

CODIFICATION OF CUSTOMARY REGULATIONS BY VILLAGE COUNCILS IN SAMOA: SOME SOCIAL AND GENDER ISSUES

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VILLAGE GOVERNMENT IN SAMOA

This paper explores the significance of the 2016 Amendment of the 1990 Village *Fono* Act in relation to the customary and legal status of women. Samoa has a unique system of local government based on an adaptation of traditional practice. Until 1990 there was no specific acknowledgement of the *Fono* in law but in 1990 the Village *Fono* Act gave legal recognition to the exercise of power and authority by the *Fono*, in accordance with ‘custom and usage of their villages’. It was introduced in 1990 at the same time that the results of a plebiscite was affirmed and made law, extending the previously restricted franchise to all citizens over the age of 21. The Act was, no doubt, intended to assuage the concerns of traditional village leaders (*matai*), who had previously held the exclusive right to vote in elections, that their authority had been undermined. In its original form the Act outlined the breadth of the authority of the Village Councils in Samoa. The Act remained otherwise unchanged until 2017 when new provisions were added and will be discussed below.

Samoa has approximately 200 traditional villages (*nu'u*); these are traditional polities governing a group of extended families within a territory, which typically extends from the top of the central ridge of mountains to the coast¹. Local government in Samoa is based on the institution of *Fono* (village councils) made up of *matai* who represent the families of the village. A *matai* is the head of an extended family or clan, identified by a title (an ancestral name) belonging to that family. The term *matai* is sometimes translated a “chief”. Each village has a unique traditional honorific salutation

¹ Meleisea, L. M., Meredith, M., Schoeffel, P., Lauano, S. A., Sasa, H., Boodoosingh, R., & Sahib, M. ‘Political Representation and Women’s Empowerment in Samoa’ *Volume 1: Findings and Recommendations*, 2, 2015).

(*fa'alupega*) that alludes to (and thus defines) the rank and status of the *matai* titles of the village. The *Fono* make decisions based on consensus and following discussions in which all *matai* have the right to express opinions. For liaison with the national government, each *Fono* elects a village representative (*Sui o Nu'u*). In most villages there is a lower level of local government comprising village women's committees (*Komiti*) which are represented by an elected *Sui Tama'ita'I*, and associations of untitled men (*Aumaga*), who are subordinate to the *Fono*. This system is often referred to as '*fa'amatai*' and is widely believed to be the foundation (*fa'avae*) of Samoan custom and tradition. Village governments have considerable power and authority in setting priorities for the provision of health and education services, water supply, agricultural development, business operations, land use, customary observances and maintenance of law and order.

Village government is based on the customs, usage and history of each village as interpreted by the *Fono*, its legislative body. These may appoint sub-committees for local services such as schools and water supply as they see fit. The authority of the *Fono* covers actions which are of benefit to the village financially and matters related to village hygiene. The *Fono* imposes fines in the forms of money, animals or other goods, or by requiring work on village land for persons who have contravened the village rules. Samoa's courts were permitted in the 1990 Village *Fono* Act to consider the penalties imposed by the *Fono* in determining the final penalty imposed by the court for a criminal offence. Those dissatisfied with a decision by a *Fono* may appeal to the Land and Titles Court.

LAW, CUSTOM AND THE CONSTITUTION OF SAMOA

The Constitution of the Independent State of Samoa (1960) spells out the rights of the individual, based on the United Nations Convention *on Human Rights*, Part II *Fundamental Rights*, including the provision under Article 3:

“Except as expressly authorized under the provisions of this Constitution, no law and no executive or administrative action of the State shall, either expressly or in its practical application, subject any person or persons to any disability or restriction or confer on any person or persons any privilege or advantage on

grounds only of descent, sex, language, religion, political or other opinion, social origin, place of birth, family status, or any of them.”

