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**United Nations Human Rights Council
Universal Periodic Review: Samoa**

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About ICAAD

ICAAD is a registered 501(c)(3) with special consultative status with the United Nations Economic and Social Council. Established in 2013, ICAAD works at the intersection of legal innovation and human-centered design to create evidence-based programs with organizations and communities to combat structural discrimination. By taking an integrated approach, we are able to improve resilience, safety, and equity across systems. ICAAD's key activities include:

- Partnering with local NGOs and governments to build capacity while using our expertise and resources as a means of enhancing their advocacy efforts.
- Leveraging legal and policy expertise to advocate and reform discriminatory laws, policies, and cultural norms.
- Exploring how emerging technologies can be effectively integrated into human rights practice.
- Providing data and research to fill gaps in knowledge for judiciaries, NGOs, governments, and other international bodies.

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INTRODUCTION

The following examples and recommendations derive from ICAAD's systematic review of 282 gender-based violence (GBV) sentencing decisions from Samoa between 2000 and 2020. Supporting data will focus on the time period of 2013 to 2020, marking the passage of the Family Safety Act 2013, with a qualitative focus on cases since 2016.

Methodology

1. In Samoa, perpetrators of sexual and domestic violence often receive disproportionately low sentences or no custodial sentence at all. The driving force behind this problem is gender discrimination, which can result from: stereotypes, rape myths, and customary reconciliation practices. With the aim of removing gender bias and discrimination from judicial decision making, ICAAD's program, TrackGBV uses technology to monitor accountability in GBV cases and supports judicial policy reform through legal advocacy and training.
2. The presence of contentious factors evidencing gender bias in sentencing decisions is a clear violation of international law. By allowing gender bias to play a role in decision-making, judges are creating present and future barriers for women to access justice, privileging the interests of perpetrators over victims/survivors.
3. ICAAD's case law analysis methodology focuses on determining whether or not contentious factors influenced the final sentence received by the defendant, resulting in gender discrimination. These contentious factors are categorized by: gender stereotyping, customary practices, and other factors that unjustly privilege the interests of the perpetrator over the interests of the victims/survivors.¹
4. For Samoa, we reviewed 282 cases including 151 cases from 2000-2012 and 131 cases from 2013-2020.

GENDER-BASED VIOLENCE AND ACCESS TO JUSTICE FOR WOMEN AND GIRLS

General Issue Statement

5. The case law data depicts some progress as well as remaining challenges in terms of eliminating GBV in Samoa. Progress has been made in terms of the Family Safety Act 2013, but the implementation has a long way to go. Customary practices and gender stereotypes are frequently used to justify and excuse GBV in the courts. Traditional practices such as *ifoga* and fono punishments conflict with the formal justice system.² These practices may appear to be facially neutral, but in practice impose significant barriers that disadvantage certain groups, namely women and girls, in achieving substantial equality.

Supporting Examples

6. **Systemic gender discrimination.** In Samoa, many women continue to be treated unequally in aspects of private and public life. Discriminatory treatment arises because of entrenched cultural, religious, and patriarchal traditions.³ According to the National Public Inquiry into Family Violence in Samoa, 86% of women reported being subject to kicking, punching, slapping, causing bodily harm using a hard object.⁴ Samoan men are regarded as the head of households, superior to their wives.⁵ Further to that, “90% of female respondents believe a good wife obeys her husband... [and] 79% of non-victims of abuse and 87% of victims believed a man should show her partner who is boss.”⁶ Violence against women and girls is also prevalent outside the context of intimate partner violence with 62% of women surveyed reporting physical violence by non-partner in their lifetimes.⁷ Unequal gender roles in Samoa are widely enforced and can be seen in how girls are taught to be subservient and how boys’ sexual entitlement is encouraged.⁸ It is clear that domestic and sexual violence by men against women are a reflection of gender-based power and control. The act of family violence then is seen as a “policing mechanism” to keep women in their subordinate position in the household and society more generally.⁹
7. **GBV sentencing decisions from 2013-2020.** Of the 131 cases ICAAD reviewed from this time period, 58.02% involved only sexual violence, 10.69% involved only domestic violence, and 31.30% involved both sexual and domestic violence. The victim was a child in 73.85% of cases.

