Article

ALTER AN INTERNATIONAL JOURNAL OF INDIGENOUS PEOPLES NATIVE

AlterNative
2023, Vol. 19(1) 13–22

DOI: 10.1177/11771801221145843
journals.sagepub.com/home/aln
SAGE

Self-represented litigation and meaningful access to justice in Aotearoa and Samoa

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Abstract

More than a decade ago, the first exploratory study into the experiences of Self-Represented Litigants in Aotearoa (New Zealand) recommended the need for more cultural perspectives in this area of research. This article makes a timely contribution to building this knowledge base while identifying some of the gaps, attitudes, intersectional experiences and challenges faced by Pacific communities within their respective cross-cultural contexts in response to Aotearoa's justice system. As a starting point, we explore the existing framework of self-represented litigation in Aotearoa as well as some of the key limitations to highlight how responsive it is to cultural and systemic issues of bias. This article further explicates key principles from a customary approach used in Samoa to demonstrate how it may help facilitate meaningful engagement across diasporic Pan-Pacific communities to further enhance cross-cultural litigation in the civil justice system of Aotearoa—a largely under-theorised area.

Keywords

access, custom, justice, law, Samoa, Self-Represented Litigants (SRLs)

Introduction

As a starting point, self-represented litigants (SRLs) are commonly defined as *litigants who are not represented by legal counsel* or noted in reference to other popular terms such as *pro se litigants*, *lay litigants*, *unrepresented litigants* or "People without Representation by Lawyers" (Toy-Cronin, 2016, pp. 10–11). This is the common way of viewing SRLs across the globe.

The rise in individuals seeking to self-represent often have little to no legal training and as such, they are not well equipped to navigate their way in the court system (Dyer, 2016; Knowlton, 2016; Sudeall & Meals, 2017). This is largely attributed to the lack of money to afford competent legal representation. The difficulty with this increased participation of SRLs is that it promises to deliver the appearance of the right to self-representation, while, in practice, it often delivers discriminatory and unjust outcomes. As such, these problems have been accentuated by the COVID-19 global pandemic which has led to a greater dependence on technology and has exposed the need for developing new ways of delivering legal services.

However, individuals who are legally trained to understand the specialised court system, processes and specialised language also understand the hidden parts of the system that are not apparent to SRLs (Sudeall & Meals, 2017). This includes specific documents to complete, filing dates, court protocol and case law, to name a few. In comparison to represented litigants, the majority of SRLs' cases result in worse outcomes, while reportedly overburdening court administrative staff who are often reluctant to assist, in the event they would be incriminated for not having the appropriate legal qualifications to assist SRLs (Knowlton, 2016).

Given that the type of public funding to provide the requisite legal services to various individuals is unlikely to ever be achieved, it is imperative that legal reform explore innovative solutions to drive meaningful access to justice. Thus, access to a legal system underpinned by the rule of law and due process, access to legal advice and representation, access to a court and access to funding (Law Society of England and Wales, 2019) to the greatest possible extent.

In the analysis of the justice versus legal problem, Sandefur (2019) argues that we should be mindful that: (1) resolving civil justice problems does require advice from a legal professional which does not strictly need to be a lawyer or the use of a formal legal process and (2) the range of "do-it-yourself" (p. 52) online Alternative Dispute Resolution platforms suggest a preference towards self-represented litigation as social networks are commonly being utilised to resolve disputes. Sandefur (2019) also

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highlights the systemic bias and prejudice of a flawed legal system designed "by lawyers" (p. 53) for lawyers as evidenced by a legal profession monopolising the justice system. Evidently, the adage that access to justice is synonymous with access to legal representation is no longer the case (Kozak, 2011). What is required are new ways of supporting SRLs to achieve access to fair and equitable dispute resolution processes which do not revert to solutions prior to the age of the internet and empowers SRLs to solve problems more efficiently and effectively (Schmitz & Rule, 2019). For example, the use of technology-assisted review in the task of preparing discovery within the scope of the High Court Rules of New Zealand (Gordon & Sharma, 2020) has highlighted the benefits of technology as an efficient and cost-effective means to the administration of justice (Gordon & Sharma, 2020; Law Society of England and Wales, 2019). But solutions remain entangled in a web of complex, costly and obscure challenges posed by and to the legal system. This article does not explore meaningful access to justice through technology, but it does explore potential innovative models based on cultural norms that could potentially enrich the access to justice experience of SRLs.

