

## **GENDER EQUITY IN SAMOAN LAWS: PROGRESS VS CONTRADICTIONS**

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### **Introduction**

National laws in Samoa have potentially supported abused women in seeking legal redress. Concerted efforts to remove direct gender discrimination from Samoan domestic laws has led to the development of laws including the Family Safety Act (2013) to protect women, children and our vulnerable communities from gender based violence and sexual crimes. The subsequent development of legal frameworks to protect women against violence is a progressive step but the enforcement of new laws and law reform has been slow and warrants further attention.

Whilst the underrepresentation of our fa'afafine, fa'afatama and LGBTQI communities in this dialogue is vital to progress and gender equity in Samoa, this research paper briefly captures and reviews the background to gender equity codification in Samoan laws. It explores the equitable provisions in law and questions whether subsequent law reforms have led to progress or prevailing contradictions.

### **Background**

The Government of Samoa (“GoS”) Constitution of the Independent State of Samoa 1960 upholds equality and human rights. GoS has been a signatory to a range international conventions and treaties: Convention on the Elimination of All Forms of Discrimination Against Women (1992), Convention on the Rights of the Child (1994), International Covenant on Civil and Political Rights (2008), Convention on the Rights of Persons with Disabilities (2014), to name a few.<sup>1</sup> Reported milestones of key progress was evident in legislative compliance with CEDAW as reflected in the Crimes Act 2013, Family Safety Act 2013 and the Labour and Employment Relations Act 2013, to name a few. Also in 2013, the constitutional change established the parliamentary quota of 10% women. However, further analysis will measure progress following an audit and review of relevant laws or whether celebrated changes on paper with minimal enforcement are stalling progress and highlighting prevailing contradictions; or furthering the process of individualisation of the Fa’asamoa. It may also be argued that the traditional gender roles in Samoa is the root of the prevailing discriminatory practices in some villages placing gender restrictions.

### **Gender classification in Samoa**

The Samoa Bureau of Statistics reflect the standard statistical reporting of sex disaggregated data across the private and public sectors of Samoa – that is the female and male.<sup>2</sup> The Office of the Ombudsman’s first National State of Human Rights Report, acknowledged on record the status of fa’afafine as “the third gender that has always existed in Samoa” and noted “their hard work and dedication to the family in carrying out both roles and responsibilities for men and women”.<sup>3</sup> This reflects the work of the Samoa Fa’afafine Association Inc. (“SFA”) having mobilized both national and international support for the recognition of the third gender: i.e., “fa’afafine and fa’afatama” (gay and lesbian, respectively).<sup>4</sup>

The State of the Human Rights (“**Report**”) contradictory remark includes the noted definition of

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<sup>1</sup> UNFPA. 2015. *Samoa Sexual and Reproductive Health Rights Needs Assessment*. <http://pacific.unfpa.org/sites/default/files/pub-pdf/2.SamoaSexualandReproductiveHealthRightsNeedsAssessmentReportLRv1.pdf>

<sup>2</sup> Government of Samoa. 2016. 2016 Census Brief No 1. Apia.

<sup>3</sup> Government of Samoa. 2015. State of Human Rights Report. Apia; p9.

<sup>4</sup> Universal Periodic Review Samoa, Samoa Faafafine Association Inc. Civil Society and Other Submissions. Session 25, 03 May 2016 session. UN's Office of the High Commissioner of Human Rights. <https://www.upr-info.org/en/review/Samoa/Session-25---May-2016/Civil-society-and-other-submissions> ; p1.

*fa'afafine*:<sup>5</sup> which literally means men who act in the manner of women. SFA report that *fa'afafines* and *fa'afatamas* are not all transgender; whilst acknowledging that some are although “exceptions to the rule”. The SFA have also argued that this Report did not fully acknowledge *fa'afafine* and *fa'afatama* as a marginalized sector of the community by “boxing our issues together with transgender issues under the LGBTIQ framework ignores our cultures connection or “fa'asinomaga” which is the essence at the heart of every Samoan”.<sup>6</sup> The SFA challenges the perception that *fa'afafines* and *fa'afatamas* are all transgender for the sake of conveniently being boxed into the LGBTIQ framework; whilst aiming to raise public awareness of societal acceptance and elimination of all discrimination based on sexual orientation and gender identity (“SOGIE”).

