



Journal entry for THE PARLIAMENTARIAN

October 2018 – *Contextualising Human Rights is crucial from the Perspective of a Small State*¹

The Independent State of Samoa located in the Pacific Islands gained its independence in 1962. It has a total population of 199,243.² The Constitution of the Independent State of Samoa (1960) is the supreme law with Part II setting out the fundamental rights recognized by Samoa which includes the right to life, personal liberty, freedom from inhumane treatment, freedom from forced labor, right of fair trial, rights concerning criminal law, freedom of religion, rights concerning religious instruction, freedom of speech, assembly, association, movement and residence, a person's rights regarding property and freedom from discriminatory legislation. These fundamental rights also correspond directly with the rights enshrined in the Universal Declaration of Human Rights (UDHR)³ and the international human rights instruments already ratified by Samoa.

Despite its Constitution declaring the protection of fundamental rights, dialogues and discussions on human rights as a foreign construct remain a challenge. The introduction of the UDHR and other International Instruments in Samoa saw the idea of individualism introduced and continues to meet with mixed responses and feelings of fear of threat to the *Fa'asamoa*. These discussions are not new and the dialogue had already taken place long before the inception of NHRI Samoa in 2013 which is mandated under the *Ombudsman Act 2013* to promote and protect human rights of all Samoans. Since its establishment, NHRI Samoa has worked alongside its partners and the community to develop mechanisms that continue to push and promote contextualizing human rights to suit the Samoan context. This is done by weaving together foreign concepts and principles of *Fa'asamoa* to demonstrate and reflect that the combination of both can be mutually reinforcing; that is, they work together to uphold and protect both the *Fa'asamoa* and the human rights of the individual which can ultimately lead to collective good and safer and harmonious communities.

Fa'asamoa is a unique way of life to Samoa. It prescribes an all-encompassing traditional system of roles and responsibilities that spell out different relationships within the family and community. The traditional *fa'amatai* system (village councils) is central to the organization of Samoan society. Over

¹ Article by the Samoa National Human Rights Institution cited in *The Parliamentarian* (2018) Issue Four, pp. 310-311, <file:///C:/Users/USER/AppData/Local/Temp/TheParliamentarian2018IssueFourFINALonlinesingle.pdf>

² <http://www.sbs.gov.ws/index.php/population-demography-and-vital-statistics>

³ For example, protected within the Universal Declaration of Human Rights (UDHR) are the following: the right to life (Article 3), freedom from inhumane treatment (Article 5), the right to a fair trial (Article 10), freedom of thought and religion (Article 18), rights regarding speech, assembly, association, movement and residence (Articles 20 and 13, respectively), and freedom from discriminatory legislation (Article 7).

the decades, the authority of village councils⁴ has played a vital role in maintaining and preserving peace, harmony, security, and stability through customary law and traditions, especially in the rural areas where the majority of Samoans reside. The state relies heavily on this effective system for the maintenance of law and order throughout Samoa. This is the environment and context in which the individual exercises his/her rights and freedoms.

Survey and village consultations held across Samoa in 2015 as part of NHRI Samoa's first *State of Human Rights Report to Parliament*⁶ saw many accepting human rights as a slow process, as ingrained practices within the *Fa'asamoa* inhibit its full realization. This ranged from substantial issues like restrictions on the establishment of new religions and banishment to more general statements around village rules and punishments being too severe and burdensome.⁷ It also points to the clash between village council decisions and individual freedoms within the village. Additionally, the clash between the family matai and members of the families where individuals feel that they are not consulted and are expected to adhere to decisions made by their family *matai*.

Under *Fa'asamoa*, the individual is as conscious of self and personal rights and is as desirous of personal dignity as any other individual, but recognizes and accepts the role and ultimate authority in the village in which she/he is represented by her/his matai.⁸ However, it is paramount for village councils to properly exercise their authority while also taking into account the individual's human rights and strike an important balance between communal rights and individual rights. While it is desirable not to precipitately undermine the authority of *Ali'i* and *Faipule* in the village communities, NHRI Samoa firmly believes that when the individual is protected against unjust or unfair governance or other unreasonable interference, society is also protected.

The Constitution declares the protection of fundamental rights and individual freedoms, but it is less explicit on communal rights. Due to this imbalance, village councils have felt that their right to make governing decisions in the interests of communal welfare have been unreasonably trumped in the Courts by claimed individual freedoms. Recently, there have been issues with communal regulations violating fundamental rights under the Constitution that have been heard at the Supreme Court. The most common cases involve village councils exercising collective opposition over the banishment of villagers or to the establishment of new churches.⁹ The Supreme Court has been strict in upholding individual fundamental rights as required by the Constitution. Hence, while there is a divergence in the origin of human rights beliefs between Europeans and Samoans, they are equivalent in nature and complement each other by sustaining human dignity and entitlements and improving the welfare of individuals and their families.

⁴ Consisting of *Ali'i* and *Faipule* (high chiefs).

⁵ See generally Samoa Law Reform Commission (SLRC), Final Report for the Village Fono Act 1990 and Freedom of Religion [includes portions of the Commission of Inquiry Report (COI) Report] available at: <http://www.samoalawreform.gov.ws/wp-content/uploads/2014/08/Final-Report-for-the-Village-Fono-Act-1990-and-Freedom-of-Religion.pdf> [accessed 26 June 2015]; See also, *Lafaialii v Attorney General* [2003] W.S.S.C 8 (24 April 2003).

