

THE FA'ASĀMOA AND THE ELECTION LAWS

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Introduction

Allegations of vote buying during election times are common place in the Pacific region and Sāmoa is no exception. However, in Sāmoa confusion arises because these allegations are complicated by the assertion that gifts given during election campaigns are not bribery but payments that are required in customs. This has been the common defence raised in court in election bribery cases. In Sāmoa, all seats of Parliament can only be held by *matai*, and electorates are defined by districts and sub-districts. The potential for confusion about whether monetary payments are bribes or acceptable customary practice is magnified during elections because voters sell their votes and expect something in return from candidates. The problems of bribery lead Parliament in 1995 to amend the Electoral Act 1963 purposely to reduce the floodgate of bribery petitions. In 2005, Parliament again amended the Electoral Act 1963 intentionally to specify certain customary payments as not considered bribery.

The importance of Parliamentary control over the making of appropriate laws in relation to bribery cannot be over-emphasised. One may debate whether it is the role of Parliament to effectively control political procedures and the law, or, should Parliament put in place specific mechanisms in an attempt to control bribery at election times? It is generally understood that Parliament must do all within its power to ensure that all election laws are intact effectively and efficiently, is a fact no one would wish to debate. The paper examines the cultural and legal factors that have contributed to instances of bribery. It also discusses the Electoral Amendment Act 1995 which has been generally considered discriminatory, and the Electoral Amendment Act 2005 as failing to address the issue of bribery. The paper will also address the necessity to clarify distinctly the forms of payment that constitute bribery and the forms that do not. Moreover, discussions will also take into consideration the most recent amendments including the Constitutional Amendment Act 2013 and the Electoral Amendment Act 2015 in cognizance of the Sāmoan culture and the legislative framework guiding the elections.

The matai suffrage and the universal suffrage

After independence in 1962, the *matai* system was the basis of Sāmoa's electoral system that governed the families, the villages and the whole of Sāmoa. The introduction of Universal Suffrage in the 1991 General Elections allowed all aged 21 and over, male and female, the right to vote in elections while restricting the right to stand as candidates for Parliament to *matai*. The change came into effect when the Human Rights Protection Party (HRPP) put to the test the question of universal suffrage by way of a national referendum in 1990 and was supported and approved by 52.6 percent of voters. Hence, the right to contest elections was restricted to individuals holding traditional leadership or *matai* titles. The preference and endorsement of this form of suffrage was based on the fact that the *matai* are representatives of the families (*'aiga*) and likewise, constituencies because they are chosen by a decision of the extended family (*'aiga potopoto*). However, the plebiscite of 09th May 1961 revealed a majority preference for a restricted form of suffrage wherein only *matai* could run for elections as well as vote.

In effect, the *matai* suffrage remains while at the same time posing a challenge to the democratic process and the validity of the system as in elections. With the establishment of universal suffrage, causing an escalation in the number of votes never before encountered, the potential for bribery also increased significantly compared to the times when only *matai* voted.

The common types of bribery allegations

Electoral corruption of vote buying and vote selling became extremely common during the period preceding any General Elections and allegations concerning such will only be heard by the Courts. The allegations are not necessarily criminal prosecutions but are election petitions which challenge the validity of a candidate's election under section 12 of the Electoral Act: "*where a candidate who has been elected is proved at the trial of an election petition to have been guilty of any corrupt practice at the election, his election shall be void.*"

In the history of election petitions, conflicts have arisen over what constitutes bribery or corrupt practices as opposed to traditional concepts of giving gifts and chiefly obligations. No doubt, the courts have been put in an invidious position in their obligation to decide the applicable laws in the realisation that the ramification to the fabric of Sāmoan traditional society would be far reaching. Nevertheless, the most common acts of bribery during election times are the giving of food, gifts and money to induce voters. As determined by the courts and the allegations are proved, this will result in the successful candidate's seat in Parliament declared void.

The cultural concept

The traditional culture in Sāmoa is still well respected and intact. Sāmoa remains a predominantly kin-based family oriented society. As a result, emphasis will continue to be placed on cultural elements, family connections, the chiefly system and so forth. The *fa'asāmoa* is essentially a traditional governance system serving social, economic and political functions, and a system based on closeness and affective ties. The *fa'asāmoa* further manifests itself in an institution known as the *fa'amatai* whereby the *fa'asāmoa* encapsulates all aspects of life in regards to social, economic and political functions and practices. Thus, it gives a clear view of the *fa'asāmoa* framework and an indication of the solidarity of the structure of *matai* (chief and authority) and *'āiga* (family). The *matai* is the head of the family, has the authority over land and is the voice and decision maker of his or her family.

During the election period, a candidate will present gifts, food and money to the *matai* or the head of a certain family. One can imagine the controversial issues arising out of such close and affective ties especially in times of election when this *matai* or head of the family gives the order that all members of his family are to vote for this particular candidate who provided him with gifts, and by doing so breaches Article 21 (3) of the Universal Declaration of Human Rights.

