

Mandate of the Special Rapporteur on the independence of judges and lawyers

REFERENCE:
OL WSM 1/2020

26 May 2020

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolution 35/11.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning **three bills currently before the Parliament that would amend the Constitution, the Judicature Ordinance and the Lands and Titles Act**. These bills would, if adopted as they are, have an adverse impact on the independence of the judiciary in Samoa.

I would also like to raise some general concerns with regard to the current procedures for the appointment and dismissal of the Chief Justice, judges, and members of the Judicial Service Commission, which appear to be at odds with international standards related to the independence of the judiciary and the separation of powers.

In October 2019, the Prime Minister of Samoa, H.E. Mr. Tuilaepa Aiono Sailele Malielegaoi, tasked the Samoa Law Reform Commission, the Ministry of Justice and Courts Administration and the Office of the Attorney General to review (1) how Samoan customary law could be recognised and protected in the Constitution and (2) how the Lands and Titles Court (hereinafter, "LTC"), a specialised court established by the Constitution to deal with customary land and chiefly titles, could be made autonomous from the formal court system.

In late 2019 or early 2020, the Samoa Law Reform Commission issued a report entitled "Samoa mo Samoa" ("Samoa for Samoa"). The report, which was uploaded on the Commission's website on 2 April 2020 and subsequently removed, articulates the Government's vision that "essence of being a Samoan must be given more recognition and protection" in the Constitution and other laws.

Based on the recommendations included in that report, on 17 March 2020 the Government introduced three bills into the Parliament to amend the Constitution, the Judicature Ordinance (1961) and the Lands and Titles Act (1981). These proposed laws immediately went through a first and second reading, and were then referred to a Parliamentary Committee for review. At the same time, the Government withdrew another bill that had already been tabled in the Parliament, the "Lands and Titles Bill 2019", which aimed at introducing changes to the LTC in line with a 2016 Parliamentary Committee Report.¹

¹ In 2016, complaints about the quality and fairness of outcomes in the LTC gave rise to a Parliamentary Enquiry. The outcome of this public consultative process was a report that recommended various

The bills were not subject to any public consultation, required by the Samoa Law Reform Commissions' statutory mandate and by the Government's legislative drafting policies.

On 20 March 2020, the Government declared a state of emergency due to the COVID-19 pandemic. The state of emergency introduced significant restrictions on freedom of movement and peaceful assembly, the closure of courts and tribunals, the closure of schools and restrictions of public sector working hours. The state of emergency has been extended several times, most recently on 9 May 2020.

At the time he announced the state of emergency, the Prime Minister also informed the general public on the appointment of a new Chief Justice, Mr. Satiu Simativa Perese, a Samoan barrister from New Zealand. His appointment was announced 12 months after the former Chief Justice retired. The appointment was made at the initiative of the Prime Minister, without any formal consultative process.

Before explaining my concerns on these bills, I wish to remind your Excellency's Government of its obligations under article 14 of the International Covenant on Civil and Political Rights (ICCPR), acceded by Samoa on 15 February 2008, which provides that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

In General Comment No. 32 (2007), the Human Rights Committee stressed that the requirement of independence of a tribunal is "an absolute right that is not subject to any exception." The requirement of independence "refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature." The Human Rights Committee clearly stated that "[a] situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal" (para. 19).

The principle of the independence of the judiciary has also been enshrined in a large number of United Nations legal instruments, including the Basic Principles on the Independence of the Judiciary. The Principles provide, *inter alia*, that it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary (principle 1); that judges shall decide matters before them impartially (...) without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason (principle 2); and that

resourcing and capacity improvements to the LTC. In particular, the report specifically recommended that the Supreme Court retain its role to enforce breaches of fundamental rights in LTC hearings.

there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision (principle 4).

In light of the above-mentioned standards, I am concerned that the proposed amendments to the Constitution, the Judicature Ordinance and the Lands and Titles Act would, if adopted, fall short of international standards relating to the independence of the judiciary and the separation of powers. I am also worried at the wide discretionary powers that the executive power, through the Head of State, retains in relation to the appointment and dismissal of the Chief Justice, the President of the LTC, and ordinary judges.