Notwithstanding this provision the constitution is silent on customary governance norms. Under Part IV, Article 100 provides vaguely for traditional leadership, stating that: ‘A *Matai* title shall be held in accordance with Samoan custom and uses and with the law relating to Samoan custom and usage.’ Article 101 provides for customary tenure by defining customary land as “land held from Samoa in accordance with Samoan custom and usage and with the law relating to Samoan custom and usage”. It further provides that there will be no alienation of customary land. However ‘Samoan custom and usage’ is not defined in the Constitution or any other Act, but in the case of disputes over custom and usage with regard to *matai* titles or customary land, a case may be taken for arbitration to the Samoa Land and Titles Court, provided for in the Constitution under Article 103. Recent legislation provides that a minimum of 10% of seats in Parliament are to be held by women. In the 2016 elections, four women won seats in the 50 seat parliament and one woman was appointed to make up the quota,² The Internal Affairs Act 1995 provided for the Internal Affairs Division (currently being re’organised into a Governance Division) of the Ministry of Women, Community and Social Development to oversee the wellbeing of villages, village authority, and to provide for ‘other matters relating to the culture and traditions of Samoa’.

The Amended Village *Fono* Act 2016

The Amended Act went into effect in 2017 and Section 5 expanded the authority of the *Fono* to specifically include the ability to impose banishment, to impose curfews as needed, to classify offenses and penalties in the village, protect natural resources, record *Fono* discussions and decisions and the authority to make and alter these and other village rules. It also included the “promotion of natural justice and fairness principles in decision making processes and procedures, protection of Samoan customs, traditions and the protection of village traditions, norms and protocols.”³

² Women in Politics, ‘Country Profile: Samoa’ (2018) <https://www.pacwip.org/country-profiles/samoa/> (Accessed 16 August 2018)

³ *Village Fono Amendment Act 2017* (Samoa)

The village rules in each traditional village vary, as do the penalties for offences committed. These are seldom documented and are subject to change based on the membership of, and decisions of, a *Fono* at a particular time. For example, in the 1970's many villages forbade the consumption of alcohol, whereas nowadays few do so. The Samoa Law Reform Commission (SLRC), after a national consultation on the authority of the *Fono* (2012) recommended that village rules and the penalties imposed be written and registered and assessed for constitutional compliance⁴. The intention of the recommendation was to avoid abuse of authority by *Fono*. The provision of a draft set of rules and penalties as a kind of template would be made available to villages for their consideration and adoption or amendment. It further recommended that penalties for the same offense be standardized across different villages, with records of decisions made by the *Fono* documented for presentation to the court as required⁵. Although the Amended Act invites registration of village bylaws, it is voluntary and registered bylaws cannot be interpreted to be compliant with the constitution (Section 5C). *Fono* were to be gently eased into making a commitment to a set of transparent bylaws to ensure accountable standards of village governance.

The Role of the Ministry of Women Community and Social Development

The Ministry of Women Community and Social Development (MWCSD) is the implementing Ministry for the Village *Fono* Act (VFA) and is responsible for evaluating the Government's compliance with the Convention to End All Forms of Discrimination of Women. There are two liaison representatives, the village representative (*su'i o le nu'u*, a *matai* who is elected member of the village *fono*) and the women's committee representative (*su'i tamaitai*, who is an elected member of the women's committee). The village representatives were managed by the Internal Affairs Division and the women's committee representatives were managed by the Division of Women.

⁴ Samoa Law Reform Commission *Village Fono Act* Report 9 (2012), 16.

⁵ Samoa Law Reform Commission, above n 4, 16 -18.

With a recent restructure the newly established Governance Division oversees both the village committee and women's committee representatives. The Division of Social Development now handles matters related to the advancement of women and children, and the compliance of the Government with CEDAW and the Convention on the Rights of the Child⁶. The Ministry has also introduced District Planning Committees to facilitate a locally driven project agenda.

