

THE UNDER-THEORISATION OF RELIGIOUS FREEDOM IN POLYNESIA – TWO CASE STUDIES

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Most of the Pacific Island nations have constitutions that draw their understanding from international human rights instruments, including the religious liberty provisions of the Universal Declaration of Human Rights 1948 and the International Covenant on Civil and Political Rights 1966. This article examines aspirational religious liberty in Tuvalu and Samoa against customary expectation and practice. While violence premised in religious difference is rare, the toleration of minority belief and practice in accordance with the UN standards does not come naturally in any country, especially when culture and custom dictate majoritarian outcomes. As Martha Nussbaum has suggested in relation to religious liberty in the United States, the foundations and justifications of freedom of conscience and religion need to be relearned in each new generation if they are to protect minorities as envisaged by the framers of the UN instruments after World War II.¹

I INTRODUCTION

The thesis in this article is that freedom of conscience and religion in Polynesia is under-theorised and that the lack of understanding of what freedom of conscience means in practice results in occasional village conflicts. However, violence premised in religious difference is rare in Polynesia. That may be because religious difference is itself a European introduction and does not engage the strongest sensibilities of the Polynesians, despite their famous church attendance in their home islands. The lack of violence is more likely because populations are small, and because lived history and European teaching have identified other means of conflict resolution. In this article I will explain my statement that freedom of conscience and religion in Polynesia is under-theorised and not well understood with two examples – Tuvalu and Samoa.

I first briefly sketch the history of the idea of freedom of conscience and religion and suggest that it does not come naturally to any culture. Rather it is the learned product of compromise and results from belligerent willingness to abide the terms of documentary peace. It is the product of constructive reason rather than of any particular culture or custom. Culture and custom generally operate to favour the most powerful opinions in any society and tyrannise minority viewpoints.

In the first example, I review the constitutional freedom of religion that has been established in Tuvalu, one of the smallest nations in the Pacific. Tuvalu features a modern constitution that ‘ticks all the boxes’ where human rights principles are concerned. These principles have

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clearly descended from the *Universal Declaration of Human Rights* ('UDHR')² and the two UN covenants, the *International Covenant on Civil and Political Rights* ('ICCPR')³ and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').⁴ However, there is an interesting proviso in relation to local culture that bears the hallmarks of localisation, but which does not fully connect with local culture or guide religious freedom or practice when it is inspected closely.

In my second example, I consider freedom of religion in Samoa. Again, the Constitution bears the hallmarks of UDHR ancestry, but it is a first generation example, originating as it did in 1960 before the ICCPR and ICESCR were finalised and ratified. Only chiefly males were given the vote when Samoa became independent in 1962, and that restriction did not end until 1990, but with a quid pro quo – the passage of the *Village Fono Act 1990* (Samoa) ('VFA'), which reinstated some chiefly control of village discipline at the same time as women were given the vote for the first time to satisfy international concern. I review the context of that change and the disagreement about what village discipline meant historically and what it means in the 1990 legislation, and discuss how it has led to conflict with freedom of conscience and religion under the 1960 Constitution.

I conclude that as in Europe and the United States, freedom of conscience and religion was not a natural state in either of these countries and no existing customary dispute resolution mechanism existed to resolve dissent in a way that protected minority belief. Custom in Polynesia, as elsewhere in the world, entrenched majoritarian attitudes and was unaccepting of minority opinion and practice, including minority opinion premised in religious belief. The history of freedom of conscience and religion is the product of collective human reflection after hundreds of years of conflicts in and between European countries with large populations. While freedom of conscience and religion can provide a universal solution to religious conflict, it cannot do so unless its philosophy is understood in every place where it is implemented on paper. Even in the United States, Martha Nussbaum is correct to have observed that freedom of conscience and religion needs to be relearned in each succeeding generation.⁵ That is because a useful understanding of freedom of conscience and religion does not come naturally to the human race.⁶

² *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

³ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

⁴ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

⁵ Martha C Nussbaum, *Liberty of Conscience: In Defence of America's Tradition of Religious Equality* (Basic Books, 2008) 361. In an American context, Martha Nussbaum has observed that the origins and wisdom of religious equality, and what she calls "the battle for equal respect...[must] be refought in each new era".

⁶ Martin Krygier, 'The Rule of Law: Pasts, Presents, and Two Possible Futures' (2016) 12 *Annual Review of Law and Social Science* 199, 201-8. However, note that in his extensive writing about 'the rule of law', Martin Krygier has confirmed that rule of law obedience is learned behavior and that even the cultures that do learn it, can lose it easily if they do not nourish it. Recently, for example, he has said that although concern to temper the arbitrary exercise of power is millennia old, the residues of thought and practice which enable the management of arbitrary power in western culture and particularly in the common law tradition, extends through many generations and can instruct us how to develop what Montesquieu called 'moderate forms of government'. He says in particular that:

Distinctive and strong rule of law traditions are not natural facts, in some times and places not facts at all. In the Russian imperial state tradition, for example, law was not a central cultural symbol, and to the extent that it counted, it did so as an arm of the central tsarist power, over which there stood no mortal superior. The notion that power should be framed and restrained by law; that law should have a power-tempering role, both horizontally among members of society and vertically between political power-holders and their subjects; or that it should do anything but transmit central orders, was for long periods unknown, then heretical, more commonly alien, and late and weak in developing.

II THE ORIGIN OF THE IDEA OF FREEDOM OF CONSCIENCE AND RELIGIOUS LIBERTY – A HISTORICAL OVERVIEW

In this brief overview, it is not possible or appropriate to discuss all the ideas that seeded the international norms that flowed from the *UDHR*. My purpose is more limited. I acknowledge ideas of community over self that flow from Confucian and other traditions. I acknowledge the European idea, perhaps most famous in *Magna Carta* and the *Treaty of Westphalia*, that a written document can capture the terms of a peace accord that will protect and bind its signatories if they are collectively faithful to it. I also acknowledge the idea that natural rights flow from reason, a contribution made by Greek and Roman philosophers. However, what I will do in this part is identify the idea of freedom of conscience and religion that crystallised after World War II in the consensus achieved by those who framed the *UDHR*. While it is true to observe that there are many respects in which all of the *UDHR* ideas remain aspirational, I submit that those aspirations have now infected the world so thoroughly that it is unlikely any single dictator will ever succeed in suppressing them again.

The story of the evolution of the idea of freedom of conscience is not the study of the principled development of a noble dream. For the most part, it is a story of conflict and compromise, and paradoxically it is a story of selfishness and the almost complete absence of any fragment of the religious idea of reciprocity. Ancient Roman policy included a version of pluralism which included religious liberty at times, but the policy was inconsistently applied. Christianity for example, was ignored, then persecuted and finally tolerated under Constantine.⁷ ‘Attempts had been made to incorporate...it [along with]the religions of Isis, Mithras...and others...[into] one vast polytheism, whose cult was to be maintained and controlled by the State’.⁸ But ‘Christianity would not accept this inferior position...and from the fundamental conflict arose the problem of Church and State’.⁹ Broadly stated, that problem was ‘that many earnest thinkers f[ou]nd it impossible to accept the State as the highest form of human society’¹⁰ or the ultimate authority in their lives. In Europe, this core philosophical problem explains ‘the long conflict between the Empire and the papacy’¹¹— and in England it explains the conflicts between Archbishop Thomas A’Becket and King Henry II and even the Puritan revolution which spilled onto American soil.¹² While the church could be ‘a potent ally’, it could also be a ‘vigorous rival’.¹³

Durham and Scharffs suggest that the ‘pattern of the persecuted becoming persecutors’¹⁴ manifests ‘[a] flagrant flaw of human nature’¹⁵ — ‘the tendency of a majority group to abuse its power to the detriment and suffering of minority peoples’.¹⁶ The irony is that the persecuted become persecutors when ‘emboldened by the strength of their numbers’.¹⁷ Christians persecuted from approximately 64 AD under Nero into the early part of the 4th century AD when Constantine and Licinius concluded the Edict of Milan, were invested with state power and became persecutors of their own dissenters.¹⁸ But in the Christianised Western empire, ‘neither the church nor state could ever totally subordinate the other’.¹⁹ ‘The result was a continual tension between religious and political institutions that...contributed

⁷ Theodore F T Plucknett, *A Concise History of the Common Law* (Little Brown and Co, 1956) 4.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid 5.