1. Amendments to the Constitution

(a) Judicial Service Commission

Article 72 of the Constitution provides that the Judicial Service Commission (“JSC”) consists of five members: the Chief Justice, who serves as the chair of the Commission, the Attorney General (or in his/her absence, the Chair of the Public Service Commission), a person nominated by the Minister of Justice, the President of the Lands and Titles Court and a retired Supreme Court judge appointed by the Head of State on the advice of the Cabinet. The Registrar of the Supreme Court is an *ex officio* member acting as secretary of the Commission without voting rights.

At present, judges constitute a majority of the JSC (Chief Justice, a retired Supreme Court judge and the President of the LTC). The JSC can only act if a quorum of three members is attained. Decisions are taken by simple majority of members present and voting.

According to article 72(4) of the Constitution, the responsibility for the appointment, promotion and transfer of any judicial officer (other than the Chief Justice), as well as for the dismissal of any judicial officer (with the exception of Supreme Court judges and the president of the LTC) is vested in the Head of State, acting on the advice of the JSC, and pursuant to a procedure established by ordinary law.

The Constitution Amendment Bill 2020 (“Act to amend the Constitution on matters relating to the Civil and Criminal Courts and the Land and Titles Court, and related purposes”) introduces a number of amendments to the composition and functioning of the JSC that would undermine, if adopted as they are, the independence of the judiciary in Samoa and the separation of powers. .

A new article 80 of the Constitution would introduce changes to the membership of the JSC by removing the President of the LTC and replacing this position with the Chairperson of the Public Service Commission.² As a result of this change in the

² According to article 87(1) of the Constitution, the Public Service Commission is responsible for (i) human resource planning (ii) human resource management policy; and (iii) human resources monitoring and evaluation, for the Public Service, as well as for performing any other functions as may be provided by

composition of the JSC, judges – whether appointed or elected *ex officio* – would no longer constitute the majority of JSC members.

The members appointed or elected *ex officio* by the executive branch of power (Attorney General, Chair of the Public Service Commission, and Minister of Justice’s appointee) would have a decisive say on all decisions taken by the JSC, particularly those relating to the appointment, promotion, transfer and dismissal of judges. Two out of three of the executive members of the JSC are currently appointed by the Head of State, acting on the advice of the Prime Minister (see articles 41(1) and 84(2) of the Constitution). The Head of State also retains the power to appoint the Chief Justice (upon the advice of the Prime Minister) and the retired Supreme Court judge (upon the advice of the Cabinet).

The new composition of the JSC is not consistent with international standards on judicial councils. In my report on judicial councils, I noted that although there is no standard model that a democratic country is bound to follow in setting up its judicial council, “there is a tendency at the international level for judicial councils to have a mixed composition, and for a majority of members to be judges elected by their peers” (A/HRC/38/38, para. 66).

With regard to the selection of non-judge members, the report notes that the matter has largely been left to the discretion of States, which have to strike a fair balance between the need to insulate the judiciary from external pressure and the need to avoid the negative effects of corporatism within the judiciary. As a general rule, however, the involvement of political authorities at any stage of the selection process of judge-members of the judicial council should be discouraged, so as to insulate it from external interference, politicization and undue pressure (A/HRC/38/38, para. 76).

With regard to Samoa, I note with concern that the wide powers entrusted to the executive branch of Government (acting through the Head of State) in relation to the formal appointment of JSC members risk hampering the independence of the JSC and the judicial system as a whole. The power of the Head of State with regard to the dismissal of the members of the JSC is equally problematic, since it allows the Head of State to exert influence over individual members of the Commission, whose continuous service as member of the JSC depends on maintaining good relations with the Head of State. Even assuming that the independence and impartiality of the members of the JSC is not undermined by actual interferences from the executive branch, their perceived independence and impartiality would be irremediably compromised.

With regard to the chairperson of the Commission, the above-mentioned report notes that in accordance with international standards, the chair of a judicial council should be elected by the council itself, preferably among its judge-members, and that as a general rule, the Chief Justice or President of the Supreme Court should not be appointed as the chair of a judicial council (A/HRC/38/38, para. 80).

ordinary law. The Commission consists of not more than three persons appointed by the Head of State on the advice of the Prime Minister (article 84(1)).

(b) Appointment of the Chief Justice

According to article 65 (2) of the Constitution, the Chief Justice of the Supreme Court shall be appointed by the Head of State, acting on the advice of the Prime Minister. Candidates to this position must meet the minimum requirements set out in article 65 (3), namely (a) they must possess the qualifications prescribed by the Head of State, on the basis of the Judicial Service Commission’s advice, and (b) they must have practiced as a barrister in Samoa, an approved country, or both, for a period of not less than 8 years.