SRLs have become more acute over time as legal systems have shifted towards a more consumerist ethos and functionality approach which affords greater rights and respect to those who can afford the cost of litigation (Toy-Cronin, 2015, 2016). These developments are at odds with the 1990 *Basic Principles on the Role of Lawyers* which calls for state governments to "ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons" which leads to a series of challenges the legal system must address to achieve equal justice for participants (Office of the United Nations High Commissioner for Human Rights. 1990, "Access to lawyers and legal services," para. 3). In customary courts of the South Pacific region, the majority of petitioners are, in fact, SRLs due to many factors, including the adoption of customary justice—more inquisitorial rather than adversarial by nature; the explicit division between courts dealing with customs and the courts dealing with civil and criminal matters (Penal Reform International, 2000), to name a few. However, in the examination of Samoan customary norms which are compatible with universal human rights (Va'a, 2009), it helps to ease the tension between collective responsibility embedded in customary norms and individual rights and liberty embedded in the justice system as will be discussed later in the 'Self-represented litigation: Samoa' section.

Self-represented litigation: Aotearoa

In late 2017, New Zealand Ministry of Justice data indicates that SRLs contributed to more than 50% of active general proceedings and active civil cases in the District Court. These figures were supplied under the New Zealand Official Information Act 1982 request for the period 1 July 2017 to 13 June 2018. Evidence indicates most SRLs engage in the appellate, civil and family jurisdictions (M. Smith et al., 2009). The increase in SRLs is evident in other comparable international jurisdictions such as Australia and the United Kingdom (Moorhead & Sefton, 2005; Richardson et al., 2012; Trinder et al., 2014; Williams, 2011). Lower income, education level and different socio-economic factors impact the demography of SRLs. This corroborates with international evidence (Hann et al., 2002). The lowest income earners with little disposable income, and those often caught in a catch-22 situation—earning too much to qualify for legal aid and too little to obtain legal assistance, account for about 1% of legal aid grants in civil cases (Toy-Cronin, 2015, 2016). Reasons for disengaging from the justice system vary from financial barriers, racism and 2014 Family Justice Reforms restricting legal representation in family courtrooms, to name a few. Key informants from the SRLs exploratory study reveal that Pacific people were unlikely to represent themselves (M. Smith et al., 2009). From 2018 to 2019, of the 83,745 legal aid applicants, 1% were Cook Island Māori and 2% were Samoan, with more males (69%) over-represented to females (17%) and other genders (14%) (Coster, 2020). The scarcity of competent legal representation and resources in the New Zealand justice system, to adjudicate civil disputes may cause citizens to lose public confidence. This has been noted by members of the judiciary, such as Judge Jan-Marie Doogue (2018).

King's Counsel Frances Joychild, previously Queen's Counsel, estimated that at least one-half to two-thirds of the New Zealand population cannot obtain legal assistance and are denied meaningful access to justice. This lack of legal assistance has significant detrimental implications for maintenance of the rule of law, democratic governance, fairness, and equality. Impacts are magnified if the right to self-representation is downplayed or denied (Joychild, 2015). Some SRLs proceed without representation because they simply cannot afford the cost of retaining a lawyer. This affordability access to justice concern is exacerbated by the fact that recent years have seen significant reductions in civil legal aid funding in New Zealand and a decrease in the eligibility threshold (Winkelmann, 2014). This is not uncommon as many court systems experience budget cuts due to politicians struggling to balance competing interests while funds originally allocated to justice and the courts are often reallocated to other more pressing areas. In the United States, the state of California experienced court budget cuts of over USD$600 million in a 10-year period which reduced court administrative services while causing dissatisfaction of citizens (Kozak, 2011).

The right of access to justice is enshrined in section 27 of the New Zealand Bill of Rights Act 1990, whereby rights to *natural justice* is part of the wider principle within a human rights framework, whereby the right of access to courts is about meaningful and effective justice in light of individuals' differing circumstances. The full realisation of this right is preserved by law for "any person [to represent] himself or herself in proceedings before any court or tribunal" (Lawyers and Conveyancers Act, 2006, s27(1)(a)).

As Chief Justice Dame Helen Winkelmann (2014) notes:

> The first is that for the well-being of our society, its peacefulness and economic prosperity, the public good that civil justice provides must be reflected in the policy settings that impact upon access to the courts. In particular it must be reflected in the level of court fees and the funding of legal aid. (p. 229)

Other SRLs forego counsel for non-economic reasons, such as a fundamental distrust of lawyers or the belief they can navigate the litigation process alone to have their *day in court* as this empowering process enables them to exert greater control over their case. In any event, it is unlikely that changing the nature of proceedings towards a more inquisitorial nature "can make up for the adversarial deficit in such situations" (Zuckerman, 2014, p. 367).

