

# **A THEOLOGICAL REFLECTION ON LEGAL PLURALISM: A CASE STUDY OF THE LAND AND TITLES COURT ACT 2020**

A Thesis Presented to the  
Faculty of the Malua Theological College

In Partial Fulfilment of the  
Requirements for the Degree  
Bachelor of Divinity with Honours

by

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## ABSTRACT

This thesis is a theological reflection on the issue of legal pluralism with the purpose of clarifying the role that law plays in maintaining and safeguarding the wellbeing of society. Before the Act was passed into law, the *Land and Titles Bill 2020*, as it was known then, underwent public consultation with villagers and stakeholders to help explain the effects of the Bill should it be passed into law, and to provide a floor for public query. During this time, I sought this as an opportunity to pursue both my understanding of law and appreciation of theology to research, discuss and raise awareness about the theological perspective on these amendments, and its possible impacts upon the people of Samoa.

A theological understanding of legal pluralism would enable those responsible for making laws, namely the Cabinet, to carry out their calling in an appropriate and a relevant manner. The Bible as the central source in doing theology will be sought in finding meaningful examples of legal pluralism in biblical cultures. The trials of Jesus Christ and the whole complex of legal undertakings that occurred would give a clear view of the advantages and disadvantages of legal pluralism. The church can therefore find meaningful ways of contributing theologically in the life of the community in matters concerning legal pluralism and the Land and Titles Court Act 2020.

## DECLARATION

I declare that this work has not used without due acknowledgment of any material that has been previously submitted for a degree or diploma in another institution. I also declare that the work has not used any material, heard or read, without proper acknowledgment of the source.

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## DEDICATION

*In memory of my beloved paternal grandparents, the Late Rev. Iose and Pepe Patea who paved the way in doing the Lord's work for the next generation of God's servants.*

*To my beloved maternal grandparents, the Late Poufa and Elisapeta Pesaleli who served the Lord to the end with faith and perseverance*

To my loving parents, Rev. Elder Isaako and Tavai Patea.

To my siblings, Esau and Roine, Sailuma and Elisa, and friends,

To my nephews, Heremoni and Gamaliel, and nieces, Leonia and Arisa,

To my beautiful Alice who has always supported me through this journey,

As well as my beloved Church, CCCS Villawood, for their unconditional love and support.

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*Fa'afetai, fa'afetai, fa'afetai tele lava.*

## **List of Abbreviations**

CCCS	Congregational Christian Church Samoa
FAST	Fa’avae i le Atua Samoa ua Tasi
HRPP	Human Rights Protection Party
IBAHRI	International Bar Association Human Rights Institute
LTC Act 2020	Land and Titles Court Act 2020
LTC Bill 2020	Land and Titles Bill 2020
SLS	Samoa Law Society

## INTRODUCTION

Since my first day stepping into the Malua compound in late January of 2018, I have grown increasingly appreciative of what I have learnt in my studies here in Malua. It is an appreciation which continues to grow. Having been employed as a solicitor practicing law in Australia before coming to Malua, the interrelationship between law and theology is a very profound and unique one. Both have a foundational basis on morality and ethics on an intimate level. Even the historical figures in Christian theology, such as Protestant reformer Martin Luther of Germany was himself a former lawyer before becoming the famous protestant theologian he is known for today.

The Land and Titles Court Act 2020, which was passed into law by the written assent of the Head of State of Samoa, His Highness Tuimalealiifano Vaaletoa Sualauvi II, brought into existence a separate judicial hierarchy to the already existent judicial system since Samoa's independence in 1962. The creation of these separate judicial systems is what the notion of Legal Pluralism is all about. That is, the existence of more than one judicial system within a society, state or nation.

This thesis, therefore, is a theological reflection on Legal Pluralism, seeking to highlight its impact upon the everyday life of the Samoan people. As a theological paper, it looks into the Bible, both the Old Testament and the New Testament, for traces of legal pluralism not only in the history of Israel but also in the life and ministry of Jesus Christ. The advantages and disadvantages of legal pluralism found in the Bible would be helpful in establishing a theological perspective for the church, to raise the awareness of the people as they come face to face with issues like the LTC Act 2020.

## Methodology

The attempt in this thesis is to clarify the meaning of legal pluralism and the Land and Titles Court Act 2020 with all their ramifications, before seeking to develop any theological significance or relevance for the life of the community. It is, therefore, prioritising the central issue concerned of the thesis, before delving into the biblical and theological reflection. Only then can a relevant conclusion be drawn in which the church's position can be determined when it encounters such an issue in the future. The theological methodology therefore is the method of correlation championed by Paul Tillich,<sup>1</sup> where existential questions are formulated by an analysis of the human situation in a given period, e.g., philosophy, literature, art, science, etc. These questions are then correlated with the answers of the Christian message. It moves from culture and experience to Scripture and theology.

Thus, in order for Christianity to have any credibility in the secular world, the bible needs to answer questions in a coherent way by finding a correlation between these two aspects. It is about making sense of the gospel in the secular world. For Tillich, this was one of the most important tasks of theology, that is, to try and find ways of relating theological thought to nonreligious situations.<sup>2</sup> This falls under the wider scope of systematic theology, which is about using the bible to answer questions regardless of its nature.<sup>3</sup>

When applying this approach to the current issue, it is about finding biblical answers to questions asked of legal pluralism, a secular notion, in the context of the LTC Act 2020. The opportunity to provide a theological answer can hence be seen as an innovative first because it has never been addressed before. It is hoped that it would pave the way for

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<sup>1</sup> Paul Tillich, *Systematic Theology* (Chicago: University of Chicago Press, 1951), 59-64.

<sup>2</sup> Ibid.

<sup>3</sup> Wayne A Grudem, *Systematic Theology: An Introduction to Biblical Doctrine* (Grand Rapids: Zondervan, 2009), 25.

further discussion and critical evaluation for those interested especially in relation to whether Samoan society was better off before the Act was passed, or after its enactment. These issues would also assist in raising awareness for the church as far as its members are concerned, given that it is a reality that they may potentially face, or may have already experienced.

## **Thesis Layout**

Thus, chapter 1 discusses legal pluralism in depth including its basic concept, and underlying issues including its advantages and disadvantages. An actual case study will also be examined, namely from the Independent State of Samoa, whose long-standing culture and traditions existed before the arrival of colonisation and its legal system. The existence of legal pluralism in Samoa will be discussed in light of the new LTC Act that has been passed, with an emphasis on explaining the rationale behind the legal concept in a clear manner.

Chapter 2 develops a theological reflection on legal pluralism based on biblical accounts from the history of Israel as well as the life and ministry of Jesus Christ. A better understanding of a theological perspective on legal pluralism would enhance the Church's position in dealing with similar issues in the future and explain the LTC Act 2020 itself, along with impacts both negative and positive, so that both views of the subject matter are heard and addressed adequately.

Chapter 3 will address and explain the LTC Act 2020 itself, along with impacts both negative and positive, so that both views of the subject matter are heard and addressed adequately. The path towards making this law a realisation divided public opinion due to its sensitive nature in relation to the management of lands and titles; these being important components of Samoan cultural identity. I will address the comments and criticisms made by the public regarding the Land and Titles Bill. This will certainly give

a clear view of the public concern with the introduction of the new composition of the Land and Titles Court, which has altered and replaced the 40-year-old law that guided the determination of customary land and *matai* title issues and disputes within Samoa.

Chapter 4 will provide a comparative analysis between legal pluralism, the biblical accounts, the LTC Act itself, and theological reflection. This will be followed by discussing its application to the CCCS context, its impact on its members, and my stance on the LTC Act itself.

Followed thereafter will be the conclusion, which will complete a culmination of all previous chapters into a coherent and logical end. The aim of which, is to attract future interest in the topic and potentially create new theological academia in this area still at its infancy, both intellectually and in its application.

# **CHAPTER 1**

## **A STUDY OF LEGAL PLURALISM**

In this chapter, I will set out to explain what Legal Pluralism is and its nature. Its practical use within society will also be discussed with the sole focus being the case study of Samoa and its existence therein. The function that legal pluralism serves in Samoan society will also be analysed, with the aim of clarifying this concept further in how it is practiced in the Samoan context. This will be followed with a theological reflection on the above.

The importance of legal pluralism to the overall paper warrants proper attention. In order to understand what this paper is about; it is important to explain what legal pluralism is in the first place. Understandably, not everyone is from the legal profession. Thus, I will attempt to clarify any legal term so that they can be understood by the average reader. In doing so, it is hoped that once this is understood, the rest of the paper would also be understood accordingly.

### **1.1 What is Legal Pluralism?**

According to Hughes:

The term covers various theories of law which hold that there can be many independent spheres of law, such as local or customary law, which do not require or depend upon the existence of a central state as the primary law-making body in a society.”<sup>1</sup>

Legal pluralism is the existence of many legal systems within a community, society, or state and can manage to co-exist without any need of a central authority to regulate it.

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<sup>1</sup> Robert Hughes, Anita Jowitt, and Tess Cain, “Chapter Title: Legal Pluralism and the Problem of Identity Title: Passage of Change Book Subtitle: Law, Society and Governance in the Pacific” (Canberra: ANU Press, 2010), 329.

This coexistence is common in countries that have a colonial past such as Solomon Islands, Fiji and Vanuatu <sup>2</sup>. That is, before countries were colonised by European powers, there already existed a developed legal system based on customary law and traditions. Colonial introduction of their own legal system, on top of the already existent traditional and customary legal systems, gives legal pluralism its definition. The existence of customary and local laws before the arrival and influence of European colonialism shows that there was a sense of societal order and civility in how the native community was structured with an authoritative head at the helm. As Merry states:

The Europeans were not the first outside influence bringing a new legal system to many Third World peoples. Indigenous law had been shaped by conquests and migrations for centuries.<sup>3</sup>

The internal influences stated here is based on inter-tribal warfare or diplomatic means in resolving disputes. And it shows an already complex society that had its own political order and civil discourse that governed the way natives lived amongst each other.

From another perspective, Cohen provides an alternative definition of what legal pluralism is all about:

Legal pluralism refers to the descriptive fact of a multiplicity of legal orders within the same social field. As a description of multiple forms of normative ordering, legal pluralism is everywhere and unremarkable. Legal pluralism becomes interesting when it is designed as a strategy for the management of difference as it was in the case of overseas European colonial and many land-based empires.<sup>4</sup>

In addition to defining what legal pluralism is, she adds further that it is common place in most countries.<sup>5</sup> The fact that Cohen argues that legal pluralism is really just a

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<sup>2</sup> Keebet von Benda-Beckmann and Bertram Turner, "Legal Pluralism, Social Theory, and the State," *The Journal of Legal Pluralism and Unofficial Law* 50, no. 3 (September 2, 2018): 255–74, doi:10.1080/07329113.2018.1532674, 255.

<sup>3</sup> Sally Engle Merry, "Legal Pluralism," *Law & Society Review* 22, no. 5 (1988): 869, doi:10.2307/3053638, 870.

<sup>4</sup> J. L. Cohen, "The Politics and Risks of the New Legal Pluralism in the Domain of Intimacy," *International Journal of Constitutional Law* 10, no. 2 (March 30, 2012): 380–97, doi:10.1093/icon/mor071., 381.

