

VILLAGE FONO AMENDMENT ACT 2017- SOME SOCIAL AND GENDER ISSUES

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Abstract

Sāmoa possesses two parallel systems through which social order and justice are maintained; these are the formal western judicial and legal system and the traditional justice mechanism provided by the village councils. Village councils play an integral role in maintaining social order and passing judgement on offences in the traditional villages in Sāmoa, with the majority of villages being classified as traditional. Due to variation in the definitions of acceptable norms, the penalties for different offences across villages, and the potential conflict with the state laws, there was a push towards a review of the Village Fono Act 1990, the key piece of legislation which governed the functioning of the village council. The amended Village Fono Act 2017 has expanded the authority of and has encouraged the codification of the customary regulations by village councils. This paper will discuss several social and gender issues which may emerge due to the codification.

Keywords: Village Fono Act 2017, Codification, Gender

Village Government in Sāmoa

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. Sāmoa has a unique system of local government based on an adaptation of traditional political 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 Sāmoa. The Act remained otherwise unchanged until 2017 when new provisions were added and will be discussed below.

Sāmoa 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 coast (Meleisea et al 2015: 20). Local government in Sāmoa 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 as ‘chief’. Each village has a unique traditional honorific salutation (*fa’alupega*) that alludes to (and thus defines) the rank and status of the *matai* titles of the village. The *fono* makes 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 is 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 Sāmoan 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. Decisions made by the *fono* can be challenged at the Land and Titles Court and citizens are in principle, able to report criminal matters to the police, but many choose to abide by the decisions of the *fono*.

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 benefit 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 had contravened the village rules. Sāmoa'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 Sāmoa

The Constitution of the Independent State of Sāmoa (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 Sāmoan custom and uses and with the law relating to Sāmoan custom and usage." Article 101 provides for customary tenure by defining customary land as "land held from Sāmoa in accordance with Sāmoan custom and usage and with the law relating to Sāmoan custom and usage." It further provides that there will be no alienation of customary land. There are few definitions of 'Sāmoan custom and usage', it is not defined in the Constitution but is defined by the *Acts Interpretation Act* 2015, Section 3 as:

'the customs, usages and traditional practices of the Sāmoan people existing in relation to the matter in question at the time when the matter arises, regardless of whether or not the custom, usage or practice has existed from time immemorial.'

Prior to universal suffrage coming into effect in 1990, only *matai* title holders could be on the individual voter's poll. This was challenged in the case of *Saipā'ia Olomalu v. Attorney-General* almost a decade earlier, in 1982, where sections of the Electoral Act 1963 relating to eligibility requirements to be a registered voter (including the requirement to hold a *matai* title to be on the individual voter's roll), were contested as being incongruent with Article 51(1) and (2) of the Constitution (subsequent amendments to the Constitution have placed the contents of these Articles under Article 3) which covered freedom from discriminatory legislation. Although *Olomalu* won, the Attorney-General's office appealed and the judgement was overturned on the basis that the drafters of the Constitution intended for Sāmoa to be governed by its traditional *fa'amatai*.

While the Court of Appeal agreed that the sub sections in the Electoral Act 1963 (sub sections 16 and 19) were discriminatory on the basis of family status, the decision was the Article 15 of the Constitution were not 'was not intended to and does not relate to voting at general elections...' (Bayne 1985: 202).

Cases of disputes over custom and usage with regard to *matai* titles or customary land may be taken for arbitration to the Sāmoa Land and Titles Court, provided for in the Constitution under Article 103. Issues can potentially arise as the practice of several persons holding the highest *matai* title within extended families normally held by the family *sa'o* (who traditionally was the sole head of the extended family and could approve a lease on part of the customary land belonging to the title on behalf of the extended family) are becoming more common (Meleisea 2018: 60).

There are many constraints to women holding decision making positions at the local and state government levels, which include the small percentage of women who hold *matai* titles, 11 percent at the 2011 Census, (Sāmoa Bureau of Statistics 2012: 50), among other social normative constraints. To support the amelioration of this situation, an amendment to the Constitution in 2013 (the Constitution Amendment Act 2013, No. 17 inserted the new Article 44[1A]) provides that a minimum of 10 percent 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 (Women in Politics 2018).

The Ministry of Women, Community and Social Development remains a key point of contact and a liaison between the *fono* and *komiti* of communities. This is achieved by monthly meetings with the *Sui o Nu'u* and *Sui Tama'ita'i*, who represent these village bodies, with meetings taking place both in Upolu and Savaii. The Internal Affairs Division of the Ministry (currently being reorganized into a Governance Division), is authorized under the *Internal Affairs Act* 1995 to oversee the wellbeing of villages, village authority, and to provide for other matters relating to the culture and traditions of Sāmoa, which includes oversight and management of the *Sui o Nu'u* and *Sui Tama'ita'i*.