GENDER, INDIVIDUAL RIGHTS AND GOVERNANCE

Besides the recommendations of the SLRC (2012)⁷, other recommendations to Parliament when it considered the Bill to amend the Act, included those of the State of Human Rights Report 2015 produced by the National Human Rights Institute, which raised concern about the ability of women to present their cases to a *Fono*, and advocated the representation of women in *Fono*⁸. Of all *matai*, only 11% are women according to the 2011 Census⁹. The major issue raised in consultations reported by the SLRC was not women's representation, but freedom of religion; many *matai* making representations voiced their objections to new Christian denominations being brought into villages in competition with the established churches¹⁰. Another common issue raised was the right of *Fono* to banish delinquent individuals or whole families from a village to preserve peace and good order¹¹ with cases recorded of the courts awarding financial compensation to persons who were banished by the *Fono*, on the basis that the VFA 1990 did not authorize the to use banishment as a penalty.¹² A study of gender and governance in Samoa published as *Political Representation and Women's Empowerment in Samoa* found that in villages only about 5% of *matai* were women

⁶ Ministry of Women, "Community and Social Development, Divisions" (2018).

<http://www.mwcsd.gov.ws/divisions> (Accessed on September 3 2018).

⁷ Samoa Law Reform Commission, above n 4.

⁸ Office of the Ombudsman and National Human Rights Institute, *State of Human Rights Report: "For Samoa, by Samoa."* (2015), 9 -12.

<http://www.palemene.ws/new/wp-content/uploads/05.Annual%20Reports/OOTO/OO-NHRI-State-of-Hman-Rights-Report-2015-Eng.pdf> (Accessed on 30 June 2017).

⁹ Bureau of Statistics Government of Samoa, *Population and Housing Census 2011 Analytical Report*, (2012), 50.

¹⁰ Samoa Law Reform Commission, above n 4, 4.

¹¹ Samoa Law Reform Commission, above n 4, 26-27.

¹² The Editor, 'Banishment practice – conflict with the law' (2015) Pacific Human Rights Law Digest (Vol 5) pg. 45- 46

and that many villages have unwritten laws which deny recognition to *matai* titles if they are held by women, and have conventions that exclude women *matai* from participating in village councils¹³. To address these findings, the report of the study made recommendations to Samoa's parliament concerning the amendment to the VFA (a Bill before Parliament in 2015), as follows:

The current proposed provision to amend the Village Fono Act 1990 will extend the powers of the village council to define village council policy (faiga fa'avae) and establish procedures to be followed in making village council decisions (i'ugafono). The proposed provisions of the bill will give legal recognition to the authority of the village council to protect Samoan customs and traditions, and to safeguard village traditions, norms and protocols. On the basis of the research findings we recommend that the Government of Samoa give further consideration to gender equity in the proposed amendments to the Village Fono Act 1990, and hold further consultations to include the following:

- I. In keeping with constitutional provisions (Article 15) for the equality of citizens, and the rights of Samoan families to bestow their matai titles (Article 100), the Village Fono Act 1990 should be amended to include provisions that disallow village councils to discriminate on the basis of sex with regard to the recognition of matai titles or the right of a matai to participate in the village council.*
- II. The amendment of the Village Fono Act 1990 should include provisions requiring village councils to formally consult with the Nu'u o Tama'itai and the Faletua ma Tausi on the formulation and provisions of village council policy (faiga fa'avae) and on the establishment of procedures to be followed in making village council decisions (i'ugafono).*
- III. The amendment of the Village Fono Act 1990 should include provisions that village council policy (faiga fa'avae) and procedures to be followed in making village council decisions (i'ugafono) and include the provision that the president of the village women's committee and/or the village women's*

¹³ Leasiolagi Malama Meleisea et al, above n 1, 8.

*representative (Su'i Tama'ita'i) may directly represent issues and concerns of the village women's committee to the village council at its meetings, rather than indirectly through the village representative (Sui o le Nu'u)*¹⁴.