8. **Contentious factors in the sentencing of GBV cases.** Samoan courts have increased their reliance on contentious factors over time. Between 2000 and 2012, contentious factors were used to reduce sentences in 50.33% of cases. Between 2013 and 2020, that number increased to 63.36% of cases. Between 2013 and 2020, contentious factors were raised by the judicial officer in 77.86% of cases. The average sentence reduction as a result of these contentious factors was 0.94 years.
9. **Customary practices that privilege men.** In all cases with contentious factors raised, customary practices and reconciliation were used to reduce sentences in 77.99% of cases from 2000 to 2020. *Ifogais* a traditional form of reconciliation that historically was used to settle crimes between families or villages.¹⁰ A Pacific Community (SPC) report in July 2013 noted that, “some cases of VAW continue to be dealt with through customary law procedures and measures, such as the provision of compensation to the family or community of the survivor, and customary reconciliation practices.” Importantly, the report adds, “[c]ustomary law does not provide redress to the survivor and, in many instances, the use of customary law inhibits or precludes the survivor from seeking redress within the formal justice system. Sometimes, survivors are discouraged from seeking relief from the courts for fear of further violence and shame.”¹¹
10. The case of *Police v Lemi* [2020]¹² illustrates how *ifoga* is used in sentencing. The victim, a 13-year-old girl, took the defendant's taxi to visit a friend. The defendant asked how the complainant would pay her taxi fare. She told him she had no money and agreed to have sexual intercourse with him as a payment. The defendant instructed the victim not to tell anyone about their sexual encounter and gave her five dollars. While a person who has sexual connection with a young person is liable to imprisonment for a term not exceeding 10 years,¹³ the judicial officer set a starting point of 5 years and further reduced the sentence by 6 months due to the defendant's clean record. Then after recognizing that there had been a formal apology and reconciliation, the judicial officer deducted one year from the balance of the defendant's sentence. The judge stated:

“It has been confirmed by the Probation Service that there has been the necessary apology and reconciliation. They say you and your wife have apologized to the complainant and her family. I give credit to your wife for standing by you, in the circumstances not many women would Sir. This is a large factor in your favour I will deduct one (1) year from the balance of your sentence, leaves three and a half (3½) years.”¹⁴

It is not clear if the victim and her family accepted the *ifoga*. Although the judge stated they would hold the defendant accountable for his actions and the harm he caused, he chose a low starting sentence and used reconciliation as a significant mitigating factor. Reconciliation should be impermissible due to the power imbalance inherent in the process. In this case, a 13-year-old minor would be placed in a position where her family or even the entire village would be counseling her to reconcile. Women and girls should not be placed in an untenable position of having to accept reconciliation for serious crimes. This is not to say genuine reconciliation cannot exist, but in many instances the societal pressure is too great, and regardless, it should not interfere with the formal justice system.

- 11. Village Fono Act.** The Constitution of Samoa recognizes custom as a source of law through matai and fono.¹⁵ The Samoan Government decided in 1990 to provide statutory support for the traditional authority of the village fono, through the Village Fono Act 1990. For the very first time in Samoa's history, the concept of fono was incorporated into the formal structure of local government and the administration of justice.¹⁶ Under s.8 of the Village Fono Act, Samoan courts are now required to take into account in mitigating a sentence (or in the case of a civil dispute, the award/ order), the punishment imposed by a village fono in respect to village misconduct by any person.
12. The difficulty with punishments imposed at the village fono level is that "the fono often do not punish the offenders, they fail to prevent continuing abuse (hence, allowing it to become more severe) or may choose to counsel the victim, rather than the perpetrator. They often prevent victims from reporting matters to the police. Further, fono is not required to make written records of its proceedings."¹⁷ There are several examples of judges reducing sentences for village penalties,¹⁸ in some cases by 2 years.¹⁹ The 2018 National Inquiry into Family Violence in Samoa reported that in GBV cases, fono most commonly impose fines on the perpetrator and his family.²⁰ Fono also facilitate what incidents are reported to the police. According to the report, "[i]n villages which prohibit direct reporting of matters to the police the situation is therefore not uncommon where a victim of family violence would have to seek approval from the very person who carried out the violent act to be able to approach the law enforcement authorities."²¹ The report also found several opportunities for the fono to be used to genuinely protect women, for example, by helping to enforce protection orders, which they are well-positioned to do.²²

13. In *Police v A.T.* [2021], the defendant was given a reduced sentence for village punishments already imposed. The defendant was sentenced on one charge of indecent act and six charges of sexual intercourse with a girl below 16 years of age. The defendant approached the victim when the victim was staying at his house. The victim was 14 years old at the time. According to the summary of facts, it was the defendant who was the aggressor, he approached the victim and told her where to meet him.²³ Both the defendant and the victim are from the same village and are related. During the course of one year, the defendant and victim had sexual intercourse multiple times. In sentencing, the judge considered the age disparity, familial relationship, and abuse of power and set a starting point of 7 years. The judge accepted mitigating factors of the village penalty and banishment imposed, deducting 18 months. The judge also noted the apology by the defendant's family to the victim's family and deducted an additional 6 months. While it is permitted by law, the use of village penalties in mitigation legitimizes fono gatekeeping of GBV incidences which impedes survivors' access to justice.

