

Samoa Law Reform and Legal Pluralism: Critical challenges to achieving legal recognition of *Fa'atama* and SOGIEC.

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Abstract

In this article, I draw attention to Samoa's women's gender quota cases which brought into question the legal and constitutional language adopted in laws, constitutional interpretation, human rights, judicial independence of the courts and rule of law in conflict with Samoan customs. What the constitutional cases demonstrate is a more modern egalitarian Samoan legal and political system which highlights how this modern conception of justice undermines the Samoan political and legal values that traditionally begin with fostering and enhancing fundamental interpersonal relations first, because it is there that we observe the modern state or community's most fundamental values with respect to the politico-legal realm. This article argues for a critical examination of these ongoing challenges and tensions first before considering whether the best pathway for recognition of the status of fa'atama and diverse sexual orientation, gender identity expression and sex characteristics (SOGIEC) representation is achievable in Samoa.

I. Introduction

In Samoa, the indigenous Samoans operate a bijural system of law where both customary law and state law co-exist.¹ Samoa has a population of 200,010 people, with English and Samoan as the official languages. The *fa'amatai* (Chiefly system) acts as the main source of Samoa's customary law and is enforced in varying

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For this article, any reference to "customary law" is used interchangeably with Samoa "customs", "customary legal system" and "customary practices"; any reference to "gender equity" is used interchangeably with Samoa all Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual and diverse Sexual Orientation, Gender Identity Expression and Sex Characteristics ("SOGIEC") and "gender diversity"; and lastly, any reference to "bijural" is used interchangeably with "legal pluralism".

degrees across Samoa's 220 traditional villages (*nu'u fa'avae*) governed according to each village council (*fono*) and customary practices.'

This article explores the interface between Samoa law reform and legal pluralism, with an emphasis on legal recognition of *fa'atama* ("in the manner of men" is the literal translation of the Samoan word *fa'atama*: "like" (*fa'a*), a "man" (*tama*)) and SOGIEC representation in the law. As evident in the experience from legally pluralistic Pacific nations outside Samoa, law reform points to the effectiveness of accommodating legal pluralism to enable a sustainable pathway, where both tensions in customary law and state law are reconciled, and customs are incorporated and recognised in state law.

Because I express opinions based on lived experience and observations from recent empirical research based in Samoa, it is important that I refer to my "positionality". The author is a law academic who lived and worked in Samoa as a law reformer, commercial law academic, lawyer and gender consultant.

In terms of structure: Part II provides an explanation as to why I have chosen the principal theories, concepts, customs and processes under review followed by a critique of these theories; Part III examines the case study of Samoa's women's gender quota cases. It responds to the analysis from Part II and outlines potential challenges to address; and, finally, in Part IV, I respond to lessons from Part III in addressing what challenges lie ahead with respect to *fa'atama* and SOGIEC representation in Samoa customs and laws.

11. Relevant Theories, Concepts, Customs and Practices

In this part, I present a critique of some of the relevant theories, concepts, customs and practices at the intersection between gender and law.

A Patriarchy

It is well known in the literature that unequal power relations exist between men and women. This is often embedded in terms such as "patriarchy" and "gender inequality".³ Even when taking cultural and institutional variation into consideration, patriarchal structures exist in social systems characterised by male

2 Jennifer Corrin "Land, Law and the Fa'a Samoa" [2008] *LAWASIAJournal* 46 at 49-50; and see generally Richard P Gilson *Samoa 1850 to 1900: The Politics of a Multicultural Community* (Oxford University Press, Melbourne, 1970) at 29.

3 Pamela Paxton and Melanie Hughes *Women, Politics and Power* (Sage Publications, California, 2007),

dominance or control over females and other genders. The imposition of colonial and Christian values, with a built-in patriarchal system, has had detrimental impacts on Pacific cultures with matrilineal economic and political structures, or in some aspects, land inheritance which could be traced through the matrilineal as opposed to patrilineal line.⁴ The rights of indigenous women to land, decision-making and economic exchange were further undermined after colonisation, when colonial governments established institutions and legal systems that reflected patriarchal and religious ideals of their own societies which no doubt impacted political and legal thought on democracy and justice.¹

B, Human Rights

Human rights refer to the fundamental rights that every human being is entitled to, such as the right to life, freedom of speech and freedom from discrimination. These rights are recognised and protected by law and society. On the other hand, responsibilities and obligations refer to the duties that individuals and institutions have towards themselves, others, and society. These duties include obeying the law, contributing to society, and treating others with respect and consideration. The key difference between human rights and responsibilities and obligations is that human rights are protected by law and are considered inherent to every individual, while responsibilities and obligations are imposed on individuals by society and laws. In other words, human rights are entitlements, whereas responsibilities and obligations are duties.

Based on Va'a's indigenous Samoan analysis, human rights are framed as duties rather than entitlements, held in common by all on the basis of being human.⁶ Further to his indigenous view, Va'a makes the contradictory assertion that the basis of human rights differs between Western Euro-centric cultures and the Samoan culture, while the overall understanding is not different. Arguably, Va'a is wrong to assert that this system of duties, obligations and responsibilities form part of the system of human rights or that the West did not have a system of this kind in place, as this is a fundamental aspect for which most societies could not exist. However, the rationale behind Va'a's claim links to his argument about the evolution of human rights in Samoa which is evident in the two sets of codes - the traditional notions

4 Martha Macintyre and Carolyn Brewer "Gender Violence in Melanesia and the Problem of Millennium Development Goal No. 3" in Margaret Jolly and Christine Stewart (eds) *Engendering Violence in Papua New Guinea* (ANU Press, Canberra, 2012); and Meta Motusaga "Women in decision making in Samoa" (PhD Thesis, Victoria University, Victoria, 2017).

Elise Huffer "Desk Review of the Factors which Enable and Constrain the Advancement of Women's Political Representation in Forum Island Countries" in *A Woman's Place is in the House - the House of Parliament; Research to Advance Women's Political Representation in Forum Island Countries* (Pacific Islands Forum Secretariat, Suva, 2006).

6 Unasa Va'a "Samoan Custom and Human Rights: An Indigenous View" (2009) 40(1) VUWLR 246.

expressed in reciprocal and interpersonal responsibilities and obligations to family, community and others; while the other is Western - influenced by "western notions of human rights, such as those based on the philosophical principles of natural justice and divine law" in Ancient Greece,⁷ Thomas Aquinas' theory of natural rights, Christian principles, and so on. In Samoa, Va'a claims that the equivalent ideas are sourced from custom.

Va'a states that the Samoan human rights notions spelt out in *suli* and *feagaiga* suggest that Samoa had a pre-existing system of human rights before colonisation.⁸ Firstly, the *suli* is the right of the heir belonging to a kinship group/family who holds one or several Chiefly titles in a village, as determined by blood connections. As Samoan custom dictates, all Samoans can trace their genealogy to the *Atua* (Supreme God/Creator), *Yagaloalagi*, and by virtue of their ancestry, all Samoans accord respect and dignity for individual life irrespective of gender. Secondly, the *feagaiga* system is likened to a social contract between two parties: sister-brother, female descendant of a Chiefly title (*tama fafine* - male descendant of a Chiefly title (*tama tane*)).⁹

For instance, A (female) marries B (male) and their children are C (female) and D (male). C is *tama fafine* in this particular family, and D is *tama tane*. C and D are *feagaiga*.