These recommendations were presented to the Select Committee of Parliament considering the Bill for amending the Village Fono Act (1990), by the research leader, Professor Malama Meleisea, but were ignored by the Committee. As passed by Parliament (now comprising only one political party) the Act does not require a *Fono*, when formalising its rules and penalties, to consult the village women's groups in a *Komiti*, the *Nu'u o Tama'ita'i* (the sisters and daughters of the village) and the *Faletua ma Tausi* (the wives of matai). The application of village norms and traditions has been used as one of the reasons to justify why, in several villages, women are not permitted to hold *matai* titles or to sit in the village *Fono*¹⁵.

FAMILY VIOLENCE AND CUSTOMARY RESPONSES

Village council plays an integral role in maintaining lawful behaviours and dealing with anti-social actions in Samoa's traditional villages. Among such behaviours family violence (the beating of wives and children) as distinct from fighting between different families, has been recognized as a major social problem in both the 2006 Samoa Family Health and Safety Study and the 2017 Samoa Family Safety Study^{16, 17}. The earlier report recommended that the Act be amended to allow village councils to "prohibit violence whatsoever in the family"¹⁸ and the 2017 report recommended that the Act be amended to "empower and oblige village councils to intervene to end family violence incidents."¹⁹ So far only one village in Savaii has banned domestic violence.

¹⁴ Leasiolagi Malama Meleisea et al, above n 1, 9-10.

¹⁵ Samoa Law Reform Commission, (2016) 17 *Samoa's Legislative Compliance with the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)*, Final Report 15.

¹⁶ Secretariat of the Pacific Community, (2006) *The Samoa Family Health and Safety Study*. Noumea: Secretariat of the Pacific Community
<http://countryoffice.unfpa.org/pacific/drive/SamoaFamilyHealthandSafetyStudy.pdf> (Accessed 30 June 2017).

¹⁷ Ministry of Women Community and Social Development Samoa, (2017) *2017 Samoa Family Safety Study*.

¹⁸ *Ibid.*, 94.

¹⁹ *Ibid.*, 102.

Research shows that family violence is common in Samoa^{20 21} and is widely condoned by custom and by Samoan understandings of Christian teaching, and is seldom addressed by village councils. According to the 2017 Samoa Family Safety Study, an estimated 60% of women between the ages of 20-49 who had ever been in a relationship had experienced spousal abuse in their lifetime, with 46% of women in this category, having been abused by their spouse in the last twelve months²². As Samoa's Ombudsman and Commissioner for Human Rights, Maiava Ulai Toma has pointed out on a number of occasions; the key institutions in addressing this social problem are village councils and village churches²³. The report of a national consultation on family violence by the Commissioner for Human Rights is forthcoming.

The research by Meleisea et. al.²⁴, previously cited, argues that the reluctance of *Fono* to rule on matters of domestic violence may be due to the rarity of women *matai* in *Fono*. Given prevailing attitudes in village, however it may be difficult to persuade village councils to tackle family violence or to provide for the exclusion of a 'woman's voice' in *Fono*. As the village council plays an integral role in local governance of Samoa's traditional villages, which are in majority, their role in responding to family violence and domestic violence has been recognized in both the 2006 Samoa Family Health and Safety Study the 2017 Samoa Family Safety Study²⁵²⁶. The earlier report recommended that the Act be amended to allow village councils to "prohibit violence whatsoever in the family" and the 2017 report recommended that the Act be amended to "empower and obliges village councils to intervene to end family violence incidents."²⁷

However, it must be acknowledged that even if a woman's voice were to be permitted, that voice may not critically address the issue of family violence. A recent research

²⁰ Secretariat of the Pacific Community, above n 15.

²¹ Ministry of Women Community and Social Development Samoa, above n 16.

²² *Ibid.*, xvii.

²³ Maiava I. Toma, 'Churches Need to Bear Witness to Domestic Violence' *Samoa Observer* (Apia Samoa) 29 November 2013.

²⁴ Leasiolagi Malama Meleisea et al., above n 1.