Whether SRLs forego counsel due to a lack of financial resources, navigating the court system and litigation process can have serious negative impacts, including what Zuckerman (2014) calls the "efficiency deficit" (p. 355). An efficiency deficit occurs where a layperson litigant is unfamiliar with court procedure and substantive law and as such has trouble with adequate preparation and courtroom compliance which results in the Court spending disproportionate time and resources. Limitations on the efficacy of judicial help of litigants in person were noted by High Court Justice Matthew Palmer in the New Zealand Court cases (Low Volume Vehicle Technical Association Inc v Brett, 2017; Robertson v ASB Bank Ltd., 2014).

This lack of knowledge in filing appropriate applications, causes of action and procedural unawareness, reinforces SRLs' unequal position, impeding access to justice and success while reinforcing the already significant bias against SRLs in the court system. Irrespective of the reasons for a person's SRLs status, the potential for poorly adjudicated litigation is an undesirable outcome for society. Accordingly, public policy is better served by seeking more innovative solutions that address the full spectrum of barriers that stand between SRLs and meaningful access to justice.

This critical lack of justice has not gone unnoticed. One government-sponsored exploratory study into SRLs looked at concerted efforts by organisations trying to solve the dilemma for more than a decade (M. Smith et al., 2009). A more recent Access to Justice Working Group paper outlined various innovations to legal services, different service types, delivery models for services, funding sources, fee arrangements, with recommendations for action by the New Zealand Bar associations for ways to cater to diverse legal needs (Toy-Cronin, 2016).

In light of this, new innovative models have emerged. Aotearoa's Te Ao Mārama (The World of Light) model was officially launched in November 2020 by Chief District Court Judge Heemi Taumaunu for intended rollout across all District Court locations (Sio, 2021; Taumaunu, 2020). Te Ao Mārama was developed in response to the evidence for the urgency of transformative change in Aotearoa's criminal justice system. With a strong focus on procedure fairness, Te Ao Mārama represents the needs across the diverse spectrum of a growing multi-cultural Aotearoa where justice can be sought by all, irrespective of gender, financial means, culture, ethnicity—where everyone can meaningfully participate in the justice system while feeling heard and understood. Chief Judge Heemi Taumaunu highlighted Te Ao Mārama further addresses historical calls for action by local iwi (tribes) and communities, in the spirit of partnership under the Treaty of Waitangi, with solutions developed for all and not exclusively Māori. For example, a non-Māori applicant in the case of Peter Hugh McGregor Ellis v The Queen [2019] became a beneficiary of a tikanga Māori (Māori system of "practices, principles, processes and procedures, and traditional knowledge" (Jones, 2014, pp. 189–190) approach to justice by way of criminal appeal. Some of the key features in this much-needed cultural shift has been put into action in other specialist courts including Rangatahi Courts, Alcohol and Other Drug Treatment Courts in addition to the adoption of plain language, processes for the adoption of Kaupapa Māori —"research by Māori, for Māori and with Māori" (L. T. Smith, 2015, p. 47) in the mainstream, wider stakeholder involvement in court, thus engaging iwi and the community, greater use of cultural speakers (Sentencing Act, 2002, s27).

Lessons from mediation

Some of the key limitations experienced by SRLs build on unique insights gathered from cross-cultural mediations. Based on experiences involving New Zealand Europeans and Asians, issues concerning seating arrangements, key decision-makers and enforceability of oral agreements were noted as key challenges (L. T. Smith, 2015). The language barrier was singled out as the major issue of concern especially when one party had adopted English as a second language (Hudson, 1996; Neal, 2022; L. T. Smith, 2015). In response, Aotearoa's new Te Ao Mārama model seeks to address this by use of cultural speakers in line with section 27 of the (Sentencing Act 2002; Taumaunu, 2020).

Morris and Alexander (2017) state the need for a more thorough approach to the inclusion of culture in cross-cultural training for mediators. The effectiveness of such training would translate into effective practice, to avoid tokenism while maximising inclusiveness. This process would require self-awareness of mediators and education (Morris and Alexander, 2017). Tamasese et al. (2009) and other advocates (Kleinman, 1980; MacLeod & Egan, 2007) point out the need for professionals involved in client care to undergo critical self-evaluation of their own constraints and limitations as it relates to their cultural reference point. This builds on existing models of mediation and the adoption of the eclectic approach, allowing flexibility in how mediators tailor their facilitative styles to the specificity of the circumstances.

The recommendations put forward by Morris and Alexander (2017) complement consultation findings from 20 years ago, in which it was recommended by both Māori and Pacific members of the law and justice sector, that cultural components be incorporated into all legal courses and cultural trainings, for all lawyers and potential lawyers to help overcome barriers preventing adequate understanding of legal rights, such as cultural

and language barriers (Morris and Alexander, 2017; New Zealand Law Commission, 1997).