14. Family Violence Court and sexual violence. The Family Violence Court was established in 2014 with jurisdiction over crimes in the Family Safety Act 2013, namely domestic violence. All family violence crimes are referred to probation for family group counseling instead of sentencing. This is a form of mediation facilitated by probation officers where it calls upon relatives of the offender and the victim to meet and discuss ways forward with the family. As such, it is not appropriate for sexual violence cases to be heard at the Family Violence Court even if they also constitute domestic violence. There are at least three examples since 2016 in which sexual violence cases were adjudicated at this level.²⁴

15. Alcohol/Drugs and GBV. In sentencing, alcohol can be misattributed as the root cause of GBV when, in fact, it exacerbates rather than causes violence. The danger of describing substance abuse as a root cause is that defence attorneys and judicial officers use that reasoning to argue for leniency. The 2018 National Inquiry found that in all GBV cases from 2007 to 2014, alcohol or drugs were present in 24% of cases.²⁵ Alcohol can contribute to exacerbating violent offending, but most offending happens when alcohol is not involved. Further, there are many who consume alcohol and do not commit violence.

16. In 2016, the Alcohol and Drugs Court (ADC) was established to help perpetrators of various criminal offences prioritize overcoming their addictions. They encourage the use of rehabilitation programs as a means to prevent reoffending and reduce substance abuse. However, the ADC is unfit to respond to GBV cases²⁶ which, as previously stated, cannot be resolved long-term by only addressing substance abuse and not the root of

gender inequality.

17. In *Police v Alapati* [2016], the defendant's prior completion of an ADC rehabilitation program contributed to a fully suspended sentence. The defendant had heard rumors about his wife (the victim) having an affair, and he arrived home intoxicated. He confronted the victim, punched, and strangled her. He then forced himself on her, raped her, and said "this is to pay for what you have done to me."²⁷ He was charged with one count of causing actual bodily harm with intent and one count of unlawful sexual connection. The judge considered the physical harm to the victim but also identified the rumors of the affair as provocation that was a "weighty mitigating feature in relation to the offending."²⁸ The judge also considered the defendant's previous good character, sole breadwinner status, early guilty plea, resolution with the victim, and the victim's request for leniency. In considering the role of alcohol and the ADC, the judge stated:

"This is a domestic offence. It arose because the accused had heard rumours that the victim was having an affair with another man. The fact that the accused was under the influence of alcohol was not conducive to a peaceful solution of this matter. Anyhow, this matter has been settled and the relationship between the accused and the victim is normal again. The accused has also successfully undertaken the 6 weeks rehabilitative education programme on alcohol consumption provided by the Alcohol and Drugs Court."²⁹

The defendant received a fully suspended sentence. In this case, although alcohol is described as a contributing factor, the alcohol rehabilitation program was presented as the primary remedy for the offending. This is inappropriate, especially because the ADC is not intended for rape cases. Further, it is implied that rumor of the wife's affair was sufficient provocation for the offending when alcohol was involved. Although alcohol and drug rehabilitation programs are important for reducing addictions and dependency, it doesn't focus on the core reason for offending, which is gender inequality. Therefore, rehabilitating offenders without tackling the root cause of the problem doesn't address the systemic issue and comes at the cost of justice for victims/survivors. Assigning redress based mainly on substance abuse in GBV cases evades the responsibility for understanding the role of gender hierarchies and toxic masculinity in causing GBV.

Recommendations

18. Strengthen efforts to eliminate patriarchal attitudes and stereotypes that discriminate against women, including through a comprehensive public awareness program.
19. Encourage Samoan Government and fono to raise awareness on domestic and sexual violence.
20. Limit the use of *ifoga* and customary practices as mitigating factors in GBV cases. Legislation must ensure that if there are conflicts between the traditional and the formal justice system, such conflicts must be resolved in accordance with gender equality standards and the human rights of the victim. Reconciliation and compensation paid under customary law should not be considered as a mitigating factor in the sentencing phase of cases of sexual assault or domestic violence.
21. Adopt measures to limit the belief that alcohol can be the root cause of GBV when, in fact, it exacerbates rather than causes violence. While rehabilitation programs focused on substance abuse are an important component of rehabilitating perpetrators, the emphasis on substance abuse being the root of the problem neglects what is really causing GBV: gender inequality.
22. Introduce measures that limit the use of contentious factors in the sentencing of GBV cases including de facto provocation and other gender stereotypes and victim-blaming.

