

14 May 2020

Hon. Gatoloa'i Faana Amataga Alesana-Gidlow

Chairperson

Parliamentary Select Committee: Health and Social Services, Internal Affairs,  
Community and Social Development

**SOGI**

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**SUBMISSION REGARDING THE LAND AND TITLES BILL 2020,  
CONSTITUTION AMENDMENT BILL 2020 AND JUDICATURE  
ORDINANCE BILL 2020**

I enclose a submission from my Office as the National Human Rights Institution with regards to the proposed Bills:- Land and Tiles Bill 2020, Constitution Amendment Bill 2020 and Judicature Ordinance Bill 2020 for the Committee's consideration.

Yours faithfully,



Maiava Iulai Toma

**Ombudsman**

Attachment: Office of the Ombudsman Submission

## **SUBMISSION REGARDING THE LAND AND TITLES BILL 2020, CONSTITUTION AMENDMENT BILL 2020 AND JUDICATURE ORDINANCE BILL 2020**

### **1. INTRODUCTION**

The Office of the Ombudsman as also the National Human Rights Institution (NHRI) of Samoa under section 33 (c) (ii)<sup>1</sup> of the Ombudsman Act 2013 makes the following submissions on Cabinet's proposed amendments to the Constitution 1961, the Judicature Ordinance 1961, and the Land and Titles Act 1981.

The NHRI wishes to comment, from the perspective of human rights, on the proposals contained in the Amendment Bills and on commentary advanced in support of them in Explanatory Memoranda.

### **2. OBJECTIVE OF PROPOSED BILLS**

The objective in proposing the amendments contained in the Constitution Amendment Bill is stated to be:

“to reflect more of the Samoan context inside Samoa's supreme law, the Constitution to ‘make the Constitution a Samoan Constitution’ in light of today's context” --

“to give more recognition of our customs in our Constitution.”

It is not clear to us how the above highly desirable objectives are achieved in any substantive way by the Bills before the Committee.

What the Bills appear to do is to merely stick the entirety of the Land and Titles Courts structure in the body of the Constitution and to place that structure and its deliberations outside of regular Constitutional surveillance provided for under the Constitution.

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<sup>1</sup> The Ombudsman has the following human rights functions ... (c) to monitor and promote and protect compliance with international and domestic human rights law including ... (ii) reviewing existing and proposed legislation or reviewing other laws for consistency with international human rights law and recommendation additional legislative and other measures to protect human rights

With respect, what this creates is the impression of a fragmented rather than an integrated Constitution which doesn't look any more Samoan than what we already have.

The Explanatory Memorandum to the Constitution Amendment Bill 2020 makes reference to a concern expressed in a Parliamentary Symposium that individual rights outweigh Village Fono decisions in the Courts and that the Constitution is more protective of individual rights as compared to customs and usage and the way of life of the Samoan people.

We discuss this common perception at length below.

### 3. HUMAN RIGHTS (INDIVIDUAL RIGHTS)

Individual Rights is intrinsic to society. Each member of society, made in the image of God, possesses these rights in equal measure. It is truism therefore to say that **"if you protect the individual you protect society"**<sup>2</sup>. It is for this reason that basic freedoms of the individual are entrenched in any Charter that is revered as the supreme law of any land, as is the case with the Constitution of Samoa.

The lifestyle within a society may be individualistic or communal in character. These are approaches to human relationships that are accepted or cherished by people in democratic societies. They represent differences in outlook, inclinations or attitudes about human coexistence. They do not in any way nullify the reality of the existence of individuals within a group or society who may need protection from Authorities which are more powerful than the individual, and which may wish to do the individual grave injustice or atrocious harm. That is why individual fundamental rights are universally lauded.

These basic individual rights accrue to a person because he is a human being made in the image of God. Basic human rights such as the right to be tried fairly, or the freedom to think and to worship in accordance with one's own conscience are inalienable and pertain to any individual in civilized individualistic or communal societies.

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<sup>2</sup> Sir Guy Powles, at his swearing in ceremony as the first Ombudsman in the English speaking world, Wellington, 1962

There is no such match up as an “individual rights versus communal rights” contest. A community is a conglomerate of individuals with rights and obligations toward one another, such as the obligation to respect and accept the wishes of the majority in a democracy. On a totally different level, the Community has expectations of its members grounded on expressed laws, or traditional communal ethos if such exist, or a mixture of both.