<sup>5</sup> *Ibid*, 382-383.



strategic move to be used as a control mechanism for the “management of difference”, it shows that there is an underlying motive behind the whole notion. For Cohen, the motive behind this on the basis of gender, designed to keep men in power. She addresses this in relation to resolving the issues facing women of religion, since she desires to transcend the boundaries of legal pluralism to extend towards religious authorities as well. She believes that in societies with legal pluralism, which also extends to religious authority under her understanding, there is an entrenched gender bias which does a disservice to women.

Swenson supports this idea about the unfairness to women, by saying that:

Non-state legal orders frequently reflect cultural or religious norms unconcerned with basic human rights. Women and other vulnerable groups are particularly at risk when nonstate legal systems embrace overtly patriarchal ideals.<sup>6</sup>

Non-state legal orders are authorities that do not have the legal juristic authority as state governments do. In other words, they represent local *ad-hoc*<sup>7</sup> councils or governing bodies that provide quasi-judicial rules. Swenson argues that legal pluralistic societies lack any consideration for human rights. There was one such case that discussed legal pluralism and its relationship to human rights as such, in the case of *Refah Partisi v Turkey*<sup>8</sup> in which the Turkish political party, Refah Partisi, was dissolved and was the biggest party at the time in 2003. This was due to campaigns involving promises of introducing legal pluralism by recognising *Sharia law*<sup>9</sup> into the Turkish legislation and

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<sup>6</sup> Geoffrey Swenson, “Legal Pluralism in Theory and Practice,” *International Studies Review* 20, no. 3 (September 1, 2018): 438–62, doi:10.1093/isr/vix060, 438.

<sup>7</sup> According to the Cambridge Online Dictionary, Ad-hoc is something that is made or happening only for a particular purpose or need, not planned before it happens. See: “AD HOC | Meaning in the Cambridge English Dictionary,” *Dictionary.cambridge.org*, 2019, <https://dictionary.cambridge.org/dictionary/english/ad-hoc>.

<sup>8</sup> Refah Partisi (The Welfare Party) and Others v. Turkey (European Chamber of Human Rights February 13, 2003).

<sup>9</sup> Laws based on the Q’uran, holy book of Islam; Islamic religious law.

thereby using such laws to potentially spark violence to fulfill its objectives. In the end, the court decided that legal pluralism would be incompatible with human rights.

Brems outlines the two reasons behind this decision.<sup>10</sup> The first is that the protection of human rights necessitates the monopoly of the state in relation to law. Only through the State can human rights be properly protected. However, Brems later questions whether this idea about human rights being “properly protected” under the state can be attained in its fullness, because it would mean that the state would have to enact a separate legislation specifically for this purpose in order to enjoy the full range of rights available. Even though human rights provisions are incorporated into different legislations, it is realistically impossible to have one on its own. Such incorporation is enough for the State. Thus, it presupposes that the state is the only solution to protecting an individual’s rights.

The second reason is that legal pluralism is inherently discriminatory in practice. It is contended that, if accepted, legal pluralism will create an unfair advantage of rights under one legal system, over the other. However, Brems argues that this is not the case.<sup>11</sup> This is because there are real cases in existence. A major example would be the United States of America where one state accepts the death penalty, whilst others do not. Yet there is still a peaceful continuum between these states especially in the case of federalism<sup>12</sup>, a nation built upon different autonomous states, yet manage to function

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<sup>10</sup> Eva Brems, “Legal Pluralism as a Human Right And/or as a Human Rights Violation,” in *Human Rights Encounter Legal Pluralism: Normative and Empirical Approaches*, ed. Eva Brems, Mark Goodale, and Giselle Corradi (Oregon: Bloomsbury, 2017).

<sup>11</sup> Ibid.

<sup>12</sup> According to the Cambridge Online Dictionary, Federalism is a system of government in which states unite and give up some of their powers to a central authority. See: “FEDERALISM | Meaning in the Cambridge English Dictionary,” *Dictionary.cambridge.org*, 2019, <https://dictionary.cambridge.org/dictionary/english/federalism>.

collectively as one.<sup>13</sup> Despite these critiques of the *Refah* case above, it still has strong influence to this day.

To those unfamiliar with legal pluralism, it may cause confusion especially for those who are used to a democracy where only a single judicial system exists.<sup>14</sup> But for those accustomed to living in a society that has more than one judicial system, it takes more than analysing the legal aspect of how society is run, but also an analysis of the sociocultural and customary factors in addition to what is already in place.

## 1.2 Underlying issues

There are underlying issues that surround the notion of legal pluralism especially in the Samoan context. Legal pluralism usually involves the co-existence of the laws set by the state through legislation and case law on one hand, and traditional customary law on the other. For the purpose of clarity in this section and to avoid confusion, I will use the term "state system" to represent the government legislative body for the country, and for the traditional customary body, I shall use the term "non-state system".

Having a legal pluralist society also means that there are different courses of redress for an individual or group to take their matter. On the basis of convenience, it gives a person the ability to choose which course to take their matter that best addresses it. If one has a commercial matter for example, the courts that deal with these matters would be the best option, if it is a customary matter based within the village, it is to be dealt customarily within the village councils accordingly. This also shows a beneficial aspect of what legal pluralism can do.<sup>15</sup>

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<sup>13</sup> The United States of America is one example. Despite many courts at the local, state and federal levels, they are all under the United States Supreme Court. It is under one judicial system where there is only one court at the apex of that hierarchy. All appeals to higher courts end at the United States Supreme Court. The decision of handed down by the Supreme Court is therefore binding on all lower courts.

<sup>14</sup> Mainly European powers, most of whom were aristocracies.

<sup>15</sup> Keebet von Benda-Beckmann and Bertram Turner, "Legal Pluralism, Social Theory, and the State," 255.

The diversity in choice mirrors the diversity of the competing legal systems, which in itself is the nature of legal pluralism. As Tamanaha puts it:

What makes this pluralism noteworthy is not merely the fact that there are multiple uncoordinated, coexisting or overlapping bodies of law, but that there is diversity amongst them. They may make competing claims of authority; they may impose conflicting demands or norms; they may have different styles and orientations. This potential conflict can generate uncertainty or jeopardy for individuals and groups in society who cannot be sure in advance which legal regime will be applied to their situation. This state of conflict also creates opportunities for individuals and groups within society, who can opportunistically select from among coexisting legal authorities to advance their aims.<sup>16</sup>

The very same certainty that addresses a group or individual's course of action also causes uncertainty. With Non-state systems, it would present a person with a system already familiar to tradition and custom should they decide to pursue that avenue, especially for those from former colonies. But if pursuing the state system of legal recourse, it requires legal expertise as it requires specialisation in knowledge of the law and procedure, hence the existence of the legal profession. Subjective considerations have to be taken into account in these circumstances as not all are as well informed as others. Thus, in the negative sense it presents the idea of a potential abuse of the system by those who are well informed albeit with ulterior motives. However, as a countermeasure, there are laws and consequences in place that would discourage any action of this nature to safeguard the legal process<sup>17</sup> as well as providing those individuals and families with low-income to access legal advice and obtain legal representation.<sup>18</sup>

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<sup>16</sup> Brian Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global.," *Sydney Law Review* 30, no. 3 (September 2008): 375–411, 375

<sup>17</sup> There are legislative provisions which punishes a party for deliberate delay of legal process and failure to comply with court procedures by paying costs to the other party to the matter. This safeguards the integrity of court processes and keeps the legal profession honest. See "Criminal Procedure Act" (2016)., "District Court Act" (2016).

<sup>18</sup> The Community Law Centre established in 2015, was designed to provide free legal services to the people of Samoa by strengthening and improving public access to legal services especially for those of low-income earning capacity.

Another hindrance that limits legal pluralism from being fully realised and acknowledged is its political nature.<sup>19</sup> That is, the dialogue between state and non-state systems are at the heart of parliamentary debates as was the case in Samoa, where the LTC Bill as it was known then, was fiercely debated and cause for public scrutiny as it reinforced the idea of incorporating customary law as part of the Samoan constitution. Those in favour argued that it would reflect the reality of the state as it stood in addition to hearing the concerns of constituents. But those on the contrary argued that it would disrupt the authority and legitimacy of common law<sup>20</sup> that reinforces the authority of the State.<sup>21</sup>

The right to a fair trial is another legal concept that is an underlying issue of concern in discussing legal pluralism. The right to a fair trial in its plain meaning is that all parties to a court matter having equal opportunities to present their case and to be heard fairly. Non-state legal orders may advance human rights but it may not be as straightforward given the different contexts and emphasis that each tradition and culture places especially in post-colonial societies. Corradi, who uses the term “indigenous law” in place of non-state law, elaborates on this further:

As with all legal orders, indigenous law may advance human rights in certain areas, but undermine them in others. At the same time, these legal orders are embedded in historical, cultural and socioeconomic contexts that differ in several respects from those that gave rise to human rights law. For these reasons, evaluating whether indigenous law complies with human rights

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<sup>19</sup>“Miranda Forsyth, “The Possibilities and Limitations of Legal Pluralism,” in *A Bird That Flies with Two Wings* (Canberra: ANU Press, 2009), 29–60, 47.

<sup>20</sup>According to the Cambridge Online Dictionary, Common Law is a system of laws based on customs and court decisions rather than on written laws made by a parliament. Common law forms the basis of the legal system in the UK, US, and various other countries. See: “COMMON LAW | Meaning in the Cambridge English Dictionary,” *Dictionary.cambridge.org*, 2019, <https://dictionary.cambridge.org/dictionary/english/common-law>.

<sup>21</sup> The LTC Bill 2020 as it was known, was one of three bills, with Judicature Bill 2020 and Constitution Amendment Bill 2020, that were proposed by the Samoan government in 2020 to be passed into law but met with strong opposition and was a sensitive topic of public discourse. This will be addressed in the next chapter in detail.

standards and taking measures for the protection of human rights in legally plural jurisdictions are not straightforward tasks.<sup>22</sup>

Despite the difficulty in finding a solution, the only way forward is that both sides, non-state and state legal systems, must be able to cooperate and trust each other that they will act in the best interests of justice in deciding matters put before them. Corradi's emphasis on intra-community and cross-cultural dialogues regarding human rights issues shows how important this is in societies such as these. This is to prevent one side from feeling alienated to the point of exclusion.<sup>23</sup>

### **1.3 Legal Pluralism in Samoa**

According to the explanatory memorandum behind the Constitution Amendment Bill 2020, legal pluralism is acknowledged to be behind the need to amend the constitution to incorporate Samoan customs as part of the State judicial system. It is also the same reason why the LTC Bill 2020 was drafted as well. Clause 1.4 of the explanatory memorandum states that:

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.<sup>24</sup>

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<sup>22</sup> Giselle Corradi, "Indigenous Justice and the Right to a Fair Trial," in *Human Rights Encounter Legal Pluralism: Normative and Empirical Approaches*, ed. Eva Brems, Mark Goodale, and Giselle Corradi (Oregon: Bloomsbury, 2017), 112.

<sup>23</sup> Ibid

<sup>24</sup> "JUDICATURE BILL 2020 SAMOA Explanatory Memorandum," *Parliament of Samoa* (Apia: Parliament of Samoa, 2020), <https://www.palemene.ws/wp-content/uploads/EM-Judicature-Bill-2020-Eng.pdf>.