¹³ Ibid.

¹⁴ Cole Durham and Brett Scharffs, *Law and Religion: National, International and Comparative Perspectives* (Aspen Publishers, 2010) 4.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid 7.

¹⁹ Ibid 10.

to a sense that both institutions were subject to limits'.²⁰ Though it took a long time and a lot of war, the resulting detente seeded dualistic thought and political theory. Additionally, in England and her American colony, after the efforts of the Tudors and Stuarts to once again subordinate the church, uniting the two great domains under one grand head, it led to the idea of tolerance as first a tentative, and then a confident solution.

Edwin Gaustad tributes the American religious reformer Roger Williams as the source of many of John Locke's more famous ideas concerning toleration.²¹ But when John Locke wrote his famous 'letters concerning toleration' between 1689 and 1692, much of the 'terror' which attached to these ideas when Roger Williams wrote in 1642, had dissipated.²² England now had its own Bill of Rights and William of Orange was the new king (jointly with his wife, Mary II of England) following the 'Glorious Revolution' of 1688. Durham and Scharffs list six of Locke's key ideas, and summarise that he 'rejected the prevailing notions of church and state in his time',²³ including the idea that 'an established homogeneous religion...could serve as a kind of social glue and...motivation for loyalty...to the regime'.²⁴ Locke's keys to effective toleration were: separation of the civil and religious spheres; ensuring that civil power does not extend to the religious sphere; ensuring that religion is not entitled to assert civil power; acknowledging that the State is incompetent to ascertain religious truth; acknowledging that plurality is a source of stability; and acknowledging that there is no civil obligation to tolerate intolerance.²⁵

Locke argued that coercion in matters of religion had no value whatever; that the State could not force anyone to heaven; and that toleration was more likely than coercion to stabilise a political regime.²⁶ Locke had profound influence in America, but most notably with Thomas Jefferson and James Madison 'who drew upon his work in building their case for a broad understanding of religious freedom'.²⁷ Voltaire captured Locke's sentiments very well when he later wrote on the toleration that evolved in England after the American revolution:

If there were only one religion in England there would be danger of despotism, if there were two they would cut each other's throats, but there are thirty, and they live in peace and happiness.²⁸

Much in the United States Constitution and Bill of Rights must be attributed to the spirit of compromise.²⁹ James E. Wood Jr states that 'assurances of religious liberty were needed to protect...religious diversity...[and] were an important way of building a consensus'.³⁰ Thomas Berg explained the pragmatism when he wrote:

The founding era was only a few generations removed from major religious persecutions and conflicts – Protestants versus Catholics, Puritans versus traditional Anglicans, majority churches versus dissenting sects – in England and continental Europe. America's founders knew very well that, in James Madison's words, [t]orrents of blood

²⁰ Ibid.

²¹ Edwin S Gaustad, *Liberty of Conscience: Roger Williams in America* (Judson Press, 1999) 196–8; See also Martha C Nussbaum, above n 5, 41.

²² Gaustad, above n 21, 199.

²³ Durham and Scharffs, above n 14, 14.

²⁴ Ibid, quoting Cole Durham 'Perspectives on Liberty: A Comparative Framework' in Johan Van der Vyver and John Witte (eds), *Religious Human Rights in Global Perspective: Legal Perspectives*, (Martinus Nijhoff, 1996) 1, 7.

²⁵ Durham and Scharffs, above n 14, 14–17.

²⁶ Ibid 14.

²⁷ Ibid.

²⁸ Voltaire, *Letters on England* (Penguin Books, 1980) as quoted in Durham and Scharffs, above n 14, 11.

²⁹ David Little, 'The Reformed Tradition and the First Amendment' in James E Wood (ed), *The First Freedom: Religion and the Bill of Rights* (Baylor University Press, 1990) 17.

³⁰ James E Wood, 'Religion and the Constitution' in Wood, above n 29, 10.

have been spilt in the Old World, by the vain attempt of the secular arm to extinguish religious discord, by proscribing all differences of opinion in religion.³¹

Roger Williams had stated that ‘enforced uniformity (sooner or later) is the greatest occasion of civil war’³² — the separation of state and religion was necessary to protect religion.

An understanding of the principles of toleration distilled gradually as it dawned on philosophers and politicians that coercion had not solved the problem of sectarian violence. Locke's idea that compulsion was the antithesis of any meaningful sense of worship in religion crystallised into a political understanding that coercive suppression of minority belief did not benefit government in the long term either. There was ‘consonance between a system of civil peace based on freedom of conscience and a Christian gospel conveyed freely and in peace by persuasion, admonition, and example, rather than by force’.³³

For Nussbaum, Roger Williams' understanding of liberty of conscience was the root, not just of religious tolerance, but of sincere mutual religious respect,³⁴ prefigured not only Locke, Jefferson and Madison, but also Rawls' idea of overlapping consensus as the solution to peace in the liberal state in both his *Theory of Justice* and *Political Liberalism*.³⁵ Compared to Locke, and in some respects Kant, Williams has an extra measure of psychological insight. He helps us see why persecution is so attractive and what emotional attitudes might be required to resist it.³⁶ Further, he is absolutely sure that the ‘[l]aw and force have absolutely no place in the sphere of the soul and its safety, which must be governed by persuasion only’.³⁷ The result of this understanding of ‘how to live with people who are different’³⁸ is that we need to relearn and refresh our understanding³⁹ of why ‘a demand for imposed homogeneity’⁴⁰ is misguided and cultivates ‘an atmosphere of suspicion and fear [which leads to]...intolerance and disrespect’.⁴¹

In her seminal 2001 book *A World Made New*,⁴² Mary Ann Glendon has explained that the large personalities in the drafting of the *UDHR* were P C Chang (China), Charles Malik (Lebanon), Eleanor Roosevelt (US), Carlos Romulo (Philippines), Henan Santa Cruz (Chile), Alexei Pavlov (USSR), John P Humphrey (Canada), Hansa Mehta (India) and Rene Cassin (France). Many other nations including Australia also assisted with this process. Dr Herbert V Evatt from Australia stressed the foundation of human rights in economic justice. At all material times, the United Kingdom and the United States were reluctant. Thus, though some saw Eleanor Roosevelt as advocating her late United States President husband's ‘four freedoms’ dream, her work was not appreciated as the United States retreated to a version of its traditional isolationism – save to the extent that its economic interests and post-war occupations dictated otherwise. United States ambivalence towards the UN is perhaps most clearly demonstrated in its failure to ratify the *ICCPR* until 1992 and the fact that it has still

³¹ Thomas C Berg, ‘Introductory Essay’ in Thomas Berg (ed), *The First Amendment: The Free Exercise of Religion Clause: Its Constitutional History and the Contemporary Debate* (Prometheus Books, 2008) 17, quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), reprinted in R.A. Rutland and W.M.E. Rachal (eds), *The Papers of James Madison* (University of Chicago Press, 1973) 11; See also Douglas Laycock, ‘Religious Liberty as Liberty’ in Thomas Berg (ed), above, 145–7.

³² Roger Williams, *The Bloody Tenent of Persecution, for Cause of Conscience, Discussed, in a Conference between Truth and Peace* (1644) as quoted in Durham and Scharffs, above n 14, 19.

³³ Little, above n 29, 36.

³⁴ Nussbaum, above n5, 34–71.

³⁵ *Ibid* 57–58; See also Andrew Koppelman, ‘Corruption of Religion and the Establishment Clause’ (2009) 50(6) *Mary & William Law Review* 1831.

³⁶ *Ibid* 58.

³⁷ *Ibid* 59.

³⁸ *Ibid* 13.

³⁹ *Ibid* 4, 361.

⁴⁰ *Ibid* 308.

⁴¹ *Ibid*.

⁴² Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2002).

not ratified the *ICESCR*. The *UDHR* was a genuinely international achievement and was largely the work of non-western philosopher diplomats reflecting on how world war could be avoided in the future. The international resonance of their achievement is demonstrated by the almost universal acceptance of the *UDHR* and the 21st century status of the *ICCPR* and *ICESCR*, recognised as legitimate customary international law.

