

1. Talofa lava everyone, I am Theresa from the Samoa Law Reform Commission. Firstly, I thank the International Centre for Law and Religion studies and those that made it possible for me to participate in this conference, to hear from so many learned people about religion and law in their different countries. In Samoa's situation, it is finding the balance between the right to religious freedom under Samoa's Constitution, versus our customary rights under Samoa's Customary laws. It is an ongoing saga faced by Samoa's Government and Courts to harmonise the best of the Western and Customary systems, to meet the needs of the Samoan community.
2. Today, I will share with you some of our experiences and provide some examples where the rights to freedom of religion have formal protection under the law but the reality being that it relies on (informal) customary laws to be secured.
3. I will start with the address by His Highness our Head of State Tuiatua Tamasese Efi at a symposium on Law and Religion at the Samoan National University in 2008. He stated:

...the quest for freedom of religion presumes not only the right to worship one's God freely, but also the responsibility to practice that worship in a way that respect and upholds the virtues of harmony, balance and justice.

4. Samoa is considered the heart of Polynesia, located in the South Pacific ocean halfway between New Zealand and Hawaii. It consists of ten islands and has a population of approximately 190,000. Samoa is a postcard of natural beauty, known for its beautiful beaches, friendly, warm people, and I believe unmatched hospitality. Samoa is probably more well known in the U.S for its American football players of Samoan descent.
5. Samoa is a country fiercely proud and protective of its culture and the 'Samoan way of life' (the 'faasamoa') which is communal in nature. The faasamoa is widely accepted as one of the main contributing factors to Samoa's peace and stability. Underpinning the faasamoa is the 'faamatai' which is a system of traditional chiefs –with its own hierarchy, process and laws. Each aiga or extended family has several chiefs (matai) who head the family, with status and ranking depending on the title held by that chief.
6. Collectively the chiefs in the village form a village council (village fono). The village council meets regularly to deal with the village affairs in accordance with custom and usage. From a 'western perspective' the village council acts as the executive, legislature and judiciary of the village, covering civic and political duties in the village, dealing with offences which threaten village harmony, and imposing punishment by way of fines in money, mats, food or animals.
7. The significant role of the village council in maintaining and preserving peace, harmony and stability within villages, thereby resulting in peace and stability nationwide is often reiterated in Samoa's case law. It is widely accepted that for peace and stability to continue in Samoa, it is essential that its culture remains strong and intact.
8. Samoa was a colony of Germany (1899-1914), and later a protectorate of New Zealand (1914 to 1961). Samoa became independent in 1962, the same year Samoa's Constitution, its supreme law was enacted, stating in the preamble that Samoa is based on Christian principles and Samoa customs and traditions. Christianity has had a profound and lasting impact on Samoan society and the faasamoa since the arrival of the first missionaries some 186 years ago, as evidenced in the motto on Samoa's crest which reads, *Fa'avae I Le Atua Samoa* – 'Samoa is founded on God'.

9. Drawing heavily from the Universal Declaration on Human Rights, the Samoan Constitution guarantees fundamental rights and freedoms. The right to freedom of religion is set out in Article 11(1) – providing that every person has the right to freedom of thought, conscience and religion and that this right includes freedom to change his or her religion or belief, and freedom, . . . to manifest and propagate his religion or belief in worship, teaching, practice and observance. This is very much based on an individualistic philosophy, in contrast to the communal philosophy of the faasamoa.

10. The Constitution was created to be well received by the United Nations, so as not to jeopardize national independence aspirations. There were many concerns about religious freedom raised at the time, and suggestions that religious denominations permitted in Samoa should be restricted to those ‘existing’ at the time, and that freedom of religion should be provided to Christians only. In response, article 11(2) was included allowing ‘reasonable restrictions’ on the right to freedom of religion on certain grounds which include public order, health or morals. In my respectful view, caution is required, so that what is described as a ‘reasonable restriction’ on a human right does not result in the denial of that right.

11. Many challenges to Article 11 of the Constitution have occurred between individuals and small groups on the one hand and Village Councils on the other. These relate to rural settings on customary land, as 81% of Samoa’s land is customary land under the control of Village Councils. Most matters involve resistance by Village Councils to attempts by individuals or groups to set up new churches in villages, with violence and sometimes the banishment of the individual and family from the village, a feature of such disagreements.