Even though the Samoan Law Reform Commission<sup>25</sup> acknowledges the challenges of legal pluralism and the need for a response, there is still a lack of scholarly information about this issue in Samoa itself.<sup>26</sup> Suaalii-Sauni admits that sociologically there exists such pluralism. It exists in the relationship between the Westminster<sup>27</sup> style of legal system already adopted in our Samoan constitution pursuant to statute<sup>28</sup> and common law, and the customary ruling affairs in resolving disputes by village matters by their respective village councils whose decisions are binding. However, in the juristic sense of being a codified set of laws, there was none. The newly enacted LTC Act 2020 serves as the codification of Samoan customary rulings into law. Suaalii-Sauni also refers to the Samoan public's neglect of customary law to be incorporated into the judiciary system as a reflection that it is not a serious issue.<sup>29</sup> The lack of any serious discussion surrounding the need for customary law to be legalised through statute whether it was because there was no effect upon the status quo of Samoa or not, was enough reason to understand that this would have been the cause for such lengthy delays and inaction until mid-2020. Mulitalo also acknowledges the existence of legal pluralism in as far as acknowledging

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<sup>25</sup> According to their website, "the Commission was established in 2008 for the review, reform and development of the laws of Samoa, in order to promote Samoan custom and traditions, enhance the social, cultural, economic and commercial development of Samoa, and ensure that the laws of Samoa are kept in a modern state which meets the needs of Government and the community." For more information see <https://www.samoalawreform.gov.ws/>

<sup>26</sup> Tamasailau Suaalii-Sauni, "Legal Pluralism and Politics in Samoa: The Faamatai, Monotaga and the Samoa Electoral Act 1963," in *Small States in a Legal World* (New York: Springer, 2017), 165–85, 167.

<sup>27</sup> Samoa's parliament is based on the Westminster model whereby the party which has the majority in parliament after an election, forms government with its leader being elected to the post of Prime Minister. The party or parties in the minority may then form the Opposition if they are registered and have the requisite number of members. See: Office of the Clerk of the Legislative Assembly, "System of Government Parliament of Samoa," *Parliament of Samoa* (2014), <https://www.palemene.ws/wp-content/uploads/Infosheet/Infosheet-08-System-of-Government.pdf>.

<sup>28</sup> According to the Cambridge Online Dictionary, Statute Law is a system of laws that have been decided and approved by Parliament. See: *STATUTE LAW | Meaning in the Cambridge English Dictionary* 2019, dictionary.cambridge Dictionary, viewed 6 February 2021, <<https://dictionary.cambridge.org/dictionary/english/statute-law>>.

<sup>29</sup> Suaalii-Sauni-Sauni, T., (2017). p. 167

that customary law is recognised under the Constitution of Samoa.<sup>30</sup> The effects of post-colonialism gave Mulitalo reason to believe that the existence of legal pluralism in Samoa was an eventual consequence of the colonial era. A by-product left in the wake of its aftermath. This is common throughout Pacific countries with similar colonial pasts.<sup>31</sup>

One must consider pre-colonial Samoa and understand how important the existence of a Westminster style system of laws were necessary. Before the colonial era, Samoa had its own village councils where matters of the village were handled amongst themselves. However, if a disagreement broke out, especially between villages, and if all dialogue and diplomacy failed, violent conflict was the solution. Apart from the reign of Salamasina who united Samoa and centralised power<sup>32</sup>, the country remained largely decentralised as each district<sup>33</sup> had its own traditional rulers, hence the likelihood of civil conflict would have kept everyone cautious.

We should consider ourselves fortunate that the existence of statute laws exists alongside the traditional customary laws so that such violence is prevented and unnecessary. The LTC is a major reason why this is so. It may be that Samoa is founded in God and that it is a Christian country as such, but the decisions by the LTC which determines land disputes concerning customary land are culturally sensitive issues, especially as it pertains to matters involving the village councils, chiefs, and villagers.

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<sup>30</sup> Teleiai Lalotoa S. Mulitalo Seumanutafa, *Law Reform in Plural Societies*, National Library of Australia (New Catalog) (Cham, Switzerland: Springer, 2018), <https://catalogue.nla.gov.au/Record/7794204>. Foreword, vii.

<sup>31</sup> Ibid

<sup>32</sup> Penelope Schoeffel, "Rank, Gender and Politics in Ancient Samoa: The Genealogy of Salamasina O Le Tafaiā," *The Journal of Pacific History* 22, no. 4 (October 1987): 174–93, doi:10.1080/00223348708572566, 182.

<sup>33</sup> There are eleven traditional districts of Samoa, each has its own constitutional foundation (faavae) based on the traditional order of title precedence found in each district's faalupega (traditional salutations). The capital village of each district administers and coordinates the affairs of the district and confers each districts' paramount title, amongst other responsibilities. See: "Samoa," *Government of Samoa*, 2017, <http://www.samoagovt.ws/about-samoa/>.



The decisions handed down by judges contributes to the stability of the country which shows how much respect the villages place on the LTC and their decisions.

Legal Pluralism in Samoa exists because the nature of law is diversely executed in different ways. Statute law and legislation by Samoan Government, as opposed to traditional and customary laws, can still work together but will take time.

In maintaining its strong stance on cultural conservatism, Samoa remains fairly intact in the face of western influence. According to Holmes, this cultural conservatism is the reason why Samoa has maintained its cultural stability<sup>34</sup> and it can also extend towards its political stability in comparison to its neighbours in the South Pacific region.<sup>35</sup>

Thus, in contributing to Samoa's stability, the existence of legal pluralism has seen the complementary blend of traditional pre-colonial customary laws from the villages, and colonial/post-colonial legal Westminster systems of western democracy. However, what differentiates Samoa from the rest of the Pacific is that they have already materialised this concept and have put this concept into action by codifying it into statute law with the enactment of the LTC Act 2020 and other relevant bills.

The cultural stability of Samoa in adapting foreign laws brought forth from the colonial times has given Legal Pluralism its existence despite the largely decentralised governance before independence in 1962. For Samoa, culture and religion are intertwined and inseparable. Thus, the next chapter will address the theological aspects in attesting to the historicity of Legal Pluralism and to provide a biblical basis for its existence throughout the Old and New Testaments.

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<sup>34</sup> Lowell D. Holmes, "Factors Contributing to the Cultural Stability of Samoa," *Anthropological Quarterly* 53, no. 3 (July 1980): 188–97, doi:10.2307/3317825, 188-189.

<sup>35</sup> Nukualofa riots of Tonga in 2006, Fijian coup by Commodore Banimarama in 2006, Solomon Islands riots in 2006. As of the date of this paper, the victorious F.A.S.T party who defeated the H.R.P.P Party in the national elections on 9 April 2021 have finally moved into office after almost 3 months of constitutional turmoil. However, despite this crisis no violent conflict broke out which is a reflection of the cultural stability and Christian values that Samoan society embraces in maintaining peace.

## **CHAPTER 2**

### **THEOLOGICAL REFLECTION ON LEGAL PLURALISM**

This chapter will provide a theological reflection on Legal Pluralism. It will begin with the biblical accounts of Legal Pluralism cited from both the Old and New Testaments on the basis of historicity. A correlational-theological analysis will then be provided after the above. By the end of the chapter, it is hoped that a better theological understanding of legal pluralism would be achieved before addressing how it used in Samoa through the lens of the LTC Act 2020.

#### **2.1 Biblical Accounts**

Biblical accounts of legal pluralism will help serve as a starting point for theological reflection, a necessary priority highlighting the importance of scriptural authority. It is important to understand that evidence of legal pluralism existed in the history of Israel who are God's chosen people. Its structure of being exists and is determined by how it is used. However, as will be noticed throughout the biblical accounts, how it is used will also depend on the contexts they find themselves in. Different contexts present a different perspective of legal pluralism in how it is used in each of these biblical accounts throughout the history of Israel.

In the Old Testament, not much is described about court systems per se in ancient Israel or in any extra biblical source.<sup>1</sup> Although there are numerous accounts of legal disputes throughout the Old Testament, evidence indicating legal pluralism itself are lacking. The closest example which resembles legal pluralism can be found in the judicial

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<sup>1</sup>Terry L. Wilder, *Holman Illustrated Bible Dictionary*, ed. Chad Brand, Archie England, and Charles W. Draper (Nashville, Tennessee: Holman Reference, 2003), 583.

authority of the Levitical priests acting alongside secular judges in Jerusalem.<sup>2</sup> It shows the coexistence of religious and civil law within a society.<sup>3</sup> In 2 Chronicles 8-11, Levitical priests are granted judicial power in addition to their religious roles due to major legal and religious reforms by King Jehoshaphat to revive Israel's intimate relationship with God once more. This is a clear example of legal pluralism in action.<sup>4</sup> The pluralistic roles they carry allow them flexibility to efficiently deal with matters that cannot be heard at a local level by secular judges. In other words, legal pluralism exists in this situation for the purposes of proper administration and reform policy. However, it can be argued that the King would have had ulterior political motives to gain popularity and the favour of the people.<sup>5</sup> Thus, legal pluralism exists in this circumstance for efficient case management, and/or to gain favour and be portrayed in a positive light. Regardless of purpose, legal pluralism exists nonetheless.

Legal pluralism can be found in the New Testament during the time of Jesus and thereafter, when Israel was under Roman imperial rule (63BCE – 476 CE).<sup>6</sup> Jewish laws pertaining to customary and religious matters were dealt with by the Sanhedrin<sup>7</sup>, seen by the Jews as the local authority, which existed alongside the judicial system and legal authority of the Roman Empire.<sup>8</sup>

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<sup>2</sup> Deut. 17:9; 19:17; 2 Chron. 19:8, in *The Holy Bible: New Revised Standard Version: Containing the Old and New Testaments with the Deuterocanonical Books* (Peabody, Mass.: Hendrickson Bibles in Conjunction with Oxford University Press, 2008).

<sup>3</sup> Terry L. Wilder, *Holman Illustrated Bible Dictionary*, ed. Chad Brand, Archie England, and Charles W. Draper (Nashville, Tennessee: Holman Reference, 2003), 585.

<sup>4</sup> Max E Anders and Winfried Corduan, *I & II Chronicles* (Nashville, Tenn.: Broadman & Holman, 2004), 268

<sup>5</sup> Louis C Jonker, *I & 2 Chronicles* (Grand Rapids, Michigan: Baker Books, 2013), 26.

<sup>6</sup> Mark Allan Powell, *Introducing the New Testament: A Historical, Literary, and Theological Survey* (Grand Rapids, Michigan: Baker Academic, 2015), 18.

<sup>7</sup> The Sanhedrin were a council which acted as the Supreme Court of Chief Priests and Elders in Jerusalem that dealt with traditional Jewish matters and interpretation of the laws of Moses. See Mark Allan Powell 2011, 388-389.

<sup>8</sup> Adrian Nicholas Sherwin-White, *Roman Society and Roman Law in the New Testament* (Grand Rapids, Mich.: Presbyterian And Reformed Publishing Company, 1963), 5-7.

Jesus' trial before the Sanhedrin<sup>9</sup> and Pilate<sup>10</sup> is the most prominent example of legal pluralism in practice in accordance with its definition. Although there are varying degrees in narration between the synoptic gospels, the focus is on crucial points of the trial rather than a specific focus to its authenticity. This is because priority is given to identifying basic elements of legal pluralism to prove its existence rather than alluding to specific details. After all, the focus is on the system, not its substance.<sup>11</sup> When applied to this biblical account, Jesus is taken before the Sanhedrin and is accused of blasphemy, a serious accusation.<sup>12</sup> After an unsuccessful attempt there, he is then taken to Pilate to be tried under Roman law for treason, a serious crime punishable by death.<sup>13</sup> This shows both judicial systems existing at the same time, but it is used dubiously by the Sanhedrin as a plot to put Jesus to death,<sup>14</sup> whom they viewed as a threat to their authority since his ministry began.<sup>15</sup> The Sanhedrin had their own rules and interpretations which existed alongside Roman imperial law. The fact that the Romans allowed the council to operate shows their inclusive approach towards managing their subjects in a manner that gives them freedom to manage their own affairs albeit with scrutiny.