Self-represented litigation: Pacific communities in Aotearoa

The Pacific population in New Zealand, who affiliate with at least one Pacific ethnic group, has increased by 29% from 2013 to 2018 (Ministry for Pacific Peoples, 2021). About two-thirds of Pacific people were born in New Zealand (Statistics New Zealand., 2020). The three largest Pacific groups comprise Sāmoans (47.9%) representing the highest proportion followed by Tongan (21.6%), Cook Islands Māori (21.1%), Niuean (8.1%), Fijian (5.2%) and Tokelauan (2.3%) (Ministry for Pacific Peoples, 2021).

The unique distinctions in cultural values and beliefs, history, language and social structure across the diverse Pacific diaspora in New Zealand, indicate the unique sub-groups within each group. Anae et al. (2017) recognise the demands confronted by the *pioneer generation* or the parents of the *new generation* children born and raised overseas, such as raising the *new generation* who had to adapt to learned traditional knowledge of fa'asāmoa (the Samoan way; essence of being Samoan) as passed on from the *pioneer generation* and contextualised with other issues such as cultural identity and social justice.

More than two decades have passed since the New Zealand Law Commission consulted with over 200 women of Pasifika (Pacific) descent involved in some aspect of the law and justice system to better inform a consultation paper on women's experiences in access to legal services. This report failed to delineate between different Pacific Island groups (New Zealand Law Commission, 1999). The major themes emanating from this research capture the crucial factors acting as deterrents to engagement and faith within the New Zealand justice system. Some of these issues caused increased frustration to Pasifika women often linked to the language barrier where English is a second language and different cultural values resulting in a clash between the predominantly Euro-centric values underpinning the justice system and neglect of their own cultural values and contexts. Given the high reporting of racist or patronising attitudes from Ministry of Justice personnel, based on Māori and Pasifika women experiences, it is unsurprising this led to a recommendation for more Pacific-specific legal services and Pacific-specific legal professionals and the large underrepresentation of Pacific people working as law academics, lawyers, judges, legislators or policy-makers. This contributes to the perception that Pasifika women feel that their cultures are inadequately recognised and often ignored by the law and in legal decision-making (Johnsen, 2020; New Zealand Law Commission, 1997; J. Pointon, personal communication, January 29, 2020). This echoes findings similar to another study entitled *Self-Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions* (M. Smith et al., 2009).

Walker (2012) indicates that in the Samoan culture, a more culturally competent regime is required, as a collective approach governs the traditional fa'asamoa. The Western Mediation Model underpinned by impartiality and confidentiality, does not complement the Samoan village style of dispute resolution (Morris & Alexander, 2017). It is about preserving and fostering harmonious relationships rather than establishing fault, which often translates into the low level of complaints made by Samoans. This supports findings pointing to the low uptake of mediation services and the perception that the process is unfair and would not lead to an appropriate resolution, particularly among the marginalised groups, also due to the failure to consider cross-cultural style differences in western dispute resolution models (Lau, 2014). The differences between recent Samoan immigrants and those born in New Zealand further highlight the diversity of Samoans which must be factored into any cross-cultural model of mediation (Walker, 2012). The critical examination of Samoa's cultural approach to litigation as underpinned by Samoa's core values and beliefs is timely and may help guide Pacific communities engaging with Aotearoa's justice system (Tamasese, 2007).

Self-represented litigation: Samoa

In the absence of comprehensive, reliable data collection or long-term studies, a critical overview of a Samoan approach to litigation based on the experience of Samoan SRLs, will attempt to deconstruct the stigma connected to Pan-Pacific people in New Zealand often misrepresented in the literature as largely incapable of self-representation with common reports of language and comprehension problems, for example, English as a second language stress, frustrations and uncomfortability on account of the lack of Pacific-specific representation across court staff exacerbate this stigma—collectively limiting their understanding of the process.

As a starting point, I contend that an exploration of the core values of fa'asamoa can lend much-needed insight into how this deconstructing and unpacking exercise may collectively be brought together to understand the character and scope of Samoan jurisprudence as it pertains to litigation. Before delving further into the Samoa cultural approach for self-represented litigation, there are several expressions of Samoan core values which guide social action, the most fundamental of these are, namely, usitai (obedience), fa'a'aloalo (respect), alofa (love) and tautua (service) (Mailo, 1992; Va'a, 2009). It is important to note that the expression of fa'asamoa may not always be explainable and may often lack uniformity across different nu'u (villages) in Samoa (Tuala-Warren, 2002).

