Department ex parte Thakrar,*[30] where the English Court of Appeal refused in an immigration matter to assimilate the status of a British protected person to that of a British subject, Lord Denning MR partly relied on consequential considerations.[31] But in the interpretation of statutes judicial freedom of this sort is limited by a clear rule — the inconvenience alleged to result from a particular interpretation must be assessed from the state of affairs at the date the statute was passed, not from subsequent events.[32] No one has suggested that when the Acts of 1923 and 1928 were

25 To this effect, McLay, supra n 19 at 354.

26 As was so with the Foreign Jurisdiction Act 1890: see *R* v *Crewe ex parte Sekgome* [1910] 2 KB 576, 596 (per Vaughan Williams LJ). Evatt J's criticism of the Order in Council of March 1920 (cf supra, p 375) was that it "stretch[ed] . . . the [Foreign Jurisdiction] Act even beyond its very wide limits of elasticity": *Jolley* v *Mainka* (1933) 49 CLR 242, 275.

27 [1955] NZLR 168.

28 This criticism on the whole has been implicit rather than explicit. For a tentative expression of the first part of it, see G S Orr in The New Zealand Listener, 14 August 1982.

29 See Neil MacCormick, *Legal Reasoning and Legal Theory* (1978) 105 et seq, 129 et seq.

30 [1974] QB 684.

31 See supra n 30 at 707: "This country is not large enough to take in all those whom we would gladly accept."

32 *Attorney-General* v *Prince Ernest Augustus of Hanover* [1957] AC 436, 461 per Viscount Simonds.

respectively passed the consequences of Western Samoans born thereafter being British subjects would (however contrary to the League Council's resolution) have been seen as absurd or inconvenient. After all, the Territory was being administered under the mandate as part of New Zealand. It was not extraordinary that a growing number of its inhabitants would have the status of natural-born British subjects in New Zealand Law.

6. *The decision showed a misunderstanding of the locus of Sovereignty over Western Samoa, which all along has resided in the Western Samoan people.*[33] This criticism has been coupled with another that Western Samoans never saw themselves as British subjects or as owing allegiance to the Crown.[34] So far as the latter criticism rests on the subjective attitude of Western Samoans, there may be some truth in it; though it must be considered beside evidence that the British Sovereign, like the Kaiser during the period of the German protectorate, was regarded as Tupu Sili.[35] The whole question is one of New Zealand law and of the effective paramount power of the Crown in the Territory through the New Zealand mandatory. As we have seen,[36] allegiance was indeed exacted from Western Samoans at least as British protected persons (which of course those remained who were born in the Territory before the 1923 Act was passed). But the New Zealand legislature turns out to have made those born while the two Acts were in force British subjects; that generally they would have strongly objected to this had they known at the time is scarcely to the point, even if true. After all, many Irish during the long period of the Ascendancy objected to being English or British subjects but they remained so, owing allegiance to the Crown.[37]

It will be seen that the general objections made to the decision in *Lesa's* case had little or nothing to commend them.[38] One of them, the apparent inconsistency of the Privy Council's interpretation with New Zealand's moral obligation to abide by the League of Nations resolution of April 1923 would fare better if *any* doubt could be thrown on the Board's precise analysis of the statutory provisions. Was the language, after all, ambiguous, so that it should be interpreted consistently with (i) that international moral obligation and also (ii) the presumption against intention to change the common law?[39] One critic thought to find an

33 To this effect, Sir Guy Powles (*Auckland Star,* 21 July 1982); approvingly cited by Palmer, supra n 19. Sir Guy thought Western Samoan acquisition of a "home grown" (ie autochthonous: infra, nn 48 and 49 and text) constitution "almost conclusive proof that the sovereignty of Western Samoa was intact at independence and has been all the way through history".

34 Prime Minister, *New Zealand Herald,* 30 July 1982.

35 See Keesing, supra p 369, n 9 at 104; and supra pp 369 and 379.

36 See supra p 378.

37 Cf *R* v *Casement* [1917] 1 KB 98.

38 See also Glover "The Privy Council was Right" [1982] NZLJ 315 and "The Western Samoa Bill – Background and Unanswered Questions", ibid 355 at 357.