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<sup>9</sup> Matt. 26: 57-67; Mark 14: 53-65; Luke 22: 54-71; John 18: 13-28 in the *Holy Bible: New Revised Standard Version: Containing the Old and New Testaments with the Deuterocanonical Books* (Peabody, Mass.: Hendrickson Bibles in Conjunction with Oxford University Press, 2008).

<sup>10</sup> Matt. 27: 11-26; Mark 15: 1-15; Luke. 23: 1-25; John 18: 28-40, 19: 1-22 in *Holy Bible: New Revised Standard Version*, (2008).

<sup>11</sup> This is not to state that the procedural aspect of a trial is the only important factor in determining legal pluralism and thus alienate the substantive arguments made by parties to a matter, but rather the former taking priority over the latter. Both are still important.

<sup>12</sup> Mark 14: 63-65; Matt. 26: 65-66 in *Holy Bible: New Revised Standard Version*; Tibor Horvath, "Why Was Jesus Brought to Pilate?" *Novum Testamentum* 11, no. 3 (July 1969): 174-84, doi:10.2307/1560139., 175 – 176.

<sup>13</sup> Matt. 27: 11-26; Mark 15: 1 -15; Luke. 23: 1-25; John 18: 28-40, 19: 1-22 in Tibor Horvath, "Why Was Jesus Brought to Pilate?" *Novum Testamentum* 11, no. 3 (July 1969): 174-84, doi:10.2307/1560139. ; Sherwin White, AN 1963. pp. 13, 33

<sup>14</sup> Matt. 26: 1-5; Mark 14: 1-2 Tibor Horvath, "Why Was Jesus Brought to Pilate?" *Novum Testamentum* 11, no. 3 (July 1969): 174-84, doi:10.2307/1560139.

<sup>15</sup> George A. Barton, "On the Trial of Jesus before the Sanhedrin," *Journal of Biblical Literature* 41, no. 3/4 (1922): 205-11, doi:10.2307/3260096.

Paul's appearance before the Sanhedrin and later before Felix is another instance of legal pluralism.<sup>16</sup> Much like Jesus' trial, Paul also goes through a similar process and is accused by the Sanhedrin for profaning the temple<sup>17</sup> and later appears before Agrippa, the Roman governor of the province. His appeal to appear in Rome before the Emperor is granted by Agrippa but does not go into any detail. It also helps his case that he is a Roman citizen which comes with rights and protections, especially the right to be heard fairly in court.<sup>18</sup>

## **2.2 A Correlational-Theological Analysis**

The biblical accounts show that legal pluralism existed back then as it does now. And much like how the Sanhedrin in the New Testament, with their influence and expertise of the law, used this system to their advantage to dispose of Jesus, it would be naïve to state that this does not happen today. Anything God created was meant for good. Laws are created to protect society and maintain order. Courts and judges are appointed to arbitrate on matters fairly. Legal pluralism is no different. Legal pluralism in its existence was made by God. For its pluralistic nature was to deal with different matters in a fair and just manner. But the problem with any creation of God is not the creator, but of the creation itself. To clarify using legal pluralism, its existence is not the problem, but those who misuse it.

The correlation between the customary and legal systems is that they both serve to do what is right and just. Even though they differ in approach, they serve the same end, that is, to do what is just and right. God is omniscient, for He sees the heart of man and

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<sup>16</sup> Acts 22:30-25:26:32 in the *Holy Bible: New Revised Standard Version: Containing the Old and New Testaments with the Deuterocanonical Books* (Peabody, Mass.: Hendrickson Bibles in Conjunction with Oxford University Press, 2008).;

<sup>17</sup> Ibid. Acts 24: 7

<sup>18</sup> Ibid. Acts 22: 25-29

knows the secrets of the heart<sup>19</sup>. God has gifted legal pluralism to create choice. But the reasons behind the choice, are what determines the nature of those intentions. As long as those intentions are noble and for good purposes, the system itself is of value.

Understanding the value of legal pluralism and thereby appreciating its worth, helps us to manage the differences between competing legal systems, and focus on the similarities that helps serve the interests of justice best. Collaboration is key in making legal pluralism effective. However, instead of promoting the ends of justice, the Sanhedrin did the opposite. They misused the system. The fact that they used their influence to rally public opinion against Jesus by fabricating accusations of the temple's destruction, shows how far they were willing to go to eliminate Jesus. For he was by himself, an individual pitted against the Sanhedrin with an angry mob behind them to support their case. This may have been the same mob of people who witnessed Jesus' teachings and miracles. The Sanhedrin may have felt their reputation slighted during their encounters with an individual like Jesus.

Jesus was alone against so many. This mob was a community of his own people, the Jews, who were most likely the same crowds that witnessed his discourses with the Pharisees and Sadducees. Yet they, for whatever reason, changed heart and rallied against him. Just because the majority may have a collective voice, does not make it the truth.

The Old Testament accounts shows how important the law was to Jewish people. Obedience of the law that would bring God's blessings upon the people was the righteous way of living. Such was the cause for reformation policies during King Jehoshaphat's reign to revive their faith in God through obedience of the law. Throughout the history of Israel in the Old Testament, the laws of God that the people of Israel live by is also pitted

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<sup>19</sup> Ps. 44: 15 in the, *Holy Bible: New Revised Standard Version: Containing the Old and New Testaments with the Deuterocanonical Books* (Peabody, Mass.: Hendrickson Bibles in Conjunction with Oxford University Press, 2008).

against the laws of foreign powers that ruled them throughout their history, that is, the Babylonians, Assyrians, and the Persians. Despite the differences in laws as they were encountered throughout time in a pluralistic society under foreign rule, the Jewish people had that unique strength to stay true to the law of God. Their faith in the law was reliable enough to be still together and their existence as a people to this day is a true testament to that. They have still managed to hold onto their identity, because of how central the laws of God were to Judaism and their identity as a people. To acknowledge the law was to acknowledge the essence of God. The sustaining essence of God is reflected in the survival of the people of Israel to this day.

The next chapter explores how Legal Pluralism is used in Samoa through the lens of the LTC Act 2020. The LTC Act needs to be understood in its entirety including its development as the LTC Bill 2020 and rationale behind its creation. It will also address criticisms against the Act to obtain a balanced perspective on the concerns of those affected as opposed to those who champion its enactment.

## **CHAPTER 3**

### **A CASE STUDY OF THE LTC ACT 2020**

Although there is a disruption to the theological development from the previous chapter, it is hoped that once a clear identification of the underlying issues of Legal Pluralism has been found, the opportunity for a more complete theological reflection will then be open for discourse in relation to the church, more specifically, the CCCS denomination.

On 5 January 2021, the LTC Act 2020, was passed into law by the written assent of the Head of State of Samoa, His Highness Tuimalealiifano Valetoa Sualauvi II, which brought into existence a separate judicial hierarchy to an already established judicial system since independence in 1962.<sup>1</sup>

Before undertaking the impacts of legal pluralism on the LTC Act itself, it is important first to provide brief understanding of how this law came into place and the reasons it needed to be codified into law. It is hoped that from within this framework it can help identify the true intent behind its formation.

#### **3.1 Development of LTC Bill 2020**

On 27 June 2016, the Honourable Prime Minister of Samoa Tuilaepa Sailele Malielegaoi, announced in Parliament that a special commission of inquiry was to be established in order to investigate the Land and Titles Court of Samoa. A Special Inquiry Committee was established to conduct a review of the LTC and its procedures with the aim of making the procedures more efficient for the Samoan public.<sup>2</sup>

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<sup>1</sup> Section 1 of the *Land and Titles Court Act 2020*

<sup>2</sup> “Report of the Special Inquiry Committee’s on Matters Pertaining to the Land and Titles Court,” *Parliament of Samoa* (Apia: Parliament of Samoa, 2016), <https://www.palemene.ws/wp-content/uploads/Tabled%20Committee%20Reports/2016/December/1.-Final-LTC-Report-sam.pdf>.



The reason why the inquiry was made was due to the public grievances in relation to the delay in LTC rulings and procedures. The delay brought no sense of finality to land and title matters that the public thought would be resolved promptly.<sup>3</sup> On 4 July 2016, an invitation was made to the public by the committee for oral and written submissions regarding the LTC. Overall, a total of 42 written submissions were made and 145 oral submissions were presented to the Committee.<sup>4</sup> According to the Report, the following grievances were recorded:<sup>5</sup>

- Continuous increase of requests for appeals;
- Connection of judges to cases;
- Questions inadequately phrased;
- Judges unprepared to hear cases;
- Adjournment of cases;
- Grievance against attendance of Judge who heard case in first instances with an unsuccessful ruling;
- Favouritism;
- Unsigned court rulings by Judges;
- Prejudice;
- Acceptance of cultural gifting from parties involved;
- Health; and
- Capacity.

Regardless in whether these grievances had merit or not, what was clear was that some changes needed to be made. A list of recommendations was thus made<sup>6</sup> but I will only name a few to highlight.

One recommendation was the need for deputy presidents to assist the President of the LTC in managing the cases before them so that matters could be dealt with

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<sup>3</sup> Taumavae, L., 'A Response to the Report of the Special Inquiry Committee's on Matters Pertaining to the Land and Titles Court', 2017, Victoria University of Wellington, viewed 3 March 2021, <<http://hdl.handle.net/10063/7932>>.

<sup>4</sup> *Report of the Special Inquiry Committee's on Matters Pertaining to the Land and Titles Court 2016*, Parliament of Samoa, Parliament of Samoa, Apia, 15.

<sup>5</sup> Ibid, 14.

<sup>6</sup> The full list of recommendations was as follows: Prioritising/Restructuring of the LTC, Appointment of Deputy Presidents, Verbal Court Rulings, Written Court Rulings, Rulings of the Court of First Instance, Guidelines for Samoan Judges, Declared Judges Conflict of Interest, Judicial Review, Mediation, Written Submissions from Parties to Dispute, Family High Chief (*Sa'o*), Registration of the Trustee of Customary Land (*Pulefa'amanu*)

efficiently.<sup>7</sup> The reason behind the delays and adjournment of cases were because there of the one President presiding over numerous matters especially at the first mention of the matter before the court.

Another recommendation was the need for verbal court rulings to be made promptly within 3 days.<sup>8</sup> The committee found that some parties had to wait 12 months for a ruling causing uncertainty and mistrust in the process. The reestablishment of recording devices in order to record the verbal rulings for the sake of evidence was also recommended.

The need for Judges to declare any conflict of interest, whether perceived or actual, was another important recommendation made by the committee.<sup>9</sup> It was important to safeguard any improper bias to a party and that if the judge should declare such conflict, it should preferably be made before a matter has proceeded.

Judicial Review is also an important recommendation made by the committee. Rulings made in the LTC were not subject to review in the Supreme Court subject to the Land and Titles Act 1981 unless there was a breach of fundamental rights, usually human rights, which were protected under the Samoan constitution.<sup>10</sup>

According to the explanatory memorandum of the Land and Titles Bill 2020:<sup>11</sup>

Through the new framework, Samoa attempts to further emphasize the importance and uniqueness of Samoa's *tu ma aganuu* and her customary land and *Matai* titles, by affording it the specialist nature it was intended to have.

