

Mandates of the Special Rapporteur on the independence of judges and lawyers and the Working Group on discrimination against women and girls

REFERENCE:
AL WSM 1/2021

4 August 2021

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the independence of judges and lawyers and Working Group on discrimination against women and girls, pursuant to Human Rights Council resolutions 44/8 and 41/6.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **alleged failure of the previous Government to comply with certain judicial orders issued by the Supreme Court in relation to Samoa's election disputes**, which would constitute, if confirmed, a serious breach of the principles of judicial independence and the separation of powers. We are also concerned about the derogatory remarks made by the then caretaker Prime Minister about young women lawyers.

The Special Rapporteur on the independence of judges and lawyers already expressed concerns in relation to the allegedly adverse impact of the constitutional amendments to the Constitution, the Judicature Act and the Lands and Titles Act on the independence of the judiciary in communication WSM 1/2020, sent on 26 May 2020. He regrets that, to date, he has not received a response from your Excellency's Government.

According to the information received:

On 9 April 2021, Samoa held its general parliamentary elections.

On 16 April 2021, the election results were announced. Both the Human Rights Protection Party (HRPP), the party of the caretaker Prime Minister, and the Faatuatua i le Atua Samoa ua Tasi Party (FAST) obtained 25 parliamentary seats out of a total of 51 seats, while the remaining seat was gained by an independent member. After the election results were announced, the independent member declared allegiance to the FAST party, giving FAST a majority of 26 parliamentary seats.

On 20 April 2021, the Electoral Commissioner activated article 44(1)(A) of the Constitution of Samoa, which requires a 10% minimum quota of female representation in the Legislative Assembly and the Head of State appointed a further female member to the Legislative Assembly, allegedly to comply with the constitutional requirement. As result of this appointment, the HRPP obtained 26 seats, thereby creating an impasse in the Legislative Assembly.

On 22 April 2021, FAST submitted a petition to the Supreme Court, challenging the appointment of the additional female member.

On 17 May, the Supreme Court declared the appointment of the additional female member to be unconstitutional.¹ The Supreme Court also ruled that a writ issued by the Head of State on 4 May 2021, directing the Electoral Commissioner to prepare for a new general election, was null and void, since it was in excess of the Head of State's constitutional powers. The Supreme Court then brought the Head of State's attention to Article 52 of the Constitution, which requires the Head of State "to call a meeting of the Legislative Assembly within 45 days of the holding of a General Election".²

On 20 May 2021, the Head of State issued a Proclamation calling the Parliament to convene on 24 May, the day that marked the 45th post-general election day.

On the night of 22 May 2021, the Head of State issued a new Proclamation suspending his earlier decision. He stated that the new Parliament would not convene "until such time as to be announced and for reasons that I will make known in due course."³ It is reported that, to date, the referred reasons have not been made known.

On the morning of 23 May 2021, FAST submitted an urgent petition to the Supreme Court, requesting the Court to invalidate the Head of State's Proclamation of 22 May 2021.

The Supreme Court heard the case and issued a written judgement on the same day. Recalling its judgement of 17 May, the Court certified the validity of the results of the general election held on 9 April 2021, and requested once again the Head of State to call a meeting of the Legislative Assembly within 45 days of the general election, pursuant to Article 52 of the Constitution. The Court further considered that Article 52 "[did] not give the Head of State the power to avoid or disavow the Constitutional obligation to call Parliament to meet not later than 45 days after a general election."⁴

Upon advice of the caretaker Prime Minister, the Head of State allegedly decided not to carry out the Court's decision, arguing that Parliament could not convene until all legal challenges related to the election – and in particular HRPP's appeal concerning the appointment of the additional female member – were concluded.

On 24 May 2021, the 45th day following the elections by which date the new Parliament should have been sworn in, Samoa's Chief Justice and judiciary, accompanied by the Police Commissioner, walked up to Parliament House building, wearing full ceremonial robes, but were denied access to the building, which had been locked on the orders of the Speaker of the House and the caretaker Prime Minister.

Barred from entering the legislative chamber, members of the FAST party held an ad-hoc oath-taking ceremony in a large marquee in the gardens of Parliament, without the Head of State, the Chief Justice or members of the

¹ *FAST & Another v Electoral Commissioner & Another* MISC80/21.

² *FAST & Others v Attorney General, Others* Misc121/21 & Misc120/20, para [94](4).

³ <https://ar-ar.facebook.com/samoagovt/posts/proclamation-from-the-head-of-state-22nd-may-2021suspension-of-the-official-open/4247708021926854/>

⁴ *FAST & Others v Attorney General, Electoral Commissioner & HRPP* Misc121/21 & Misc120/20, para [26] (v).

HRPP. Ms. Fiamé Naomi Mata'afa, the leader of FAST, was sworn in as the country's first female prime minister.

In the afternoon of the same day, the caretaker Prime Minister allegedly defined the swearing in process as “treason, and the highest form of illegal conduct”, and the Attorney General issued a notice calling the swearing-in ceremony unlawful and unconstitutional and threatening legal action against FAST.