¹ Singh, H., Singh, K., Leese, R., Huts, S., Goddard, E. and Harris, S., *Sexual and Gender-Based Violence in the Pacific Islands: Handbook on Judicial Sentencing Practices*, ICAAD & Clifford Chance (2018), available at: <https://icaad.ngo/wp-content/uploads/2019/01/ICAAD-SGBV-Sentencing-Handbook-1.19.pdf>.

² Tuala-Warren, L., *A Study in Ifoga: Samoa's Answer to Dispute Healing*, University of Waikato (2002), p.2 6, <http://lianz.waikato.ac.nz/PAPERS/Occasional%20Papers/TMOP-4.pdf>.

³ ICAAD, *Comparative Legal Review of The Impact of Gender Stereotyping on Judicial Decisions in Violence Against Women Cases Across the Pacific Island Region*, at 64-66 (2020), available at: https://www.sistersforchange.org.uk/wp-content/uploads/2020/02/SistersForChange_EJA_ComparativeLegalReview-GenderStereotypingVAW_CW_Feb2020.pdf.

⁴ Samoa Office of the Ombudsman/National Human Rights Institution, National Public Inquiry into Family Violence in Samoa, 2018, (*Samoa Ombudsman Report 2018*) p. 1, available at: https://ombudsman.gov.ws/wp-content/uploads/2019/01/National-Inquiry-Report-into-Family-Violence_-

⁵ UN Women, Ending Violence Against Women and Girls: Evidence, Data and Knowledge in the Pacific Islands Countries, July 2011, p.8, available at: <http://www2.unwomen.org/-/media/field%20office%20eseasia/docs/publications/2011/ending%20violence%20against%20women%20and%20girls.pdf?la=en>.

⁶ *Supra* note 4, at p. 22

⁷ *Supra* note 4, at p. 20

⁸ *Supra* note 4, at p. 22

⁹ Samoa Ministry of Women, Community, and Social Development, *Samoa Family Health and Safety Study*, at 5 (2017), available at: <https://library.nzfvc.org.nz/cgi-bin/koha/opac-detail.pl?biblionumber=5617>

¹⁰ *Supra* note 2.

¹¹ SPC & Pacific Regional Rights Resource Team, *Samoa: Legal Analysis on Violence Against Women*, at 62 (July 2013), available at: https://rrrt.spc.int/sites/default/files/resources/2019-01/Samoa_28329.pdf.

¹² *Police v Lemi* [2020] WSSC 67.

¹³ Samoa Crimes Act, 2013, p. 30, available at:

<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/93579/124323/F-1523655815/WSM93579%202015.pdf>

¹⁴ *Supra* note 12.

¹⁵ In the Constitution of Samoa, the definition of “law” includes “any custom or usage which has acquired the force of law in Samoa or any part thereof under the provisions of any Act or under a judgment of a Court of competent jurisdiction.” Article 3 of the Constitution provides that “the State” includes “all local and other authorities established under any law” and article 111(1) provides that “the Law” includes “any custom or usage that has acquired the force of law...under the provisions of any Act or under a judgment of a court of competent jurisdiction”. As a part of the State, fono are also bound by CEDAW and CRC. Further, *Sefo v The Attorney-General SC*, 12 July 2000, established that, “the fono cannot act (or fail to act) contrary to the fundamental rights set down in the Constitution.” See *infra* note 17, at 227.

¹⁶ Dinnen, S., *Traditional Justice Systems in the Pacific, Indonesia, and Timor Leste*, UNICEF Papua New Guinea, at 17 (2009), available at: https://www.unicef.org/tdad/index_56512.html.

¹⁷ Martin, P., *Implementing women’s and children’s rights: The case of domestic violence in Samoa*, 27 *Alt. L. J.* 5, (2002), p.230.

¹⁸ *Police v Peni* [2018] WSSC 37; *Police v Faasavalu* [2018] WSSC 34; *Police v Lualua* [2018] WSSC 91.

¹⁹ *Police v Lualua* [2018] WSSC 91; *Police v Peni* [2018] WSSC 37.

²⁰ *Supra* note 4, at 29.

²¹ *Supra* note 4, at 43.

²² *Supra* note 4, at 30.

²³ *Police v A.T.* [2021] WSSC 6.

²⁴ *Police v Brown* [2016] WSFVC 5; *Police v Tauese* [2018] WSFVC 2; *Police v Auvae* [2019] WSFVC 1.

²⁵ *Supra* note 4, at 30.

²⁶ *Police v Mosese* [2017] WSSC 44.

²⁷ *Police v Alapati* [2016] WSSC 15.

²⁸ *Id.*

²⁹ *Id.*