Parliament's response to problem of bribery

The 1995 Electoral Amendment Act

Section 31 of the *Electoral Amendment Act 1995* amends section 105 (1) of the principal Act by omitting the whole of section 105 and substituting a new subsection (1) which states as follows: "*An election petition may be presented to the Supreme Court by one or more of the following persons:*

(a) A person claiming to have a right to be elected or returned at the elections;

(b) A person alleging himself to have been a candidate at the elections; provided however that no petition can be filed by a person who polled less than 50% of the total number of votes polled by a person elected or returned at the elections."

The validity of the *Electoral Amendment Act 1995* was challenged and questioned in court in the case of *Sia v Peteru*. The applicant challenged that s31 of the Electoral Amendment Act 1995 was discriminatory and deemed inconsistent with Article 15 (1) of the Constitution of Sāmoa. The court ruled otherwise stating that the purpose of the amendment was self-evident, basically to reduce the

number of those who can petition the election results and does not infringe Article 15 (1) of the Constitution as argued by the applicant.

Not all agree with the decision of the court on the notion that Section 31 of the Electoral Amendment Act gives leeway to candidates with the resources and sufficient monetary support to continue bribing and buying voters with the intention that other candidates will not achieve the 50 percent mark thus disqualifying them from launching a petition. Effectively, this is a defect of the electoral system, as well as a violation of rights of the grieving candidate to pursue justice and that the winning candidate has succeeded through acts of bribery. Unfortunately, Section 31 of the *Electoral Amendment Act 1995* clearly ostracises the grieving and the losing candidate to seek justice.

The 2005 Electoral Amendment Act

Section 7 of the Electoral Amendment Act 2005—Conduct of *O’o* and *Momoli* (Giving of Gifts) provides that: “Despite the other provisions of this Act, the traditional presentation of “*O’o* and *Momoli*” by a Member or Candidate for Parliament or a person acting on behalf of such Member or Candidate shall not be considered as treating, bribery or an illegal or corrupt activity or practice provided that the presentation is made within the period commencing with the 180th day and ending with the 90th day from expiry of the then Parliament at 5 years from the date of the last preceding General Elections.”

O’o and *momoli* according to the customary laws of Sāmoa refer to traditional presentation of food, money and gifts by a person in recognition of an important event like a Reverend (*faifeau*) called by a village parish to be their pastor, or a traditional presentation by a person who has been bestowed a paramount chiefly *matai* title.

One of the big debates in Parliament when amending the *Electoral Act* in 2005 was trying to arrive at a decision on the point relating to the issue of gift giving. It is an unnecessarily complex issue because gift giving is part and parcel of the cultural *fa’asāmoa*, meaning: its cultural system and its associated values. To uphold the complexity of the Sāmoan cultures and its values, Parliament eventually passed an amendment to the Electoral Act by providing a timeframe outside of which giving gifts will not be considered an illegal or corrupt activity by a Member or Candidate for Parliament.

It is interesting to note that the Electoral Amendment Act 2005 contradicts the decision of the Supreme Court in the 2001 case of *Ah Him v Amosa* where the court clearly emphasised that any such form of giving gift constitutes “bribery.”

For clarification, Section 7 of the Electoral Amendment Act 2005 does not address the issue of bribery. The amendment only provides a timeframe during which giving gift is deemed not illegal. In the case of *Posala v Su’a* the defendant miscalculated the 180th day and ending with the 90th day from expiry of the then Parliament, but argued that as a chief, he is duty bound according to the *faa-sāmoa* to provide for his constituency by giving a “*o’o* and *momoli*” a day later. His seat in Parliament was declared void by the Court. Again, it appears that Section 7 of the Electoral Amendment Act 2005 violates Article 27 (1) of the Universal Declaration of Human Rights.

The 2015 Electoral Amendment Act

In March 2015 the Legislative Assembly of Sāmoa passed the *Electoral Amendment Act 2015* which had a number of implications on the 2016 General Elections involving cultural amendments, provision of *monotaga* and the conduct of *O’o* and *Momoli*, and most notably the Supreme Court ruling five candidates for the elections were ineligible under the amendments to the Act.

Monotaga

The most discussed amendments clarified and defined the eligibility requirements that candidates must satisfy: the three year residency requirement and the ‘village service requirement’ for the preceding three years, universally understood to mean the ‘*monotaga*.’ Under this amendment, *monotaga* is defined as ‘the compulsory service, assistance or contribution (such as contribution in form of cash, kind or goods) rendered for customary, traditional or religious activities, events, functions or similar purposes pursuant to the customs of a particular village.

There was strong support for the *monotaga* clause including the amendments although many were of the view that the *monotaga* amendments should have been implemented in the next elections 2021—and not applied retrospectively. The retrospective application of the law automatically disqualified people who had not made *monotaga* contributions from three years previously, as well as individuals who were bestowed *matai* titles within the last three years. Furthermore, the point was raised that the definition of *monotaga* under the law did not adequately take into account all the cultural complexities of this cultural practice.