III RELIGIOUS FREEDOM IN TUVALU

In my introduction I stated that Tuvalu has a very modern Constitution that ‘ticks all the boxes’ so far as human rights principles are concerned. That is because it not only includes the right to change religion, which was accepted when the *UDHR* was adopted, but it also faithfully uses the words and concepts of the limitation in Article 18(3) of the *ICCPR*. Furthermore, I have also expressed the view that it is under-theorised because I do not believe that the additions to the simple *UDHR* and *ICCPR* concepts, that are a part of its structure, are faithful to those concepts. That is, the drafters of Tuvalu’s Constitution, failed to consider all the consequences of departing from UN standards.

In Article 18, the *UDHR* states:

Everyone has the right to freedom of thought, conscience and religion: this right includes the freedom to change his religion or belief, and the freedom alone or in community with others and in public or private, to manifest his belief in teaching, practice, worship and observance.

Article 18 of the *ICCPR* states:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom either individually or in community with others and in public or private, to manifest his belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice.
3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents, and where applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The concept of freedom of conscience and belief expressed in these instruments begins with the individual and is extended into the community so that individuals can worship and otherwise practice their religion together, without state intervention, except where necessary by a valid law passed ‘to protect public safety, order, health or morals or the fundamental rights and freedoms of others’.⁴³ In the Tuvaluan Constitution (1978), this non-derogable individual right is sublimated to the interests of the collective in the name of culture, and the *ICCPR* requirement that the state show necessity before it intrudes is diluted. The change is subtle and may not be appreciated unless ss 23(6) and 29 are read together, yet it is introduced by the words that have been grafted on to Article 18(3) of the *ICCPR*. The other changes are not as significant.

Section 23 of the Tuvaluan Constitution⁴⁴ provides for freedom of conscience and religion in a manner consistent with the requirements of Article 18(3) of the *ICCPR*, save that the requirement of necessity before national law interferes with this liberty is replaced with the

⁴³ *ICCPR* art 18(3).

⁴⁴ Tuvaluan Constitution s 23.

lesser idea that such interference need only be reasonable. Moreover, in s 29⁴⁵ the protection afforded to freedom of conscience and religion is further reduced because it is sublimated to 'values, culture and tradition'. There is also an extended anti-discrimination provision in s 27, but it does not require analysis given my limited purpose here. I do observe, however, that the anti-discrimination provisions do not extend beyond the traditional human rights and freedoms set out in the *UDHR* and the *ICCPR* (race, ethnicity, political opinions, colour and religious belief). Discrimination on grounds of gender and sexual orientation are not protected.

The addition of the words 'including the right to observe and practice any religion or belief without the unsolicited intervention of members of any other religion or belief' at the end of s 23(6) reads like an innocuous explanation of what it means to protect the rights and freedoms of other persons. But when the explanation set out in s 29(3)-(5) is factored in, the non-derogable limitation intended by Article 18(3) of the *ICCPR* can be seen to have been extended to protect a mere claim of offence on grounds of culture. If this extension holds in law, then a claim of cultural offence can trump a claim that an individual was manifesting her religion within the meaning of Article 18(2) of the *ICCPR*, even though there was no law passed to prevent that manifestation of religion – whether it was necessary or not. The cultural addition in the Tuvaluan Constitution thus deprives the idea of 'necessity' under Article 18(3) in the *ICCPR* of all meaning. No doubt defenders of these cultural rights under the Tuvaluan Constitution would cite s 15⁴⁶ and deny that these qualifications of the *ICCPR* freedom are a significant derogation from the freedom that was intended by the framers of the UN instruments. But s 15(5) further undermines the *ICCPR* necessity requirement by providing that any previous decision of a Tuvaluan court, or even a decision of a court in another country, can trump the UN standard.

Though any court interpreting ss 23 and 29 is instructed to have regard to international instruments and jurisprudence, the words of the Tuvaluan Constitution will govern. Those words replace the UN requirement of 'necessity' with the lesser standard of 'reasonableness'. They also remove the UN requirement that there be a law passed before freedom of conscience and religion can be abrogated or interfered with in any way. The difficulty is exposed if one considers two simple, but likely examples. First, imagine the pastor of a new religious movement going door to door in Tuvalu to discuss religion with his neighbours. If one of his neighbours alleges cultural offence and takes the matter to court, the pastor must defend. If the UN standards alone were followed, the assertion would not be contestable. Provided the pastor was not inciting violence, his manifestation of his religious belief would be constitutionally protected in accordance with the *ICCPR* standard. Any local law passed to curtail his conscience right would be invalid as unnecessary 'to protect public safety, order, health or morals or the fundamental rights and freedoms of others'.⁴⁷ Second, imagine further a new religious movement convened to worship in a traditional Tuvaluan home without walls. If the small new congregation chooses to worship by singing a song that is unfamiliar to neighbours, the difference in music may alert the village to the presence of the new church. If a neighbour alleges that the non-traditional music offends because it not familiar either culturally or religiously, the members of the new congregation may have to defend themselves even though no law has been passed outlawing the music, on grounds of offence against public safety, order, health or morals or the fundamental rights and freedoms of others. Never mind that the existence of an established Christian church in the village has genealogy extending only into the 19th century. The assertion of the value leads to a contest that would not have arisen but for the qualification of the UN freedom of conscience and religion standards.

⁴⁵ Ibid s 29.

⁴⁶ Ibid s 15.

⁴⁷ *ICCPR* art 18(3).

I do not deny that Tuvalu has values and culture that are foundationally important. However, I am pointing out that the primacy given to these values in the Constitution creates a contestability that would not arise if the simpler UN standards were observed. This is ironical on two fronts. The first is that Tuvaluan culture has a general aversion to confrontation, meaning that the introduction of western-style contestability may itself represent an affront to Tuvaluan culture and values.⁴⁸ The second is that traditional Tuvaluan architecture features few walled dwellings.⁴⁹ The traditional absence of walls limited privacy and enabled engagement with new ideas, but it also allowed any disagreement to be settled in the local community of ideas. To the extent that culturally sensitive drafting of the Tuvaluan Constitution departs from the UN standard of freedom of conscience and religion, it also departs from the traditional non-confrontational approach to religious dispute resolution. I explain traditional Tuvaluan dispute resolution methods below, but for my present purposes, I wish to focus on the damage done to the UN standards by the Tuvaluan culture qualifications that have been added without proper reflection on the consequences.

I suggest that the Tuvaluan constitutional version of freedom of religion and conscience is under-theorised, because the consequences of the changes to the UN standards endanger the principle of freedom of conscience and religion itself. I accept that the assertion of western legislative standards in a different culture may be colonial and paternalistic,⁵⁰ but the *UDHR* and the *ICCPR* are not western standards.⁵¹ Thus it should not be assumed that localising the UN standards will not dilute them nor result in a loss of their integrity. In the case of the Tuvaluan Constitution, I submit that the localisation efforts were a mistake. Fortunately, Tuvaluan society is not culturally litigious and the issue has rarely been raised for consideration.⁵²

This interference with the idea of ‘necessity’ as a precondition to the legislative limitation of freedom of conscience and religion under Article 18 of the *ICCPR*, does not stand alone. In explaining why Christian churches in Australia are skeptical about protecting human rights by charter, Patrick Parkinson has observed that the similar removal of the necessity requirement when the Victorian State Charter was drafted in that country, showed that those

⁴⁸ Because Tuvalu is a very small country, it has not produced an extensive literature documenting its aversion to confrontation. However, the Prime Minister, Hon Saufatu Sopoanga made an oblique reference to that aversion in paragraph 7 of his 24th September 2003 address to the General Assembly of the United Nations, see Statement by Hon Saufatu Sopoanga OBE, Prime Minister and Minister of Foreign Affairs of Tuvalu, 58th Session of the United Nations General Assembly (24 September 2003) <<http://www.un.org/webcast/ga/58/statements/tuvaeng030924.htm>>; See also Patrick Safran, ‘Small is Beautiful, But Fragile in the Pacific’ on Patrick Safran, *Asian Development Blog* (13 January 2016) <<https://blogs.adb.org/blog/small-beautiful-fragile-pacific>>.