While multiple relational arrangements and other considerations factor into this, such as the status ascribed to each party, this system is meant to be complementary or harmonious.

Further to this point, Va'a asserts that human rights are equated to custom (and vice versa), in a Samoan context and embedded in the rights of *feagaiga* and the rights of a *suli*. He considered the *feagaiga* as "special rights which function to maintain a balanced relationship between the genders".¹⁰ The rights of a *suli* are universal rights which include "the right to live and survive so as to serve the kin group and community".¹¹ On this view, Samoan people and other indigenous communities view human rights through the lens of custom. Thus, the core values and beliefs that underpin the customary obligations and hierarchical status embedded in the *fa'amatai* (Chiefly) system and in *fa'asamoa* (the Samoan way) are inextricably linked to Samoan notions of human rights.

7 At 246.

8 At 245.

9 At 242.

10 Va'a, above n 6, at 245.

11 At 245.

Most *Samoa* political academics interviewed in a 2009 study on "Samoaizing" human rights had affirmed that human rights are part of the *fa'asamoa*.¹² However, the lack of education on human rights, generational differences and conflicting notions between individual rights and *Samoa* communal values within the *fa'asamoa* add to the obstacles facing the **full** realisation of human rights in contemporary *Samoa*.

While this is quite a different claim, it is worth noting that *Samoa* political historian Professor Meleisea contends that "individual" human rights are not incompatible with traditional communal *Samoa* values of equality, protection, respect and dignity. He contends that the demystified dichotomy between *Samoa* notions of human rights and Western notions of human rights is based on the wrongful assertion of *Samoa* customary values. The protection of the individual means the protection of the community. On this view, the 2015 State of Human Rights Report also highlighted that human rights are deeply rooted in *fa'asamoa* values and are not foreign ideals or incompatible, as both ideals create a more harmonious *Samoa*. Here, essential *Samoa* values cross over and emphasise mutual compatibility or harmonisation in relation to the promotion of universal human rights protection.¹³

Nonetheless, one *Samoa* political academic, Nanai Sovala Agaiava, agrees with Va'a that *Samoa* human rights must be contextualised through the *Samoa* lens rather than a Western lens.¹⁴ Importantly, Nanai pointed to obstacles in *fa'asamoa*, specifically the oppressive hierarchal structures embedded in the *fa'amatai* system and village *fono* (village council) which inhibit the **full** acceptance of human rights in contemporary *Samoa*.¹⁵ He provided examples about village governance led by the village *fono* which are comprised exclusively of *matai* (Chief) - this is likened to local councillors elected to represent their local council, in this case, a village. *Matai* in the village *fono* are authorised to define village council policy (*faiga fa'avae*) and develop procedures to guide the determination of village council decisions (*i'uga fono*) in accordance with the Village Fono Act 1990.¹⁶ Here, Nanai claims the conflict between *fa'asamoa* and human rights is based on the principles and values embedded in the *fa'asamoa* which inhibit the **full** realisation and acceptance of human rights in *Samoa*, unless human rights are reframed primarily in the context of the *fa'asamoa*. For example, according to the *fa'asamoa* context, children's rights are often misconstrued as giving children the authority to disrespect their elders

12 Margaret R Smith "'Samoaizing' Human Rights: A Generational Comparative of Views on Human Rights in Contemporary Samoa" (2009) *Independent Study Project (ISP) Collection* 635 <<https://digitalcollections.sit.edu>>.

13 Government of Samoa "State of Human Rights Report" (8 November 2015) Office of the Ombudsman (Samoa) <<https://ombudsman.gov.ws>>.

14 Nanai Agaiava, Principal Youth Development Officer, Division of Youth Office, Apia, 6 May 2009, as cited in Smith, above n 12, at 30.

15 At 30.

16 Village Fono Act 1990, s 5-

unless emphasis is reframed to focus on promoting children's rights in the context of protection from harm which is indeed compatible with *fa'asamoa* values.

Asofou So'o, another Samoan political academic interviewed in the same study, argued that the older generation view human rights as empowering children with equal rights to adults which is not only a threat but contradicts the traditional hierarchal Samoan notions of authority.¹⁷ Further to this point, So'o asserted that in Samoa, the reality is that human rights is considered a *palagi* (literal translation is "White") idea that would only serve some use in Samoa if it was Samoanised.¹⁸

It is questionable whether human rights are a Samoan concept or an introduced concept. With this background in mind, Samoa has become an increasingly egalitarian society, as noted by an increase in the conferring of *matai* titles.¹⁹ Thus, it becomes clearer that human rights must be reframed and contextualised through a Samoan lens, rather than relying on Western ideas of human rights. This way, it may serve to achieve the best conditions for collective recognition of *fa'atama* in Samoa laws and customary laws.

In the same way, it is debateable whether principles of the *fa'asamoa* are indeed democratic by nature, especially when key aspects of village *fono* and *matai* representation are incompatible with principles embedded in the theory of representative democracy. As Maddox explains, representative democracy "implies the transmission of the people's authority to elected representatives".²⁰ Unlike Samoa's village government, representatives are not democratically elected. Representatives are appointed to the village *fono* by right as heirs and *matai* of the family (or extended family). This is problematic because not all views expressed will represent the minority, including *fa'atama* and the SOGIEC community. In

17 Asofou So'o, Vice Chancellor, NUS (National University of Samoa) 27 April 2009/7 May 2009, as cited in Smith, above n 12, at 33.

18 At 33-34. See Nanai, above 14, at 29-30, who also asserts that human rights will need to be "Samoanized" first in order to be fully accepted in *fa'asamoa* culture.

19 Malama Meleisea and Penelope Schoeffel "Samoan Custom, Individual Rights, and the Three 2020 Acts: Reorganizing the Land and Titles Court" (2022) *The Journal of Pacific History* DOI: 10.1080/00223344.2022.2058475,

20 Graham Maddox "Representative Government" in Tony Blackshield, Michael Coper and George Williams (eds) *The Oxford Companion to the High Court of Australia*, Melbourne (Oxford University Press, Oxford, 2002) 33, as cited in Allan Beever *Forgotten Justice: The Forms of Justice in the History of Legal and Political Theory* (Oxford University Press, Oxford, 2013) 293. HLA Hart identified three secondary rules - rules of adjudication, rules of change and the most significant one, the "rule of recognition" [Herbert LA Hart *The Concept of Law* (2nd ed, Oxford University Press, 1994) at 21, 103, and 108, as cited in Beever at 153, 155]. While space constraints limit a full discussion of this, a full treatment of the rules of recognition will be covered in a separate paper. I only focus on the rule of recognition for human institutions (rather than rules for informal institutions) because the rule of recognition determines whether a rule is legally valid or not and, recognises (whether or not) a rule is a law of the relevant jurisdiction. Beever (at 155) also points to one of the mistakes in Hart's argument which is the claim that human institutions are not constituted by constitutive rules which further highlights Hart's misunderstanding about the nature of rules.

the village context, members who challenge their *matai* and village *fono* may, in some cases, be subject to village misconduct and penalised." Thus, I argue that the representative democratic process is not evident in Samoa's village context where customary protocols are prominent which is, in fact, an embodiment of the Samoan customary rule of recognition.