It is often said in Samoa that Human Rights is an introduced ‘palagi/foreign’ thing and not part of our customs and traditions.

Human Rights is about humans, it’s about the wellbeing and the freedom of people to enjoy their existence with and around one another. We need to see Human Rights in Samoa as simply the entitlements of people as people living with one another and in the same way, see the entitlements of everybody else in the world.

Seen in that light, Human Rights have been with us and observed by us since time immemorial under a different guise; that is, in the guise of the *Faasamoa* with its concepts of *Feavaa’i*, and mutual recognition of individual dignity. Mutuality permeates everything in a communal society in terms of respect, dignity, equality, protection etc.

In that Samoa is a free democratic country, its Constitution protects the individual’s basic freedoms and his right to seek the assistance of the State in the enforcement of his freedoms when they are at risk of being improperly violated. This has been the situation in Samoa from the time of its independence.

The proposals contained in the three Amendment Bills before the Committee seek changes that will impact upon the fundamental freedom guarantees that are currently in place in the Constitution. We comment in Part 7 below on the injurious consequences the proposed amendments to Articles 4 and 73 of the Constitution have, in our view, on the legal guarantees of fundamental freedoms.

#### 4. LEGAL PLURALISM; CONFLICT BETWEEN MODERN LAWS AND SAMOAN CUSTOMS

The Explanatory Memorandum to the Constitution Amendment Bill draws attention to two “situations” existing in the law of Samoa that supposedly give rise to the need for the changes proposed in the batch of Amendment Bills now before the Parliamentary Committee. These situations are:

- (i) legal pluralism; and
- (ii) conflict between modern laws and the customs and usages of the Samoan people.

This submission contends that there is nothing of consequence arising intrinsically from the existence of these phenomena in the law of Samoa, to justify tampering with existing mechanisms in the law as entrenched in the Constitution, for the protection of fundamental freedoms.

##### *(i) Legal Pluralism*

Legal pluralism is nothing strange or frightening. It can work perfectly well in situations where it needs to exist, provided jurisdictions within the structure of the law as a whole are clearly established and properly observed.

Human failings aside, the structures that have been operating in Samoa since 1934 have not proven, in their essence, incapable of serving Samoa’s needs for a specialized Court with exclusive jurisdiction and for the delivery overall, of justice for the people as a whole.

Segments of these structures can of course be revised and expanded to improve quality of outcome without altering the parameters of their functions. **On this ground alone, this submission sees merit in the purely structural elements of the proposals in the Bill for the Land and Titles judicial mandate.**

##### *(ii) Conflicts between modern laws and Samoan customs*

Much is made in the Constitution Amendment Bill Explanatory Memorandum of “**conflicts between modern laws and the customs and usages of the Samoan People**”.

Since independence it has been open to the Courts in Samoa to modify application of the law to take into account where appropriate, the customs and cultural practices of the Samoan people. This freedom is preserved under Article 111 of the Constitution which defines law as “ ... *and includes any custom or usage which has acquired the force of law in Samoa or any part thereof under the provisions of any Act or under a judgement of a Court of competent jurisdiction ...* “

A question is posed and answered for explanatory effect in the Explanatory Memorandum of the Constitutional Amendment Bill as follows:

**“In a courtroom, why are individual rights more powerful than *Village Fono* decisions? The answer is because the Constitution says so.”**

Given the centrality of the *Village Fono* to Samoan life, the red-blooded Samoan reaction from rural Samoa to the scenario conjured up here, quite predictably, would be to get rid of either individual rights, the Constitution, or both.

With respect, the truth of the matter is not fully reflected in the posed question and answer. The fact is that in a courtroom, individual fundamental rights can be more powerful than the decisions of Village Fono or any other Authority in Samoa, **if the decisions in question are in violation of such rights**. The high importance of a fundamental human right, such as the right not to be subjected to cruel or inhuman treatment, for each individual human being living in Samoa, cannot be over emphasized.

No individual right is however, **absolute**. The right to life itself can be taken away, as under capital punishment, if the laws of the State, representing the will of the people, so allow. Other examples are when war or public emergencies threatening the life of a nation (in cases like covid-19 or measles pandemic) cause some freedoms and rights to be limited or suspended by States in the best interests of everyone. What is important to note is that whatever is done in the modern state, be it the enjoyment of a fundamental right or the holding of a village feast, **it has to be in compliance with law**.