⁴⁹ Balwant Saini and Alison Moore have observed that ‘walls are often omitted [in Pacific Island homes] to allow good cross-ventilation in an environment where humidity is extremely high’: ‘Traditional architecture in the Pacific’, University of Queensland School of Architecture Publication UQ 13635 (<http://espace.library.uq.edu.au/view/UQ:13635/bs_tradarchpac.pdf>). However, there is some evidence of adobe wall construction in more recent times, see (<<http://www.encyclopedia.com/places/australia-and-oceania/pacific-islands-political-geography/tuvalu>>).

⁵⁰ Randall Peerenboom, *Asian Discourses of the Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries* (Psychology Press, 2004).

⁵¹ Note that Mary Ann Glendon explains how the UDHR is truly an international creation partaking of and blending elements of cultures from all over the world in her book, *A World Made New*, above n 42. Brett Scharffs makes the same point with his more specific example of the concept or *ren* or ‘two-man-mindedness’ in the *UDHR*. See, eg, International Centre for Law and Religious Studies, *Scharffs at Indonesian Conference on Shari’a and Human Rights* (13 June 2011) <http://www.iclrs.org/index.php?blurb_id=1302&page_id=1>.

⁵² See, eg, US Department of State, *Tuvalu: International Religious Freedom* (2006) <<http://www.state.gov/j/drl/rls/irf/2006/71361.htm>>, where the Department of State references the banning of a new charismatic Christian church by ‘an island council of elders’, which was upheld by the Chief Justice because of the right to restrict ‘the constitutional right to freedom of religion in cases where they contended it could threaten traditional mores and practices’. The same report also references the issue of temporary High Court injunctions to stop action against the same church when a second island council attempted to ban it in 2006.

framers were not 'serious' in their wish to protect freedom of conscience and religion. Parkinson said:

Christians who are opposed to a Charter of Rights...would be less opposed...if they thought that the legislators and policy makers would take all human rights seriously, and faithfully protect freedom of religion and conscience in the manner required by Art 18 of the *ICCPR* and other human rights instruments. The suspicion that those advocating for a charter don't take freedom of religion and conscience nearly seriously enough – a concern which has been fuelled by the track record of the human rights lobby and the drafting of the two Charters that already exist in Australia – has certainly played a significant part in enlivening opposition to a national Charter.⁵³

Parkinson further observed that even though churches want human rights recognised, they do not believe that charters assist.⁵⁴ Their concerns stem from the perception that current standard form charters 'may be used to support agendas hostile to religious freedom', do not always 'enact the grounds of limitation contained in Article 18' of the *ICCPR*, and that 'governmental human rights organisations [can be]...rather selective about the human rights they choose to support'.⁵⁵ Parkinson claims that:

The heart of Christian concerns...is that secular liberal interpretations of human rights Charters will tend to relegate religious freedom to the lowest place in an implicit hierarchy of rights established not by international law, but by the intellectual fashions of the day.⁵⁶

While it is doubtful that a secular liberal agenda was at work in the drafting of the highlighted provisions of the Tuvaluan Constitution,⁵⁷ it is submitted that an undue focus on the need for localisation of the instrument may have blinded the framers to the virtue and universality of what the UN drafters had achieved in both the *UDHR* and the *ICCPR*.

IV RELIGIOUS FREEDOM IN SAMOA

The Samoan Constitution (1960) predates the final drafting of the *ICCPR* and so does not pick up the *ICCPR*'s precise necessity language proscribing limitations on freedom of conscience and religion, which are not based on formal laws passed to protect public safety, order, health or morals or the fundamental rights and freedoms of others. However, ss 11 and 12⁵⁸ do a good job of setting out freedom of religion as it was expressed 12 years earlier in the *UDHR*.

Even though this Constitution predates the *ICCPR*, a version of the familiar limitation protecting public safety, order, health or morals, or the fundamental rights and freedoms of others is present in s 11(2). However, the rights of others are extended to provide an indeterminate freedom from religion, which has not received significant judicial comment or interpretation. The meaning of the extension seems to allow proselytising, but not proselytising after rejection. If that is so, then the extension may do nothing more than codify English common law, but the absence of judicial comment leaves that issue unclear. Of more long term concern is the absence of the conjunctive 'necessity' from this early version of the *ICCPR* limitation. In this version, freedom of conscience and religion may be

⁵³ Patrick Parkinson, 'Christian Concerns about an Australian Charter of Rights' (2010) 15(2) *Australian Journal of Human Rights* 87, 114.

⁵⁴ *Ibid* 83.

⁵⁵ *Ibid*.

⁵⁶ *Ibid* 87.

⁵⁷ Tuvalu's Constitution was drafted by veteran Australian draftsman Joe Lynch. Born in Albury, New South Wales in 1924 and admitted to the New South Wales Bar in 1949, Lynch worked as a legal officer and draftsman in Papua New Guinea and elsewhere in the Pacific from 1955 until his death in 1985.

⁵⁸ Samoan Constitution ss 11, 12.

abrogated if limitation in the interests of national security etc is reasonable rather than necessary. This means that the government is not prevented from passing legislation that erodes freedom of conscience and religion unless there was no other way to achieve their security objective. Instead, they can pass legislation that a simple parliamentary majority considers is reasonable, though not absolutely necessary in the circumstances. Freedom of conscience is thus less protected in the Samoan Constitution than it is in constitutional instruments that conform to the more recent *ICCPR* standard. However, to date, the cases in the Supreme Court of Samoa have not touched or turned on these interpretive subtleties. Rather, the most litigated issue has been whether the chiefs of a village, previously unified in following one of the major Christian faiths, breached the Constitution by imposing 'village discipline' on villagers who introduced another faith.⁵⁹

Questions about the intersection between customary practice and constitutional interpretation that are beginning to be asked in Samoan courts,⁶⁰ may preview questions that will eventually be asked in every Polynesian country where majorities seek to impose cultural uniformity on dissenting minorities. While these questions are seldom asked in small countries without significant media and interaction with the outside world, it may well be that the accumulation and syndication of stories of dissent will embolden dissenters. The absence of media and questions likely also explains why such matters are only brought to court when the population of a country grows larger.

A Samoan Culture (fa'a Samoa), Village Discipline and the Universal Franchise

The island of Savaii is a 45 minute ferry ride from the island of Upolu, which is home to Samoa's capital Apia, the seat of government and the international airport, which connects Samoa with the world. But there is a sense in which that 45 minutes divides the past and present in Samoa. It certainly insulates the villages and people on Savaii from the press of first world living. The fa'a Samoa, or customary way, is more predictive of daily decisions on Savaii than the statutory laws that flow from the legislature in Apia.⁶¹ In matters of religion

⁵⁹ Samoa Law Reform Commission, *VFA 1990*, Report 09/12, 4. In 2010, the Samoa Law Reform Commission was appointed to inquire into 'the issues that have arisen in the past involving art 11 (freedom of religion) and report to Cabinet' because the right to freedom of religion, affirmed by art 11 of the Constitution of Samoa, has been subject to controversy over the years. The courts in Samoa have dealt with cases involving the application of art 11 in the context of religious disputes in rural settings governed by Alii and Faipule ('village fono'). The prominent issues that have arisen over the years involve family members or village groups that have become part of a different church denomination separate from the prominent churches that were long established in the history of Samoa such as the Methodist Church, Catholic Church and the Congregational Christian Church of Samoa. The Commission found there was no basis for any change to Article 11 of the Constitution. Village Fonos needed to be better educated about their constitutional obligations and it was recommended that the government give consideration to including a policy section in the *VFA 1990* to provide guidance on how new churches should be dealt with.