39 Maxwell, *Interpretation of Statutes* (12th ed 1969) 116. There is also the presumption that "momentous constitutional changes are not held to be brought about by a side wind or loose and ambiguous general words": *Re the Constitution of Western Samoa* (supra n 24), citing (among other cases) *Nairn* v *University of St Andrews* [1909] AC 147. But understood in its context, the change in the law of Western Samoan national status wrought by the Acts of 1923 and 1928 was scarcely *momentous.*

error in the analysis which, if supportable by argument, might indeed have that effect:—

7. *The Privy Council overlooked the words "capable of application in New Zealand" in s 6 of the Act of 1928.*[40] The effect of those words is said to be that, in Western Samoa as notionally part of New Zealand, the Act could not make Western Samoans British subjects because (owing to the Territory's status as a mandate) it was not "capable" of doing so.[41] But "capable of application" must mean "capable of application in fact or in law".[42] The Act could clearly have applied in fact. It could be inapplicable in law only to the extent (if any) that it was ultra vires the General Assembly. New Zealand legislation passed before 25 November 1947 was (and still is) challengeable on that ground. Specifically in the case of Western Samoa there were, as has been shown, some doubts about the constitutional power of the General Assembly to legislate at all for the Territory.[43] Those doubts, though not satisfactorily disposed of by the Full Court in *Tagaloa's* case[44] and in *Nelson* v *Braisby (No 2),*[45] are unlikely to be sustained by a court today. They provide, however, so far as one can see, the only possible basis for arguing any limit to the legal applicability of the Act of 1928 to Western Samoa. Otherwise one must conclude that the legislation was capable in law as well as in fact of having that effect.

In any event, the "capable of application" phrase is missing from the corresponding s 3 (1) of the Act of 1923.

The Western Samoa Act 1961

The whole matter of the national status of Western Samoans has to be related to "the attainment of independence by the people of Western Samoa", *"in connection"* with which the Western Samoa Act 1961 was passed.[46] By s 3 on Independence Day (1 January 1962) "Her Majesty in right of New Zealand" ceased to have any "jurisdiction over the Independent State of Western Samoa". Under s 4:

> "No Act of the Parliament of New Zealand passed on or after Independence Day . . . shall be in force in Western Samoa."

Section 10 (3) provided that the Imperial Order in Council of 11 March 1920[47] should cease to have effect. And s 10 (1) repealed the British Nationality and New Zealand Citizenship Act 1948 in its application to Western Samoa.

40 Haughey "The Privy Council was Wrong" [1982] NZLJ 317.
41 Ibid at 318.
42 Cf the similar construction given to "capable of taking effect" by Kekewich J in *Re Finch and Chew's Contract* [1903] 2 Ch 486, 493.
43 See supra pp 372-377.
44 [1927] NZLR 883.
45 [1934] NZLR 559.
46 See the long title to the Act.
47 SRO 1920 No 569; 1920 New Zealand Gazette, vol ii, 1819.

The Act of 1961 has a three-fold importance for our purposes.

1. The abandonment of New Zealand jurisdiction and legislative power under ss 3 and 4 was unaccompanied by any conferring of full legislative power on a Western Samoan legislature. The omission was certainly deliberate so that (as the long title and the preamble of the Act indicated) the Constitution of the new independent State should be autochthonous,[48] owing nothing to New Zealand authority. That end seems to have been achieved.[49] But one should not infer that this somehow assists the presuppositions of the critics of the Privy Council in *Lesa's* case. The emergence of Western Samoa as an independent State on 1 January 1962, without any empowerment by the New Zealand legislature, does not imply some mysterious pre-existent indigenous sovereignty in the inhabitants of the Territory, inconsistent with their having been New Zealand citizens because of the Acts of 1923 and 1928.[50]

2. Sections 3 and 4, ending New Zealand jurisdiction in the Territory, would have needed to be in little if in any different form, had Western Samoa been actually incorporated in New Zealand as annexationists desired at the time of the Treaty of Peace. Even read in the light of the preamble (which recites the trusteeship agreement under which New Zealand had been administering authority in succession to its role as mandatory),[51] the provisions of the Act are all consistent with the Crown and the New Zealand General Assembly having enjoyed virtual sovereignty in the Territory — as if indeed it had been part of New Zealand. One is again reminded that had an exercise of that power resulted in Western Samoans becoming New Zealand citizens, that result, assessed against the plenitude of the power, would not have been absurd or unreasonable.

3. Did the Western Samoa Act 1961 itself bring to an end the New Zealand citizenship of Western Samoans which had resulted from the Acts of 1923 and 1928? An affirmative answer to that question could have been urged, though but faintly. The common law status of British subject was, it has been held, lost by persons residing in a territory where British sovereignty was abandoned with the concurrence of Parliament.[52] Possibly a person who was a British subject by birth under largely codificatory legislative provisions, as in the Acts of 1923 and 1928, would lose that status under the common law principle. But nothing similar could apply to the status of New Zealand citizen which, following the pattern introduced generally in Commonwealth countries in the late

48 See K C Wheare *The Constitutional Structure of the Commonwealth* (1960), ch IV, and G Marshall *Constitutional Theory* (1971) 57-64.

49 K Roberts-Wray *Commonwealth and Colonial Law* (1966) 298-300. See supra n 33, for Sir Guy Powles' view. Cf his "Constitution Making in Western Samoa" [1962] NZLJ 106, 108-109.