The whole purpose behind the reform of the LTC was to incorporate Samoan cultural practices within the judicial system of dispute resolution. That is, to handle cultural

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<sup>7</sup> *Report of the Special Inquiry Committee's on Matters Pertaining to the Land and Titles Court* 2016, *Parliament of Samoa*, Parliament of Samoa, Apia, 16.

<sup>8</sup> *Ibid.* p. 17.

<sup>9</sup> *Ibid.* p. 17-18

<sup>10</sup> *Ibid.* p. 28.

<sup>11</sup> Parliament of Samoa, "Land and Titles Bill" (2020).

matters of land and titles, is to require a specialised Samoan person who best understood such matters to judge accordingly. There is a definite national sentiment in how this LTC will be set up but not without any proper guidelines to assist in judges' decision making.

Furthermore, with these amendments, it would restructure Samoa's court system by elevating the specialised Lands and Titles Court (LTC) into a stand-alone court of review and appeal equal to that of the already established Supreme Court. The establishment of two courts of review instead of having one has brought heavy criticism especially from those of the legal profession.<sup>12</sup> This dual establishment is what gives legal pluralism its definition.

### **3.2 Criticism of the LTC Bill 2020**

The creation of two equal courts, as proposed by the amendments, instead of having a single apex court to oversee the lower court's rulings is problematic, especially if there are differences in rulings between these two courts which will bring uncertainty and confusion.<sup>13</sup> This was a trending topic which attracted public opinion given the sensitive nature in relation the land and culture. There were a variety of responses from individuals and organisations alike who were either in favour or against the enactment of the bill.<sup>14</sup>

According to the Samoa Law Society (SLS), they strongly opposed the proposed bills at the time. In emphasising this uncertainty, the SLS argued that the three bills<sup>15</sup> would "...collectively represent the most drastic and incompetent attack on the stability

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<sup>12</sup> Fiona Ey, "Samoa's Constitutional Crisis: Undermining Rule of Law," *Www.lowyinstitute.org*, May 8, 2020, <https://www.lowyinstitute.org/the-interpreter/samoa-s-constitutional-crisis-undermining-rule-law>.

<sup>13</sup> Ibid.

<sup>14</sup> See Appendix A.

<sup>15</sup> Land and Titles Court Bill 2020, Judicature Bill 2020, and Constitutional Amendment Bill 2020.

of the justice system and the operation of the Rule of Law ever seen in Samoa since independence”.<sup>16</sup>

According to Fiona Ey, herself a solicitor in the Supreme Court of Samoa, the removal of the Supreme Court’s oversight over the LTC would also mean the removal of fundamental human rights from customary matters and more undefined power to communal rights, that is, the village councils.

By removing the Supreme Court’s supervisory jurisdiction, the proposed changes would abolish the application of fundamental human rights from customary matters. Instead, the LTC would apply undefined “communal rights”, which the bill’s explanatory memorandum essentially equates to decisions of the village *fono* (chiefly council). In the past, certain actions claimed to be taken on behalf of the community, such as beatings or house burnings, have been declared by the Supreme Court to violate fundamental rights. The removal of Supreme Court oversight of the LTC would effectively leave village *fono* with decision-making power unfettered by human rights considerations. she saw these bills as undermining the judicial independence and the rule of law, which will impact human rights.<sup>17</sup>

However, Ey also refers to Meleisea and Toma, notable Samoans who see this idea of the individual against the communal as a “false dichotomy” because individual rights are protected under the communal rights, whilst the latter argues that individual rights are also entrenched in Samoan cultural values.<sup>18</sup>

Despite her position regarding individual rights above, she does question the motives of the government in relation to the timing of these amendments as politically motivated in nature. Meleisea made these comments in the wake of the elections in April 2021 where the move is seen as a political ploy by the government at the time, to gain

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<sup>16</sup> Sina Retzlaff, “Samoa Law Society Says Bills Are Fundamentally and Technically Defective,” *Samoa Global News*, April 23, 2020, <https://samoaglobalnews.com/sls-bills-fundamentally-technically-defective/>.

<sup>17</sup> Ey, F., 2020.

<sup>18</sup> Ibid.

popularity and momentum heading into their campaign.<sup>19</sup> She also criticises the government that in the event the amendments are passed, as it has been now, the same problems in relation to a lack of resources will remain, which will give the government more reason to intervene in what is deemed to be a family affair. In other words, Meleisea is arguing that this will only create more government oversight into private family matters, when the opposite is desired.<sup>20</sup>

Section 46 of the LTC Act<sup>21</sup>, now gives added power to the President of the LTC to decide what appeal can be taken and grants the power to rehear or reopen any case that has already been decided by the Court. According to the International Bar Association, this goes against the established legal principle of *Res Judicata* which is latin for “a case decided”. This means that once a matter has been decided and ruled upon by a court, that decision is final and cannot be appealed unless it is set aside by a higher court for legitimate reasons.<sup>22</sup> In other words, this section has the potential for the President of the LTC to use his power to grant appeal on matters that may even appear trivial or minor and have already been ruled upon. The whole point of this legal principle is to prevent an undue waste of time and resources from further pursuing a matter without any reasonable cause or merit.

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<sup>19</sup> Malama Meleisea and Penelope Schoeffel, “Culture, Constitution and Controversy in Samoa,” *Www.lowyinstitute.org*, June 23, 2020, <https://www.lowyinstitute.org/the-interpreter/culture-constitution-and-controversy-samoa>.

<sup>20</sup> Ibid.

<sup>21</sup> Parliament of Samoa, “Land and Titles Court Act,” (2020).

<sup>22</sup> St. Matthew D.R., - (ed.), *IBA - IBAHRI Condemns Samoan Parliament’s Passing of Controversial Constitutional Reforms*, 2020, [www.ibanet.org](http://www.ibanet.org), viewed 17 March 2021, <<https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=f9b55308-6d82-4767-8616-1222c14037d4>>.

In a letter from IBAHRI<sup>23</sup> Co-Chairs and former Justice of the High Court of Australia, the Hon Michael Kirby<sup>24</sup> and Anne Rambers<sup>25</sup> to Prime Minister Tuilaepa Sailele Malielegaoi:

The IBAHRI urges the Parliament of Samoa to reconsider the new legislation and new amendments in light of their potentially very damaging impact on the rule of law and independence of the judiciary. Giving the Government the power to dismiss judges is contrary to the principles of the International Covenant on Civil and Political Rights, legal tradition and judges' tenure; the practical guarantee of judicial independence...[It] is a dangerous move that could lead to further derogations from the rule of law. We urge reflection, reversal and wide consultation. Political leaders in Samoa need to be reminded of the importance of preserving the rule of law and the equality of all people before the courts, whatever their race, ethnicity, nationality or culture. This is not only a matter of international obligation and fundamental human rights. It is also critical to the economic stability of Samoa and investment in the prosperity of the country.<sup>26</sup>

There is also the criticism levelled at the government for rushing the bill into procedure without seeking proper consultation with the public and stakeholders subject to the Samoa Law Reform Commission's mandate and pursuant to its relevant act<sup>27</sup> Given the serious nature in creating a court equal to that of the already established Supreme Court of Samoa, public opinion is a necessity when considering that 80% of Samoa is customary land<sup>28</sup>. In essence, it affects many families and chiefs, and they need to be consulted as well.

It is clear that the LTC Bill drew plenty of criticism from the legal profession, as well as those who wished to maintain the status quo as it was. But it is also understandable that a specialised court that deals with Samoan matters should only be

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<sup>23</sup> International Bar Association Human Rights Institute

<sup>24</sup> Former Justice of the High Court of Australia, Co-Chair of IBAHRI

<sup>25</sup> Co-Chair of IBAHRI

<sup>26</sup> Malama Meleisea and Penelope Schoeffel, "Culture, Constitution and Controversy in Samoa," *Www.lowyinstitute.org*, June 23, 2020, <https://www.lowyinstitute.org/the-interpreter/culture-constitution-and-controversy-samoa>.0

<sup>27</sup> Parliament of Samoa, "Law Reform Commission Act" (2008), sections 6 (d) and 7(c).

<sup>28</sup> Meleisea, M & Schoeffel, "Culture, Constitution and Controversy in Samoa"

dealt with in the Samoan way, the *Fa'asamoa*<sup>29</sup>. However, it cannot be said that such fears from those who opposed the bill is unfounded, because as with any well intended action, what may start out as genuinely good, could end up being corrupted overtime.

If Legal Pluralism acknowledges the worth of all types of laws in co-existence and without disruption to a society, the introduction of the LTC Act 2020 does the opposite. This is because the LTC Bill would legalise a different court system that has the potential to upset the status quo in maintaining stability between individual members and the village community, and between statutory laws and customary rules. The next chapter provides a comparative analysis between the previous chapters into a coherent position in addressing its application to the CCCS and its members.

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<sup>29</sup> It means “the Samoan way”

## **CHAPTER 4**

### **COMPARATIVE ANALYSIS**

This chapter is a comparative analysis of the above discussion between Legal Pluralism, biblical accounts, and theological reflection. This will be done with a special emphasis on the theological argument of the analysis. It is hoped that in doing so, a recognition of the issue will help bring attention to the potential impacts it may have on the church and its members. This will then be followed by its application to the church, the CCCS, and its members.

#### **4.1 The Significance of the Correlational Method**

In using Tillich's method, and with a systematic approach in providing a coherent response to the issue of legal pluralism, the same systematic approach of correlation will be used between secular concepts themselves. Not only is the method of correlation going to correlate similarities between secular and theological thought<sup>1</sup>, but will also be used to correlate between secular ideas themselves. This is helpful when narrowing down a secular idea that can be too broad for proper comparative analysis to take place. When applied to this paper, a correlation between legal pluralism and the LTC Act will be made to find mutual ground that best describes both. This will then be followed by correlating these mutual issues to the biblical text for theological thought. Hence, it is hoped that a systematic approach of providing a structured theological response will help identify a solution.

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<sup>1</sup> Alister E McGrath, *The Christian Theology Reader* (Malden, Massachusetts: Wiley Blackwell, 2017), 48.



In comparing legal pluralism to the LTC Act itself, the former can be seen as a single overarching concept that covers the LTC Act under its principle. The LTC Act can thus be seen as a specific aspect of legal pluralism given the broad nature of the principle and multiple platforms on how it manifests itself around the world. If the LTC Act falls under the umbrella of legal pluralism, then it is the pluralistic elements of the Act itself which can also be mutually identified as part of a generalised meaning of legal pluralism.

## **4.2 Impact of the LTC Act 2020 on the Community**

At the core of LTC matters, it is either a conflict between the individual rights and the communal rights of the village, and the land on which is subject to these claims. Thus, at its core the mutual element of both is deducted as follows, *the individual rights to land versus the communal rights of the villagers to the land*. To further clarify, the “land” aforementioned is customary land, which covers a majority of land in Samoa.<sup>2</sup>

Such land is what attracts the ire of villagers in an instance where there is a violation to an already established rule of enforcing the prohibition of establishing other Christian denominations. This is especially the case where an individual decides to introduce a new Christian denomination in the village despite the objections of the villagers. Understandably, the village as a community would be a united front to uphold their own rules for the sake of maintaining the peace and stability of the villagers. But for the individual concerned, it is argued that this is a violation of their fundamental human rights to religious freedom as protected under the constitution of Samoa.<sup>3</sup> And it is usually the case that the individual is successful on appeal against the LTC decision in the Supreme

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<sup>2</sup> 80% of land in Samoa. See Jennifer Corrin, “Dispute Resolution,” *Australian Department of Foreign Affairs and Trade* (2008), [https://www.dfat.gov.au/sites/default/files/MLW\\_VolumeTwo\\_CaseStudy\\_10.pdf](https://www.dfat.gov.au/sites/default/files/MLW_VolumeTwo_CaseStudy_10.pdf).