In the nature of a free egalitarian society, individual rights in Samoa are exercisable with respect to, or without infringing upon, the rights of others. This fundamentally limits the efficacy of any individual right. In accordance with this principle, individual rights should not be viewed as something cold and sharp like a knife that is to cut through whatever gets in its way, but rather

as something that is desirable in itself to have around, in the nature of flowers for instance.

As the upholding of human rights is for the general good, they come with responsibilities. Just as a flower's continued flourishing depends on the soil and garden, the individual in exercising his rights, needs to have regard for others and the well being of the community around him.

## **5. INDIVIDUAL RIGHTS TRUMPS VILLAGE CONSENSUS AND VILLAGE FONO EDICTS**

The notion that individual rights trump village consensus and Village Fono edicts is widely held in Samoa. We came across this in consultations for NHRI Samoa's first *State of Human Rights Report 2015* pursuant to section 40 of the Ombudsman Act 2013.

The notion is directly linked to a succession of Supreme Court rulings squashing Village Fono refusals to allow the establishment of new churches in their villages. Harboured resentment of perceived humiliation by the Supreme Court of the Village Fono and an undermining of its necessary authority is real, for which rural Samoa blames "individual rights", and the favouring that the Constitution is believed to give this claimed to be only "newly introduced phenomenon", over the "age-old" cherished ethos of our communal society.

The Village Fono is at the core of the Matai system and of society in rural Samoa.

It could be said that what rural Samoa may be feeling, is simply part and parcel of historical shoddy treatment and lack of proper recognition by the State of the Village Fono, and what that customary body actually is and does, for the Independent State of Samoa.

The Village Fono, from time immemorial, has been the instrument for the peace, harmony and security of the Samoan village. The Village Fono regulates the life of the village population in accordance with honoured customs and traditions. The rural Samoan looks to the Village Fono for civil leadership and protection; and is expected to accept its censure when given. He is proud to be a Samoan citizen, but if push comes to shove he probably is a man of his village, first and foremost.

Colonial governments, in their time, had their own priorities in Samoa and by and large, they left self-governing rural Samoa to its own devices. Apart from

activities that were considered mutinous by the colonial powers, the few problems involving rural people that came to the attention of, and deemed to require action from, the central governments were dealt with in accordance with colonial wisdom and introduced laws. Things continued in much the same way into independent Samoa when this came about in 1962.

The 1961 Constitution of Samoa did not provide for municipalities or local-government bodies. The equivalent of these civic functions and responsibilities were shouldered by Village Fonos in the way they have traditionally performed them. The Village Fono however was not recognized as part of the national machinery of governance. As noted by Samoa's Constitutional Advisor, Professor Davidson in his book *Samoa mo Samoa* (page 391), Village Fono authority, derived as it was from custom, **operated outside of the law**. This legal situation remained unchanged for almost three decades after independence.

What most frequently brought Village Fono decisions into the high common law Courts during the first four decades of independence was village resolve not to allow the establishment of new churches within village precincts. In dealing with disputes in this matter, the Land and Titles Court, applying Samoan custom and usage, was inclined to rule in favour of Village Fono decisions as traditional practice, reflective of the wishes of the village populations.

Non-acceptance of Land and Titles Court conclusions brought applications under Article 4 of the Constitution to the Supreme Court for enforcement of fundamental religious freedom. Applications to the Supreme Court were inevitably decided in favour of the applicants. Village Fono refusals of permission for the establishment of new churches were found simply to be in violation of the individual's freedom of religion, guaranteed to him under Article 11(1) of the Constitution.

In the case of *Lafaialii v Attorney General* [2003] WSSC 8 (24 April 2003), Sapolu CJ said:

*" ... this Court is not unmindful of or insensitive to Samoan customs or the Samoan way of life in the village context or the authority held and the position occupied by the Alii and Faipule within the village. The authority of the Alii and Faipule has played a major and vital role in maintaining and preserving peace, harmony and stability nationwide.*



*However, the Constitution is the supreme law of the land and it must be obeyed."*

**In no other circumstance but in religious freedom cases, has the Samoan Supreme Court found itself simply compelled to rule in favour of an individual fundamental right without needing to consider arguments a Village Fono may have against it.**

And in Lafaialii above, the then Chief Justice was quite right. The supreme law of the land had indeed to be obeyed but, with respect, **what the supreme law of the land says about religious freedom needs to be looked at more closely** for purposes of our going forward.