The *fono* is integral to governance at the local level of Sāmoa's traditional villages, and until the amendment of the *Village Fono Act* 1990 in 2016, the 1990 Act existed as the guiding legislation for their authority. The following section expands on the implications of the amendment of the legislation on village *fono* authority.

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 Sāmoan customs, traditions and the protection of village traditions, norms and protocols*” (Village Fono Amendment Act 2017).

The village rules in each traditional village vary, as do the penalties for offenses committed. These are seldom documented and are subject to change based on the membership and decisions of a *fono* at a particular time. For example, in the 1970s many villages forbade the consumption of alcohol, whereas nowadays few do so. The Sāmoa 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 compliance (SLRC 2012: 16). 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 standardised across different villages, with records of decisions made by the *fono* documented for presentation to the court as required (SLRC 2012: 16–18). Although the *Amended Act* invites registration of village by laws, 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 accountability of the standards of village governance.

The Land and Titles Bill 2019

Other laws salient to the discussion of the eligibility requirements for *matai* title bestowal are the *Land and Titles Act* 1981, the *Land and Titles Bill* 2019 and the *Sāmoan Status Act* 1963. The *Land and Titles Bill* 2019 is currently under review and should it be passed into law, will repeal the 1981 legislation. The *Land and Titles Act* 1981 and the *Land and Titles Bill* 2019 both include sections on the qualifications of a person to hold a *matai* title. Part 5 (Titles) section 20A of the 1981 Act (*Land and Titles Act* 1981) refers to applicant as a person. In the 2019 Bill, Part 4 (*Matai* Titles) Section 10, the individual under consideration is referenced by the pronouns he or she. The 2019 Bill (*Land and Titles Bill* 2019) reduces the age of eligibility to hold or to be bestowed a *matai* title from 25 years (in the 1981 Act) to 21 years of age.

Both the *Land and Titles Act* 1981 and the *Land and Titles Bill* 2019 make reference in the respective sections on qualifications of a *matai* title holder (Part 5 Section 20A in the 1981 Act and Part 4 Section 10 in the 2019 Bill) that the individual is required to carry out duties (serving the family,

community and village) in accordance with Sāmoan custom and usage. Again there is no definition of Sāmoan Custom and usage provided in the Constitution, but custom has been defined by the *Acts Interpretation Act 2015*. This facilitates the variable interpretation of the term when determining the suitability of candidates for the title.

The Sāmoan *Status Act 1963* has two sections related to *matai* title holders; Section 6 states that only Sāmoans can hold *matai* titles, with the rest of the section related to land rights entitled to only Sāmoans. Section 7 contains a caveat to Section 6 as it states that persons of European descent who were bestowed *matai* titles prior to the *Sāmoan Status Act 1963* coming into effect and who still held those titles when it came into effect, would be allowed to continue to do so. ‘Honorary’ *matai* titles continue to be bestowed to foreigners out of respect and appreciation for their contribution to Sāmoa however these titles have no impact under Sāmoan land and titles law.

Gender, Individual Rights and Governance

Besides the recommendations of the SLRC’s 2012 report on the *Village Fono Act*, 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 the *fono* (Office of the Ombudsman and the National Human Rights Institute 2015: 9–12). Of all *matai*, only 11 percent are women according to the 2011 Census (Sāmoa Bureau of Statistics 2012: 50). The major issue raised in consultations reported by the SLRC was not women’s representation, but freedom of religion, (this could have been attributed to the Terms of Reference of the 2010 Commission of Inquiry being on “freedom of religion”) with many *matai* making representations voicing their objections to new Christian denominations being brought into villages in competition with the established churches (SLRC 2012: 4). Another common issue raised was the right of the *fono* to banish delinquent individuals or whole families from a village to preserve peace and good order (SLRC 2012: 26–27), 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 *fono* to use banishment as a penalty (The Editor 2015: 45–46). A study of gender and governance in Sāmoa published as *Political Representation and Women’s Empowerment in Sāmoa* found that in villages only about 5 percent of *matai* were women (this figure varies from the 11 percent stated in the 2011 Census, as the 2015 report was written four years after the census, and some female *matai* holders may not reside in the village), 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 councils (Meleisea et al 2015: 8). To address these findings, the report of the study made recommendations to Sāmoa’s parliament concerning the amendment to the *Village Fono Act* (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 Sāmoan customs and traditions, and to safeguard village traditions, norms and protocols. On the basis of the research findings we recommend that the Government of Sāmoa 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 Sāmoan 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 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) (Meleisea et al 2015: 9–10).*

These recommendations were presented to the Select Committee of parliament considering the Bill to amend 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 tausī* (the wives of *matai*). The application of village norms and traditions has been used as one of the reasons to justify why, in 19 villages women are not permitted to hold *matai* titles or to sit in the *fono* (SLRC 2016: 15; Meleisea et al 2015: 8).