The Constitution Amendment Bill would not modify the procedure for the appointment of the Chief Justice, but amend slightly the requirements for the post by requiring an experience as a barrister of not less than 15 years (draft article 66 (2)).

I consider that the procedure for the appointment of the Chief Justice is not in line with the principles of judicial independence and the separation of powers. While the procedure and the authorities involved in the selection and appointment of the Chief Justice vary from one country to another, I cannot but notice that in the case of Samoa, the wide discretionary powers attributed to the Prime Minister, on whose advice the Head of State acts, with regard to both the definition of the necessary qualifications for the post and the actual selection of the successful candidate do not provide sufficient safeguards to prevent political interference in the selection of the Chief Justice, with political considerations prevailing over the objective merits of a candidate.

I am aware that in some countries, including some of the oldest democracies, the executive power sometimes has a decisive influence on the appointment of the Chief Justice. However, such systems work well in practice because the role of the Head of State or the Prime Minister is restrained by legal culture and traditions. In the case of Samoa, the procedure set out in the Constitution and the criteria for the selection of the Chief Justice are not sufficiently clear to ensure that the Chief Justice is selected solely on the basis of objective factors, such as ability, integrity and experience. Furthermore, the participation of other authorities in the appointment process does not render the selection process less questionable, considering the prominent role played by the Prime Minister in their appointment.

(c) Judicial career

Article 72(4) of the Constitution of Samoa provides that “[t]he power of appointing, promoting and transferring any judicial officer, other than the Chief Justice, and of dismissing any judicial officer, other than a Judge of the Supreme Court and the President of the Land and Titles Court, is hereby vested in the Head of State, acting on the advice of the Judicial Service Commission as may be provided by Act.”

Supreme Court judges retain office until they reach retirement age of 68 years (article 68(1) of the Constitution). They can only be removed from office by the Head of State, on the basis of a deliberation of the Legislative Assembly adopted by qualified

majority vote on stated grounds of “misbehaviour” or “infirmity of body or mind” (article 68(5)).

Other judges are appointed, promoted, transferred and dismissed by the Head of State, acting on the advice of the JSC, in the cases and in accordance with the procedure set out in ordinary legislation (article 72(4)).

The Constitution Amendment Bill introduces a simplified procedure for the appointment, promotion, transfer and dismissal of all ordinary judges, except the Chief Justice. According to draft article 80(4), “[t]he power of appointing, promoting, transferring and dismissing a Supreme Court Judge and a subordinate Court is vested in the Head of State, acting on the advice of the Judicial Service Commission, as may be provided by Act.”³

The procedure for the appointment, promotion and transfer of judges remains unchanged. However, the procedure for the removal of Supreme Court judges would be different, since the power to dismiss judges would now be vested in the Head of State, acting on the advice of the Judicial Service Commission. The role of the Parliament in the dismissal process would be retained only in relation to the dismissal of the Chief Justice, while all other judges – including Supreme Court judges – would be dismissed upon the advice of the JSC.

The current procedure for the selection, appointment and promotion of judges – which would not be affected by the constitutional amendments – is not in line with international standards on judicial independence and the separation of powers. These standards aim at safeguarding the independence of individual judges and of the justice system as a whole by insulating the judiciary from external interference, politicization and undue pressure. In order to guarantee the independence of the judiciary, they recommend that decisions on the appointment and promotion of judges be taken by a judicial council or an equivalent body independent of the legislative and executive branches of power.

Due to its composition and the procedure for appointing its members, the JSC cannot be regarded as being independent from the executive branch of power. If the constitutional amendments on the composition of the JSC were to be adopted, the JSC would be even more dependent on the executive branch, and its independence would be further undermined.

The procedure for the dismissal of judges is even more problematic.

³ This procedure would not be applicable to the Chief Justice. According to draft article 67(5), the Chief Justice can only be removed from office “by the Head of State on an address of the Legislative Assembly carried by not less than two-thirds of the total number of Members of Parliament (including vacancies), praying for his or her removal from office on the grounds of ‘stated misbehaviour’ or ‘infirmity of the mind’ as prescribed by Act.”