However, the issue was raised by way of a legal challenge against a candidate who is a paramount chief and a holder of a *non-monotaga* title in the case of *Liuga v Alailima*. According to the customs of the village of Sili in the territorial constituency of Palauli le Falefa, the *matai* title Le Tagaloa is a paramount chiefly title and would not provide *monotaga* services but to receive *monotaga*. He was also a subject of an electoral petition based on the same clause in 2011 when the court accepted the customs of his village pertaining to his title and the *monotaga* issue and dismissed the petition against him. However, in 2016, the Court ruled in favour of the petition against him in light of the 2015 amendment clarifying the *monotaga* to be a ‘compulsory’ service to the village. As his title does not provide compulsory service to the village according to the amendment, the Court held that he was automatically disqualified notwithstanding the fact that he provides voluntary service to the village.

O’o and momoli

The legislative reform around the traditional practice of the presentation of *O’o* and *Momoli* under the 2015 *Amendment Act* is now generally accepted whereby it is now traditionally undertaken by Members of Parliament or candidates for elections to thank their supporters. It is noted that the line between cultural reciprocity and corruption are issues that other jurisdictions struggle with. Now, under the amendment to the law, the presentation of *o’o* and *momoli* is restricted to the 12 months period following the declaration of the election results. Any other presentation of *o’o* and *momoli* outside the 12 months restricted timeline is deemed not legal. This includes the provision of gifts including food and money.

Confirmed by the Office of the Electoral Commission (OEC), almost all elected Members of Parliament in the 2016 General Elections presented their constituencies with *o’o* and *momoli* before the 12 month period expired, according to the 2015 Amendment Act. However, some elected Members of Parliament opted not to present *o’o* and *momoli* to their constituencies. It cannot be confirmed whether any unsuccessful candidate of the 2016 General Election ever performed a presentation of *o’o* and *momoli*.

Amendments to the constituencies

One of the changes when the Electoral Act was amended in 2015 involved the changes in names and definition of the types of electoral rolls in Sāmoa. Previously, registered voters of non-Sāmoan’s and part Sāmoans for the two seats in Parliament were known as Individual Voters, but now renamed as “Urban Constituencies” under the 2015 *Amendment Act*. The ethnic electoral constituencies have also been renamed as ‘Territorial Constituencies.’

Candidates contesting the urban seats need only prove six months residency requirement in that constituency but having lived in Sāmoa for the preceding three years and only need to show proof of

providing some form of community service in the preceding three years as opposed to the three year *monotaga* requirements for the candidates contesting the territorial constituencies. Prior to the 2011 General Elections, candidates for the individual voters' roll were not required to hold *matai* titles. However, the 2010 Amendment to the Electoral Act 1963 changed the eligibility criteria whereby all electoral candidates must hold a registered *matai* title.

The Constitution Amendment Act 2013

One significant change came into being when Parliament passed the *Constitutional Amendment Act 2013* to provide for a minimum number of women representation in Parliament. The minimum number should account for no less than 10 percent of members of Parliament which is equivalent to five seats. This special measure will only come into effect if no women or fewer than five women are elected into Parliament. It is important to note that Sāmoa is the first independent country in the Pacific to introduce reserved seats for women at the national level.

Conclusion

All that has been said so far assumes that the people of Sāmoa desire to live a true democratic system and exercising their constitutional and fundamental rights at all times. Hence, the importance and emphasis that has been discussed so far points directly to the weaknesses of the electoral laws and the solutions to the electoral system. Needless to say, that some uncertainty remains in the *fa'amatai* and the *fa'asāmoa* that resulted in the many amendments to the Electoral Law. Sāmoa must not let go of its culture and traditions, but on the other hand should be considerate of the values of constitutional and fundamental rights, a system Sāmoa has adopted and adapted to.

Free and fair elections is one of the most vital organs of the democratic system, an organ which must not be allowed to remain static, for this organ is at the very heart of the system. Sāmoa can only succeed in having free and fair elections if our political leaders are keen enough and have the political will to initiate and introduce the appropriate electoral laws relevant to the social changes and relevant laws to protect the human rights of its citizens. Unless Sāmoa fully adapts to it, not partially, the system is threatened and can be determined of having no legal effect.

Notes

1. The basis of the *fa'asāmoa* is clearly the *matai* system of chiefly titles, where extended families live and reside under the leadership of one of their members whom they select to hold the family's specific chiefly title. *Fa'asāmoa* is customary and traditional way of living.
2. Article 21 subsection 3 of the Universal Declaration of Human Rights "The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be universal and equal suffrage and shall be held by secret vote or by equivalent free voting process."
3. Article 15 Constitution of Samoa. "Freedom from discriminatory legislation (1) "All persons are equal before the law and entitle to equal protection under the law."
4. Article 27 (1) Universal Declaration of Human Rights: Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefit.
5. The term *monotaga* was not defined separately in previous amendments but was understood to be the 'village service requirements. It is now defined in the clause as services a *matai* renders to his or her village in accordance with the customs of that particular village.

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