On 2 June 2021, the Court of Appeal heard HRPP's appeal concerning the legality of the appointment of an additional female member to the Legislative Assembly pursuant to Article 44(1)(A) of the Constitution. The Court decided that the Constitutional provision required the appointment of an additional female candidate when this was necessary to meet the 10% minimum quota of female representation in the Legislative Assembly.⁵ The Court further declared that any additional appointments based on the requirement of Article 44(1)(A) should wait until all election disputes, and any subsequent by-elections, were completed.

Following the 2 June decision, the caretaker Prime Minister and Head of State reportedly claimed that the Court of Appeal's decision confirmed that the Parliament should not convene until the appointment of any additional parliament member is complete, a step which could only be taken once all the ongoing election disputes were resolved.

On 22 June 2021, upon request of FAST, the Court of Appeal issued a clarification as to the meaning of its judgement of 2 June. The Court clarified that it did not declare that the convening of the Parliament was dependent or relied on the activation of Article 44(1)(A).⁶ The Court recalled that the convening of Parliament is mandatory under Article 52 of the Constitution, saying that “there is no certainty that Article 44(1)(A) will be required to be called on to supplement the guaranteed number of women members of six, because a sixth woman member may win an electoral constituency seat in a by election”.⁷ The Court further stated that “any suggestion that both parties continued post the 2 June 2021 decision to hold 26 seats each, [was] wrong. ... FAST had 26 seats and HRPP had 25”.⁸

On 28 June 2021, the Supreme Court issued another judgement related to the general election. Reiterating its previous decisions, the Court restated that the constitutional provisions requiring the Parliament to convene within 45 days after a general election were clear and unambiguous, and that no exceptions were permitted. According to the Court, the executive branch of the government appeared to have “deliberately and unlawfully prolonged the calling of the parliament for plainly political reasons.”⁹ The Court gave immediate effect to the Head of State's initial May 20 Proclamation, and requested once again the Head of State to call a meeting of the Legislative Assembly within 7 days. The Court further declared that any attempts to undermine the Court's orders or subvert the convening of Parliament would be

⁵ *Electoral Commissioner & Another v FAST & Another* CA 04/21.

⁶ *Electoral Commissioner & Another v FAST & Another* CA 04/21, CA 05/21, para [20](a).

⁷ *Electoral Commissioner & Another v FAST & Another* CA 04/21, CA 05/21, para [20](c).

⁸ *Ibid.*

⁹ *Attorney General & Others v FAST Misc139/21 & Misc140/21*, para [62].

tantamount to a contempt of the Supreme Court.¹⁰

On 4 July 2021, the Head of State issued a late-night Proclamation to convene the Parliament on 2 August, and not by 5 July as ordered by the Supreme Court. Allegedly, the rationale for convening the Parliament at a later date was that the “Parliament [could] not be properly convened at the present time” as the ongoing petitions before the courts did not allow any of the parties to claim majority in the Parliament.¹¹

In the Proclamation, the Head of State stated that “the Supreme Court [had] no jurisdiction to order the convening of the Parliament,”¹² as only the Head of State “have the powers to appoint a time and place for the meeting of the Legislative Assembly”.¹³ The Head of State further stated that, in its decision of 28 June 2021, the Court had shown “flagrant disregard, and disrespect, of the powers of the position of the Head of State”.¹⁴ The Head of State concluded by expressly revoking the Proclamation of 20 May 2021, which called for the convening of Parliament on 24 May 2021.

On 5 July 2021, at 4pm, the 7-day deadline for the convening of the Parliament set by the Supreme Court in its decision of 28 June expired.

In a new decision issued on 8 July 2021, the Supreme Court expressed severe concerns that the Parliament has not been convened despite 90 days having passed since the general elections. The Court affirmed that ongoing disputes did not constitute an impediment to the immediate convening of Parliament, and reiterated its earlier decisions giving immediate effect to the Head of State's Proclamation of 20 May 2021 to convene the 17th Parliament of Samoa.¹⁵ The Supreme Court then remitted the case to the Court of Appeals to hear and determine.

On 23 July 2021, the Court of Appeal handed down its decision in the “swearing in” case. The Court ruled that the ad-hoc swearing-in ceremony held by the FAST party was consistent with the provisions of the Constitution, and therefore lawful and legitimate. The Court confirmed that the FAST party held majority seats in the Parliament and thus was the lawful Government of Samoa.

Allegedly, the caretaker Prime Minister did not accept the Court of Appeal’s decision, saying that it was unconstitutional.

Alleged verbal attacks against the independence of the judiciary

It is reported that the caretaker Prime Minister and other members of the caretaker Government have publicly questioned the Supreme Court’s orders pertaining to the election cases on several occasions. Multiple derogatory remarks questioning the independence and integrity of the Supreme Court judges in dealing with the ongoing legal challenges related to the 9 April

¹⁰ *Attorney General & Others v FAST Misc139/21 & Misc140/21*, para [66](iv).

¹¹ Proclamation of the Head of State, Convening of the XVIIth Parliament of the Independent State of Samoa, dated 4 July 2021, p. 3.