Tuala-Warren (2002) asserts the conflicting tensions at play between the two competing underlying philosophies: on the one hand, the fundamental rights underpinning the western philosophy of individual liberty; and on the other, the Samoan philosophy of collective responsibility administered by matai (chiefs) at the fono (village council [VF]). This aligns with Tamasese's (2007) understanding of Samoan jurisprudence. Tamasese (2007) explores four concepts underpinning Samoa jurisprudence: (1) tua'oi

(knowledge of boundaries between us, others, wider environment, the cosmos and God, as protected by law), (2) tofa saili (knowledge of how to search for meaning or wisdom), (3) faasinomaga (a person's designation, identity as located within the *heart, mind and soul of a person* and gives meaning and belonging), and (4) pae ma suli (Samoan mediation). Of the four concepts, Tamasese highlights the significance of fa'asinomaga in capturing the essence of Samoan culture as not individualistic but integrally connected to the ancestors, the cosmos, the land, and so forth while being in search of our tua'oi (boundaries) which are central to understanding the moving tides and contours of culture, politics, practised customs and impact of laws interpreted by courts.

However, it is instructive to offer a brief outline of some of the complementary customary norms of fa'asamoa as it pertains to civil and criminal matters in Samoa's justice system (Va'a, 2009). This includes aiga (extended family), VF, ifoga (reconciliation) and matai. Each customary norm will be discussed in detail below with some commentary to guide SRLs as well as some key challenges faced by SRLs in Samoa.

Aiga

The aiga serves as one of the core values of fa'asamoa which is often inextricably linked to the concept of self-identification (Anisi, 1993). The actions of the accused individual, or in this case SRLs, carry the potential to harm and elevate the status of the aiga and vice versa. On this rhetoric, holistically, the offensive actions of SRLs in fa'asamoa are not a separate stand-alone incident. It carries the potential to harm the reputation of the aiga or any active member of the aiga beyond the individual merely responsible for the offence. Within the Samoa justice system, SRLs faced with prosecution or sentencing, is subordinate to the aiga or collective rights of the nu'u (Polu, 2003).

Village Fono

There are about 250 VF active in Samoa (Meleisea & Schoeffel, 2022). The local VF is authorised by law to administer justice as a formal structure of local government by prescribing rules to resolve disputes that threaten village harmony and enforce punishment such as banishment from the village (Village Fono Act, 1990). The VF's affairs are also governed by law (Internal Affairs Act, 1995). Courts of law may also consider the punishment imposed by VF in mitigating a sentence which may or may not result in a sentence reduction, in criminal cases but not necessarily in the award/order for damages in civil cases (Tuala-Warren, 2002). Judges have also reduced sentences by up to 2 years, on account of village penalties imposed on the defendant (Police v Faasavalu, 2018; Police v Peni, 2018).

To resolve this issue, Sapolu, former Chief Justice of Samoa, states that the customs and usages of the fa'asamoa remained post-colonisation (Sapolu, 1988). However, as the Constitution of the Independent State of Samoa 1960 is the supreme law of Samoa, it expressly embeds the philosophy of individual liberty in the expression of fundamental rights which effectively subordinates any custom or customary rights that are inconsistent with the individual rights or freedoms entrenched in Samoa's Constitution (Tuala-Warren, 2002). This principle was captured in Sefo v Lands and Titles Court (2000) in which the Supreme Court upheld the constitutional freedom of religion provisions enshrined in Samoa's Constitution when deciding that the ali'i (chief) and faipule (elected heads of villages) had no jurisdiction to ban non-mainstream Christian religious groups within the village of Saipipi.

Matai

> My experience as a litigant. . .and the fact that I live my Samoan Indigenous culture are my qualifications. . .. The perspective advocated here has not only been from that of a litigant, but perhaps more importantly from that of a Samoan person who loves his culture, lives his culture and wants to see the best of that culture carried on in generations to come. (Tamasese, 2007, pp. 1, 18).

In Samoa, there is a complex hierarchy of matai or chiefly titles grounded in long-standing traditions. Figures vary on the number of matais but a 2015 figure from a survey by the Ministry of Women, Community and Social Development (2015) indicated a total of 17,340 matai's in Samoa, and the 2016 census identified that 10% of matai are women (National University of Samoa, 2015). Only the senior, resident, male holder of the matai title normally sits in the VF. Others have more of an honorary matai title. In many villages, women matai are not expressly forbidden to sit in the VF but are discouraged from doing so by informal conventions (Meleisea et al., 2014).

In Tamasese's (2007) critical analysis, he explicates the use of customs and values in his engagement with the Land and Titles Court (LTC), as captured uniquely from his SRLs' perspective and as a matai. Tamasese's exploratory study and exercise in tofa saili provided insight into the scope of Samoan jurisprudence as applied to Samoa's LTC (Tamasese, 2007). Prior to the Land and Titles Act Bill 2020, which proposed the removal of the prohibition against the use of lawyers in the LTC, only the matai sa'o or matai sili (highest ranking or most senior chiefly title in the family) or suli (heir of kinship group holding several village chiefly titles) could bring a claim to, or litigate in, the LTC in accordance with protocols of Samoan custom and usage (Meleisea & Schoeffel, 2022). In principle, this largely resembled SRLs' approach to litigation, insofar as LTCs are inquisitorial in nature as opposed to adversarial or procedural as observed in Samoa's common law civil and criminal courts.