International and regional standards on the independence of the judiciary recognise that judges may be subject to disciplinary proceedings and penalties, up to and including removal from office, only for sufficiently serious misconduct. Principle 18 of the Basic Principles on the Independence of the Judiciary outlines that as a general rule, judges can only be suspended or removed from office for serious misconduct, disciplinary or criminal offence or incapacity “that renders them unfit to discharge their duties”. Disciplinary sanctions can only be imposed on the basis of an appropriate and fair procedure (principle 17) and in accordance with established standards of judicial conduct (principle 19), and should be subject “to an independent review” (principle 20).

Draft article 80 (4) in its current formulation is not sufficiently clear to be in line with the standards referred to above. The adoption of a law is needed to identify, at the very least (a) the kind of behaviour that may give rise to disciplinary liability; (b) the procedure to be followed to handle disciplinary cases; (c) the procedural safeguards for the judge; and (d) appeal procedure against the disciplinary decisions.

International standards provide that the responsibility for disciplinary proceedings against judges should be vested in an independent authority (such as a judicial council) or a court. For this reason, the involvement of members of the executive branch of power (Head of State, Prime Minister, Cabinet, Minister of Justice or any other representative of the political authorities) in the disciplinary body is *de facto* incompatible with the principle of the independence of the judiciary. The Human Rights Committee held that the dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal, is incompatible with the independence of the judiciary (General Comment No. 32 (2007), para. 20).

For the reasons mentioned above, I consider that in light of its composition, the JSC cannot be regarded as an independent authority. The fact that the all members of the JSC (with the exception of the Minister of Justice’s appointee) are formally appointed by the Head of State makes it easier for the Prime Minister and Cabinet to exert pressure on the members of the JSC, who may feel pressured to support the position of the executive of the in order to minimise the risk of being dismissed themselves. Consequently, the involvement of the JSC in the procedure for the dismissal of judges poses serious problem with regard to respect for the principles of independence of the judiciary and separation of powers.

The involvement of the JSC in the dismissal procedure is even more problematic because the constitutional amendments do not foresee any fair trial guarantee for the accused judge, such as the right to be heard, the publicity of the proceedings or the obligation to issue a motivated decision subject to review on appeal. In other words, prior to the enactment of ordinary legislation on disciplinary proceedings against judges, the Commission would have *carte blanche* to dismiss individual judges at its will. The overly broad discretionary powers granted to the JSC do not provide any guarantee to judges against arbitrary dismissal. It is not even clear whether the recommendation of the Commission needs to be motivated or not.

(d) Judicial salaries

Article 69 of the Constitution provides that the salaries of Supreme Court judges shall be determined by ordinary legislation and charged on the Treasury Fund. Their salaries cannot be reduced during their term of office, unless as part of a general reduction of salaries applied “across the board”.

This provision is consistent with international legal standards on the independence of the judiciary. Principle 11 of the Basic Principles on the Independence of the Judiciary provides that the remuneration of judges, along with other elements essential for their independence (e.g. term of office, security of tenure, conditions of service, pensions and age of retirement), “shall be adequately secured by law.” The Guidelines for Ensuring the Independence and Integrity of Magistrates, drafted by the Commonwealth Magistrates’ and Judges’ Association (CMJA) in 2013, also recognise that in order to ensure the independence of the judiciary, the salaries of magistrates shall be “secured by law and not be diminished during the continuance of their term,” and be periodically reviewed by a body independent of the executive branch of Government.

The Constitution Amendment Bill would introduce changes as to the authority that determines the salaries of Court of appeal judges. According to draft article 82 (1), salaries of Court of Appeal judges would be determined by the JSC and appropriated by the Legislative Assembly. The salaries of Supreme Court judges would continue to be appropriated by the Legislative Assembly and charged on the Treasury Fund.

This provision is problematic. In view of its composition, transferring the power to determine judicial salaries to the JSC would pave the way for possible political interferences with the independence of the judiciary. In this regard, the Human Rights Committee stressed that in order to protect judges from any form of political influence in their decision-making, States should establish, through the Constitution or ordinary legislation, clear procedures and objective criteria for the remuneration of judges (General Comment No. 32 (2007), para. 19). The Special Rapporteur’s mandate has also stressed on various occasions that judges’ salaries should be adequate and commensurate with the status, dignity and responsibility of judicial office, should be determined by law and be periodically reviewed by the independent body so as to overcome or minimise the effect of inflation (see for instance A/HRC/11/41, paras. 73-75).

