

Talofa everyone. I am Leilani from the Samoa Law Reform Commission.

Samoa is located halfway between Hawaii and New Zealand in the South Pacific ocean. It has a population of approximately 185,000. It is known for its endless sunsets, breathtakingly beautiful beaches and its manu Samoa rugby team. Its most recent notable characteristics are: changing the side of the road on which to drive from the right to the left hand side of the road and moving the international dateline from its west to its east so that we are in the same day as New Zealand and Australia. It is an intensely Christian country. It is communal in nature.

It is a country fiercely proud and protective of its culture-called the 'faasamoa'. The 'faasamoa' or the Samoan way of life includes the 'faamatai' or the system of traditional chiefs. The head of each extended family is a chief. These chiefs form a village council of chiefs in each village. These village councils are the cornerstone of Samoan society, contributing to the country's stability. They meet regularly to deal with the affairs of the village in accordance with custom and usage. They have powers to impose punishment by way of fines in money, mats, animals or food. They deal with local offences which threaten village harmony.

Samoa became independent from New Zealand in 1962. The same year a new constitution came into effect. Our constitution is our supreme law. It guarantees fundamental rights and freedoms such as the freedom of religion in article 11. The fundamental rights chapter of the Samoa constitution draws heavily from the Universal declaration on Human Rights. Samoa is a relatively young nation, its Constitution is reasonably robust. But challenges to the Constitution and these freedoms have arisen in the last decade.

Challenges to article 11 have arisen from the communal nature of Samoan existence. The existence of religious freedom guaranteed by Art 11 on communities situated on freehold or state owned land has not been an issue. Traditional communities situated on customary land present a different picture. The village councils which exist in rural Samoa are well known for their role in controlling village affairs and maintaining peace and harmony in the village. Samoa's small police force are concentrated in the urban area. Village councils control customary land which is 85% of the land in Samoa.

The need to interpret Article 11 has taken the form of cases brought before the courts between individuals and groups on the one hand and village councils on the other. These cases have been over violation of religious freedom. Typically these cases involve efforts to establish a new church in the village against the wishes of village councils. Often villages have had the same denominations since John Williams of the London Missionary Society brought Christianity to Samoa in 1830.

After a Commission of inquiry in 2010, the Samoa Law Reform Commission was tasked to find a compromise between religious freedom and the authority of village councils. A starting point for the Law reform Commission was that Article 11 would not be touched and it would remain as it has always been. However the freedom of religion is not an absolute freedom. The Constitution allows reasonable restrictions. The reality of rural and community living in Samoa often means that an individual cannot expect to be unfettered in his/her activities as he/she would be in an individualistic society.

All cases that have been to court has seen the Courts support the rights in the Constitution. However the Courts fail to comprehend the reality of everyday life in rural Samoa. In most cases, while the Court has ordered the affected individual or group to return to the village and build their church, these successful plaintiffs haven't. Why? Their community which gives them their identity and sense of being has been alienated and any reconciliation will only be carried out when the village council is good and ready. In a sense, it is up to Samoan custom to secure and restore such rights to an individual who is deprived of them, despite what the Court says. Instances where plaintiffs have returned without proper restoration have led to violence and unrest in villages.

While religious freedom is to be supported and encouraged, it cannot be pursued at all costs. It cannot be pursued at the expense of the village council, which is the glue holding together the fabric of Samoan society. Samoa has a strong culture and village councils are an integral part of that culture. They have been there since time immemorial. The Constitution on the other hand was created to satisfy Samoa's aspirations of nationhood, so that the United Nations would accept its strive for independence as a colonial territory. It is a situation of a legal framework superimposed on an existing culture. It has always been a question of fit- does the reasonable restriction clause of the Constitution accommodate this fit?

Since Christianity came to Samoa, village councils have entered into protective covenants with Church ministers/reverends. It means church ministers/reverends are protected and accorded the highest status and respect by village councils. In any given village, whether there are 2 or 7 different churches, village councils accord the same protection, status and respect to each of those reverends. For village Councils, the issue for them is not so much a freedom of religion issue, it is more a question of how many protective covenants that they realistically enter into. Villagers have never been prohibited from attending the church of their choice in other villages. When village councils prohibit the establishment of a new church, it is both a territorial and land issue, and a social harmony issue. It is a territorial issue because customary land is communally owned and no one individual can decide unilaterally what is built on that land. It is a social harmony issue because new churches attract people from outside the village, people who are not subject to the village council and therefore do not respect and obey village rules

and protocols. But oftentimes it is simply a practical issue. When a small village has 5 or more churches, it means that these large structures are practically side by side.

The constitution also recognizes any custom or usage which has acquired the force of law, either through legislation or common law. So customary law needs the intervention of Parliament or the Courts to render it law. A 1990 Act called the Village Fono Act (Village Council Act) recognized the existence of village councils and the control they exercised over their communities. However this Act is inadequate in many ways-while it gives powers to village council, it does not specify how they should exercise those powers.

What do we at the Samoa Law reform Commission consider as the way forward?

Religious freedom in individualistic societies is very different from the realities of communal societies. Religious freedom which is an individual right cannot be pursued at all costs, but neither can village councils have unfettered powers to make decisions on this freedom or any other freedom, in a vacuum, without consultation and proper processes.

We believe that the key to reforming the Village Fono Act is to introduce concepts such a consultation: especially between those wishing to set up a new church and village councils. Other concepts such a general applicable laws and neutrality means that village rules, protocols and by laws must not target particular denominations. Concepts of constitutionality of village rules and by laws must be introduced through a system of registration of all village rules, protocols and by laws with the Ministry of Justice which determines the constitutionality of such. Rejections of bylaws/rules/protocols mean that they do not comply with the Constitution. The way in which the village councils make their decisions can no longer be arbitrary and unilateral. They must abide by the rules of natural justice.

The proposed amendments to the Village Fono Act are intended to bring to light, scrutinize and expose unreasonable decision making by Village Councils so that abuses of fundamental freedoms are eliminated. At the same time, it is not an exercise in downplaying their importance, it is an acknowledgment of their importance in maintaining peace and harmony in villages.

This approach may be considered inadequate but the ultimate aim of this reform as with any reform undertaken by the Commission, is to ensure that peace and harmony is maintained in Samoa.

Thank you for your time. I trust that gives you some understanding of what we face. Thank you to the International Centre and the Law School for the opportunity to share our realities and enjoy your wonderful hospitality. Faafetai Lava (many many thanks)