Ifoga

Ifoga practices within the area of restorative justice capture the competing interests of individual rights and collective responsibility with the purpose of healing wounds, also referred to as dispute healing between the offender and

victim, as opposed to imposing vengeance and punishment (Tuala-Warren, 2002). This captures the purpose of Samoa's Alternative Dispute Resolution Act (2007) to promote reconciliation and conciliation by obtaining the consent of the complainant and encouraging reconciliation and settlement in cases that are not aggravated in degree, or carry a substantial personal or private nature. Similarly, the Ontario Arbitration Act 1991 provides the legal framework which recognises First Nations Communities as law-makers and commercial actors, free to enter contracts on their own terms (Sanderson, 2012).

Traditionally, taking accountability for such actions would entail assuming responsibility for the offence which would then activate ifoga, where individual rights are outweighed by collective rights (New Zealand Law Commission, 2006). Examples of ifoga include hefty fines imposed on the aiga, as opposed to only the individual offender. The fine must be proportional to the act of making an offender faamativa (poor) (Tuala-Warren, 2002). Such fines may include demanding the removal of foodstuff to prevent the breeding of livestock, removal of all taro roots and crops from the family plantation to name a few. The customary practice of ifoga is intended to publicly shame the offender and their respective aiga, based on genuine remorse and regret for the offence committed to strengthen and preserve the vā (social relationships) between the offender and victim's community, nu'u and aiga (Tuala-Warren, 2002). However, the acceptance of the ifoga by the victim's aiga and nu'u demonstrates a resolution of the wrongdoing, removal of shame imposed upon the offender's aiga and nu'u and the beginning of the healing process. Any form of retaliation or rejection of the ifoga is frowned upon as it shows disrespect to the matai or holders of chiefly titles and heads of aiga.

The ifoga practice is not unique to Samoa's justice system. The public act of seeking forgiveness in front of the community is a form of restorative justice adopted in Gacaca (community justice) courts of Rwanda which could lead to a reduction in penalties (Samuels, 2006). On this view, the community-based judicial system helped resolve genocide cases that emphasised reconciliation and reintegration (Article 51 Organic Law No. 16/2004 of 19/6/2004, A. 51 O. L, 2004; Ingelaere, 2016; Samuels, 2006). The request for forgiveness is also incorporated into reconciliation ceremonies in Timor-Leste, as a form of dispute resolution to enable reintegration into society and restore unity in the clan while sending a clear message of acceptable and unacceptable behaviour (Harper, 2006).

Historically, the adoption of ifoga by VF in local village cases was used as a form of customary justice to settle offences as determined by VF comprised of matai (Filoiali'i & Knowles, 1983). In contemporary Samoa, the ifoga is often considered by judges in criminal cases to mitigate sentences after defence counsel enters a plea in mitigation (Macpherson & Macpherson, 2006). Unlike the state justice system, the VF is not required to produce written records in VF proceedings, punish repeat offenders or counsel the defendant (Meleisea, 1987). This is problematic as it contributes to ongoing domestic violence, especially in instances where the VF prohibits direct reporting of crime to the police. At times, this may undermine the dignity of the victim and genuine expression or acceptance of the ifoga by the victim particularly in cases where: (1) the defendant or victim did not actively participate in the ifoga; and (2) the perpetrator's aiga participated in the ifoga instead of the defendant or victim. This was evident in the following cases: Police v Laki (2018); Police v Misipati (2017).

The case of Police v Crichton (2019) demonstrates how ifoga is considered in sentencing. In the case, the victim, wife, 44 years old, was stabbed seven times by the perpetrator, after he threatened to kill her and their children. The victim stated in her victim impact statement that she fully accepted the traditional ifoga rendered by the perpetrator's family. The defendant was charged with one count of assault grievous bodily harm, one count of armed with a dangerous weapon and one count of threatening words. Justice Clarke set a starting point of 6 and a half years imprisonment and considered the mitigating factors of the perpetrator's ifoga. Mr Crichton, the perpetrator, also had previous convictions for offences of a different nature. Justice Clarke reduced Mr Crichton's sentence by 1 and a half years with 8 months deducted on account of the ifoga and 4 months on account of the victim's plea.

Importantly, before the following cases are reviewed, I point out some of the common beliefs linked to gender-based violence (GBV). This is often referred to as "GBV myths" about the causes of GBV, the nature of victims and the nature of perpetrators (Sisters for Change et al., 2020, p. 12). On this view, it is held that the combined influence of societal endorsement or normalisation of interpersonal violence and traditionally held beliefs about gender roles have, in some cases, enabled GBV, victim blaming, toxic masculinity and unjust customary practices. Some of these GBV myths are that perpetrators are absolved from criminal actions they take when intoxicated and that a rape did not happen if a victim did not suffer physical harm, scream for help or defend themself (Singh et al., 2016).