## Gender equity

As an integral part of Samoan culture or Fa'asamoa, the well-being of the community or collective often takes precedence above that of individuals. The allocation of different responsibilities and roles according to sex as opposed to gender, may create tensions between rights entrenched in the formal legal system and customary law which are safeguarded by the Constitution.<sup>7</sup> Cultural standards and norms have historically defined distinct roles for men, women and children in the Samoan society. The core social unit is the *aiga* or extended family headed by at least a *Matai*, a chiefly title held primarily by men. In 2015, of the 240 traditional villages, 151 (63%) have women matai titles and in 115 villages (48%) women matais are not permitted to participate in village councils.<sup>8</sup> However, part of the Fa'asamoa culture is not necessarily rooted in western views of superiority or inferiority of either men or women but represent the broader context necessitating the allocation of responsibilities as determined by chiefly title status, village, family, gender, age. Such roles play a part in conceptualizing the Fa'asamoa identity and sense of belonging. Arguably, the elimination of the different roles may in fact contravene the principles of Fa'asamoa.

Legal and regulatory reforms increase opportunities for women to be economically active in the private sector:

### The number of women and men on boards of private companies and state owned enterprises<sup>9</sup>

Shareholder	2012	2013	2014	2015	2016
Female	1069	1139	1260	1355	1414
Increase in year		70	121	95	59
Male	1736	1879	2095	2250	2351
Increase in year		143	216	155	101
Director	2012	2013	2014	2015	2016
Female	797	845	920	996	1075
Increase in year		48	75	76	79
Male	1727	1801	2026	2209	2333
Increase in year		74	225	183	124

Source: Ministry of Commerce, Industry and Labour (August 2017).

<sup>5</sup> Government of Samoa. 2015. State of Human Rights Report. Apia; p9.

<sup>6</sup> Universal Periodic Review Samoa, Samoa Faafafine Association Inc. Civil Society and Other Submissions. Session 25, 03 May 2016 session. UN's Office of the High Commissioner of Human Rights. <https://www.upr-info.org/en/review/Samoa/Session-25---May-2016/Civil-society-and-other-submissions> ; p1.

<sup>7</sup> There is some protection from discrimination caused by customary practices articulated in Article 15 (4) of the Constitution. It allows the state to remove discriminatory practices including those of customs and traditions. Challenging customary practice takes time and resources unavailable to many women who may be disadvantaged by harmful cultural stereotypes and practices.

<sup>8</sup> Government of Samoa and Pacific Island Forum Secretariat. 2015. *Women: Matai and Leadership Survey*. Apia.

<sup>9</sup> Preliminary Consultation with ACEO of MCIL Samoa (Level 3 - ACC Building, Savalalo, Samoa, (22 August 2017).

Whilst strong cultural traditions may contribute to community and family stability, they also restrict equal access to leadership and development opportunities<sup>10</sup> and create contradictions and discriminatory flow on effects between cultural and international indicators of women’s status.<sup>11</sup> The SFA report that fa’afafine is not strictly about sexuality and is commonly acknowledged as a separate gender in Samoan society. Inclusion and visibility in statistics and policies is an issue for the fa’afafine community. There was a call for the national statistics office to look into how to address this in regularly produced official statistics as well as developing surveys on issues specific to fa'afafine and fa'afatama, not just in the context of health but their social economic activity and contribution. Also, SFA requested that MWCSO consider explicit interventions for fa’afafine in policies such as the Domestic Violence Policy.<sup>12</sup>

### Gender equity provisions in Samoan laws

A number of legal instruments support gender equity in Samoa. Given the breadth of this area, only laws pertaining to gender representation will be discussed here (ref. Table 1).

**Table 1: Gender representation**

LAW	PROGRESS	CONTRADICTIONS
Constitution	Article 44(1B)(b) introduced the new Parliamentary quota system requiring that 10% of seats be reserved for women and coincided with the 2016 National Elections. This boosted the number of women running for Parliament to 25 with 5 women successful, and 1 on account of the quota.	This may be considered a special temporary measure in an aim to increase representation of women in Parliament. Although the enactment of legislation itself may appear concrete, the quota system may be discontinued by way of legislative enactment when its desired results have been achieved. One of the biggest restrictions on women’s participation in the national political sphere is that much fewer women hold a matai title. Despite equality under the law, women’s political representation remains low. Samoa was ranked among the lowest in the world (131 out of 139) for women’s political participation and since independence in 1962, women have remained below 10% of Samoa’s parliamentarians. To address these cultural perceptions which are one of the most significant barriers to participation of women in politics, non legislative measures may be more appropriate. This should include public awareness, education campaigns, and programmes focused on enhancing the roles of women and changing mindsets of men and women of women’s roles in the village. Legislative interventions in this regard, may be viewed as too intrusive into the affairs of the Village Fono.