⁶⁰ For example, in *Punitia v Tutuila* [2014] WSCA 1 (31 January 2014) at [33]-[35] a unanimous Court found the question of whether banishment was allowed under either the Constitution or the *VFA 1990* and been well traversed and settled in *Italia Taamale v Attorney-General* [1995] WSCA 1 (18 August 1995) and *Pitoamoa Maua et al v Fuga Leitara* [2005] WSCA 1 (4 March 2005). In the second case cited, the Court had noted the disproportionate harshness and breaches of natural justice that sometimes occurred when village discipline was meted out under the *VFA 1990* and then confirmed Va'ai J's decision in the Supreme Court that the *VFA 1990* did not include powers of banishment and that it was unthinkable that Parliament would have conferred powers that drastic by silence. In *Punitia v Tutuila* the Court added by way of summary: [W]ithin the meaning of Article 13(1)(d) and (4) of the Constitution, the right of all citizens of Samoa to move freely throughout Samoa and to reside in any part thereof is not limited by any existing law as to any powers of a fono.

⁶¹ The Encyclopedia Britannica says simply that 'cultural life [on Savaii] is considered more traditional'. In its 'General Information about Savai'i', Pacific Islands tourism guide is a little more fulsome in its description of how Savai'i is different from the rest of Samoa. It says:

(Christianity until recently), the custom has been that a Samoan belongs to the church of her village. That church was chosen at some time in the past by the village elders, and a villager is unwise to dissent because the village elders may enforce village rules. These range from discipline up to fines (normally pigs, chickens and bags of rice paid to the elders for later redistribution as the elders see fit) and banishment in the case of repeated disobedience.⁶²

The genealogy of the history of these village allegiances to particular churches, and the authority behind the imposition of village discipline is murky.⁶³ In the case of church allegiance, the Christianity of the religion followed cannot predate the 19th century since the London Missionary Society did not bring Christianity to Samoa until 1830.⁶⁴ Of course that does not mean that there was no enforced allegiance to earlier traditional religion before village councils opted for one or other of the new Christian sects, but no one really knows the nature of religion in Samoa before the coming of Christianity. In Samoa, Christianity completely converted the hearts and minds of the people so that no one remembers or can prove any earlier religious observances, though the Samoanisation of some Christian practices hints at what previous practice might have been.

The history of village discipline is more controversial, although it must predate European colonisation. This is because it is clear that it was sufficiently suppressed by successive waves

Fa'a Samoa, the unique traditional culture and way of life in Samoan society, remains strong in Savai'i where there are fewer signs of modern life and less development than the island of Upolu where the capital Apia is situated. Samoan society is communal and based on external family relationships and socio-cultural obligations, so that kinship and genealogies are important. These fa'a Samoa values are also associated with concepts of love (alofa), service (tautua) to family and community, respect (fa'aaloalo) and discipline (usita'i). Most families are made up of a number of different households situated close to each other. See The Editors of Encyclopedia Britannica, *Savai'i Island Samoa* (2017) <<https://www.britannica.com/place/Savaii>>.

⁶² The US State Department's 2015 report on the state of religion in Samoa observes in relation to 'Government Practices':

[I]n the analysis prepared for a 2012 special commission review of the Village *Fono* Act 1990 village elders and the community at large often resisted attempts to introduce another denomination or religion into the community. Observers stated in many villages throughout the country, leaders forbade individuals to belong to churches outside of the village or to exercise their right not to worship. Villagers in violation of such rules faced fines and/or banishment from the village.

Traditionally, villages have tended to have one primary Christian church. Village chiefs have often chosen the religious denomination of their extended families. Many larger villages have had multiple churches serving different denominations and coexisting peacefully. However, new religious groups sometimes faced resistance when attempting to establish themselves in some villages. See US State Department, *Samoa International Religious Freedom Report* (2015) <<https://www.state.gov/documents/organization/256349.pdf>>.

⁶³ Malama Meleisea, 'Governance, development and leadership in Polynesia: a microstudy from Samoa' in *Culture and Sustainable Development in the Pacific* (ANU Press, 2005) 76, 78. Malama Meleisea suggests many of the practices which are now described as 'traditional' in fact have their roots in compromises settled during the colonial period. In Samoa he cites the German invention of the Lands and Title Court as an example. In section 3E of his paper presented at the Biennial Law Symposium of the Samoa Law Society December 3-4, 2015 and published in the *Samoa Observer* newspaper on December 20, 2015, Leulua'iali'i Tasi Malifa quoted the Samoan Court of Appeal in its judgment in *Pitoamoia Mauga et al v Fuga Leituala* (unreported, CA March 2005, Lord Cooke of Thorndon P, Casey & Bisson JJ) on efforts made by successive governments to 'extirpate' banishment as one of the traditional punishments that a Village Fono could impose because it could operate 'with altogether disproportionate harshness, in violation of natural justice against innocent family members'. While the Court of Appeal had not outlawed the practice, it had noted that this power had no foundation in the *Village Fono Act 1990*. To the extent that the power of banishment still existed at all, it was vested in the Lands and Titles Court. See Leulua'iali'i Tasi Malifa, 'Village Fono Act Reforms', *Samoa Observer* (online), 20 December 2015 <http://www.samoaoobserver.ws/en/20_12_2015/sunday_reading/491/Village-Fono-Act-Reforms.htm>.

⁶⁴ The first European missionaries to arrive in Samoa were members of the London Missionary Society, John Williams and Bariff in 1830. They arrived in Sapaalii with eight teachers, six Tahitians and two Aitutakians. They were accepted into Samoa by Malietoa Vai'inupo. See Voice of Samoan People, *From Darkness to Light* <<https://sites.google.com/site/samoanvoice/cu/from-darkness-to-light>>.

of colonisers,⁶⁵ before the 20th century opened, that it had lost much of its customary authority in favour of the new central government authority.⁶⁶ That suppression predates 1914 when New Zealand took over the colonial administration of the country from Germany as World War I broke out. However on Savaii where life has always been more traditional and detached from central government, the idea of village discipline has been resurgent, mostly since independence in 1962. But the history of that resurgence has become intertwined with the nature of Samoan democracy.

The nature of voting and parliamentary representation in Samoa was different from other British Commonwealth countries and that difference continued after independence. The right to vote and to represent a constituency in parliament was not universal. Only persons with matai titles (chiefs) had the right to vote or stand for parliament. However, the rise of western feminism, particularly after the passage of the CEDAW Convention in 1981, saw the UN focus on the need for institutional reform in Samoa so that women would have the right to vote and be elected to the national parliament. By 1990, the pressure was intense, but it was resisted as a modern form of cultural imperialism in Samoa. The protests that Samoa functioned perfectly well without the western imposition of the universal franchise did not satisfy the critics and the pressure for institutional change intensified. Perhaps because the contest was interpreted by matai chiefs all over Samoa as the UN seeking to suppress their cultural authority (as the German, British and New Zealand colonial authorities had done before), the Prime Minister of the day worked out a compromise solution which restored some of the disciplinary authority that matai chiefs had exercised in their villages in historical times.⁶⁷ Since the matai chiefs were giving up the colonially invented and bestowed exclusive right to vote in the national parliamentary elections, a restoration of their customary authority at the village level was a very natural, appropriate and adapted quid pro quo – except that the restoration was not as culturally perfect or balanced as the matai chiefs understood it to be. That was because the *VFA* was just an ordinary act of parliament and was not a part of the supreme constitutional law of the land as the franchise and representation rearrangements would be. That foundational misunderstanding has seeded a lot of village conflict in Samoa ever since. The village councils composed of matai chiefs assert that they were given complete disciplinary authority in all matters pertaining to village life, but their occasional minority village opponents assert that village authority only extends to cultural issues and does not give the chiefs the right to ignore the Constitution where property and political rights are concerned. The chiefs' response is to cite the 1990 compromise. When they are told the *VFA* never meant what they thought it meant, they suggest the franchise and representation changes in the Constitution must themselves be invalid since they were induced by misrepresentation.