⁶ State of human rights report 2015

⁷ In the majority of village consultations, participants often expressed frustration with village councils making decisions without consulting the families or person involved.

⁸ See note 27.

⁹ See e.g. *Tutuila v. Punitia* [2012] W.S.S.C. 107 (21 June 2012); *Ibid.* at 4.

“Despite its Constitution declaring the protection of fundamental rights, dialogues and discussions on human rights as a foreign construct remains a challenge. The introduction of the UDHR and other International Instruments in Samoa saw the idea of individualism introduced and continues to meet with mixed responses and feelings of fear of threat to the Fa’asamoa.”

It is clear from the decisions of the Court that individual rights will supersede communal rights as long as it is shown that there is a breach of fundamental rights within the Constitution. However, it has not done so without respect for the village system.¹⁰ For example, with regards to banishment, the Court has upheld the decisions of the *Ali’i* and *Faipule* when there is a reasonable restriction imposed by existing law on the exercise of the rights of freedom of movement and residence, in the interests of public order.¹¹ The activities and decisions of the *Ali’i* and *Faipule* within a village must always be undertaken and made subject to the Constitution, even if it is feared that some unrest or disharmony may result.¹²

It is the view of NHRI Samoa that Human rights are underpinned by core values of respect, dignity, equality, and security for everyone. Similarly, *Fa’asamoa* holds core values that guide social interaction such as respect, inclusivity, dignity, love, protection, and service, which mutually reinforce human rights. It is no surprise that the relationship between human rights and *Fa’asamoa* can be mutually reinforcing given they are both rooted in the dignity of the person, love and respect. An example, looking at the issue of family violence – human rights are based on the notion of rights and responsibilities – you cannot have rights without the responsibility to uphold the rights of others. *Fa’asamoa* is based on reciprocity and mutuality. Mutual protection cannot be achieved by one person alone, it requires people to meet their own responsibilities towards one another to enjoy the protection the *Fa’asamoa* affords them. When it is not a two-way process, abuse and violence can occur. Human Rights apply universally and equally to each and every one of us. Family violence violates a range of human rights including the right to life, freedom from punishment and torture amongst others. Whilst human rights approaches see protection and promotion from an individual perspective (the very nature of them being indivisible, interrelated, and interdependent, meaning that if you protect one individual you are also helping to protect the rights of a community and vice versa. By better-protecting rights of individuals from violence, we will also be protecting the collective rights of others including women and children.

The NHRI acknowledges that:

1. Continuing education and awareness on the topic of human rights and its application to Samoan way of life is critical particularly the interconnectedness of its principles as it can

¹⁰ Nelson, J. in *Su’a Rimoni Ah Chong v Mulitalo Siafausa Vui* an unreported decision dated 1 August 2006 (“... the power of the village and Matai is important and ought to be respected by this court. But the power is not greater than the power of the Constitution, the Legislative Assembly, the Supreme Court of Samoa or the rule of law.”). His Honour Chief Justice also shared the same view in the case of *Lafaialii v Attorney General* [2003] W.S.S.C. 8 (24 April 2003).

¹¹ *In re the Constitution, Taamale v Attorney-General* [1995] W.S.C.A. 1; 02 1995B (18 August 1995); affirmed by Article 13(1)(d).

¹² Commission of Inquiry (COI), Commission of Inquiry Report 2010, on file at the Office of the Ombudsman.

lead to an understanding and ultimately set us on the track to fully customizing human rights.

2. It takes time to get past the hurdles of misunderstanding and pure resistance but the work we are doing now through human rights education and awareness can lead to new attitudes and realization of human rights in our society
3. Increased awareness of responsibilities that go hand in hand with exercising of rights and universal rights at village level can heighten understanding and can allow people to grasp how human rights can/might benefit the *Fa'asamoa* rather than undermine it.

Cited in: *The Parliamentarian* (2018) Issue Four, pp. 310-311,

<file:///C:/Users/USER/AppData/Local/Temp/TheParliamentarian2018IssueFourFINALonlinesingle.pdf>

The article is by the National Human Rights Institution Samoa. The Office of the Ombudsman was established in 1990 by virtue of law to investigate complaints about decisions,¹³ actions or inaction of government agencies¹⁴ in matters of administration. The good governance core function of the Office promotes transparency, accountability, integrity, and fairness in public administration. The Samoan Parliament repealed the Office's founding law in 2013 and replaced it with the Ombudsman (Komesina o Sulufaiga) Act 2013.¹⁵ This new Act re-establishes the original good governance function and mandated the Office with two additional core functions: Promotion and protection of human rights; and Investigation of complaints concerning officers of a disciplined force. The Act gives the Office wide-ranging duties and powers to promote and advocate for the protection of human rights in Samoa, qualifying it as a National Human Rights Institution (NHRI). In May 2016, it was graded 'A Status' NHRI by the Global Alliance of National Human Rights Institutions (GANHRI) as a 'Paris Principles'¹⁶ compliant institution. For further information email: info@ombudsman.gov.ws or visit www.ombudsman.gov.ws.

¹³ Including recommendation made to a Minister of Cabinet.

¹⁴ Officers, employees or members exercising a function or power under a legislation are included in the investigation.

¹⁵ The new Act commenced on 6 June 2013

¹⁶ Principles relating to the Status of National Institutions (The Paris Principles), General Assembly resolution 48/134, 20 December 1993, <https://nhri.ohchr.org/EN/AboutUs/Pages/ParisPrinciples.aspx>.