Freedom of religion and worship, as it happens, is **not unconditionally guaranteed** under the Samoan Constitution. While Article 11(1) guarantees freedom of thought, conscience and religion including the right to manifest and propagate religious beliefs in private or in public, Article 11(2) allows the imposition of **reasonable restriction on the exercise** of religious freedom by an existing law or new law of the State.

Even though it was the expectation of the Constitutional Convention prior to independence, that the Independent State of Samoa would do so, **the State has never enacted any law pertaining to Article 11(2) of the Constitution**. That being the case, "reasonable restriction" as an issue in the context of Article 11(2) has never featured in Supreme Court consideration of the religious freedom cases.

The possibility of viewing decisions of the Village Fono as "law" in the sense of Article 11(2) was not ever advanced, even though in accordance with the custom and usage of the Samoan people, Village Fono decrees, within the confines of the village, have always been law. On the other hand as the Village Fono operated outside of the law as pointed out by Professor Davidson, how could they possibly have standing in a Court of Law in these matters?

Religious freedom, in the circumstances of Samoa, was so unconditional and unrestricted in law, at the time of *Mau Sefo & Others v Attorney General* [2000] WSSC 18 that the Court considered it "*not necessary for [the Court] to analyze the several purposes the Alii & Faipule may be said to have had in mind [for withholding consent]*".

The Supreme Court was plain speaking and expansive in its remarks in *Mau Sefo*, a case which had been earlier considered in the Appeals division of the Lands and Titles Court. Wilson J commented that-

*“the [Land & Titles] Court may be seen as having asserted the predominance of decisions of the Alii & Faipule said to be in conformity with the custom and usages of the Samoan people over and above the fundamental rights of the plaintiffs by the Constitution”.*

Wilson J stressed the imperative of observing the supreme law:

*... “it must be emphasized that the Constitution is the supreme law of Samoa and any existing law which is inconsistent with the Constitution is, to the extent of the inconsistency, void. The activities and decisions of the Alii & Faipule of a village must always be undertaken and made subject to (and in the light of) the Constitution. Even if it is feared that some unrest or disharmony may result, consent to the establishment of a new church cannot be withheld or insisted upon if, to do so, infringes a fundamental right guaranteed under the Constitution”.* (Underlining supplied)

Reasonable restriction on the exercise of religious freedom as already pointed out can be imposed by law as allowed by Article 11(2) of the Constitution. While the Independent State has not enacted any law directly focusing on religious freedom in the villages, it has acted to recognize in law the role of the Village Fono in village governance.

The Village Fono Act 1990 states its purpose to be:

*“An ACT to validate and empower the exercise of power and authority by Village Fono in accordance with the custom and usage of their villages and ... ”.*

Section 3 of the ACT states:

*“The past and future exercise of power and authority by every Village Fono with respect to the affairs of its village in accordance with the custom and usage of that village is hereby validated and empowered”.*

The words of the Village Fono Act are clear and weighty enough, but what do they mean in real life for the villager? What does ‘the past and **future** exercise of power by every Village Fono with respect to the affairs of its village in

*accordance with the customs and usage of that village is hereby validated and empowered* mean?

Does it not mean that legitimate laws for the village and its affairs can be made by its Village Fono? What relevance might these “laws” have to the vexed question of new churches within village precincts **from the perspective of “reasonable restriction”** under Article 11(2) of the Constitution, and taking into account the definition of law given in Article 111 with reference to customs and usage rendered law by Act of Parliament? What more might be needed to enable the Village Fono to at least be heard on these matters in Court?

After all, the withholding of permission to establish a church in a village does not make it impossible for a particular individual to worship in accordance with his chosen religion. Furthermore, United Kingdom Courts, the House of Lords no less, uphold the view that while the right to believe is unchallengeable, religious belief ‘*does not allow one to manifest one’s religion at any time and place of one’s own choosing*’<sup>3</sup>. Rural Samoa, presumably, would readily agree with that *Palagi* view of the individual right in question.

Relevant or not, weighty or not, the above questions were never posed for consideration in the Supreme Court even though *Mau Sefo* was heard and decided ten years after the passing into law of the Village Fono Act 1990. From the perspective of rural Samoa, the attention given to these matters of vital rural interest by the State and Organs of the State may have appeared as nonchalant as they have always seemed to be from as early as the colonial days. Should anyone wonder then at a cry of: Let’s have a Samoan Constitution!