<sup>3</sup> Sections 11-12 of the Constitution of Samoa.

Court on the basis of their right to religious freedom being violated.<sup>4</sup> However, this was before the LTC Act 2020 was enacted, whose purpose is to achieve the opposite, that communal rights be prioritised on the basis of custom and tradition.

#### **4.2.1 Negative Impacts on the Community**

The pitfall of the communal perspective however is that it creates a “mob mentality”, or a “tyranny of the majority”<sup>5</sup> where misinformation is used to create a false narrative to establish a public position over a particular individual or group. It can be argued that the same applies to Jesus before the Sanhedrin and Pilate in the biblical account aforementioned. Here we have a mob mentality of people after being misinformed by members of the Sanhedrin accusing Jesus, an individual, but also a fellow Jew. It is likely that this mass were the same people who were part of Jesus’ audience when he was preaching. They are the ones shouting from the mob for his death. The accusers plot for Jesus’ demise<sup>6</sup> culminated in this trial event which for them, was a success in finding him guilty and get crucified as punishment. It is clear in this instance, that the trial procedures in the legally pluralistic sense, had been abused by the Sanhedrin.

The same pitfall is also found in a real case that occurred between a village council and an individual family. In the matter of *Tutuila v Punitia*<sup>7</sup>, the customary land in dispute was owned by the Tutuila family who refused to let the CCCS of Tanugamanono expand their physical premises upon their land which was adjoined. In response the village council banished the family, and burnt their property. They were also members of the CCCS at the time. Before the Supreme Court, they found the village council had acted

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<sup>4</sup> Ey, F., 2020, *Samoa’s Constitutional crisis: Undermining Rule of Law*, [www.lowyinstitute.org](http://www.lowyinstitute.org), viewed 19 March 2021, <<https://www.lowyinstitute.org/the-interpreter/samoa-s-constitutional-crisis-undermining-rule-law>>.

<sup>5</sup> Ferdinand A Hermens, *The “Tyranny of the Majority”* (Notre Dame, Ind.: Univ. Of Notre Dame Press, 1958), 39-40.

<sup>6</sup> John Stuart Mill, David Bromwich, and Jean Bethke Elshtain, *On Liberty. Rethinking on Liberty / with Essays by Jean Bethke Elshtain ...* (New Haven, Conn.: Yale University Press, 2003), 76

<sup>7</sup> *Tutuila v. Punitia* (Supreme Court of Appeal 2012).

outside of its powers as mandated under the Village Fono Act 1990 and ruled in favour of Tutuila with orders for the village council to monetarily compensate the Tutuila family to the sum of almost \$1, 000, 000 SAT.

#### **4.2.2 Positive Impacts on the Community**

The very fabric of Samoan society is the *fa'asamoa* and with it, the recognition of the village council which is headed by the Mayor, Paramount chief and Orator chiefs of the village who deal with the daily operations of the village at a local level. Village life is regulated and rules are to be respected and adhered to. The *fa'asamoa* is more akin to a communal way of living, where it is more about the collective than an individual.

In relation to customary land, the village works together to protect it. As much as the Sanhedrin misused the court system for their own personal vendetta, it is not so much the same with Village councils. Their intentions are to uphold unity amongst their villagers. And it would be a remiss not to acknowledge the good work that is being done by each village council. However, more care should be taken in investigating matters such as these. Although Samoans already have the notion of “*fa'aaloalo*” and “*soalaupule*”, a consensus building principle between members in discussing affairs especially in the village setting,<sup>8</sup> it would also help to gain an active insight into the other party and reasons for their actions, for a proper consensus to take place.

Customary land is also associated with identity and cultural importance. The sense of belonging is about where they are from, their “*faasinomaga*”.<sup>9</sup> It is understandable why land is a sensitive issue to many Samoans here and abroad. Legal pluralism in relation to the land for the community and individual warrants the need for a theological approach.

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<sup>8</sup> Elise Huffer and Asofou So'o, “Beyond Governance in Sāmoa: Understanding Samoan Political Thought,” *The Contemporary Pacific* 17, no. 2 (2005): 311–33, <https://www.jstor.org/stable/23722058>, 312.

<sup>9</sup> Esera Esera, “An Economic-Political Reading of 1 Kings 21:1-4 in Light of the LTRA 2008 Controversy” (2018), 21.

### 4.2.3 Individualism vs Communalism?

Those who support a more individualist right to land would argue the fundamental western influence of independence and freedom to do with their land whichever way they want. It can also be justified on the biblical basis to work and toil the land for their own survival.<sup>10</sup> The Samoan culture champions a communal sense of living, where everyone is open to sharing resources with one another on the basis of *alofa*<sup>11</sup> and looking out for one another. Whilst individualism can find selfishness as a downside if taken to the extreme, the disadvantage of the latter in relying on others in the communal sense, creates a sense of dependency on others and thereby minimises individual potential.

Irrespective of whether individualism or communalism is the preferred approach, what is more important is that mutual correlation that connects both legal pluralism and the LTC Act itself is identified. This represents the human situation which man finds themselves in. Man's purpose and existence comes into the fray with a guiding question, how can we make sense of this human situation in relation to God? This question is also to acknowledge our own brokenness and incompleteness, which only God make complete because his presence is beyond the limitations of our understanding of what existence really is.<sup>12</sup> In other words, only that which is beyond our understanding of existence, time and space, can we be fully made complete. God can only make us complete at his own will.

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<sup>10</sup> Prov. 28:19 in B In The, *Holy Bible: New Revised Standard Version: Containing the Old and New Testaments with the Deuterocanonical Books* (Peabody, Mass.: Hendrickson Bibles in Conjunction with Oxford University Press, 2008).

<sup>11</sup> Samoan translation for "love" which can also be defined as compassion, or the customary act of gift-giving in Samoan culture, with the aim of reinforcing familial connections. See Tolu Muliaina, "Grounding Malaga in 'Aiga Samoa: Alofa as Manifested in Population Movement." (Unpublished PhD Thesis, 2017), <http://digilib.library.usp.ac.fj/gsdlib/collect/usplibr1/index/assoc/HASH01bb/695b8a8a.dir/doc.pdf>, 57, 86.

<sup>12</sup> Bernard M. Loomer, "Tillich's Theology of Correlation," *The Journal of Religion* 36, no. 3 (1956): 150–56, <https://www.jstor.org/stable/1201049>, 150-151.

In identifying our own limitations, we find that limitation everywhere around us that exists as well.<sup>13</sup> Legal pluralism also has its limitations, it is not a perfect system. Its very nature is meant to deliver justice and other ideal virtues beneficial to mankind in the pursuit of truth. But just like how mankind manifests God in their own way, mankind manifests legal pluralism in their own way as well, whether it would be good or bad, selfish or altruistic.

The Sanhedrin's plot for Jesus' demise was the whole motive behind their use of having him heard before their council and then before Pilate under Roman imperial law with the hope of proving Jesus guilty and be punished severely to death as a result. It was not legal pluralism that was the problem, but how it was used by those who were willing to abuse it. They used their influence to sway the community in creating a louder voice in numbers to put forward a persuasive case devoid of merit. Regardless of whether it was wilful ignorance or misinformation, the crowd that shouted to have Jesus crucified were clearly in the wrong. In correlation with the LTC Act 2020, the villagers can also be swayed to cause harm as was the case of Tutuila above. The individual family, like Jesus, were unjustly treated.

However, this is not to state that the communal rights to land is at fault. Whether it be an individual or a community, it is how the system is used and the intent behind it that gives meaning to legal pluralism's existence. It is clear that the value we place on land especially in Samoan culture, is very high and part of our identity and can also be cause for tensions given the intimate connection Samoans have to it.

Both individual and communal rights need to come together. But it can only be achieved through humility and the willingness to listen. What is man's purpose of being?

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<sup>13</sup> Bernard M. Loomer, "Tillich's Theology of Correlation," *The Journal of Religion* 36, no. 3 (1956): 150–56, <https://www.jstor.org/stable/1201049>, 153.

If man's purpose is to acknowledge the presence of God, then that presence alone is enough to show humility and cooperation with each other. God can truly exist in this sense and allows mankind to make a positive meaning to their existence from this correlated approach. We need to have faith in God and understand that faith in itself so that true meaning in our lives can be experienced.

### **4.3 Theological Perspective: CCCS and the LTC Act 2020**

For all things that God created was out of love, and Jesus Christ is the incarnation of that love who came to save the world. The people of Israel saw the law and Torah as central to their daily lives by being obedient to it as a sign of that outward manifestation of love. Jesus said that he came to enhance law, not abolish it.<sup>14</sup> Only Christ can provide proper meaning to the law and hence legal pluralism. Christ was also purposed to simplify the law throughout times in his ministry. For as complicated as the laws of society were at the time, only Jesus could simplify it enough for people to understand and appreciate the effect and operation of the law in its entirety.

His two golden rules throughout his ministry are an attempt at simplifying the 10 commandments of Moses.<sup>15</sup> Had these two rules been applied fully, the need for legal recourse would be non-existent. But such is the reality that courts exist, and legal pluralism accordingly. These two rules would apply universally, not just individual and communal land rights. These are also the same rules which can also give meaning to our very existence as championed by Tillich. The vertical relationship with God must be spiritually enforced through prayer and devotion, in order for our horizontal relationships

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<sup>14</sup> Matt. 5: 17-20 in *The Holy Bible: New Revised Standard Version: Containing the Old and New Testaments with the Deuterocanonical Books* (Peabody, Mass.: Hendrickson Bibles in Conjunction with Oxford University Press, 2008).

<sup>15</sup> Matt. 22: 37-39 in *The Holy Bible: New Revised Standard Version: Containing the Old and New Testaments with the Deuterocanonical Books*.

with people to flourish as well. Humility is the key. The absence of humility only paves way for pride to envelop even the smallest of groups and leave the church in ruins. It is also the key in governing the hearts of villagers in their relationships with fellow villagers. Humility can also serve as compromise between an individual and the village council. If this can be valued, the need for legal recourse to the courts would be minimal. It is more to do with changing oneself first, to change from within, and allow the Holy Spirit to manifest that change and understanding, before effecting that change on someone else. This would do more of an impact to society than anything else.

As land is a sensitive issue amongst Samoans, parishioners of the church are also affected in these matters and can have an impact on relations with other church parishioners, even the Minister. As highlighted in a case study involving the CCCS<sup>16</sup>, if the new LTC Act gives power to the community, it would potentially legitimise violent conflict and forced removal of families without resorting to dialogue. These removed families could be CCCS members which would also affect the Minister, of whom are under his pastoral care. Based on the above, and to avoid these calamities altogether, the LTC Act should be repealed. The new act would do more damage than good.

The comparative analysis between Legal Pluralism, the LTC Act 2020, and theological reflection, shows that it can affect the CCCS and its members. By identifying their common elements so it can be addressed effectively, it helps bring the whole issue to its culminating end in the conclusion.

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<sup>16</sup> *Tutuila v. Punitia* (Supreme Court of Appeal 2012).