²⁵ Secretariat of the Pacific Community, above n 15.

²⁶ Ministry of Women Community and Social Development Samoa, above n 16.

²⁷ *Ibid.*

paper²⁸ demonstrates how women have internalised religious teaching on the roles of wives, believing that if a wife is to avoid beating or rape, she must be a submissive moral exemplar to her husband, acquiesce at all times to his sexual needs, and guard and protect their daughters. There are widely held perceptions—even religious beliefs—that married women should take her status from her husband. Without significant participation in leadership decision-making at the village level, it is difficult for women to become—or to be seen as—national leaders. It found that, irrespective of sex, in the past successful female members of Parliament have shared certain exceptional characteristics. Samoan custom requires a woman to take her status from her husband, so most women parliamentarians have been single, widowed, or married to a non-Samoan. Most were also very well connected by kinship and religious affiliation, well educated, and well-off financially²⁹.

As women are most often the victims of domestic violence, lack of provision within the legislation, for a victim to present a case to *Fono* subverts the course of natural justice. As Boodoosingh³⁰ and Percival³¹ have documented, members of the *Fono* may themselves be perpetrators. When a *matai* commits an offense such as public drunkenness or fighting he will be reprovved and fined by the *Fono* to which he belongs, as may also be the case if he is known to have committed adultery within the village. There are cases when women have reported an offence in their family to the *Sui O le Nu'u*, requesting that it be taken to the *Fono*, but the matter has not been reported. In some instances villages require a matter to be taken to the *Fono* before it is reported to the Police. According to our observations and reports cited above, when an offense is *within* a family (such violence, sexual abuse) it will be seen as a private matter and not acted upon, unless the matter is reported to the Police and the Courts. Although the promotion of natural justice has been written into the Act, so has the protection of the

²⁸ Penelope Schoeffel, Ramona Boodoosingh and Galumalemana S Percival, 'It's All about Eve: Women's Attitudes to Gender-Based Violence in Samoa' in C. Blyth, E. Colgan and K Edwards (eds) *Rape Culture, Gender Violence, and Religion Interdisciplinary Perspectives* (2018).

²⁹ Leasiolagi Malama Meleisea et al., above n 1, 19.

³⁰ Ramona Boodoosingh, *Violence against Women in Developing Countries: Policy and Services in Samoa and Fiji*. (PhD diss., National University of Samoa, 2016).

³¹ Steven Percival, 'Raise the Sennit Sail: Exploring Violence Against Women and Girls in Samoa'. Documentary Film Series. Tiapapata Art Centre (2015). <http://www.creativesamoa.com/multimedia> (Accessed 30 June 2017).

often vaguely defined ‘Samoa tradition and custom’ anticipating, as did the fathers of the Constitution of Samoa, that these would evolve in keeping with public opinion and national circumstances over time.

CUSTOM AND SOCIO-ECONOMIC CHANGE

Prior to 1960 there is no evidence that women held *matai* titles, other than those specific to the daughters of high ranking *matai*. But, as history shows, Samoan culture is flexible, resilient and accommodating³² and has found new ways to honour women as *matai*, in new circumstances. It is now increasingly common for women to be given *matai* titles by their families in a process of cultural accommodation, to acknowledge the achievements of women in education and employment. *Fono* that refuse to recognise women *matai* claim that there are unchanging customary rules since time immemorial that only men can be *matai*. Some of these villages are historically important traditional district centres that see their rules as defences of Samoan culture and protocols from intrusions by state authority and foreign concepts about natural or human rights. It is significant that among these villages were the pre-colonial traditional capitals of the historical leading districts in the 18th and 19th centuries and perhaps long before, and the seats of powerful group of orators who bestowed some of Samoa’s royal titles. While *matai* from these villages conceded that *matai* titles belong to families, not to villages, and that families could bestow titles as they saw fit, these villages reserved the right to recognise titles or to refuse recognition. Therefore it is up to the families that comprise the village, whose *matai* comprise the *Fono*, to make decisions concerning recognition. If families want to bestow titles on women, they must work through their representation in the *Fono* for the recognition of the person they have appointed.