GBV underreporting and "GBV have also permeated judicial decision-making" (Sisters for Change et al., 2020, p. 12). There are some customary practices that operate outside the formal justice system that fails to account for the rights of victims of GBV and may, in some instances, privilege the community apology of the perpetrator rather than the rights of the victim of GBV. In Samoa, the Court has considered ifoga in cases involving the rape of young girls: Police v Lauvae (2011), Police v PE (2013) and Police v Tuifao (2012).

By examining two SRLs' cases of Police v Felise (2010) and Leota Leuluaialii Ituau Ale et al. v Alii & Faipule of Solosolo Land and Titles Court of Samoa (2012) in the next section, it gives value to the cautionary advice from Tuala-Warren (2002) that the fa'asamoa customary norms may not always be the same in practice. This lack of homogeneity suggests the flexibility of customary norms (Sanderson, 2012) as outlined above.

Case 1: Police v Felise [2010]

In Police v Felise (2010) the SRL was the perpetrator, a 32-year-old man, who raped a 15-year-old girl who lived in the same village. The victim's evidence submitted in trial found the defendant had appeared drunk and that the following day, he approached the victim's grandmother with an apology, together with members of his family. The judge did not factor this as a mitigating factor to sentencing. Also, the prosecution did not highlight the fact that the victim was under-age. Of the four customary norms outlined above, the absence of VF and a formal ifoga, is explicitly clear and detrimental to the perpetrator's overall sentencing. I note the victim considered Felise's informal apology, as an ifoga, although it was not formally expressed to her in person. However, Justice Nelson held that "There has been no formal *ifoga* made so there is no deduction that can be made for that, neither have you expressed any remorse in this matter because when you were given the chance by the court this morning you still say you are not guilty, and you did nothing. So you are not entitled to any deduction for remorse" (Police v Felise, 2010, p. 127). In short, the defendant did not approach the victim with an apology and no remorse was expressed. The defendant was given a reduced sentence on account of his first offender status and remand in custody time. The judge acknowledged that "alcohol played a part in the offending" (Police v Felise, 2010, p. 127) but did not account for the fact that the victim was under-age or that most men consume alcohol without committing GBV.

Case 2: Leota Leuluaialii Ituau Ale et al v Alii and Faipule of Solosolo Land and Titles Court of Samoa (2012)

In another SRL case, Ale, had petitioned the LTC in 2012 to overturn a banishment order imposed by the VF (Seumanutafa, 2018). The VF from the village of Solosolo had imposed a lifetime ban on Ale and his aiga from remaining in the village as Ale had not rendered any services to the village as he subsequently tried to establish his own sub-village ("Samoan leader welcomed back", 2016). Consequently, the LTC effectively revoked the VF banishment order. Legally, the VF has "the power to order banishment or ostracism" (Village Fono Act, 1990, s6(1)(aa)), and the constitutional safeguard is that the person against whom the banishment or ostracism order is made may appeal the order to the LTC. However, the village took matters into their own hands and enforced the banishment order even against the LTC's revocation order, which resulted in Ale's guest house being burnt to the ground and property damaged ("Samoan leader welcomed back", 2016). With respect to the customary norms in action: first, the aiga of Ale and their reputation were detrimentally impacted by the lifetime ban and subsequent damage to their property which severed generational connections and ties to the village of Solosolo; second, in the LTC proceedings, matai submitted the affidavit of evidence in support and in opposition to Ale significantly disrupted interpersonal relations in the village, and third, the VF played a prominent role and were obliged by law to act according to the law while observing the constitutional requirements of fairness to Ale and his aiga. Unlike case 1 above, and in light of the facts here, the absence of ifoga was warranted within the formal legal system. Evidently, Ale did not seek the full suite of legal remedies, which included claiming special damages and vindicatory damages under tort law due to the unlawful banishment order and subsequent damage to their property which is an example of one legal avenue explored in the case of Punitia v Tutuila (2014).

However, in a customary context, Ale and his aiga lived on customary land and not freehold land. Thus, the VF governs most aspects in the village setting (Village Fono Act, 1990, s9), and in accordance with customary protocol, it was expected that Ale and his aiga exercise ifoga to the VF. As Ale pursued justice outside the village, having sought guidance from the LTC, it effectively undermined the mana (authority) of the VF. Ironically, in 2016, it was reported that Ale and his family sought ifoga from the village.