Where modern demands (including access to formal education, health, technology, human rights) cannot be met by the customary legal system, the state holds the responsibility to ensure central public infrastructure, including any law-making process, must satisfy the demands of a diverse and plural society. Thus, the interdependent relationship between the state law and customary law is significant. State intervention occurs when customary law fails, and this approach is worth exploring within the context of law reform alongside the role of traditional authorities in customary law.²²

C Customary Law

In this section, I examine Samoa's customary law system and what it entails. As a starting point, the historical understanding of customary law reveals some of the key challenges faced by legal pluralism.²³ This effectively reveals why a critique of both historical and common understandings of customary law have emerged in modern Samoa, which will also be discussed in turn.

While there is no general consensus on the definition of customary law or whether it exists, some of the common features applied in Commonwealth Pacific nations comprise a set of rules based on local customs and usages, traditionally passed down by oral culture.²⁴ In the Samoan context, customary law is based on customs, practices or rules of conduct, formally prescribed and recognised as binding or enforced by a competent controlling authority or multi-dimensional traditional authority (for example, the Land and Titles Court or Village *Fono*).²⁵ Va'a asserts that such customs form the basis of human rights, and human rights protect the *vii* between individuals, in line with interpersonal justice (via the mechanism of *suli* and *feagaiga* - discussed earlier). From a traditional Samoan perspective,

21 Village Fono Act 1990, ss 4-6, 8.

22 Campbell McLachlan "State recognition of customary law in the South Pacific" (PhD Thesis. University of London. 1988) at 336.

23 I note this article is thematically incomplete without a full discussion on legal pluralism for which I apologise. This had to be removed due to word constraints. A full treatment of legal pluralism will be covered in a separate paper.

24 Constitution of the Independent State of Samoa (1962) art 111; Bernard Narokobi *Lo Bilong Yumi Yet: Law and Custom in Melanesia* (Melanesian Institute for Pastoral and Socio-Economic Service and the University of the South Pacific. Fiji. 1989) at 4; and Jonathan Aleck "Introduction: custom is law in Papua New Guinea" in Jonathan Aleck and Jackson Rannells (eds) *Custom at the Crossroads* (University of Papua New Guinea. Papua New Guinea. 1995) at 3.

25 See Meleisea and Schoeffel. above n 19.

this argument sounds attractive but, as we will see later, the modern approach to the politico-legal realm and justice, as demonstrated in the treatment of the state law cases (in Part III), is not compatible with this approach. This is particularly problematic for *fa'atama* seeking protection and recognition in customary law and state law.

While I agree that customary law exists in Samoa, there are opposing views, however, that challenge this claim. Over the past half-century, Meleisea and Schoeffel contend that Samoa has been driven by an intricate set of customs and protocols embedded in many aspects of the *fa'asamoa*, such as the protocols which underpin village governance, ethical behaviour, gender relations and social conventions governing meaningful and respectful relationships - that is, "space" (*va*), in terms of maintaining reciprocal obligations and duties between individuals and groups which carry different status. Meleisea and Schoeffel assert that Samoa protocols protect Samoan communalism more from individualism as opposed to modern principles based on individual rights. Based on the lack of common law evidence to support the argument that Samoa's Constitution has diminished Samoan custom and communal rights,²⁶ Meleisea and Schoeffel further assert that Samoa has no customary law embedded in its legal system.²¹ On this point, Meleisea and Schoeffel would support the reasoning that customs are a collectively recognised social practice that form the foundation of law, just not "customary" law. I view this as a powerful argument because it effectively undermines the legitimacy of human institutions set up to address customary and legal matters.

Another view is that if customary laws formed the basis or became an operative part of Samoa's primary laws and legal system, then a critical review of existing evidence is required to understand what this means in a law reform context. This is because any research on the law reform of Samoa's customary legal system is inseparable from the operation of the state legal system - that is, Samoa's bijural system that exercises executive, enforcement and law-making functions.²⁸

D. Fa'atama and SOGIEC

The SOGIEC non-heteronormative or non-binary concept or term is not problematic in the Pacific, insofar as there is an understanding of the specificities and particularity to the cultural and political context to which it is applicable. The use of terms and labels to define *fa'atama* may be incompatible with their

26 See Meleisea and Schoeffel, above n 19.

27 See Meleisea and Schoeffel, above n 19.

28 Aiona Le Tagaloa "The Samoan Culture and Governance" in Ron Crocombe, Uentabo Neemia and others (eds) *Culture and Democracy in the South Pacific* (University of the South Pacific, Institute of Pacific Studies Publication, Suva, 1992) at 117, 121.

overriding identity when contextualised to their traditional role and status in the home, family, village and community. When comparing *fa'atama* to accepted perceptions and sociocultural understandings of masculinity, some *fa'atama* may choose to distance their gender identity from how they are generally perceived, which also highlights the danger of fitting *fa'atama* under broader gender-inclusive terminology. For example, non-heteronormative males in Samoa who identify as gay may reject the term "*fa'afafine*" (literally translated as "in the manner of women") as it prefaces a sexual persona to which they seek to not be associated.²⁹ Similarly, non-heteronormative females in Samoa may reject the term "*fa'atama*" and not subscribe to sexological gender and legal discourse. Based on data from the author's research in Samoa, all *fa'atama* participants identify as transmen.³⁰ The reasons were varied as to why some perceive their gender identity as an individual decision separate to their role in the family, the church and wider village community; other participants were concerned with the more immediate aspects of their daily life such as responsibilities to their family, village, church and community. In short, their gender identity is not a core aspect of their life but considered more when they are denied legal protection and access to employment opportunities, health care and justice.

1. Problems facing Fa'atama and SOGIEC recognition in Samoa customs and Laws

In accordance with Samoan custom which informs human rights protection, *fa'atama* gender identity is not a socially recognised practice and, hence, does not have the full status or recognition to justify a Samoan customary rule of recognition; nor is it compatible with the theory of representative democracy, alluded to earlier. The perceptions of transgender and non-heteronormative people in the law are also reflected in judicial attitudes towards marriage. The role of the courts, the legal system, parliamentary processes and social media all play a significant role, in varying degrees, and influence the extent to which legal developments and advocacy for law change are relevant to *fa'atama*. In Samoa, to bring *fa'atama* within the law would be met with challenges from the present framework, heavily influenced by the imposition of introduced common law and the Christian patriarchal principles strongly embedded in Samoa's prevailing customs, traditions and values.

29 Kalissa Alexeyeff and Niko Besnier "Gender on the edge: Identities, politics, transformations" in Niko Besnier and Kalissa Alexeyeff (eds) *Gender on the Edge: Transgender, Gay, and Other Pacific Islanders* (Honolulu, University of Hawaii Press, 2014).

30 I refer to *fa'atama* interview *talanoa* (open and respectful interactions) and focus group *talanoa* data collected as part of the Auckland University of Technology Ethics Committee approved PhD data collection in Samoa in June-July 2022.