50 Pace Sir Guy Powles, supra n 33.

51 The Trusteeship Agreement (see the First Schedule to the Samoa Amendment Act 1947) differed from the mandate in that the "integral portion" formula of the latter (see supra, pp 370-372) was not used: see Article III and cf s 14 (4) of the Act of 1947. But in municipal law the legislative power of New Zealand was no less and its exercise unchallengeable in the courts, whether under mandate or the agreement. See *Fishwick* v *Cleland,* supra n 20.

52 *Doe d Thomas* v *Acklam* (1824) 2 B & C 779, 107 ER 572.

1940s, is purely the creation of statute. One cannot infer any intention in the Western Samoa Act 1961 to take New Zealand citizenship from those Western Samoans holding it immediately before Independence Day. Indeed, the implied saving (by s 10 (4) (d)) of the citizenship of naturalized persons points the other way.

Western Samoan law already discouraged dual citizenship so far as it possibly could, as has been seen in the Citizenship Ordinance of 1959. Indeed, under that Ordinance and now under the Citizenship Act 1972 (WS), a person holding New Zealand as well as Western Samoan citizenship could lose the latter by travelling on a New Zealand passport or exercising other privileges of New Zealand citizenship.[53] Since the Act of 1961 left unaffected the New Zealand citizenship of Western Samoans who had undergone naturalization procedures, it must have been intended (in the light of the Ordinance of 1959) that those persons would have to choose between which of their citizenships they wished to exercise. Of course, had the Acts of 1923 and 1928 been correctly understood, as the Privy Council has interpreted them, provisions for adjustment of nationality would have been included in the Act of 1961, which no doubt would have taken New Zealand citizenship generally from those for whom it depended proleptically upon the Privy Council's decision. Such provisions would have been in accord not only (it would seem) with Samoan wishes but with the practice already generally adopted in the legislation by which the United Kingdom Parliament granted independence successively to its colonies, in the years after citizenship of the United Kingdom and Colonies was introduced by the British Nationality Act 1948.[54] The citizens of a newly independent State would, as a rule, scarcely expect to retain their old citizenship with the new.

The Citizenship (Western Samoa) Act 1982

The ensuing alarm at the Privy Council's judgment, the suggestions that there were serious legal objections to it, were perhaps politically understandable; but it is hard to understand why there should have been so much reluctance to admit that, if the legislation of the '20s was intended by those responsible for it to do no more in substance, in applying to Western Samoa, than to provide for the naturalization of alien residents there, the relevant sections were ill-drawn. After all it was a serious mistake to provide in respect of Western Samoa that "this Act shall apply in all respects", if "this Act shall in relation to naturalization apply in all respects" was intended; a mistake made worse by specific references which rendered it impossible for a court to save the construction from its apparent generality.[55] Any criticism should have been directed not at the Privy Council but at those responsible for the Acts of

53 See Citizenship Act 1972 (WS), s 14 (d) and (e).

54 See, eg, Jamaica Independence Act 1962, s 2 (2); Lesotho Independence Act 1966, s 3 (2); Fiji Independence Act 1970, s 2 (2). And cf Zimbabwe Act 1979, s 2.

55 Lord Reid's question, though asked in a somewhat different context is apposite: ". . . could any competent draftsman have adopted this form of drafting it he had intended the result for which the appellant contends?" (*R* v *Schildkamp* [1971] AC 1, 10.)

1923 and 1928; and, to a lesser extent, those who, overlooking the warning in *Annandale's* case,[56] failed to include in the Act of 1961 — even as a precaution — provisions that would ensure that Western Samoans affected by the legislation of the '20s were not left with a New Zealand citizenship they could neither expect nor, it would seem, wish, to retain.

The problem of *Lesa's* case was caused by error not of the Privy Council (for the criticisms of it were groundless and virtually unarguable) but of the New Zealand legislatures of the '20s and early '60s. The problem — which perhaps was not so much that an uncontrolled influx of Western Samoan New Zealanders was likely in fact to occur, but that the public was thought to fear one — could have only a legislative solution. It would of course have been a gross breach of constitutional convention to deprive the successful appellant, Miss Lesa, of her success before the Privy Council.[57] That was not done: by s 5 of the Act of 1982 she was declared to be a New Zealand citizen. Otherwise, under ss 6 and 7, nearly[58] all Western Samoans who had the benefit of the Privy Council decision lost their New Zealand citizenship but, if they were present in New Zealand at the time of enactment, could (together with any other Western Samoans so present) apply for it as of right.[59] The solution, if rough and ready, was not unfair; if one bears in mind that the normal inclusion of nationality adjustment provisions in the Act of 1961 would generally have removed New Zealand citizenship, from those who benefited by the two Acts of the '20s and by the Privy Council decision.