## 6. A DESIRABLE CONSTITUTION

But what thing is such a thing as a ‘**Samoan Constitution**’?

In layman’s terms, a desirable Constitution is simply a *Supreme Law that requires people to live in freedom and to conduct their affairs as they wish in accordance with law; whereunder we can do all the Samoan things in strictly Samoan ways and whereunder no Authority may impose any gross injustice or atrocity upon any of us.*

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<sup>3</sup> R (Begum) v Governors of Denbigh High School 22 WLR 3372 and R (on application) v Head Teachers [2006] EWHC 298 (Admin)

It is the contention of this submission that we have such a Constitution now. To meddle with it in any drastic way could, in our humble view, result in throwing the proverbial baby out with the bath water.

The solid precedent the Supreme Court has set for itself through its many rulings on religious freedom, can only be reversed or negated by the Court itself, should it have a mind to do so. The State can however solve the problem that has taxed rural Samoa for so long, by legislating 'reasonable restriction' on the exercise of religious freedom in villages under Constitution Article 11(2). The law would need to show objective justification for the restriction it authorises and Village Fono can resume the performance of their traditional responsibilities in these matters.

## 7. ENFORCEMENT OF FUNDAMENTAL RIGHTS

Constitution 1961, Article 4 (1)	Proposed Change
<p><b>Article 4. Remedies for enforcement of rights – (1)</b> Any person may apply to the Supreme Court by appropriate proceedings to enforce the rights conferred under the provision of this Part.</p>	<p><b>Article 4. Remedies for enforcement of rights - (1)</b> Subject to judicial review matters arising from the proceedings in Part IX Land and Titles Court, any person may apply to the Supreme Court by appropriate proceedings to enforce the rights conferred under the provision of this Part.</p>

The current Article 4 (1) of the Constitution guarantees to any person the right to apply to the Supreme Court to enforce their fundamental rights (such as the right to a fair trial, freedom from inhuman treatment, freedom of religion, etc).

We are confused as to what the proposed amendment to Article 4 (1) of the Constitution, as set out in the above box, is supposed to mean exactly.

Taken together with the intended replacement of current Article 73 with the proposed new Article 71 (Jurisdiction of the Supreme Court), the intended

effect appears to be that citizens may no longer make application to the Supreme Court, or anywhere else for the enforcement of their fundamental rights, with regard to matters that will fall under Land & Titles judicial jurisdiction.

The proposed changes strike at the heart of Part II of the Constitution which secures and guarantees to any and every person the enjoyment of their fundamental rights in all areas be it under civil, criminal, Lands and Titles or whatever jurisdiction. It runs counter to the nature of the Constitution as portrayed in its preamble by the words “**Wherein should be secured to all the people their fundamental rights ...**”.

Furthermore, the changes are contrary to the requirements of Article 8 of the Universal Declaration of Human Rights<sup>4</sup> and Article 3 (a)- (c) of the International Convention on Civil and Political Rights<sup>5</sup> (ICCPR). Samoa is a signatory of the ICCPR.

## 8. CONCLUSIONS

NHRI Samoa does not support drastic amendment of the Constitution. It does not consider this necessary to remedy the problems experienced in the past.

NHRI Samoa suggests instead, Parliamentary consideration of legislation under Article 11(2) of the Constitution.

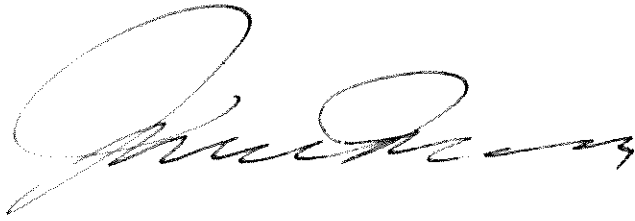
NHRI Samoa supports in general the proposals made in the Amendment Bills for the operational expansion and deepening of the Lands and Titles judicial mandate except for the removal of any part of it from lawful surveillance currently in place under the Constitution.

Submitted with great respect.

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<sup>4</sup> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

<sup>5</sup> Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

A handwritten signature in black ink, appearing to read 'Maiava Iulai Toma', with a stylized flourish at the end.

Maiava Iulai Toma  
**Ombudsman**