Another invocation of custom³³ to support the exclusion of women from *Fono* is *o le va tapuia* – the sacred space – a respectful silence between men and women who are

³² Serge Tcherkezoff, ‘The Samoan Category Matai (“Chief”): A Singularity in Polynesia? Historical and Etymological Comparative Queries’ (2000) 109(2), 151-190 *The Journal of the Polynesian Society*.

³³ Leasiolagi Malama Meleisea et al, above n 1, 4.

not spouses. At meetings of the *Fono*, it is said that men like to jest with one another in ways that are not befitting for women to hear.³⁴ The ‘sacred space’ is an aspect of the covenant of respect between sisters and brothers. It forbids any aspect of sexuality to be mentioned between them. This convention extends to people who are related by marriage to a brother or sister. For example, if in a *Fono* meeting a *matai* man is married to the sister of another *matai*, these two men should not joke together about sexual matters, and there is a polite convention that men and women should be circumspect about sexual joking in each other’s company lest the sacred space of the brother-sister covenant be transgressed. But whether or not such jesting is appropriate or dignified in village council meetings, it is evident that it contributes to the idea that women *matai* may not feel comfortable participating in *Fono*, and that their absence re-inforces cultural and religious perceptions that decision-making is a male prerogative, not only in the *Fono*, but also, by extension, in national Parliament.

Samoa is perhaps unique among the Pacific Island States by reason of the fact that it has made efforts through institutional means to meet its international conventions, commitments and goals. For example, under the Convention for the Elimination of All Forms of Discrimination against Women, the 10% law can best be understood as the outcome of the international governance agenda. Samoa’s progress towards meeting commitments to the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW) was criticised in the Thirty-second session of the CEDAW Committee in 2005³⁵. The representative of the government of Samoa acknowledged that Samoa’s constitutional provision on gender equality related to Article 1 of the Convention, as it ensured equal protection under the law and prohibited discrimination on the basis of sex. It was noted that “... women achieved suffrage in 1991 and equality in acquiring or retaining citizenship when married to a foreigner in 2004 ... reform was still required, especially in regard to gender-based

³⁴ Steven Percival. *E Au le Ina’ilau a Tama’ita’i: Gender Equality Issues in Samoa* (2013). <https://www.creativesamoa.com/multimedia> (Accessed 30 June 2017).

³⁵ Committee on the Elimination of Discrimination against Women, ‘Concluding Comments: Samoa’ (2005). <http://www.un.org/womenwatch/daw/cedaw/cedaw32/conclude-comments/Samoa/CEDAW-CC-WSM-0523820e.pdf> (Accessed 17 August 2018).

violence, family, employment, land and criminal law and women's participation in parliament.”

While expanding the authority of *Fono*, the amended Village *Fono* Act has not addressed directly, as was hoped, issues of gender equity and family violence. These matters have been left in the hands of the various *Fono* and it is possible that *Fono* will eventually establish bylaws to address family violence and women's participation. Since Samoa became a Christian country nearly 200 years ago, many old ancestral customs have been discarded. For example, some village councils still believe that their customary right to banish a *matai* and his or her family from a village includes the right to destroy the house and property of that *matai*. While this was certainly the custom in pre-colonial Samoa, it is no longer permitted by law. The process of cultural accommodation of liberal rational/legal norms is still gradually unfolding; there are many utterances that the concept of “rights” is hostile to Samoan values which revere hierarchy and collective interests^{36 37}. Yet the day may also come when some brave Samoan woman *matai* challenge a *Fono* that does not recognise female *matai*, in the Samoa's Supreme Court, invoking Part II Fundamental Rights, Article 3 in The Constitution of the Independent State of Samoa (1960).

³⁶ Steven Percival, above n 33.

³⁷ Steven Percival, above n 30.