12. Samoa’s Courts have however consistently ruled in favour of fundamental freedoms in the Constitution, with the Supreme Court urging tolerance of beliefs of others as the way forward. In one such case, Sapolu CJ stated:¹

Inherent in the concept of freedom of religion enshrined in the Constitution is tolerance, the ability to understand and accept the fact that not all people would hold and subscribe to the same religious beliefs even if they are all Christians. One must learn to tolerate and respect the religious beliefs of others even though such beliefs may be different from one’s own religious beliefs. In this way peace harmony and stability will remain and continue in village societies.

13. From the perspective of maintaining law and order the State has a real stake in ensuring the authority of Village Councils is not undermined. It seems in the village perspective that such disputes are not religious disputes but bear on custom and tradition of the authority of the Village Council.

14. It is important to look at the aftermath of Court decisions which reflect the realities of individuals who seek redress for violations of fundamental rights under the Constitution. Although Courts have consistently ruled in favour of these fundamental rights, the reality of everyday life in rural Samoa appears to be ignored. The reality being that an individual cannot

¹ *Laifaialli v AG [2003] WSSC 8, 924* (Supreme Court, Sapolu CJ)

expect to be unfettered in his or her activities as he or she would be in an individualistic society. In most cases, despite a Court decision ordering the affected individual or group to return to the village and build their church, they wisely choose not to until reconciliation is carried out when the Village Council is ready to receive them. It seems it is up to Samoan custom to secure and restore such rights to an individual who is deprived of them.

- In one such case, the Court ruled in favour of people banished from their village by the Village Council and made a declaration to receive them back into the village and keep them safe. But this decision was in a practical sense ineffective. It fell on the petitioners themselves to seek the justice that the Court declared was due to them.² About 18 months after they were banished the village agreed to receive the banished people and formal reconciliation was made with a customary presentation of significant value.
- In another case, the Supreme Court ordered a Village Council to pay damages and refrain from excluding the plaintiff from possession of his lands. However it seems damages were never paid and the plaintiff passed away without ever returning to his village.³
- In another similar situation a Village Council banished a family that had been carrying out a bible study group at its home – the family’s belongings were burnt resulting in heavy monetary fines imposed by the Court. An appeal against the fines resulted in significant reductions and comment from the Court that the victim still had his right to bring civil proceedings– which they did not do, nor had they sought to press charges in the first place. They chose instead to keep the possibility for reconciliation open. Despite the Constitution on their side, they engaged in discussions about reconciliation 5 years later when the Village Council was ready to receive them, and a customary presentation of significant value was made to the Village Council. Reconciliation did not require the Village to retreat from its original stance and the family was restored rights that were less than they had originally enjoyed.⁴

15. In 2011, the Samoa Law Reform Commission was tasked to find a compromise between religious freedom and the authority of village councils. A starting point was that Article 11 would not be touched and it would remain as it has always been. The Commission considered that religious freedom guaranteed in Samoa’s Constitution is an individual right that should be supported and encouraged, however it cannot be pursued at all costs. It cannot be pursued at the expense of the Village Council which is an integral part of the faasamoa maintaining peace and harmony in Samoan society. Nor too must Village Councils make arbitrary and unilateral decisions and have unfettered powers to make decisions on any of the freedoms guaranteed under the Constitution, in a vacuum without consultation and proper processes. To ensure that peace and harmony is maintained in Samoa, they too must abide by rules of natural justice. Amendments to relevant legislation were proposed intended to bring to light, scrutinize and expose unreasonable decision making by Village Councils so that abuses of fundamental freedoms are eliminated. The Bill is currently before Parliament and the Commission anticipates its

² Toluono Feti & Others v Autagavaia Lave & Others ALC 5209 & ALC 5209P1 (September 1966)

³ *Tuivaiti v Faamalaga [1980] WSSC 2*

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enactment in the next year so that some (improved) balance between an individual's Constitutional rights and freedoms and the communal way of Samoan life can be struck.⁵

16. Thank you for your time. I trust that gives you some understanding of the issues Samoa.

Faafetai Lava

⁵ Village Fono Amendment Bill 2016.