According to the District Courts Act 2016 and Lands and Titles Act 1981, salaries for ordinary judges and Lands and Titles Court judges are fixed by the Head of State acting on the advice of Cabinet and the JSC. As mentioned above, the involvement of the executive in the determination of judicial salaries exposes judges to possible interference from the executive. Such interference would become more serious if the proposed changes to the composition of the JSC enter into force.

2. Amendments to the Judicature Ordinance and the Lands and Titles Act

The Judicature Ordinance 1961 regulates the composition and the jurisdiction of the Supreme Court and Court of Appeal, and deals with a number of procedural matters pertaining to the operations of both courts. It also contains and the Court of Appeal rules of procedure. The Ordinance supplements the provisions of the Constitution about the appointment and removal of judges of these courts and their jurisdiction, set out in Part VI of the Constitution (articles 61 to 82).

Adopted in 1981, the Lands and Titles Act (hereinafter, “LTA”) provides for various matters pertaining to customary land and chiefly titles referred to in Part IX of the Constitution. It contains detailed provisions about the Lands and Titles Court, which is established by article 103 of the Constitution.

The LTA regulates the appointment, suspension and removal of “Samoan Judges” who sit in the Court. Samoan Judges are lay judges, with particular expertise in Samoan customs and traditions. They are not required to hold legal qualifications. The President of the LTC, who heads the LTC, may be the Chief Justice or a Judge of the Supreme Court, or a person qualified to be a Supreme Court judge. The LTA further confirms that the LTC is a court of record and has all the powers inherent in a court of record. The LTA deals with various other procedural matters.

Appeals from first instance decisions of the LTC are heard by the LTC Court of Appeal. The Supreme Court has no jurisdiction to hear appeals from the LTC. However, parties to LTC matters may apply to the Supreme Court for enforcement of their fundamental rights under article 4 of the Constitution. Frequently, this involves applications for enforcement of the right to a fair trial under article 9 and freedom of religion under article 11.

The Judicature Bill 2020 (“Act to update the law relating to the Civil and Criminal Courts of Samoa, and for related purposes”) and the Land and Titles Bill 2020 (“Act to replace the Land and Titles Act 1981”) introduce far-reaching changes to the jurisdiction of national courts and their relations with the customary justice system, which are susceptible to threaten the rule of law and the application and enforcement of the fundamental human rights enshrined in Part II of the Constitution, including the right to a fair trial (article 9).

According to the Constitution, the Supreme Court has “such original, appellate and revisional jurisdiction as may be provided by Act” (article 73(1)). The Court also has general jurisdiction over questions relating to the interpretation or effect of any provision of this Constitution that may have arisen during legal proceedings before another court (except the Court of Appeal) or may have been referred to it by the Head of State, on the advice of the Prime Minister (article 73(2) and (3)).

According to article 4 of the Constitution, the Supreme Court hears cases concerning the enforcement of the fundamental rights set out in Part II of the Constitution, and has the power to make all such orders as may be necessary and

appropriate to secure to the applicant the enjoyment of any of the rights conferred under the provisions of this Part.

The Court of Appeal has jurisdiction to hear and determine on appeal the cases identified in ordinary law (article 79 of the Constitution) and jurisdiction on constitutional questions in the cases set out in article 80. The Court of Appeal also has jurisdiction on appeals relating to any decision of the Supreme Court in legal proceedings relating to the provision of article 4 of the Constitution.

Together with the Constitution Amendment Bill, the amendments to the Judicature Ordinance and the LTA would fundamentally alter the structure of Samoa's judiciary by introducing an entirely new administration of justice system consisting of two parallel and potentially competing court systems: the 'ordinary' court system and the 'customary' court system. According to the proposed changes:

- The Supreme Court and Court of Appeal would retain jurisdiction only in civil and criminal cases (see articles 71 and 76 of the Constitution Amendment Bill), whereas Lands and Titles Courts would acquire exclusive jurisdiction in relation to Matai titles and customary land regulated in Part IX of the Constitution (draft article 104(1));
- There would be a new three-tiered Lands and Titles Courts structure that has "special jurisdiction" over questions concerning the interpretation and application of issues related to Part IX of the Constitution since they govern "a legal system different and separate from that of the Civil and Criminal Courts in Part VI" and has "supreme authority over the subject of Samoan customs and usages" (draft article 104 (2));
- The Land and Titles Court of Appeal and Review would "possess and exercise all the jurisdiction, power, and authority, which may be necessary to administer the laws under this Part IX Land and Titles Court" (draft article 104C (5) (b)). It would also have general jurisdiction over questions relating to the interpretation or effect of any provision of Part IX of the Constitution that may arise in legal proceedings before another court or may be referred to it by the Head of State, on the advice of the Prime Minister (draft article 104C (10) and (11));
- The President of the of the Land and Titles High Court and Head of the Land and Titles Court Bench would be elected by the Head of State, upon the recommendation of the Prime Minister (draft article 104D) and the position would be de facto equivalent to that of Chief Justice;
- A new body, *Komisi o Galuega a le Faamasinoga o Fanua ma Suafa* (*Komisi*), would be established to administer aspects of the Lands and Titles Court judiciary (draft article 104E). Its composition⁴ and functions⁵ would be equivalent to those exercised by the JSC.

⁴ The *Komisi* would consist of three members: (a) the President of the LTC, as Chairperson; (b) a Supreme Court Judge as nominated by the Chief Justice; and (c) the Chairperson of the Public Service Commission. The Registrar of the Supreme Court would serve as the secretary of the Commission and have no voting rights (article 104E (1)).

I am concerned that the establishment of this new customary court system creates serious legal uncertainties with regard to the applicable law (ordinary civil and criminal legislation or customary law). In this regard, I notice that the amendments do not provide a definition of “customs and usages”, a notion that goes far beyond matai titles and customary land to cover several aspects of traditional life, including some that may have criminal or civil relevance. By recognising that Land and Titles courts have “supreme authority over the subject of Samoan customs and usages”, the proposed amendments may have the effect of extend the jurisdiction of such courts far beyond their traditional jurisdiction. This situation has the potential of creating serious conflicts of jurisdiction with ordinary courts in any case where issues relating to the interpretation or application of Samoan customs have a civil or criminal relevance.

The proposed amendments may also adversely affect the promotion and protection of human rights under Part II of the Samoan Constitution. Draft article 4 (1) of the Constitution would deprive the Supreme Court of its powers to enforce the rights set out in Part II of the Constitution.⁶ At the same time, customary courts would decide matters before them based on the custom and usage of Samoan people, the law relating to custom and usage, the new Land and Titles Act 2020 and what the court considers to be “fair and just” between the parties (draft article 104A (6) and (7)). As a result, parties to proceedings concerning customary lands and chiefly titles would no longer be able to exercise their fundamental rights under Part II of the Constitution: they would only be “entitled to the protection of their custom rights” (draft article 104 (3)). They would also not be able to invoke the application of common law and equity, which has been applied in Samoa’s legal system since independence in 1962 (draft article 104A (8)). This would prevent parties to the proceedings from invoking the rights and remedies provided for by these branches of law.

The excision of fundamental human rights from Land and Titles court system constitutes a clear breach of Samoa’s obligations under article 2 (3) and 14 (1) of the International Covenant on Civil and Political Rights.

Article 2 (3) provides that any person whose rights and freedoms set out in the Covenant (and reproduced in Part II of the Samoan Constitution) are violated has the right to an effective remedy (as is the case with regard to article 4 of the Constitution in its present formulation); that any person claiming such a remedy shall have his/her right determined by the competent judicial authority; and that the competent authority must enforce such remedies, when granted.

The first sentence of article 14 (1) of the Covenant guarantees the right to equality before domestic courts and tribunals. The Human Rights Committee pointed out that this

⁵ According to article 104E (4), the power of appointing, promoting and transferring and removal of any Samoan Land and Titles Court Judge would be vested in the Head of State, acting on the advice of the *Komisi* as may be provided by ordinary legislation.

⁶ New article 4 (1) of the Constitution would read as follows: “*Subject to judicial review matters arising from the proceedings in Part IX Land and Titles Courts, any person may apply to the Supreme Court by appropriate proceedings to enforce the rights conferred under the provisions of this Part*” (proposed amendments in italics).

guarantee not only applies to ordinary courts and tribunals referred to in the second sentence of article 14 (1), but must also be respected “whenever domestic law entrusts a judicial body with a judicial task” (General Comment No. 32 (2007), para. 7). The Human Rights Committee also stressed that article 14 also encompasses the equal and effective access to administration of justice in any case where an individual claims to have been deprived, in procedural terms, of his/her right to claim justice, and that “[a] situation in which an individual’s attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee of article 14, paragraph 1, first sentence” (Id., para. 9).