## CONCLUSION

The primary aim of this paper was to provide a theological reflection on Legal Pluralism, seeking to highlight its impact upon the everyday life of the Samoan people. It has been established that several legal systems exist in Samoa without causing any disruption to the stability of the people thus far. This is because there is a mutual recognition between different legal systems, such as the co-existence of village councils, who have their rules in regulating village life, and legislation made by the Government. A mutual recognition by the Samoan society of Legal Pluralism shows that there is tolerance in accepting both traditional and legal systems at the same time as separate legal systems. Such tolerance shows how much trust the Samoan people placed on the legal systems existing in the country. This trust is a reflection of the nature of Samoan people in general and the socio-cultural values it embraces as part of the national identity.

Life before the enactment of LTC Act 2020 provided for the protection of individual rights against the potential threat of the community. The core of communal living in Samoa is through the village unit. The significance of mutual respect is a socio-cultural value that is of high importance in the *fa'asamoa*. If such respect is highly valued in the communal sense, then such a respect should also be given to an individual who also abides by this socio-cultural value. The problem arises where in the event that such respect and reason are used in a dialogue between parties, especially an individual against the village council, alternative measures apart from dialogue are implemented.

In the theological aspect of this effort, the correlation method was employed in the attempt to identify legal pluralism in the Bible. Thus, the Old Testament and the New Testament bear witness to the existence of legal pluralism, not only in the life of the people of Israel but also in the life of Jesus Christ, and the beginning of the Church itself.



The attempt was to find a biblical basis upon which a theological perspective could be established. It was proven beyond doubt that the God of the Bible is the God of love and of justice; the God who created creation, and declared it good and very good. Meaning that all things were created for the sake of good and not evil. To do evil, therefore, would alter the nature of God as malevolent and bring into question the decisiveness of His will. So, if God's creation is made for good, then all legal systems were also created for good. The fact that there have been no violent conflicts between the village councils and national government is a testament of that.

Although we may discuss legal pluralism in its entirety, it is always implicitly about God. We see God working through all the legal systems there are, being a guiding hand in the life of His people. His creation was and is for the wellbeing of all things in it. The only reason why evil exists is because of those who misuse God's gift of life. In terms of Legal Pluralism, it is those who misuse it to gain an unfair advantage that brings the system into disrepute. Self-interest and selfish greed are negative traits that cause an abuse of the system. Thus, God's purpose is for all things in creation to live in an intimate relationship with him, founded on his unconditional love.

This is the God who is at the centre of law. He is the God of love, of justice, and of peace. Thus, the law that God established is for the benefit of mankind, and to create stability and order. The law played a central role for the people of Israel. For it was their obedience to these laws that was rewarded with God's blessings. If people respond to God by obeying his laws, this in a sense is an outward manifestation of their love for God. For God is love. This love for God is the same love that should apply to those around us through compassion and empathy. If love becomes the pinnacle of one's virtue in carrying out God's will, society as a whole will benefit tremendously.

The only way to carry out this compassion is to start developing it from within our own selves. For there is no point in caring for another if we as individuals do not have it in the first place. From the individual we also see potential. The potential to innovate and inspire, to fulfil God's abilities and gifts that He has given to each and everyone of us to excel in this world. For God does not place us in a world where we cannot thrive, because it is only through the determination and persistence that He provides within us, that make us overcome obstacles in life. Individual endeavour is a gift from God to do what is required of us to do in the time we have left in life, to fulfil the potential He has given to us. He has gifted us these. For Jesus Christ himself as an individual carried out the will of the Father all the way to the Cross, against a crowd and community who rallied for his demise.

This crowd mentality is exactly what the LTC Act 2020 potentially does. The ignorance of the masses against any individual whether justified or not, is cause for concern when considering the impacts of this Act on the Samoan Community. God has created an innate ability for individuals to thrive of their own accord, to use their own individual thoughts to seek their own truth but the bliss of ignorance is what draws them away from such potential and into the fold of popular opinion. Popular opinion on any topic may sound legitimate given its widespread acceptance by a majority of people, but it does not necessarily mean that it is truth nor fact. This could be disastrous on the stability of the village setting in Samoa in a case where an entire village is against an individual family over land.

As much as the CCCS is about its community of believers working together in the church, it would be more helpful for the minister to focus on individual empowerment first. If each individual member of the Parish is encouraged and motivated spiritually and emotionally, then together as a collective unit they will all thrive. The positive impact of

working together and helping one another as a community also helps the church and the CCCS. It would be more impactful if individuals were empowered of their own potential so that they do not need to look elsewhere but within to find their own God-given strength to do what is required of them in relation to their roles and responsibilities within the church.

What also needs to be recognised is that communal life plays a major part in the Samoan society. Whilst individualist sentiments have been advocated above, what is important here is that the individual is also recognised within the village and community. Although it is recognised, the point of this all is to acknowledge that should the potential for conflict arise, it is the individual who will always be at an obvious disadvantage.

Thus, proper judgement and diligence needs to be exercised by village councils who deal with matters concerning an individual's rights to land without being influenced by the emotional appeal and sensitivities that land has in the Samoan culture. God intends for us to judge wisely and to be impartial when making decisions so that proper justice may be carried out.<sup>1</sup> This can only be effective if there is humility in the heart of those making decisions and to rely upon evidence to make sound judgement.

With the enactment of LTC Act 2020, the potential for diligent judgement to thrive is highly questionable. This is because the Act gives more weight upon the village council to potentially make decisions with an unfettered discretion over matters concerning the village, including the individual rights to land. Hence, it is my firm view that in the interests of stability for the community and the life of the CCCS and its members, the LTC Act 2020 should be repealed.

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<sup>1</sup> Lev. 19: 15 in the, *Holy Bible: New Revised Standard Version: Containing the Old and New Testaments with the Deuterocanonical Books* (Peabody, Mass.: Hendrickson Bibles in Conjunction with Oxford University Press, 2008).

As of the date of this research paper, it is hoped that the newly elected F.A.S.T Government under the Honourable Fiame Naomi Mata'afa will repeal this act and return the LTC to the way it was before. Thus, Legal Pluralism is the way forward for Samoa and its people, as far as legal matters are concerned. It is my prayer and dream that Samoa as a Christian nation must find the law of God central in all its affairs and in the pluralistic understanding of its laws. Then, and only then, the people of Samoa will find true meaning of life as individuals and as a community, in faith and in love. On that note, I would like to end this conclusion and this paper with a theological affirmation, that God the Trinity, the Father, the Son and the Holy Spirit created laws in the very beginning for the good of all things in his creation. At the heart of these laws is the unconditional and everlasting love of God for the whole of his creation. This is exactly the reason why this pluralistic view of legal systems in Samoa, known as Legal Pluralism, is theologically valid.

## **Appendix**

### **Appendix A – Public Opinion of the LTC Bill 2020**

#### **Prominent Members of Parliament**

On 11 September 2020, Deputy Prime Minister Fiame Naomi Mataafa resigned from Cabinet having handed in her letter of resignation to Prime Minister Tuilaepa Sailele Malielegaoi citing her refusal to support the three proposed bills<sup>2</sup> that were being deliberated amongst the public at the time. She ran as an independent member of Parliament until she joined the newly formed opposition party, F.A.S.T.

In a media interview on 14 September 2020, Mataafa further discussed the reasons why she decided to resign, “the basis of my complaint is [that] we are sliding away from the rule of law and one to more [of] expediency”.<sup>3</sup> She was saying this in relation to the three proposed bills at the time, which she spoke out against. She believed that creating an independent LTC without the judicial oversight of the Supreme Court would leave it open to confusion and creating separate rulings that would have otherwise been unlawful had it been under one judicial system. The potential abuse of process, and thus a disregard for the rule of law in favour of expediency with the way these bills had been rushed, was cause enough for her opposition to be actioned in the form of her resignation.

It is important to note that when the bills were passed in parliament on 15 December 2020, the result was 41 votes in favour as against the 4 votes who opposed it.<sup>4</sup> Those in favour were all from the ruling HRPP whilst the dissenting 4 were the then independent

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<sup>2</sup> LTC Bill 2020, Judicature Bill 2020, and Constitutional Amendment Bill 2020.

<sup>3</sup> Mataafa Fiame Naomi, Samoa Deputy PM Resigns Claiming Country Is 'sliding Away from the Rule of Law, interview by Jordan Fennell, *Australian Broadcasting Corporation*, September 14, 2020, <https://www.abc.net.au/radio-australia/programs/pacificbeat/samoa-dpm-quits-gov-claims-country-sliding-away-from-rule-of-law/12660280>.

<sup>4</sup> Joyetter Feagaimaali'i, “L.T.C. Bills Pass Parliament,” *Samoa Observer*, December 15, 2020, <https://www.samoaoobserver.ws/category/samoa/76210>.

members of parliament, namely, Mataafa Fiaame Naomi, Olo Fiti Vaai, Faumuina Wayne Fong and then F.A.S.T Party leader, Laauli Leuatea Schmidt. All of whom were commended for their opposition efforts by then Prime Minister Tuilaepa Sailele Malielegaoi.<sup>5</sup> Further adding to their opposition of the bill, independent members Olo Fiti Vaai and Faumuina Wayne Fong openly criticised other members of Parliament for voting in favour of the bill despite their respective constituent's disapproval.<sup>6</sup> All four members who voted against the bill are current members of the F.A.S.T Party, a major opposition recently formed to face the H.R.P.P. Such a party would not have been formed had it not been for the passing of the bills in controversial circumstances.

Samoa was in a constitutional crisis as a result of the general elections held in April 9, 2021. However, on 26 July 2021, after 3-month standoff, the caretaker Prime Minister, Tuilaepa Sailele Malielegaoi conceded defeat to opposition leader Fiaame Naomi Mataafa of the F.A.S.T Party after the Supreme Court of Appeal ruled in favour of F.A.S.T as they ruled that the unusual swearing-in ceremony held outside of the locked parliament house on 24 May 2021 had been constitutional on the basis of necessity. This means they were adhering to the constitution but was prevented from the rival party without proper reason to carry out the swearing in ceremony as required by the constitution.

### **Samoa Law Society**

According to the Samoa Law Society, which is the professional association that represents all solicitors and barristers of Samoa, it was in their opinion that the passing of the bills felt “rushed”. This was due to the late inclusion of common law and principles of equity into the LTC Bill which at first only included the reliance on the *fa’asamoa*,

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<sup>5</sup> Sialai Sarafina Sanerivi, “P.M. Commends Four M.P.s Who Opposed L.T.C. Bills,” *Samoa Observer*, December 16, 2020, <https://www.samoaoobserver.ws/category/samoa/76272>.

<sup>6</sup> Soli Wilson, “Olo, Faumina Criticise M.P.s Voting against Constituents on L.T.C.,” *Samoa Observer*, December 21, 2020, <https://www.samoaoobserver.ws/category/article/76442>.

Samoa cultural values. The reason for this inclusion was so that the judicial process was more complete in creating more efficiency in its decision making. The Samoa Law Society claimed that such a late inclusion should have been discussed early on in its deliberations in the drafting the bill. The fact that it was not considered until very late into the draft is a reflection of it being rushed and not given the proper attention it deserved. Furthermore, the bill also gave the legislature the power to appoint and remove judges of the Supreme Court. This violates the independence of the judiciary, a core legal principle necessary for the courts to exercise their judgement free from outside interference and bias.<sup>7</sup>

Another concern for the Samoa Law Society was that if passed into law, the new court would have the potential power to overrule on freehold land and declare them as customary. This is in cases where land and border disputes between customary and freehold land may be presented before the court in which the Law Society says would give the LTC power to declare the land to be under the ownership of the customary land owners. This would in effect cause owners of freehold land to have no right of appeal since the LTC would have its own jurisdiction separate from the Supreme Court of appeal, whose own decisions also have different rulings on these matters.<sup>8</sup> Thus it causes inconsistency and confusion in relation to which judgement people would follow. Such are the potential problems presented when legal pluralism is fully realised in the establishment of these two separate judicial systems.