On the government island of Upolu, this all presents as a storm in a teacup. This is because village authority is not as important, with the national parliament buildings obvious in downtown Apia, where there is a more visible modern police presence. But things are different on Savaii. There, the *VFA* means all that it says, and more, because it was passed to ensure the matai chiefs did not have their customary authority diluted when the 1990 franchise and representation changes were made at the insistence of the UN. The provisions

⁶⁵ Samoa was first colonised by Germany in 1899 under a tripartite convention signed between Germany, Great Britain and the United States. See Marisa Maepu, *The German Colonisation of Samoa: Report for the Winston Churchill Memorial Trust* (June 2013) <[http://www.communitymatters.govt.nz/vwluResources/WCMT%20report%20-%20Marisa%20Maepu/\\$file/WCMT%20report%20-%20Marisa%20Maepu.pdf](http://www.communitymatters.govt.nz/vwluResources/WCMT%20report%20-%20Marisa%20Maepu/$file/WCMT%20report%20-%20Marisa%20Maepu.pdf)>.

⁶⁶ Meleisea, above n 63, also refers to Samoan Supreme Court and Court of Appeal discussion of the customary origins of banishment as a form of village discipline in sections 3B and C of his article. Banishment is said to be older than colonial supervision because the Germans passed legislation to suppress it.

⁶⁷ Justice V C Nelson of the Samoan Supreme Court has suggested to the writer that Hon Tofilau Eti Alesana was a particularly 'canny' politician. He recognised the push for the women's franchise as an opportunity for his Human Rights Protection Party, and when he coupled that franchise with the restoration of some village authority, he secured a landslide election victory 'from which the Opposition [has] never recovered' (Email from Justice V C Nelson to Keith Thompson, 28 and 29 May 2017).

in the *VFA* that the Savaii village chiefs rely on do not sustain their arguments and it is objectively difficult to see how they or their predecessors could have been deceived, as some continue to allege. Sections 5 and 6 set out the powers of the Fono (Village Council of Matai Chiefs) and the punishments they can impose. However, ss 8, 9 and 11 confirm that the nation's courts retain supervisory jurisdiction, reaffirming that aggrieved persons may formally appeal Fono decisions, and that Village Fono jurisdiction does not extend to non-residents or to imposing banishment as a punishment in serious cases. For the purposes of the discussion below it is useful to set out the disciplinary power:

6. Punishments – Without limiting the power of Village Fono preserved by this Act to impose punishments for village misconduct, the powers of every Village Fono to impose punishment under the custom and usage of its village are deemed to include the following powers of punishments:
 - a) the power to impose a fine in money, fine mats, animals or food; or partly in one or partly in others of those things;
 - b) the power to order the offender to undertake any work on village land.

For context's sake, though I stated above that village discipline can range up to 'fines (normally pigs, chickens and bags of rice paid to the elders for later redistribution as the elders see fit) and banishment in the case of repeated disobedience', it can be seen under the 1990 legislation that the Village Fono does not have power to impose banishment or any form of physical punishment. Legitimate punishments that the Village Fono can impose are limited to fines and village work. While some Village Fonos can and do impose more serious penalties, only the Lands and Titles Court has jurisdiction to impose banishment as a penalty.⁶⁸

B Samaleulu Village Case Study

I will now outline events at Samaleulu village on the island of Savaii in Samoa in the late 1990s and I will situate those events within the cultural and constitutional law context.

Samaleulu village might have been historically described as a Congregational Church of Samoa ('CCS') village on the island of Savaii with a small minority of Latter-Day Saint ('LDS') believers who worshipped locally in a modest open fale and whose minority worship was tolerated. The LDS congregation grew to the point where the fale was not large enough to contain those regularly attending and the international church was willing to provide funding for a larger building with assembly area, baptistry and classrooms. A senior member of the LDS community approached the Village Fono and respectfully sought to build a new and larger building, for which permission was given. However, once construction began, perhaps because the size and scale of the building indicated the future size of the LDS congregation, the village council advised the LDS church that permission was withdrawn⁶⁹ and that there would be consequences if construction continued, despite the advanced stage of construction and the LDS church's contractual commitments. In due course, there was a confrontation. Lio Isaia was the representative of the LDS family on whose customary land the new church was being built. When some young men came, by Village Fono direction, to damage the building and to coerce or frighten the LDS church members so that they would cease construction, Lio stood to speak with them. He had sent the other church members home because he did not want any confrontation or riot. He was soon pushed to the ground, trussed up in the traditional manner in which the Samoans prepare pigs for roasting, and

⁶⁸ Meleisea, above n 63, s 3D.

⁶⁹ Meleisea, above n 63, 80-1. Malama Meleisea's parable of the two-storey house in his 2005 book chapter explains the culture here at issue very well. In his parable, a wealthy self-made local man was asked to cease building his new two-storey house because none of the matai chiefs in his village had one or could afford to build one. The Lands and Titles Court ordered the wealthy man to cease construction and he obeyed because of respect.

hung across a pile of coconut husks and wood ready to be lit. He was told that unless he would renounce his LDS faith, agree to make sure the church ceased building the new chapel and take all the Mormon members with him out of the village, the fire would be lit.⁷⁰ The minister of another church with a few followers in the village pleaded with the would-be fire starters to reconsider their action and threats. They refused and, because Lio Isaia would not renounce his faith, the fire was lit. However, during the confrontation storm clouds had formed. No sooner was the fire lit than a thunderstorm broke out complete with lightning. The deluge doused the fire and, despite attempts to relight it, the intensifying storm extinguished it completely.

Perhaps because the sudden storm was interpreted by the villagers as a sign of divine disapproval, the crowd dispersed, though Lio was left trussed up until the police arrived from Tuasivi with Lio's wife, who had gone for help. However, the dust had not completely settled. In the name of the disciplinary authority vested in the Village Fono by virtue of s 6 of the VFA, Lio Isaia's house was ordered burned to the ground, and he and his extended family were banished from the village because construction on the church continued. It was several years before the validity of the Isaia family's lease of the land to the LDS church was confirmed and he could return to the village following a Lands and Title Appeal court process. That process also confirmed that the discipline imposed by the Village Fono against the Isaia family for alleged breaches of village discipline was ultra vires and it was revoked.

I was indirectly involved in less dramatic events in the adjoining Patamea village following Lands and Title Appeal Court proceedings that settled a similar dispute. In that case, the Samoan Prime Minister directed the Chief Justice of the Supreme Court to sit in his ceremonial role as President of the Lands and Title Appeals Court to send the message that constitutional freedom of religion trumped the disciplinary provisions of the VFA. While I have not been engaged in similar Samoan cases since the Patamea episode, I am doubtful that the hearts and minds of all the villagers in Savaii, Samoa understand or accept the way that village discipline and constitutional freedom of conscience and religion relate to each other in Samoan law. The 2010 government direction that the Samoan Law Reform Commission should consider whether constitutional freedom of religion should be amended to provide more accommodation of village disciplinary practices underlines the enduring dissonance.⁷¹

C Samoan Cultural Dispute Resolution Mechanisms

I will now briefly explain the traditional dispute resolution mechanisms that existed at the village level in both Tuvalu and Samoa before I draw the threads of this discussion together and suggest reasonable conclusions.

Vaaulu Uele Vaaulu (Uele) is one of the LDS church's consultant experts on the fa'a Samoa. He has observed that while there is no Samoan institution that is equivalent to the elected mayor and council in a western town or city council, the Samoan Village Fono or Council functions as a ruling body in a roughly analogous way.⁷² It is made up of the matais (or chiefs) of each family in the village. Matais function as trustees of communally held family lands and they speak for their families at Village Fono meetings. Older, more established matais normally exercise de facto control in Village Fonos by virtue of their seniority and the support of other family matais. Family matai titles are generally passed on by consent, but disputes have been settled since colonisation in the Lands and Titles Court, established during the period of German sovereignty. Though the Village Fono has no written rules or conventions, it is customary for families who wish to construct new buildings on their family lands to seek approval from the Village Fono. Those requests are formally made by their

⁷⁰ Ibid 82.

⁷¹ Samoa Law Reform Commission, above n 59.

⁷² Email from Uele to Keith Thompson, 18 October 2016.

family matai chief at Village Fono meetings convened to consider such requests. Often these requests are pro forma courtesy requests because the Village Council acknowledges traditional control of the relevant lands by the family. But families are still expected to defer or abandon requests without question if the Village Fono indicates disapproval. Renewed requests can only be reconsidered when suitable overtures have been made behind the scenes to senior Village matais with confirmation that a *sua* or placatory gift will be formally provided by the requesting family at any reconvened meeting.