The modern conception of distributive justice distorts the traditional fundamental politico-legal values of Samoan commutative/interpersonal justice. The fundamental problem remains:³¹ *fa'atama* who do not identify as women continue to be treated as women in the law against their wishes. This infringes upon their freedom of expression and other fundamental human rights. Most *fa'atama* interviewed by the author wore formal lava lava (that is, *faitaga*) worn traditionally by men, used the male toilet in public facilities, were charged with indecent activity with females in cases where consent was not an issue, to name a few.³² Thus, by exercising and claiming legal status as *fa'atama* in the law may also serve to exclude them further from other transnational groups with concerns that cross-cut in some, but not all, areas and in most cases, *fa'atama* may even be socially excluded or outcast from their own family, village and community.

Based on *talanoa* (open and respectful interactions) with *fa'atama* in Samoa, one of the key problems that *fa'atama* highlighted is the lack of gender-responsive legislation in Samoa.³³ Without appropriate legislation that considers the specific needs and concerns of *fa'atama*, they may experience various problems when it comes to accessing their rights and participating fully in society.

Some of these problems are detailed below:³⁴

- a) Limited customary and legal recognition of *fa'atama* status: *Fa'atama* are underrepresented in political and decision-making positions, as there are no specific laws, customary laws or policies that promote pathways to increase *fa'atama* representation as matai while frameworks to enhance gender equity generally avoid *fa'atama* in these areas.
- b) Limited access to justice: *Fa'atama* who experience violence or discrimination also face obstacles in accessing justice, as there are no specific legal frameworks in place that legally recognise the constitutional status of *fa'atama* gender identity in laws and customs. This means no constitutional protection under the law.
- c) Limited economic opportunities: *Fa'atama* face discrimination in the workplace compounded by limited access to resources and opportunities that could **help** them to become economically empowered.

31 *Fa'atama* interview, above n 30.

32 *Fa'atama* interview, above n 30.

33 *Fa'atama* interview, above n 30.

34 *Fa'atama* interview, above n 30.

- d) Limited access to education: Fa'atama face barriers to education, such as bullying in schools and compulsory dress codes requiring fa'atama to wear female uniforms or be subject to suspension with no specific policies or laws in place that promote equal access for fa'atama to education.

2. Potential solutions

To address these problems, there is a need for gender-responsive legislation that promotes gender equality and addresses the specific needs and concerns of *fa'atama* in Samoa.³¹ This could include laws and policies that promote equal representation of *fa'atama* in decision-making positions, address gender-based violence and discrimination, and promote equal access to education and economic opportunities. Overall, the lack of gender-responsive legislation in Samoa poses significant challenges for *fa'atama* and their ability to fully participate in society. Addressing these issues will require a commitment from policymakers and civil society organisations to promote gender equality and ensure that *fa'atama's* rights are equally protected and promoted.

In the light of the development of Samoan human rights and customary norms, the doctrinal approach continues to be employed by the judiciary in understanding the language of the law. Arguably, the Samoan customary norms and non-legal aspects were not significantly considered, as evident in the women's gender quota cases (discussed next). Although *fa'atama* do not identify as women, it helps to explore some of the judicial reasoning around the women's gender quota cases reasons to better understand what potential legal challenges lie ahead for *fa'atama* seeking to achieve recognition in Samoa laws and customs, which will be discussed in more detail next.

III. Women's Gender Quota Cases

In the previous section, we saw that Samoan customary law has built in a customary rule of recognition as evident in the village *fono* and *matai* representation. I turn now to some of the challenges faced by the Samoa Law Reform Commission (SLRC) as well as the Women's gender quota cases. Some of the learnings here may be instrumental in the development of pathways for *fa'atama* and other SOGIEC groups in Samoa to consider when advocating for law reform and better recognition in Samoa laws and customs.

35 *Fa'atama* interview, above n 30.

I respond to potential law reform challenges in this section, not to dismiss the Samoan government and agents of law reform, but to critically highlight challenges to the modern state agenda and whether it honours or effectively undermines the traditional Samoa notions of legal and political community.

When Samoa gained independence, *matai* suffrage was introduced which legally permitted only registered *matai* the right to vote. In 1990, Samoa introduced universal suffrage but retained *matai-only* candidacy. More than two decades later the women's parliamentary quota was introduced in 2013, which was hailed as a progressive move to increase women's political participation in Parliament. The original drafters to art 44(1A) of Samoa's Constitution could not have foreseen the attempted exploitation of these special temporary measures for political purposes. The 2016 General Election activated the women's quota (that is, 10 per cent, which amounted to 4.9 or 5 out of a total of 49 seats) with the appointment of the fifth woman MP after only four were elected.

The 2021 General Election led to unprecedented constitutional challenges. Samoa's constitutional crisis posed a threat to the foundations of Samoa's democracy, independence of the judiciary, rule of law and customary laws. Consequently, the women's quota was activated for the second time by the Electoral Commissioner in an already highly charged political atmosphere. One of the issues under consideration was whether the women's quota required five or six women MPs.

Further to this, the Explanatory Memorandum to the Constitution Amendment Bill 2020 illuminates the sociocultural and political context of Samoa with respect to legal pluralism, justice and human rights:³⁶

This Bill is a response by Samoa to respond to the challenges of "legal pluralism", a legal theoretical framework with features prevalent in most post-colonial societies. A review of all other Pacific Islands Constitutions show that since gaining political independence, the Pacific Islands had expressly aspired to adopt in their Constitution and laws the context of their cultures, custom, and traditions to which they belong. However, to date many countries have applied caution, and the express establishment of systems to accommodate both their customary systems with the modern western system in their supreme laws has not been pursued.

36 Constitution Amendment Bill 2020, Explanatory Memorandum, at [1.4] and [1.6].

In response to these challenges, Samoa, through this Constitution Amendment Bill 2020 has opted to give more recognition of Samoa in our own Samoan Constitution. This is without removing our current rights and freedoms. In this Constitution Amendment Bill, we adopt the best of both the modern principles and the customary values in moving forward, so that Samoan customs and usages are not lost, not now, not in the near future, and it is hoped for a very long time to come.

The Constitutional Amendment Bills objective was to "adopt the best of both the modern principles and the customary values" which aligns closely with strong pluralism in the independent operation of multiples sources of law.³⁷ However, critics still view that even without the oversight of the Supreme Court (SC) in the Land and Titles Court (LTC) hierarchy, the 2020 reforms introduce more challenges and overlaps suggesting the prevalence of legal pluralism.³⁸ With judicial discretion to decide on customary considerations leaves it open to ambiguous interpretation which could have been resolved with the adoption of the draft judicial guidance clause,³⁹ which required the "systematic consideration of relevant customs in all cases".⁴⁰ By drawing lessons from other Pacific nations, such as Palau, the SC entrenched a systematic approach taking into broad consideration the relevant customs whilst specifically outlining the relevant principles of procedure in order to plead and establish customary law.⁴¹ If this approach is adopted in Samoa, it could avoid further ambiguity in interpretation with "legislative specificity".⁴² "Legislative specificity" refers to the degree of detail and clarity in the language of a law or regulation.⁴³ Thus, the extent to which a statute or regulation is precise, unambiguous and specific in its wording, as opposed to vague or general. The more specific a law is, the more it can help guide behaviour, provide clarity, and prevent misunderstandings. Specificity in legislation is critical because it can help to ensure that the law is applied consistently and fairly, and that it achieves its intended goals. Conversely, the lack of legislative specificity can lead to confusion, inconsistency and

37 At [1.6].

38 Jennifer Corrin "Customary Land and the Language of the Common Law" (2008) 37(4) Common Law World Review 305 at 331.

39 Constitution Amendment Act 2020, s 4, amending art 71.

40 Craig Land "One Boat. Two Captains: Implications of the 2020 Samoan Land and Titles Court Reforms for Customary Law and Human Rights" (2021) 52(3) VUWLR at 537.