The impact of these impediments to women holding *matai* titles, decision making roles or being able to sit in the *fono* carry over into governance at the national level, as a political candidate must be a registered *matai* title holder to run for election. Of the twenty four women who contested seats in the 2016 general election, four won their seats and one seat was assigned to the female candidate who had polled in the highest (under the 10 percent quota mentioned earlier). The importance of women holding high ranking *matai* titles, continually contributing to village governance (the *fono* and the church) and to be supported by their extended family in the village(s) to be considered seriously by the electorate was highlighted in interviews with the women candidates who ran for the 2016 general election. The candidates also highlighted that women electors were more accustomed to men as leaders and decision makers, so were less supportive of them (Sinclair et al 2017: iii–iv).

Family violence and Customary Responses

Village council plays an integral role in maintaining lawful behaviours and dealing with anti-social actions in Sāmoa'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 Sāmoa Family Health and Safety Study and the 2017 Sāmoa Family Safety Study (Secretariat of the Pacific Community 2006; Ministry of Women Community and Social Development 2017). The earlier report recommended that the Act (*Village Fono Act* 1990) be amended to allow village councils to 'prohibit violence whatsoever in the family' (Ministry of Women Community and Social Development 2017: 94) and the 2017 report recommended that the Act be amended to "*empower and oblige village councils to intervene to end family violence incidents*" (Ministry of Women Community and Social Development 2017: 102). So far only one village in Savaii has banned domestic violence.

Research shows that family violence is common in Sāmoa (Secretariat of the Pacific Community 2006; Ministry of Women Community and Social Development 2017) and is widely condoned by custom and by Sāmoan understandings of Christian teaching, and is seldom addressed by village councils. This was illustrated in the 2000 Sāmoa Family Health and Safety Study where 76 percent of male respondents expressed that women should be obedient to avoid being beaten by their husbands (Secretariat of the Pacific Community 2006: 42). According to the 2017 Sāmoa Family Safety Study (Ministry of Women Community and Social Development 2017), an estimated 60 percent of women between the ages of 20–49 who had ever been in a relationship had experienced spousal abuse in their lifetime, with 46 percent of women in this category, having been abused by their spouse in the last twelve months (Ministry of Women Community and Social Development 2017: xvii). As Sāmoa'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

churches (Toma 2013). The report of a national consultation on family violence by the Commissioner for Human Rights is forthcoming.

The research by Meleisea et al. (2015), 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 the *fono*. Given prevailing attitudes in villages, however it may be difficult to persuade village councils to tackle family violence or to provide for the inclusion of a 'woman's voice' in *fono*. As the village council plays an integral role in local governance of Sāmoa's traditional villages, which are in majority, their role in responding to family violence and domestic violence has been recognized in both the 2006 Sāmoa Family Health and Safety Study and the 2017 Sāmoa Family Safety Study as was mentioned earlier (Secretariat of the Pacific Community 2006; Ministry of Women Community and Social Development 2017). 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 paper (Schoeffel et al 2018) 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 to 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. Sāmoan custom requires a woman to take her status from her husband, so most women parliamentarians have been single, widowed, or married to a non-Sāmoan. Most were also very well connected by kinship and religious affiliation, well-educated, and well-off financially (Meleisea et al 2015: 19).

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 Boodoosingh (2016) and Percival (2015) 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. These sanctions may also be imposed 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 the writer's 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 often vaguely defined 'Sāmoan tradition and custom' anticipating, as did the fathers of the Constitution of Sāmoa that these would evolve in keeping with public opinion and national circumstances over time.

Custom and Socioeconomic 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 Sāmoan culture is flexible, resilient and accommodating (Tcherkezoff 2000: 151–190) 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 defence of Sāmoan 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 Sāmoa'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, who comprises 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 custom (Meleisea et al 2015: 4) was that women should be excluded from *fono* is '*o le va tapuia*'—the sacred space—a respectful silence between men and women who are 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 (Percival 2013). 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 pair. 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 reinforces cultural and religious perceptions that decision-making is a male prerogative, not only in the *fono*, but also, by extension, in national parliament.

Sāmoa is perhaps unique among the Pacific Island States for 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 (CEDAW), the Millennium Development Goal 3 and Sustainable Development Goal 5, the 10 percent law can best be understood as the outcome of the international governance agenda and not from public advocacy (Schoeffel 2017: 6). Sāmoa'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 2005 (Committee on the Elimination of Discrimination against Women 2005). The representative of the government of Sāmoa acknowledged that Sāmoa'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 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 Sāmoa 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 Sāmoa, it is no longer permitted by law. The process or cultural accommodation of liberal rational-legal norms is still gradually unfolding; there are many utterances that the concept of 'rights' is hostile to Sāmoan values which revere hierarchy and collective interests (Percival 2013, 2015). Yet the day may also come when some brave Sāmoan woman *matai* challenges a *fono* that does not recognise female *matai*, in the Sāmoa's Supreme Court, invoking Part II Fundamental Rights, Article 3 in The Constitution of the Independent State of Sāmoa (1960).

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