Traditionally, *sua* were generous in-kind gifts of fine mats, foodstuffs, pigs or other tangible commodities. Formal presentation of *sua* was visible and public. Custom required that the Village Fono received *sua* as trustees for the village as a whole and it was expected that *sua* would be redistributed to other members of the village according to need. While the advent of a cash economy has reportedly led to some non-distribution of *sua* that was unknown in historical times,⁷³ it remains unacceptable in Samoan village culture to challenge the authority of the Village Fono or its discharge of its trustee-like obligations. To peacefully enjoy their customary lands, the fa'a Samoa obliges all villagers to respect and defer to the Village Fono and only to 'seek Village Fono assistance' through their own family matai representative on the Village Fono.

Uele reports that there is no other way for families or members of families to seek redress when there is disagreement. Individuals can leave their village and their customary lands to join extended family in other villages, but if they move, they are accepted in the new village as coming under the care and protection of the related family matai in that village. When matai chiefs depart from a village, they do not forfeit their titles but their voice is not heard in the Village Fono when they are absent. There is no proxy or substitution process. Uele thus reports that Village Fono processes can only be regarded as superficially democratic. In fact Village Fono processes are oligarchical and are susceptible to majoritarian abuse, and even tyranny. The majority of the Village Fono cannot be challenged in the village and the idea that the National Constitution or the *ICCPR* require the Village Fono to acknowledge personal property or political rights is difficult for matais to understand and accept.

The ideas underlying the *UDHR*, the *ICCPR*, and the National Constitution are thus foreign to Samoan culture and have been ignored in Samoa at the village level from their inception in 1948. While members of Samoan families do leave their villages, to pursue opportunities overseas, there is always someone from the family left behind to occupy and enjoy family lands. But matai titles, including the right to sit as a member of the Village Fono, can only be passed along with approval obtained in the Lands and Titles Court, and that normally only occurs when a title is vacated by the death of the holder.⁷⁴

The extensive international Samoan diaspora has brought Village Fonos on the island of Savaii face to face with the National Constitution and the international human rights instruments which the national government has ratified. That is because when some of the young Samoans who leave Samoa seeking international opportunities return to their village homes with new religious beliefs, advanced tertiary qualifications and changed political understanding, they are not always prepared to submit to Village Fono authority in accordance with the fa'a Samoa. While they understand the protocols of the Village Fono, they 'know' something is wrong and they know how to object when a Village Fono makes a decision which is disrespectful of reasonable individual autonomy, as expressed in the National Constitution or in international human rights instruments. Thus while deference to the authority of the Village Fono was the cultural mechanism that resolved every dispute in a

⁷³ See, eg, Meleisea, above n 63, 83.

⁷⁴ *Ibid* 78. Meleisea reports that:

The German administration hoped to do away with the whole basis of chiefly authority, and invented the Land and Titles Court. All these things happened such a long time ago that people today see them as features that make their society unique and different from others.

Samoa village before 1990, it does not provide a complete solution when villagers know that the Village Fono's authority to impose discipline under the *VFA* is limited and when recourse to national courts is available under the Constitution.

In effect, Samoa's wish to be a part of the international community of nations, and pluralism in Samoan society, have practically modified traditional dispute resolution mechanisms in Samoa at the village level. That process of change has taken a long and serpentine path. It began in the 19th century when the German colonial authorities banned excessive village discipline, including the killing of dissidents and the destruction of their property. Though punishment for anyone involved in such banned crimes was not always the subject of official complaint and prosecution, the colonial authorities prosecuted enough people so that the more excessive manifestations of village discipline fell into disuse. The seeds of further philosophical challenge to Village Fono authority were sown when the UN was created in 1948 and began establishing international norms which protect property and personal rights. That philosophical challenge to Village Fono authority began to crystallise in Samoa when the 1960 Constitution was drafted and accepted as the foundational law of the newly independent Western Samoan nation in 1962. But the meaning and effect of the limitations on Village Fono authority, first imposed by the German colonial administration, was only brought into focus when the universal franchise was implemented in Samoa in 1990 at the same time as the *VFA* was passed. While there was nothing new in the *VFA* (which on one view simply recorded the established limits of Village Fono disciplinary authority), the omission of village authority over life and property served to focus the sublimation of Samoan cultural norms to the demands and norms of the international world in which the Samoan nation as a whole wished to participate.⁷⁵

V TUVALUAN DISPUTE RESOLUTION MECHANISMS

Tuvaluan cultural dispute resolution systems are much more difficult to identify than those in Samoa. In large part, that is a consequence of the country's smaller size, population and diaspora.⁷⁶ My informants (Popeieta Ato Raponi and Iotua Tune)⁷⁷ confirm that the Tuvaluan people have Polynesian (Samoa and Tongan) and Micronesian antecedents and there are some linguistic similarities. The same thing is true of the name titles they give some of their village chiefs – for example, Alikī, as opposed Ali'i in Samoa.

Raponi and Tune report that the Christian beliefs of the London Missionary Society missionaries ('LMS') were accepted and rapidly became the dominant view in the 19th century because they were new and interesting. Tune reports that the Tuvaluans were naturally curious and were attracted by the gifts of tobacco that they offered. They were not perceived as presenting a threat to existing cultural religious beliefs, which still coalesced around magic practices. It was some time after the arrival of Catholic missionaries that the local islanders perceived that Protestants and Catholics 'were not friendly to each other'.⁷⁸

⁷⁵ Ibid 78. Meleisea states:

The contradictions between these two sets of principles was not really a problem in 1962 because most people lived in villages in a semi-subsistence economy, and migration and influences from the outside world had minimal impacts on most of us. Since then we have experienced changes which have made us among the most 'globalised' of people. During the 1970s and 1980s about one third of our population moved overseas, forming communities in the United States, New Zealand and Australia. In a period of 20 years we became, in effect, a nation without geographic boundaries. Inevitably this process has had an impact on our political system because the economic impact of emigration was towards individualism.

⁷⁶ According to the 2012 census, the population of Tuvalu is 10,782.

⁷⁷ Raponi is a native Tuvaluan who earned a degree in Mathematics and now teaches senior high school students at Moroni High School in Kiribati. He is regarded as an expert in Tuvaluan history. Tune has served as Director of LDS Education in Kiribati, the Marshall Islands, Nauru and Tuvalu. He continues to serve on the Kiribati Minister of Education's Advisory Board and as a member of the Advisory Board of the University of the South Pacific, Kiribati Campus.

⁷⁸ Email from Tune to Keith Thompson, 19 November 2016.

Nor are Raponi or Tune aware of any systematic effort by LMS and Catholic teachers to eradicate these customary magic beliefs and related practices. But they report now that alternative versions of Christianity are viewed as introductions likely to disturb the peace and those who promote them are systematically run out of local villages.⁷⁹ Raponi and Tune also refer to the national legislation passed in 1990 to systematise the acceptable introduction of new religions in Tuvalu in the future.⁸⁰ No one can establish a legal entity to support a new church unless they first demonstrate, by subscription, that the new church has at least 50 members who confirm their affiliation by signature on the national incorporation documents.⁸¹ While this modern documentary expedient begs the question of how any new religion can establish itself sufficiently to claim a starting membership of fifty,⁸² Ropani's view that it resonates with historic cultural practice has some attraction. The LMS version of Christianity succeeded because it was not resisted before it had obtained the necessary level of local acceptance. Ropani confirms that the establishment of the LDS religion on the island of Nanumea also accords with this pattern since this new faith had more than 50 adherents, and may even have attained a majority on Nanumea, before there was any objection, upon which it was suppressed by majoritarian village opinion and practice. Ropani also explains that LDS believers from Nanumea have then been relatively free to teach their message in other villages and on other islands because it was well known that the LDS religion was a major established Christian religion on the island of Nanumea.

VI SHOULD WE LEAVE THE POLYNESIANS TO THEIR OWN DEVICES?