41 *Beouch v Sasao* [2013] PWSC 1 at 9-14.

42 See Land, above n 40, at 538.

43 Teleiai Lalotoa Mulitalo Ropinisone Silipa Seumanutafa ("Mulitalo") *Law Reform in Plural Societies* (Springer, Cham, Switzerland, 2018) 20.

ambiguity in the application of the law. Section 5 of Samoa's Electoral Amendment Act 2009 did not specify or define the diversity and uniqueness of "village service requirements" specific to each village, which is a prime example of the problems connected to the lack of legislative specificity.

When considering the constitutional interpretation of art 44(1A), the Courts adopted the traditional literal (purposive) approach. The Court also sought guidance from common law authorities where meaning was found by doctrinal legal reasoning as opposed to "more recognition of Samoa" or "customary systems", as clearly alluded to in the Explanatory Memorandum. Evidently, the *Olomalu* landmark case adopted a purposive approach where primary attention was given "to the words used but being on guard against any tendency to interpret them in a mechanical or pedantic way".⁴⁴ The *Olomalu* case is a significant legal case in the history of Samoa. The case arose from a dispute over the ownership of land in the village of Vaitele-fou. The village council had allocated a portion of communal land to Saipaia Olomalu, who had built a house on the land. However, the Attorney General of Samoa argued that the allocation was illegal and that the land belonged to the government. The case was heard in the LTC of Samoa, which held that the village council's allocation of the land to Saipaia was valid. The Attorney General appealed the decision to the SC of Samoa, which upheld the lower court's ruling. The case is significant because it established the principle that customary land rights in Samoa are protected by law. It affirmed the importance of the traditional Samoan system of land tenure, in which land is owned communally and allocated by village councils according to customary practices. *Olomalu* also demonstrated the independence of the Samoan judiciary and its commitment to upholding the rule of law.

The purposive approach was also adopted in *FAST Party v Electoral Commissioner*, where it was accepted that the "Court does not have the power to go beyond the clear and unequivocal words".⁴⁵ This case centred on the outcome of the 2021 General Election. The *Fa'atuatua i le Atua Samoa ua Yasi* (FAST) Party, which was the opposition party at the time, won a narrow majority of seats in the Legislative Assembly, but the ruling party, the Human Rights Protection Party (HRPP), refused to concede defeat and challenged the election results. The dispute ultimately led to a legal challenge by the FAST Party, which claimed that the appointment of additional members to the Legislative Assembly by the Head of State was unconstitutional and void. The main issue in the case was whether the appointments made by the Head of State were in accordance with the Constitution of Samoa. The FAST Party argued that the appointments were unconstitutional and, therefore, invalidated

44 *Attorney General v Saipaia Olomalu* [1980-1993] WSLR 41. This case also explored the issue of whether *matai* suffrage and an individual voter's roll was discriminatory according to art 15.

45 *FAST Party v Electoral Commissioner* [2021] WSSC 23, at 29.

the election results. The Supreme Court of Samoa agreed with the FAST Party and declared that the appointments were unconstitutional and void. The court ordered a recount of the election results, which ultimately confirmed the FAST Party's victory. The case is significant because it affirms the rule of law and the independence of the judiciary in Samoa. It also highlights the importance of constitutional provisions and the need for transparent and fair electoral processes in promoting democracy and good governance.

In following *Olomalu*, the Court resolved the tension around the uncertainty created by the 10 per cent women's quota enshrined in art 44(1A): "which for the avoidance of doubt is presently 5" (avoidance of doubt rider). This approach also cautioned against the use of the explanatory memoranda or parliamentary debates or as put in *Olomalu*:⁴⁶

... without the aid of reference to the Convention's proceedings; but we think it right to refer to those proceedings to make sure that the words of the Constitution as adopted by the Convention do convey what was truly intended.

The Court accepted the plain wording that a minimum of five women MPs was the correct constitutional interpretation. The SC decision was appealed. The dissenting opinion of Justice Vui Nelson in *FAST Party v Electoral Commissioner* is worth noting, as he emphasised the intended purpose behind the increase in women's representation in Parliament.⁴⁷ His reasoning is that the avoidance of doubt rider was framed for the 2016 General Election and not the 2021 General Election which, following the 2019 Amendment, required an increase in the total number of MPs to 51 and a proportional increase in the number of women MPs to a minimum of six. However, the Court of Appeal did not follow the SC decision.

In Samoan judicial history, *Electoral Commissioner v FAST Party* marked the first Court of Appeal sitting comprised of a Samoan bench with the "knowledge, capacity and competence to deal with Constitutional issues".⁴⁸ Ironically, the sixth woman MP unsuccessfully appealed to include an overseas or expatriate New Zealand Judge on the panel, as was common practice in the past. The Court of Appeal also held that the avoidance of doubt rider was otiose, although it largely reflects the intention and purpose of Parliament. This would, no doubt, create future challenges in constitutional interpretation when taking into consideration the purposive approach adopted in the SC. The Court also relied, in part, on the dissenting opinion

⁴⁶ *Attorney General v Saipaia Olomalu*, above n 44, at 41.

⁴⁷ *FAST Party v Electoral Commissioner* [2021] WSSC 23, at [62]-[79].

⁴⁸ *Electoral Commissioner v FAST Party* [2021] WSCA 3, at 10.

of Justice Vui Nelson.⁴⁹ However, it found the primary intention behind art 44(1A) ambiguous and relied on a more purposive approach that enhanced the credibility and promotion of human rights practices and, in this matter, women's participation through the endorsement of women's quotas. As such, a more purposive approach was enunciated by the Court of Appeal in *Mulitalo v Attorney General*, as Samoa has become an increasingly egalitarian society since independence, with a Constitution that has undergone amendments 12 times since 2005 to reflect more modern values.¹⁰ As a landmark case in the history of Samoa, *Mulitalo v Attorney General* dealt with the issue of gender equality and the interpretation of Samoa's Constitution. The case arose from a challenge brought by a woman named Mulitalo Siafausa Vui against certain provisions of the Samoan Constitution that discriminated against women. Specifically, Mulitalo argued that provisions of the Constitution that only allowed *matai* (traditional chiefs) to be elected to the Legislative Assembly and hold certain other positions were discriminatory and violated her rights as a woman. The case was heard by the SC of Samoa, which ruled in favour of Mulitalo. The court held that the relevant provisions of the Constitution were discriminatory and violated the principle of equality under the law. The court ordered that the Constitution be amended to remove the discriminatory provisions. *Mulitalo v Attorney General* is significant because it affirmed the principle of gender equality in Samoa and helped to promote women's rights and empowerment in the country. It also demonstrated the importance of an independent judiciary in interpreting and upholding constitutional rights and protections.