<sup>10</sup> Australian Department of Foreign Affairs and Trade. 2015. Support for the Government of Samoa's Gender Objectives (under the Community Development Sector Plan 2016-2020). Component of Samoa Women Shaping Development Program.

<sup>11</sup> The CEDAW committee has identified contradictions evident in the juxtaposition of Samoa’s Constitutional Amendment that sets a 10% quota for women in parliament and customary laws that restrict women’s access to chiefly (Matai) titles which often influence women’s success as formal political candidates. <http://www.nus.edu.ws/s/index.php/87-nus/news-events/301-cultural-factors-continue-to-be-a-challenge-for-samoan-women-to-become-leaders>

<sup>12</sup> Asian Development Bank. 2017. *Gender and Health Statistics Training Workshop (11-13<sup>th</sup> October, 2017)*. Apia (led by Ms Jessica Gardner (ADB Consultant, Gender Statistics and Capacity Development Specialist) and Ms Bridget Crichton (ADB Consultant)).

	Article 15 provides for freedom from discriminatory legislation and even clarifies that nothing in the Article prevents making laws for the protection or advancement of women.	The Constitution also lacks any protections for LGBTI people. The fundamental protections and freedoms of the people of Samoa are enshrined in Part II of the Constitution. Article 15 within Part II specifically deals with equality of persons before the law and equal protection under the law, and sets out a number of non-discrimination grounds (Art 15(2)). However, sexual orientation, gender identity and intersex status are notably absent from this list of non-discrimination grounds.
<b>Crimes Act 2013</b>	Repealed discriminatory provisions from the previous Crimes Ordinance 1961 which criminalised males impersonating females in a public place, effectively targeting transgender women and gender-diverse persons.	Continues to criminalise consensual sex between men through its prohibition on “sodomy” (s67) It also punishes “keeping [a] place of resort for homosexual acts”. (s71) Since “place of resort” is not defined, this provision can potentially be used to criminalise same-sex couples living together, as well as their landlords or real estate agents. It has removed provisions in the previous Crimes Ordinance 1961 which criminalised “indecent acts between males” (s58D). While this has potentially narrowed the scope of criminalisation of consensual sex between men, the continued prohibition of “sodomy” and on “keeping [a] place of resort for homosexual acts” means that Samoa’s criminal laws can be used to target gay and bisexual men, and potentially transgender and intersex persons.

The absence of comprehensive anti-discrimination laws or policies, which contravene Article 15 of the Constitution, creates an environment that facilitates discrimination against LGBTI persons, including Samoa’s traditional fa’afafine and fa’afatama community.<sup>13</sup> Further constitutional amendments and amendment to provisions in the Crimes Act 2013 that criminalise consensual sexual activity between persons of the same sex are required in line with recommendations from SFA and the CEDAW Report.<sup>14</sup>

**Conclusion**

Whilst creating legal frameworks acknowledging gender equity and the protection of vulnerable communities is a major step, implementation of the new laws has been slow and requires further investment. Samoa has worked to remove direct and indirect discrimination from laws related to economic empowerment of women, fa’afafine, and LGBTQI communities. However, a number of constraints still exist. By enacting comprehensive anti-discrimination legislation that prohibits discrimination on the grounds of sexual orientation, gender identity and intersex status in all areas of public life, including employment, health, education and access to goods and services; by amending the

<sup>13</sup> *Samoa Party v Attorney General* [2010] WSCA 4, at [27].  
<sup>14</sup> Universal Periodic Review Samoa, Samoa Faafafine Association Inc. Civil Society and Other Submissions. Session 25, 03 May 2016 session. UN's Office of the High Commissioner of Human Rights. <https://www.upr-info.org/en/review/Samoa/Session-25---May-2016/Civil-society-and-other-submissions> ; United Nations Office of the High Commissioner for Human Rights 2012. CEDAW Committee Concluding Observations. [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fWSM%2fCO%2f4-5&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fWSM%2fCO%2f4-5&Lang=en)

Constitution to include sexual orientation, gender identity and intersex status as prohibited grounds of discrimination in the Constitution; by taking positive steps to counter stigma, stereotypes and prejudice against LGBTQI people, including through public education initiatives, notwithstanding recent legislative reforms, the effectiveness of such legislative developments to codify gender equity in Samoans laws must involve ongoing and inclusive dialogue with women, fa'afafine and LGBTQI communities in Samoa.