If criticism of the decision was baseless, so was much of the criticism of the Act of 1982. Those who thought it was too speedily passed or (much more important) that the long special relationship between New Zealand and Western Samoa should entitle Western Samoans not benefiting from the Act to be much more generously treated under the immigration laws,[60] may be right. But on the issue of citizenship itself there can be no complaint; ominous suggestions that the Act created "a most alarming precedent" that might be in breach of "those human rights secured by international agreement"[61] are unfounded. The prohibition in Article 15 of the Universal Declaration of Human Rights against arbitrary deprivation of nationality is in the context of a person's right to have one. The Nazi Decree of 23 November 1941 depriving German Jews abroad of their German nationality and rendering most of them stateless was one thing. The New Zealand Parliament's doing in 1982 no less properly and fairly what it could have done at the attainment of Western Samoan independence 20 years before is quite another. By association to confuse the two types of case, even in slight measure, ought to be impossible.

56 See supra n 27.

57 See Brookfield "High Courts, High Dam, High Policy: The Clutha River and the Constitution" [1983] NZ Recent Law 62, 64-66.

58 Those who had already obtained New Zealand passports were saved by s 4 (3).

59 Western Samoan citizens may also apply as of right under s 7 (1), who lawfully enter the country after commencement of the Act and obtain the right of permanent residence under the Immigration Act 1964.

60 See MacAlevey "Letter from Apia" [1983] NZLJ 381, 382-383.

61 Note on *Lesa's* case [1982] NZ Recent Law 345, 346 (JFN).

IV Conclusion

The decision of the Privy Council in *Lesa's* case will remain of great legal and historical interest. On the one hand there is the precise and cogent analysis by the Board of the Acts of 1923 and 1928, an analysis necessarily undertaken without reference to the legislative debates which indicate, in the case of the 1928 Act, that the legislators knew not what they were doing. On the other hand there is the near outrage of some critics of the decision for whom its feared impact on the immigration policies of the '80s was most inconvenient. The weakness of the criticisms has, it is hoped, been demonstrated.[62]

If the Privy Council was unable to take account of the legislative debates, the material it could and did consider showed clearly enough the ambiguous and uncertain position of Western Samoa as a C-class mandate. The resolution of the Council of the League forbade any general process by which inhabitants of a mandate acquired the nationality of the mandatory state. But that moral injunction could not easily be reconciled with the wide terms of the C-class mandates which created the only relevant obligations in international law. Further examination of the background (which, again, no court could undertake) emphasised that ambiguity and uncertainty. The history of Western Samoa's relationship to New Zealand is not, as the Privy Council's critics of the '80s seem to have thought, simply that of a territory to be held in trust until independence, the acquisition of New Zealand citizenship by whose inhabitants was unthinkable. On the contrary, New Zealand aspirations to annex Western Samoa found some fulfilment in the mandate which, after the C-class pattern, allowed the Territory to be deemed part of New Zealand; and the end of which (from the viewpoint of 60 years ago) might have been the Territory's complete incorporation in New Zealand and not independence. When the real doubts about the basis for New Zealand's constitutional power to legislate in respect of the Territory are put aside, as unlikely to be upheld by a court today, the plenitude of that power (as in the Australian and South African mandates) cannot be denied. That the power was exercised to make a number of Western Samoans British subjects by birth, and hence New Zealand citizens, was not morally or politically inappropriate. Those persons anyway owed allegiance to the Crown for its protection of them.

But in the Act of 1961, under which Western Samoa attained independence, provision should have been made that generally Western Samoans holding the citizenship of New Zealand should lose it and hence hold solely that of the new State. Because the effect of the Acts of 1923 and 1928 was not understood, this was not done. The extent to which it has been done, 20 years later, when the Privy Council in *Lesa's* case had authoritatively construed the legislation, cannot be a matter for complaint. The special relationship between New Zealand and Western Samoa has been a close one and of long standing, though obscured by

62 That the criticisms may have a quite unmerited effect on any public debate on retention of appeals to the Privy Council is regrettable indeed.

some uncertainty in the days of the mandate. In the light of the relationship and the uncertainties, the decision of the Privy Council in *Lesa's* case appears far from unreasonable or inappropriate. So too, now that Western Samoa is an independent State, does the Citizenship (Western Samoa) Act of 1982.[63]

63 Jim Evans' carefully analytical note on *Lesa's* case "Some Fine Points of Statutory Interpretation and a Constitutional Upheaval" (1983) 10 NZULR 278 appeared after this article was written and submitted for publication and would invite more adequate reference than can now be given to it here. I would take issue with Dr Evans' analysis in some respects (eg, he is surely over-subtle in his criticism of Lord Diplock at 282; is the "ambiguity" detected really there?). But I am glad his conclusions and mine substantially agree.