Here, we see how the judiciary applied caution to resolve tension (as discussed further next) to accommodate customary norms with modern western norms in the constitution alongside other, and often competing considerations - legal pluralism, the interpretation of language in the law, the intention of Parliament, the context of customs and traditions, and so on. In Part IV, we explore this deeper in the case of *fa'atama* and SOGIEC recognition where we will explore some of the ways to address the key challenges concerning Samoa's law reform process in response to *fa'atama* and SOGIEC considerations.¹¹

IV. Resolving Tension

The more purposive approach adopted in *re the Constitution, Mulitalo v Attorney-General* [2001] and, more recently, the *Electoral Commissioner v FASY Party* [2021]

49 *FAST Party v Electoral Commissioner* [2021] WSSC 23, at 29.

50 *In re the Constitution, Mulitalo v Attorney-General* [2001] WSCA 8.

51 *In re the Constitution, Mulitalo v Attorney-General* 8 (Samoa 2001); and *Electoral Commissioner v FAST Party*, WSCA 3, at 10.

would suggest that not all hope is lost.¹² Some of the critical lessons we can take from the cases is the Court's plea for more thorough drafting, a pragmatic comprehensive process of constitutional reform "free from the furnace of partisan politics",¹³ an independent judiciary that defends the Constitution and rule of law even despite significant political pressure or otherwise but, more importantly, the judicial interpretation of law that takes into consideration the promotion of human rights practices in an increasingly egalitarian Samoan society. In the words of the SC: "The whole *raison d'être* of Independence was for Samoa to free itself from its colonial shackles retaining only those institutions and practices it considered worthwhile".¹⁴ Thus, embedded in the "more purposive approach" is the promotion of human rights and considerable attention to the primary intention behind specific language in the law. I view this as a powerful mechanism that would enrich any future judicial decisions especially as it relates to *fa'atama* and SOGIEC matters in the law.

Ironically, Va'a envisions the recent constitutional crisis would occur in Samoa almost a decade earlier:¹¹

... the existence of this harmonious relationship between state law and custom is no guarantee that this will last forever. There may well be controversial issues ... that might bring this conflict, between centralised control of economic resources and localised control exercised through customary institutions, into the open. We may well see a conflict of gigantic proportions, if it is not resolved properly.

This raises the question: is the human rights problem in Samoa today the lack of consultation, transparency and accountability? And how are these terms to be defined and understood? Still, for the time being, the prognosis for human rights development in Samoa for the future remains good. And it will be better still when the political parties have resolved their differences.

52 At 10.

53 *FAST Party v Electoral Commissioner*, above n 51, at 75.

54 *FAST Party v Attorney General* [2021] WSSC 24 at 91.

55 See Vaa, above n 6, at 249, 250.

Along with this view, Land further asserts that "reform should seek to promote a sense of Samoan "ownership" over Samoan law,⁵⁶ while avoiding "a contest between custom and human rights when both are plainly important and bring satisfaction to large numbers of people".⁵⁷ Although anecdotal because there are no official records detailing the number of *fa'atama* in Samoa, "anecdotally", if there is one individual who identifies as *fa'atama* in each village, it is reasonable to assume that there are more than 200 *fa'atama* in Samoa.⁵⁸ On this view, it would be fair to say the majority of *fa'atama* live in rural Samoa, where most land is under customary land status and governance of village *fono*. Consequently, Samoa's *fa'atama* and SOGIEC community (while not wholly representative of all legal pluralism and customary considerations), may continue to advocate for effective gender equity considerations in the law reform process in a variety of ways. According to the SLRC law reform process, there are general announcements to the public to participate in *talanoa* consultations where they are invited to attend or provide submissions and comments to any issues, they wish to address with respect to any review undertaken by the SLRC.⁵⁹ However, the logistical challenges are worth noting. To address the resource and capacity limitations, SLRC use social media to raise their awareness of law reform in addition to inviting the general public to input and complete questionnaires online. SLRC have also gone to the rural villages, if they are unable to attend the public consultations in Apia. Extensions to submission deadlines are often granted to ensure all input is included. Consultations are also dependent on many factors such as available funds and the nature of the law review where a more targeted approach may be considered. For instance, a family law review may require specific consultations with a certain class of persons commonly referred to as minority groups in Samoa, such as *fa'afafine* and persons with disabilities. As such, the law reform process does not seek to exclude any minority group or class of persons in the general call for consultations. SLRC view the consultations as the evidence-base to better inform the findings that are considered when providing recommendations on any law reforms to Parliament. Therefore, it is vital that *fa'atama* and the SOGIEC community actively participate in SLRC consultations as the findings from the consultations influence the direction of any draft laws in Samoa.

In Samoa's draft bill process, a Bill undergoes procedural vetting for both constitutional compliance and gender neutrality - which is carved out into the law reform process.⁶⁰ Indeed, the language of the law is gender neutral and Article

56 Land, above n 40, at 539.

57 At 539; and New Zealand Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP17, 2006) at 41.

58 *Fa'atama* interview, above n 30.

59 *Fa'atama* interview, above n 30.

60 See Mulitalo, above n 43.

15 of Samoa's constitution provides that all persons are equal before the law. Part IV will explain the inadequacies in this claim.⁶⁰ Thus, I propose the development of a tool similar to the Gender Legislative Index which provides a benchmark to assess legislation from gender-regressive (or gender-blind) to gender-responsive legislation (to resolve some of the problems facing *fa'atama* and SOGIEC recognition in the law, as mentioned at the start in Part II, D *Fa'atama and SOG/EC*). thus providing standards for non-discrimination and inclusion.⁶² The current vetting process is inadequate and the recommendation for express provisions in the law to resolve this issue aligns with the author's data from *talanoa* focus group and interviews conducted in Samoa recently.⁶³ Notably, Samoa's constitution provides no mechanism to reconcile this tension. Needless to say, the constitutional challenges expressed in the three Bills and gender quota cases did not cast any consideration to the collective recognition of social practices which do not fit neatly into Samoa customary values and the law.

Similar to other post-colonial experiences, there is a lack in the modern socio-economic features to support successful legal transplants in which customary laws become the basis of primary laws.⁶⁴ Samoa's legal system continues to address these limitations by exploring ways to accommodate modern features into the structures of its customary legal system. Based on recent interviews conducted by the author, conflicting views promote law reform in favour of preserving only the existing customs and traditions in Samoa's formal state laws if compatible with recognition of *fa'atama* and SOGIEC rights through a more inclusive and equitable law reform process. The process of codifying customs was highlighted as the best pathway to achieve this. In contrast, the more modern view was to explore how Samoa's *bijural* system can uphold the Constitution. Other critics suggest that to achieve an effective law reform process would require an incremental and cautious approach, thus involving public consultations and submissions from the general population.⁶¹

The absence of a comprehensive anti-discrimination framework in Samoa's Constitution on gender identity enables a discriminatory culture against SOGIEC

61 *Fa'atama* interview, above n 30.

62 Ramona Vijeyarasa "Making the law work for women: Standard-setting through a new Gender Legislative Index" (2019) 44(4) *Alternative Law Journal* at 275-280, DOI:10.1177/ilo37969X19861751.

63 *Fa'atama* interview, above n 30.