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<sup>7</sup> Sapeer Mayron, "Judicial Changes Unworkable Mess: Law Society," *Samoa Observer*, December 20, 2020, <https://www.samoaoobserver.ws/category/samoa/76425>.

<sup>8</sup> Lanuola Tusani Tupufia-Ah Tong, "Land and Titles Court Overhaul Could Redefine Land," *Samoa Observer*, April 26, 2020, <https://www.samoaoobserver.ws/category/article/61927>.

## **Ombudsman of Samoa**

The ombudsman of Samoa, Maiava Iulai Tuiloma, who was also the then Head of the National Human Rights Institution in 2020, also expressed opposition in relation the bills especially as it affected changes to the constitution of Samoa. Although Maiava was emphasising religious freedom as one which gives individual rights over that of the community, his main point would have an indirect effect on the legal pluralistic nature of the issue in general. In relation to the impact it would have on the constitution by adding a separate judicial system creating an independent LTC court altogether, Tuiloma submitted:

“What the Bills appear to do is to merely stick the entirety of the Land and Titles Courts structure in the body of the Constitution and to place that structure and its deliberations outside of regular Constitutional surveillance provided for under the Constitution. With respect, what this creates is the impression of a fragmented rather than an integrated Constitution which doesn’t look any more Samoan than what we already have.”<sup>9</sup>

For Tuiloma, if the aim of the bill was to create a separate court system which prioritises the values of Samoan custom, keeping the same would also serve that purpose. The constitution is Samoan enough. Tuiloma also believed that the Samoan culture, the Fa’asamoa, was always protected in the Constitution despite the contrary belief. The idea between the protection of individual rights against the community especially in relation to religious freedom was always protected under the constitution and also vice versa. Although proponents of the bill would suggest otherwise, Tuiloma argues that both rights are already preserved in the constitution.

## **United Nations**

Speaking on behalf of the United Nations Human Rights council, Special Rapporteur on the Independence of Judges and Lawyers, Mr Diego García-Sayán

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<sup>9</sup> Sapeer Mayron, “Ombudsman Opposes Changing Constitution,” *Samoa Observer*, May 17, 2020, <https://www.samoaoobserver.ws/category/samoa/62928>.



expressed deep concerns for the bills should they be passed into law. In an open letter to the Government of Samoa dated 26 May 2020, he wrote:

“I am concerned that the proposed amendments to the Constitution, [...] 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.”<sup>10</sup>

It is clear from the above that the independence of the Judiciary is an important principle to follow in any democratic society. There are international standards mentioned above which measure Samoa to the rest of the world in relation to the freedom of the courts to properly exercise their decision-making free from all interference and influence. That influence also extends to interference from the legislative and executive arm of government, who are responsible for the creation of laws and its administration respectively. The potential result mentioned by Savon presents a problematic situation should such a circumstance eventuate. There would be serious uncertainty for citizens should there be an establishment of another LTC if the bills were passed.<sup>11</sup>

## CCCS

The largest Christian denomination in Samoa, the CCCS, also voiced public opinion in relation to the proposed bills at the time. In a media interview, the General Secretary of the CCCS, Rev. Vavatau Taufao, asked the government to shelve the bills.<sup>12</sup> Having

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<sup>10</sup> Joyetter Feagaimaali'i, "Withdraw Constitutional Change: U.N. Human Rights Council," *Samoa Observer*, May 29, 2020, <https://www.samoaoobserver.ws/category/samoa/63599>.

<sup>11</sup> With the passing of the bill, it remains to be seen how such changes will impact society since it is still in early in its enactment.

<sup>12</sup> James Robertson, "C.C.C.S. Asks Govt. To 'Shelve' L.T.C. Bills," *Samoa Observer*, October 2, 2020, <https://www.samoaoobserver.ws/category/samoa/71927>.

met with the special committee behind the proposed bills, a submission was made confirming that they were not in support of it.

Consultation with Government officials and the Samoa Law Society allowed the General Secretary and for other prominent members of the CCCS to see both sides of the argument. Having been advised of the merits and weaknesses of the bills, the general secretary decided their position was not in favour of the proposed bills. In expanding on the decision, Rev. Vavatau Taufao said in his media interview:

"It was also not made up by an individual or just a few people. It was a collective decision made by the church, after seeking legal advice and expertise from both sides regarding the bills, we invited lawyers, one from the government and one from the Samoa Law Society to explain and help us understand the bills before we made our submission. If we look at these bills, you can't help but wonder. If those who went to law school, and are well-educated in terms of laws and legislations and have experience in this profession, are making a lot of noise against these bills, I should worry too.

If they are threatened by these bills, an ordinary citizen like me should be alert and keep my eyes open."<sup>13</sup>

The collective decision was reliant upon professional advice from the Law Society, whom the General Secretary viewed as being more perceptible and knowledgeable in their area of expertise. It would be a potential cause for alarm as it would impact the church at the local level in managing the relations between their own parishioners who would potentially be affected by future decisions pursuant to the proposed bills, should they be passed into law.

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<sup>13</sup> J James Robertson, "C.C.C.S. Asks Govt. To 'Shelve' L.T.C. Bills,"

## **Prime Minister of Samoa**

In his statement addressed to Parliament on 26 May 2020, the Prime Minister at the time, his Honourable Tuilaepa Aiono Sailele Malielegaoi<sup>14</sup>, responded to those who questioned the LTC Bill to provide more clarification on the issue.<sup>15</sup> Key points were made in his statement which outlined why support for the proposed changes to the LTC were necessary. Before stating his position, he was open to those for and against the bill, to provide their submissions to the Special Parliamentary Committee<sup>16</sup> tasked with assessing the impacts and merits of the bills from the public.

He first addressed the “baseless” accusations that, should the bills be passed, there would be another arm of government. In response he stated that regardless of how many courts there were, they would all be under the one arm of government, the Judiciary. “Honourable speaker, there is only one judiciary, whether we have 2, 3 or 10 courts, they will all be under this one label, the judiciary”.<sup>17</sup> However, a simple classification of putting them under one general label overlooks the necessity for a single hierarchal system to provide each level of court to be reviewed over their decisions, so that proper justice can be efficiently administered. It is not the number of courts that would concern those opposed, but how they are structured in the hierarchal sense. Although all courts are part of the judiciary as stated, it is in name only, not how it functions.

The Prime Minister then provided a historical basis for the independence of the LTC by referring to its development over the past century. In his statement he provided

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<sup>14</sup> At the time of this paper, leader of the victorious F.A.S.T Party who won the national elections held on the 9 April 2021, the Honourable Fiame Naomi Mata’afa, finally moved into office after caretaker Prime Minister Tuilaepa Sailele Malielegaoi left office after it was held by the Supreme Court of Appeal that swearing in ceremony performed by the F.A.S.T Party was valid despite the non-attendance of the opposition for reasons that lacked reasonable cause.

<sup>15</sup> Funefe’ai Dikaosune Atoa Tamaalii, “Ministerial Statement in Parliament 26 May 2020 by the Prime Minister of the Independent State of Samoa,” *Government of Samoa*, May 26, 2020, <https://www.samoagovt.ws/2020/05/ministerial-statement-in-parliament-26-may-2020-by-the-prime-minister-of-the-independent-state-of-samoa/>

<sup>17</sup> Ibid.

the historic legislation that was enacted which in turn developed overtime towards the current period of the LTC.

“To prove this point, the Native Land and Titles Protection Ordinance was passed in 1934 by the New Zealand Government. That Law provided Exclusive Jurisdiction to the Lands and Titles Court on traditional lands and titles, but this law was passed in 1934 when Samoa was under foreign administration. The same Law was repealed and superseded by the Lands and Titles Act in 1981, after 47 years during the times of Tupuola Efi’s government.”<sup>18</sup>

The Prime Minister argued that the oversight of the Supreme Court of Appeal over the LTC on the basis of individual rights was only a modern occurrence. A modern adaption of the constitution which covered for these rights. Decisions of the LTC would be reviewed by the Chief Justice of the Supreme Court which he described were “papalagi” in nature, or influenced from Western ideals.

“It was only recently that the Chief Justice started examining and assessing decisions by the LTC, where individual rights are concerned. This means that the Chief Justice could once again review decisions by the Lands and Titles Court where individual rights are considered, because of the provisions in our Constitution and as in most other constitutions of the countries of the world, administered or formerly administered by papalagi.”<sup>19</sup>

In other words, the Constitution provides exclusively for individual rights, as it is common across all other constitutions throughout the world but it does not necessarily coincide with Samoan custom over matters of Samoan cultural importance. Because it does not cover for communal rights, the justification for a Samoan-style court was

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<sup>18</sup> Funefe’ai Dikaaiosune Atoa Tamaalii, “Ministerial Statement in Parliament 26 May 2020 by the Prime Minister of the Independent State of Samoa.”

<sup>19</sup> Ibid.

necessary. This also applies to Judicial Review of matters. Although the Prime Minister mentioned that this will still be in the proposed bill at the time, judicial review cannot cover matters of a communal nature, despite that there could be an overlap with individual rights should it be before the newly proposed court. This was emphasised further in his statement in Parliament and to the Speaker:

“I do not need to mention Honourable Speaker, the differences there will be when our own people preside over our own Courts that handle traditional and cultural matters. Why? Because they know, understand and appreciate our own traditions, customs and culture very well.”

The rights of the individual should not take priority over the rights of the community. Rather, they should be equally important especially in Samoan society. For the Prime Minister, this was a final point that had to be made to reflect the reality and seriousness of the issue, when considering what it can contribute towards in providing stability and calm throughout a village. In short, the individual rights are a product of Western ideals, whilst communal rights, are an essential element in harmonious living in Samoan society. The village structure reflects that in the current reality of Samoa. The Prime Ministers puts it quite bluntly in his ministerial statement:

“I have already mentioned that the focus on the rights of the individual is from practices of Great Britain and other countries overseas. These are their customs. But communal rights is the key element holding together our culture and traditions and the peacefulness of our people. So, what are these Bills as opposed by many trying to achieve? The answer is recognizing the cultural rights of our customs and traditions that our ancestors’ abode by and guides how we live today. The Parliament is aware of these principles as articulated in the Proposed Amendments.”<sup>20</sup>

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<sup>20</sup> Funefe’ai Dikaaiosune Atoa Tamaalii, “Ministerial Statement in Parliament 26 May 2020 by the Prime Minister of the Independent State of Samoa”

Such communal rights, is what the Prime Minister believes to be the wishes of the forefathers that were expressed during the Constitutional Convention, to prioritize our culture, customs and traditions. The common goal for these amendments was to improve the court system and place more value on Samoan tradition in the proposed new LTC

## Glossary

<i>alofa</i>	-	love
<i>fa'aaloalo</i>	-	respect
<i>Fa'asamoa</i>	-	The Samoan way
<i>Matai</i>	-	Chief
<i>Res Judicata</i>	-	A matter decided
<i>soalaupule</i>	-	consensus
<i>tu ma aganu'u</i>	-	custom and tradition

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