The religious dissonance suggested by these examples from Samoa and Tuvalu raises the question whether that dissonance is the product of international imperialism, either by 19th century Christian proselytising, or by the more contemporary insistence that disputes about religion should be settled using international human rights norms. For reasons already given above, the suggestion that international human rights norms are an example of Western cultural imperialism is flawed since these norms are not the product of Western thinking. Though that refrain has been heard occasionally from Asia when human rights are advocated,⁸³ it does not objectively hold up since the *UDHR* has been shown to be a truly international enterprise, with Asia well represented with its principle of two-man-

⁷⁹ Raponi cites the case of a Seventh Day Adventist preacher who came to the Tuvaluan island of Nanumea. In part because he was not a Nanumean and because he did not seek approval for his proselytism from the Nanumea village council before he began his teaching, he was run off and returned to Funafuti (the island seat of the national parliament) for his own safety.

⁸⁰ Religious Bodies Registration Act 1947 [Cap 54.15] (Tuvalu); Religious Bodies Registration Order 2006 [Cap 54.15.1] (Tuvalu).

⁸¹ Section 2 of the Religious Bodies Registration Act 1947 required that: Not less than 50 persons, or such greater number of persons as the Minister specifies by order, of the age of 18 years and upwards holding religious tenets in common and which has its own system of discipline and government was required before any religious body could be registered under the Act. By the *Religious Bodies Registration Order* (commenced 1st January 2006), the Minister ordered that the number of persons of the age of 18 years and above required to constitute a religious body within the meaning of section 2 of the Act, shall not be less than two per cent of the total population of Tuvalu at the last census.

The 2012 census of Tuvalu states that the total population of the country was 10,782: The Census Monograph on Migration, Urbanization and Youth, *Tuvalu National Population and Housing Census* (2015)

[http://countryoffice.unfpa.org/pacific/drive/UNFPA_Tuvalu2012NationalPopulation&HousingCensusMigration,UrbanisationandYouthMonographReportLRv1\(web\).pdf](http://countryoffice.unfpa.org/pacific/drive/UNFPA_Tuvalu2012NationalPopulation&HousingCensusMigration,UrbanisationandYouthMonographReportLRv1(web).pdf). Note the total is 11,206 according to another website using the same data: Tuvalu Central Statistics Division, *Tuvalu Population Census* (2012) <<http://tuvalu.prism.spc.int>>. It is difficult to work out how much of the population is above 18 years of age and whether the government statistician regards the population as including the overseas diaspora or not. But 2% of the 10,782 total amounts to 217.64.

⁸² Of course, if a group of 50 or more villagers convert to a new religion overseas as a group, then they will readily satisfy the requirement and the proof only has to be filed with national government officials on Funafuti. In practice, the 50 member requirement presents a barrier to the recognition of new religious groups since even when 50 have converted overseas, they rarely know each other, coming, as they do, from different islands and villages in their home country of Tuvalu.

⁸³ Peerenboom, above n 50.

mindedness front and centre.⁸⁴ The older insight that the introduction of Christianity is an example of Western imperialism is now well accepted, but that insight contributes little to modern understanding since Polynesians are now among the most faithful adherents of Christianity in the world. In consequence, they are reluctant to disavow their Christian beliefs in favour of more recent worldviews suggested by more recent Western imperialists. There also appears to be little likelihood of a strong Polynesian resumption of traditional religious practices since there are few who claim to know what those practices were.

The title to this article suggests that freedom of conscience and religion is under-theorised in Polynesia. In light of her recommendation that freedom of conscience and religion needs to be relearned in each generation in the United States, Martha Nussbaum might suggest that freedom of conscience and religion needs to be relearned everywhere in each new generation.⁸⁵ Martin Krygier's insight that freedom of conscience and religion does not come naturally in any culture, affirms the need for continuing education about the meaning of constitutional freedom and international human rights in every primary school classroom of the world.⁸⁶ Polynesia is thus not alone in this need for freedom of conscience and minority rights education from the cradle to the grave. But the need for Samoa's Court of Appeal to reaffirm that cultural banishment is not legal under the *VFA 1990* and is also unconstitutional three times since 1995,⁸⁷ suggests that many of the lawyers in Samoa do not understand these basic principles. Few would counsel their clients to take the same points if they understood them given the prospect of adverse costs orders.

Carolyn Evans has noted the debate as to whether UN religious freedom norms 'can bind member States'⁸⁸ even if they have not signed a treaty or if the relevant norms have not achieved treaty status. She concluded that a further treaty beyond the *ICCPR* was unlikely in the foreseeable future because of Middle Eastern concerns surrounding the right to change one's religion originally expressed in the *UDHR*. But she also suggests there is not much need for a further treaty in any event since the religious freedom provisions in the *UDHR* and *ICCPR* are generally considered to have become customary international law in countries that have included these provisions in their national constitutions.⁸⁹ In the case of Samoa, notwithstanding the dissonance in the examples I have cited, the point is academic not only because freedom of conscience and religion is enshrined in its Constitution since Samoa ratified the *ICCPR* on 15 February 2008, coming into force three months later. However, Tuvalu has not signed nor ratified the Covenant. In practice, this means that Tuvalu is not obliged to report to the UN Human Rights Committee, which does not have power to question it about alleged human rights violations. Nor can the UN Human Rights Committee hear citizen complaints about human rights violations under the Optional Protocol to the *ICCPR* which authorises it to chastise member states about the breaches of human rights that it investigates and upholds.⁹⁰

However, unlike non-signatory countries like China which actively pursue anti-religion policy and which are not bound by the principles of the *ICCPR* in customary international law,⁹¹ Tuvalu probably is bound by the *ICCPR* freedom of conscience and religion principles because it 'generally act[s] in compliance' with them, feeling obliged to do so.⁹² While that

⁸⁴ Glendon, above n 51; Scharffs, above n 51.

⁸⁵ Nussbaum, above n 5.

⁸⁶ Krygier, above n 6.

⁸⁷ *Italia Taamale v Attorney-General* [1995] WSCA 1 (18 August 1995); *Pitoamo Mauga et al v Fuga Leitola* [2005] WSCA 1 (4 March 2005); *Punitia v Tutuila* [2014] WSCA 1 (31 January 2014).

⁸⁸ Carolyn Evans, 'Time for a Treaty? The Legal Sufficiency of the Declaration on the Elimination of All Forms of Intolerance and Discrimination' (2007) 3 *BYU Law Review* 617, 619.

⁸⁹ *Ibid* 631.

⁹⁰ *Ibid* 623-4.

⁹¹ *Ibid* 629.

⁹² *Ibid* 629-30, citing American Law Institute, Restatement (Third) of Foreign Relations Law of the United States (1987) § 102.

sense of obligation flows not from a sense of obligation under the *ICCPR* itself, it responds to the *ICCPR* since the provisions protecting freedom of conscience and religion in their national constitutions were clearly subject to its influence. It is submitted that that influence makes the *ICCPR* freedom of conscience and religion standards binding upon them. In any event, the protection of freedom of conscience and religion in both the *ICCPR* and the 1981 *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* are now binding even on countries that have neither signed or ratified them in any way, because the obligatory language about freedom of conscience and religion in these two instruments is clear, and both have 'broad, diverse support' in the international community.⁹³

VII CONCLUSION

My purpose in this article has been to show that UN-style freedom of conscience and religion does not come naturally to the Polynesian peoples of the Pacific. The cultural expectation of many Tuvaluans and Samoans is that it is legitimate to enforce conformity including religious unity. However, much of that coercion is inconsistent with the principle of freedom of religion and conscience in international human rights instruments and in their national constitutions.

Some commentators will suggest that it is inappropriate for the UN to impose its freedom of conscience and religion paradigm on these peoples. But my submission is that freedom of conscience and religion is not an example of Western cultural imperialism. The freedom of conscience and religion expressed in the *UDHR* and reaffirmed in the *ICCPR* is a truly universal norm and has become an established principle of international law. Further, both Tuvalu and Samoa have become subject to these obligations as part of established international law. Samoa also has an *ICCPR* treaty obligation to ensure that freedom of conscience and religion are thoroughly protected within its territory. The under-theorisation of freedom of conscience and religion in Polynesia that I have highlighted can and should be resolved with additional education in parliaments and primary schools.

⁹³ Ibid 630-1.