64 Abdulmumini A Oba "The future of customary law in Africa" in Jeanmarie Fenrich, Paolo Galizzi and others (eds) *The future of African customary law* (Cambridge University Press, Cambridge, 2011) at 69; and Michael Ntuny "The dreams of a Melanesian jurisprudence: the purpose and limits of law reform" in Jonathan Aleck and Ranells Jackson (eds) *Customs at the crossroads*. (Melanesia Law Publishers, Papua New Guinea, 1995) at 11.

65 See Mulitalo, above n 43.

people.⁶⁶ Moreover, to resolve the tension in the structural division between custom and fundamental rights, Samoa can carve out customary exceptions to constitutional human rights' provisions.⁶⁷ In the absence of legislative specificity in customary exceptions, a custom may prevail in cases of religious and gender discrimination, as experienced in Tuvalu and Samoa, to name a few.⁶⁸ Similarly, Samoa has exercised this exception to preserve communal services (*tautua*) embedded in Samoa's *matai* system against the right to forced labour. This complements the United Nations vision "that human rights should adapt to the local context".⁶⁹

The development of state laws as contextualised to Samoa's socio-cultural context is riddled with challenges. In this regard, the challenge derives from local populations who demand this change, as well as relevant institutions mandated with principal functions to enable it experience considerable setback due to the absence of institutional policies and government directives (mechanisms to ensure law reforms undergo a customs analysis and public consultation).

V. Fa'atama and SOGIEC Recognition

As demonstrated in the approach adopted by Samoan Courts in constitutional interpretation, the pathway to progressive recognition of *fa'atama* in Samoa's Constitution and customary practices is riddled with many challenges. In proposing a more inclusive and meaningful law reform process that recognises *fa'atama* and members of the SOGIEC community, we need to understand the context to which it is applied to particular cases. This will yield a comprehensive understanding about the scope of law reform task ahead and what is problematic about it. Importantly, building on the understanding of the Court's approach outlined in the previous section has provided some critical lessons.

For any robust Samoa law making and reform, it begins primarily with a *talanoa* with the people to whom it will serve, in line with well-established customary protocol. There should also be focused *talanoa* focus groups and informant interviews in direct consultation with members of the SOGIEC community, directly impacted

66 See Constitution of the Independent State of Samoa (Samoa), art 15; see Universal Periodic Review of Samoa: 39th Working Group Session *Fa'afafine Association Inc Joint Stakeholder Submission* (21 September 2021).

67 See Constitution of the Independent State of Papua New Guinea, art 53(5)(d); Constitution of Solomon Islands 1978 art 15(5)(d); Samoan Constitution, art 8(2)(d); Samoan Constitution, preamble, pt II and pt IX; and International Council of Human Rights Policy *Taking Duties Seriously: Individual Duties in International Human Rights Law - A Commentary* (Versoix, 1999) at 24-25.

68 Deja Olowu "When Unwritten Customary Authority Overrides the Legal Effect of Constitutional Rights: A Critical Review of the Tuvaluan Decision in *Mase Teonea v Pule O Haupule & Another*" (2005) 9(2) *Journal of South Pacific Law*.

69 See Land, above n 40, at 539.

by proposed law and policy changes. This is the empirical approach adopted by the author having recently collected interview *talanoa* and focus group *talanoa* data in Samoa.

Now let us explore Samoa's Constitution in more depth. According to Article 15 it states:¹⁰

- (1) All persons are equal before the law and entitled to equal protection under the law.
- (2) Except as expressly authorised 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.
- (3) Nothing in this Article shall:
 - (a) prevent the prescription of qualifications for the service of Samoa or the service of a body corporate directly established under the law; or
 - (b) prevent the making of any provision for the protection or advancement of women or children or of any socially or educationally retarded class of persons.
- (4) Nothing in this Article shall affect the operation of any existing law or the maintenance by the State of any executive or administrative practice being observed on Independence Day: PROVIDED THAT the State shall direct its policy towards the progressive removal of any disability or restriction which has been imposed on any of the grounds referred to in clause (2) and of any privilege or advantage which has been conferred on any of those grounds.

It is worth noting that this Article is dated. The last time it was amended was in 1960. The Preamble of Samoa's Constitution references Samoan customs and traditions, and Christian principles, as well as fundamental freedoms, however: "Sexual orientation and gender identity are notably absent from this list of prohibited

70 See Constitution of the Independent State of Samoa (Samoa), art 15.

grounds of discrimination."⁷¹ Consequently, art 15(4) permits the enforcement of provisions that existed prior to the enactment of Samoa's Constitution. This removes any protection from discrimination based on disability and gender identity. It safeguards existing customs and usages but did not clearly articulate how laws facilitate special measures to guarantee substantive equality until recently. The discriminatory sodomy provisions still remain in Samoa's Crimes Act 2013, criminalising consensual sex between men only. It could also be used to criminalise persons ascribed the male sex at birth, such as *fa'afafine*. Thus, there is limited scope to bring *fa'atama* (often misgendered as lesbians) within Samoan laws with Samoa's Constitution serving as the starting point.

The reality of legal protection to a full suite of fundamental rights as enshrined in constitutions is an entitlement not yet afforded to *fa'atama*. Insofar as Samoa's laws and Constitution does not prohibit discrimination on the basis of gender identity, it also does not make it illegal. Arguably, shoehorning *fa'atama* and SOGIEC members into recognised gender binary norms in the law is also not ideal. As evident in the cases discussed in Section III, caution needs to be taken when adopting inclusive legal language such as "sexual orientation", "gender" and whether inclusiveness of *fa'atama* and transgendered people may dismiss any distinctive feature they seek to preserve.

More importantly, before considering any proposed law reform and legal transplant, it must be driven by what *fa'atama* want. If diverse SOGIEC people in the Pacific seek to act as agents to influence legal change to recognise their legal status within the law or to drive more meaningful and appropriate models for law reform, the power to influence this change invariably lies with *fa'atama* themselves. Their lived experience determines how they construct and maintain their identities within the wider context of the influences from globalisation, Westernisation, migration and Samoa's shifting political economy. This, then, is a matter within the scope of SLRC's mandate which is guided by the Law Reform Commission Act 2008. Thus, any review or reform must promote the Samoan customs, enhancing the development of Samoa and ensure all laws are in accordance with the Constitution and meets the needs of the Government and the people. As a recommendation, community village outreach, education awareness campaigns are a few ways to enable input from the *fa'atama* community as noted during both interview and focus group *talanoa*.⁷²

While the experiences of *fa'afafine* dominate Samoa's SOGIEC literature, the experiences of Samoa's SOGIEC community are not homogeneous, and the emphasis on *fa'afafine* could effectively render the experiences of other members of the SOGIEC

71 Bridget Crichton "Gender equity in Samoan laws: Progress vs contradictions" (2018) *Journal of South Pacific Law* (Special Issue on Pacific Custom) 125-142.