> Leota Leuluaialii Ituau Ale and his family, in a traditional ceremony. . .presented the village with food, including six cattle, up to $US10,000 and fine mats. Ale, had been banished for life by the village council but it unanimously decided to lift it. . . . A village matai says the change of heart was the result of reconciliation and forgiveness between the two sides to show the true spirit of Easter. ("Samoan leader welcomed back", 2016, paras. 2, 5-6).

This case uniquely captures the conflicts of exercising constitutional rights based on individual liberty rather than collective responsibility as well as the conflicts between customary law and state law experienced in post-colonial plural countries such as Samoa. For example, the misuse of power by VF (Samoa Law Reform Commission, 2012) complements the high success rate of the *judicial review* of VF cases, to name a few. As discussed above, it reinforces some of the critiques of customary justice systems that lack adequate safeguards and promote more unjust and discriminatory practices against the rights and treatment of vulnerable groups (Seumanutafa, 2018).

The operation and rationale behind each customary norm in Samoa are not uniquely separate by nature, it forms a constituent part of a complex weave of interconnections that are traditionally maintained through village connections. However, any attempt to implement it in Aotearoa places a responsibility on those who work in Aotearoa's justice system which could be deemed as problematic. The challenge is in the development and implementation of a uniquely *Aotearoa* meaning of Samoan customary norms to guide SRLs which must be treated with cultural competence and care in Aotearoa. This way, it seeks to preserve the integrity and vā of the fa'amatai system which is unique to Samoa. The non-Samoan community and Samoans *who choose to adopt a blended kiwi lifestyle in Aotearoa* must actively choose to learn about these customary norms. The next step is more problematic as it requires implementation without compromising the integrity of the Samoan cultural practice.

There are a myriad of factors to consider—to what extent has modern law evolved and whether it is compatible with traditional and uniquely Indigenous customary norms; whether Indigenous communities should design, develop and implement separate frameworks for SRLs managed by their communities (Sanderson, 2012); or whether informal pathways to access justice adds more value to the SRL experience as evident in Samoa and nations such as Rwanda and Timor-Leste.

Conclusion

Through a critical assessment of ways to meaningfully address the access to justice gap, specifically tailored to SRLs, this analysis demonstrates the lack of critical scholarship in cultural frameworks, which means correlations are not readily addressed or acknowledged. It further reinforces that current literature undermines the unique experiences, interactions and the wider socio-legal and socio-cultural context of Pan-Pacific communities within the civil justice system.

While not seeking to reinvent the wheel, this article argues that building on existing cultural frameworks demands further attention within the justice system. It finds that enriching the access to justice experience alongside incorporating the role of cross-cultural training in mediation provides a myriad of options to help facilitate this process and reduce the access to justice gap as evidenced in the literature.

Therein lies the dilemma as more contentious issues arise as opposed to pragmatic solutions. However, this article provides an ambitious attempt to develop a uniquely Samoan cultural approach to self-represented litigation to help guide cultural-competent practices with Pacific-specific communities, particularly Samoan communities considering self-represented litigation in pursuit of meaningful access to justice for all.

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Acknowledgements

Thanks to Associate Professor Guy Charlton (University of New England) and Dylan Asafo (University of Auckland) for comments on previous drafts of this article.

Declaration of conflicting interests

The author declared no potential conflicts of interest with respect to the research, authorship, and publication of this article.

Funding

The author received no financial support for the research, authorship, and publication of this article.

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Glossary

Samoan language	
aiga	family, kin, larger extended family
ali'i	chief. . .
alofa	love
fa'a'aloalo	respect
fa'amativa	poor
fa'asāmoa	the samoan way, essence of being samoan
fa'asinomaga	a person's designation, identity as located within the heart, mind and soul of a person and gives meaning and belonging
faipule	elected heads of villages. . .
fono	village council
ifoga	reconciliation
mana	authority
matai	chiefs
matai sa'o	highest ranking or most senior chiefly title in the family
matai sili	highest ranking or most senior chiefly title in the family
nu'u	villages
pae ma suli	samoan mediation
Pasifika	Pacific
suli	heir of kinship group holding several village chiefly titles
taro	a root crop vegetable
tautua	service
tofa saili	knowledge of how to search for meaning or wisdom
tua'oi	knowledge of boundaries between us, others, wider environment, the cosmos and god, as protected by law; boundaries
usitai	obedience
vā	social relationships based on respect
Māori language	
Aotearoa	New Zealand
iwi	tribes
Kaupapa Māori	by Māori, for Māori and with Māori
Te Ao Mārama	The World of Light, a legal model with an emphasis on fairness for all
tikanga Māori	Māori system of practices, principles, processes and procedures, and traditional knowledge
Kinyarwanda language	
Gacaca	community justice courts; literally, short grass—the area of the village for public assembly

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