The establishment of a separate court system with exclusive jurisdiction *ratione materiae* in relation to Matai titles and customary land regulated in Part IX of the Constitution also raises concerns in relation to realisation of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The Human Rights Committee stressed that article 14 also applies to situations where a State recognises, in its legal order, “courts based on customary law, or religious courts”, to carry out or entrust them with judicial tasks. In order to issue binding judgments recognised by the State, such courts must meet some minimum requirements, including (a) compliance with the basic requirements of fair trial and other relevant guarantees of the Covenant, (b) validation of their judgments by State courts in light of the guarantees set out in the ICCPR and (c) possibility of the parties to the proceedings to challenge the customary court’s judgment in a procedure meeting the requirements of article 14 of the Covenant. These principles, observed the Human Rights Committee, are “notwithstanding the general obligation of the State to protect the rights under the Covenant of any persons affected by the operation of customary and religious courts” (General Comment No. 32 (2007), para. 24). One of my predecessors, Mr. Leandro Despouy, reached similar conclusions (A/HRC/8/4, para. 38).

In my view, the new customary courts set out pursuant to Part IX of the Constitution would not meet some of these requirements. Their exclusive jurisdiction *ratione materiae* coupled with limitations of the right to an effective remedy pursuant to article 4 of the Constitution do not appear to be in line with Samoa’s obligations under the Covenant, and it is not clear from the text of the proposed amendments whether the minimum procedural requirements set out in article 14 (3) of the ICCPR would be realised in legal proceedings before customary courts.

In relation to the appointment and dismissal of the judges of the Land and Titles court system, the considerations I have made with regard to the appointment of Supreme Court judges and ordinary judges apply, *mutatis mutandis*, to the customary courts. The involvement of the members of the executive power in the appointment, suspension and removal of Land and Titles judges raise serious concerns in relation to the respect for the principles of independence of the judiciary and separation of powers, since it allows the Prime Minister and Cabinet to interfere with the personal independence of the customary judges, who may feel pressured to support the position of the executive power in order to be appointed or to minimise the risk of being dismissed.

In this regard, I also observe that in light of its composition, the *Komisi*, which plays an important role in many decisions relating to the career of customary judges, may be exposed to the risk of political influence, and cannot be regarded as an independent judicial council established in line with international standards.

* * *

In a spirit of co-operation and dialogue, and in line with the mandate entrusted to me by the Human Rights Council, I would like to recommend that your Excellency's Government and the Parliament, where relevant:

1. Reconsider the three bills, with a view to ensuring their compliance with existing international standards relating to the independence of the judiciary and the separation of powers;
2. Review the composition of the Judicial Service Commission, so as to ensure that it includes a majority of judges elected by their peers and to exclude members of the executive branch of power from its members;
3. Review the procedure for the appointment of the Chief Justice and the Supreme Court judges. Transparency and public scrutiny should guide the selection process of judges of the Supreme Court through public hearings with citizens, non-governmental organizations and other interested parties to scrutinize the independence, competencies and integrity of the candidates;
4. Reconsider the role of the Prime Minister and Cabinet in the selection, promotion, transfer and dismissal of Supreme Court judges and ordinary judges. Should the executive power retain a role in these processes, the formal decision of the Head of State should be based on the recommendations of an independent Judicial Service Commission, which he/she should follow in practice;
5. Develop clear procedures and objective criteria for the remuneration and conditions of service of judges;
6. Repeal the constitutional amendments to article 4 of the Constitution, and maintain the fundamental role of the Supreme Court in enforcing the fundamental rights enshrined in Part II of the Constitution;
7. Reconsider the system of customary justice in Part IX of the Constitution by retaining the fundamental role of the Supreme Court in overseeing the decisions of the Land and Titles courts so as to ensure their compliance with the requirements of article 14 of the Covenant.

8. Ensure that the reform of the judiciary is the result of an open, fair and transparent process, involving not only the Government and the Parliament, but also extensive public consultation with judges, lawyers and their professional associations, the Ombudsman, the National Human Rights Institution and civil society actors.
9. Adopt any other appropriate measure to ensure the protection and promotion of the independence of the judiciary and the separation of powers.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

Diego García-Sayán
Special Rapporteur on the independence of judges and lawyers