72 *Fa'atama* interview, above n 30.

community invisible in official data reporting. The Samoa Fa'afafine Association (SFA) also observed that, while both fa'afafine and fa'atama members continue to face numerous challenges, fa'atama are much more vulnerable to discrimination, stigmatisation and are invisible in official data and policies.⁷³ Unlike fa'atama, there is a large body of anthropological literature on fa'afafine, but very limited research regarding their human rights concerns.⁷⁴ There is no formal statistical data and estimates of the number of people identifying as fa'afafine and fa'atama vary. There is a lack of scholarly or applied policy literature on fa'atama, and no corresponding non-government organisation to the SFA. Fa'atama members sit within the SFA. This is problematic and, over time, fa'atama are likely to organise a separate and independent NGO driven specifically by fa'atama-framed ideals.

In 2018, Samoa's National Human Rights Institution (NHRI) and the SFA developed a national action plan to advance the human rights of the *fa'afafine* and *fa'atama* communities in Samoa and recommended the development of guidelines and standards by law enforcement agencies. The national action plan identified two overarching goals: (1) to strengthen the rights to health of *fa'afafine* and *fa'atama* communities and (2) to build the institutional capacity of NRHI staff to promote and protect the human rights of SOGIEC/LGBTI people particularly through capacity building and sensitisation activities.⁷⁵ The SFA's human rights advocacy is planned to include submissions to the review of the Births Registration legislation to enable recognition and ability to change their official sex ascribed at birth to recognise their gender identity.⁷⁶ It is also important to note that a representative from Samoa's SOGIEC community is part of Samoa's Human Rights Council of the Office of the Ombudsman. This is Samoa's National Human Rights Office and thus, Samoa's inclusion of "SOGIEC" in the Samoa Ministry of Women Community and Social Development was approved in the *recent National Gender Policy 2021-2025*.

To understand the depth of reality to laws and customary practices in Samoa, without paying attention to the lived experience of Samoan *fa'atama* and SOGIEC people, is unjust. In Samoa, *fa'atama* are still denied the common legal protections and human rights afforded to heteronormative individuals. It reflects a legally pluralistic legacy where historical association of legal status is closely aligned to the binary, biological and universal notions of female and male. Even in contemporary Samoa, the SOGIEC community, specifically *fa'atama*, are underrepresented in local

73 Consultation with Samoa Fa'afafine Association, 20 October 2020, Apia.

74 Saunoamaali'i Karanina Sumeo "Land rights and empowerment of urban women, *fa'afafine* and *fakaleiti* in Samoa and Tonga" (PhD Thesis, Auckland University of Technology, 2017).

75 Commonwealth Forum of National Human Rights Institutions *NHRI Samoa: A Case Study on Sexual Orientation and Gender Identity Rights* (2019).

76 See Consultation with Samoa Fa'afafine Association, above n 73.

Samoaan discourse.⁷⁷ The problem is that *Fa'atama* who identify as transmen do not fit into the traditional sex categories and may continue to be ignored or beyond the scope of the law. In line with Samoan and Christian principles, art 15 of Samoa's Constitution adopts a functionalist interpretation of "sex" (sexual orientation) and makes no explicit reference to "gender" (gender identity). Therefore, it does not prohibit discrimination on the grounds of gender identity, nor does it make gender discriminatory practises illegal. This is why the repeal of all gender discriminatory laws and provisions (embedded in Samoa's civil and criminal codes which discriminate on the basis of SOGIEC status) is on SFA's agenda. By drawing on lessons from other repeals such as the Crimes Act 2013 in relation to the decriminalisation of female impersonation and the Mental Health Act 2007 removal of sexual preference or sexual orientation from the statutory definition of "mental disorder" (where "a person is not considered mentally ill" if "the person expresses or refuses or fails to express a particular sexual preference or sexual orientation"). Further to this, the development of special mechanisms (administrative, legal, policy) that adequately address gender-based violence (and social stigma, stereotyping) against Samoa's SOGIEC community and, finally, consideration as to the most appropriate approach to adopt (which could form a combination of approaches), whether it be calling a public referendum, seeking judicial interpretation, advocating for a Member of Parliament to move a private member's bill or even seeking an explicit repeal of art 15 of Samoa's Constitution.

VI. Conclusion

If *fa'atama* and SOGIEC wish to effect legal change in Samoa, Farran argues:⁷⁸

... to resist introduced legal transplants, it is important that, more work of the kind presented ... is undertaken in order to establish what factual circumstances and needs the present laws must respond to and what models, if any, transgender Pacific Islanders wish to adopt to bring them more securely within the law.

⁷⁷ Sue Farran "Out with the Law in Samoa and Tonga" in Niko Besnier and Kalissa Alexeyeff (eds) *Gender on the Edge: Transgender, Gay, and Other Pacific Islanders* (Honolulu, University of Hawaii Press, 2014) at 347-370.

⁷⁸ At 367.

From the above discussion, this article proposes how to minimise conflicts between the customary and state legal system. This includes public awareness with an emphasis on formal education as a way to bring about understanding of Samoa's legal system and laws, to not only notify the public about upcoming law reform consultations but to encourage contribution or participation from members of the public that are under-represented in consultations, specifically *fa'atama* to better understand the process of law reform and state laws as well as individual rights, with an emphasis on *fa'atama* recognition and gender diversity in the customary and state legal context, all of which support mechanisms to ensure access to justice, education, employment and health. Court procedures and professional ethics training for members of the judiciary must be developed with reference to Samoa's gender diverse and customary context, to foster a deeper understanding of the evolving sociocultural environment they operate in and how their decisions must give due consideration to changes in the local and global context. Similarly, professional training is required for both parliamentarians and members of the legal profession.

For the parliamentarians, due consideration must be given to the customary environment of law making, duties to the village or constituencies they represent and how to introduce a private members bill. They must work closely with law reformers or legislative drafters as required. This will ensure that parliamentarians understand how to propose legislative or constitutional amendments to outdated ideas such as those that promote gender discrimination in the state and customary legal context.

For the legal profession, suitable training on Samoan custom, gender, tradition, protocol and language must be provided to lawyers involved in some aspect of law reform, while engagement and participation in quality research and conferences are necessary as they relate to work on law reform.

For the customary law context, village mayors should be encouraged to understand modern state laws and principles of human rights in the context of gender diversity and individual rights, then to examine the suitability of those laws and principles in the village context. Further, training for village mayors is critical in the development of villages rules and bylaws according to Samoa's constitution. The involvement of villages in law reform achieves several goals:

1. by contributing to the law reform process, it empowers the community to have a sense of shared ownership of the laws and customary reform;
2. it manages budget constraints by reducing consultation project costs; and
3. it widens the reach of village participation to include members of the *fa'atama* community, which enriches the quality of the responses.

On the whole, this article highlights key critical gaps to address such as the most culturally suitable methodology and critical legal theory to support gender and law research, with an emphasis on law reform and *fa'atama* recognition in the context of Samoa customs and laws.⁷⁹ This was informed by the evidence from relevant literature and empirical data.⁸⁰ The judicial guidance from the women's gender quota cases has given shape to the framing of *fa'atama* and SOGIEC recognition in state law which highlights the potential challenges to law making and law reform in the customary legal context.

79 Bridget Fa'amatua'inau "Talanoa methodology in Samoa law and gender research: The case for a Samoan critical legal theory and gender methodology" (2023) 7(1) Pacific Dynamics: Journal of Interdisciplinary Research 422-441.

80 *Fa'atama* interview *talanoa* and focus group *talanoa*, above n 30.