¹² Proclamation of the Head of State, p. 4.

¹³ Ibid.

¹⁴ Ibid.

Attorney General & Others v FAST Misc139/21 & Misc140/21, judgement of 8 July 2021.

general elections have been reported in local media.

On 8 July, the HRPP initiated a formal complaint against the Chief Justice and Supreme Court judges before the Judicial Services Commission (JSC). In the complaint, the HRPP called the Chief Justice “incompetent in handling cases since the beginning of electoral petitions,” stating that “recent ruling by the Supreme Court Justices appear[ed] to be legally flawed, ... outside the legal boundaries and without reference to well established precedent...”. HRPP also stated that it appeared the Judiciary was “colluding to oust the HRPP from being the current Government, or, at very least, to control the outcome of Samoa’s general election.”¹⁶

On 13 July 2021, the JSC reportedly met to consider HRPP’s complaint, but no formal announcements or decisions have been made so far. The JSC is reportedly expected to reconvene in the following weeks to discuss and decide on this matter.

On 14 July 2021, a Samoan newspaper published remarks by the caretaker Prime Minister, in which he reportedly blamed the judiciary for the current political impasse in Samoa.

Alleged derogatory remarks on young women lawyers

Reportedly, the caretaker Prime Minister made degrading comments against young women lawyers who are members of the Samoa Law Society Council and/or represented the FAST Party. The comments were made after the Samoa Law Society’s intervener submissions to Court of Appeal that the Head of State is subject to the authority of the Constitution.

On 21 July 2021, during his weekly programme on national television, the then caretaker Prime Minister reportedly commented on the intelligence and appearance of young women lawyers from the Samoa Law Society, accusing them of “wearing bikinis and mini [skirts] in courts” and referring to them as “stupid, cheeky, and disrespectful”. He allegedly called on senior lawyers to “look into the behaviours of newbies ...to assess and control the behaviours of the young lawyers.” He was reported saying that the problem was that these young women lawyers were very young with immature knowledge and accused them of “destroying the reputation of lawyers and Samoa.” He reportedly said that “they should have remained silent and not do anything.” According to the then caretaker Prime Minister, the argument made by the lawyers showed disrespect for the Head of State, and reflected “how narrow-minded and stupid they [were]”. He went on to accuse the Samoa Law Society of “tarnishing the reputation of lawyers and Samoa as a whole”.

Without prejudging the accuracy of the information received, we would like to express our concerns at the failure of the executive branch of power to respect and observe the independence of the judiciary and to uphold the free and independent exercise of the legal profession.

¹⁶ Human Rights Protection Party, Official Complaint to the Judicial Services Commission against the Supreme Court of Samoa, Letter dated 2 July 2021.

If confirmed, the failure to comply with judicial orders issued by the Supreme Court in relation to the ongoing election disputes and the derogatory remarks made by the caretaker Government through the press to discredit the authority of the Supreme Court would constitute a serious breach of the principles of judicial independence and the separation of powers, according to which the executive, the legislature and the judiciary constitute three separate and independent branches of Government. The derogatory remarks about young women lawyers demonstrated discriminatory, sexist, patronizing and disempowering attitudes towards women and youth, who play an important role in building a democratic and just society and who should be able to conduct their professional work without harassment.

In particular, we wish to underline that it is not the role of the executive branch to assess the legality of any decision issued by the judicial authority. The judiciary has jurisdiction over all issues of a judicial nature, and has exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law. International standards provide that there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. The duty to respect and abide by the judgments and decisions of the judiciary constitute a necessary corollary of the principle of institutional independence of the judiciary.

We also wish to raise serious concerns about the independence of the Judicial Services Commission (JSC), which the Special Rapporteur on the independence of judges and lawyers had already expressed in communication WSM 1/2020 of 26 May 2020.

Following the entry into force of the constitutional amendments to Article 80 of the Constitution, judges – whether appointed or elected *ex officio* – no longer constitute the majority of JSC members. Furthermore, the members appointed or elected *ex officio* by the executive branch of power now have a decisive say on all decisions taken by the JSC, particularly those relating to the appointment, promotion, transfer and dismissal of judges. In particular, the Constitution Amendment Bill introduced a simplified procedure for the appointment, promotion, transfer and dismissal of all ordinary judges, except the Chief Justice. According to Article 80(4), “[t]he power of appointing, promoting, transferring and dismissing a Supreme Court Judge and a subordinate Court is vested in the Head of State, acting on the advice of the Judicial Service Commission, as may be provided by Act”.

Due to its composition and the procedure for appointing its members, we are concerned that the JSC may lack the necessary independence from the executive branch of power to adjudicate on the complaints brought by the HRPP against the Chief Justice and Supreme Court judges.

International standards on the independence of the judiciary provide that the responsibility for disciplinary proceedings against judges should be vested in an independent authority (such as a judicial council) or a court. For this reason, the involvement of members of the executive branch of power (Head of State, Prime Minister, Cabinet, Minister of Justice or any other representative of the political authorities) in the disciplinary body is *de facto* incompatible with the principle of the independence of the judiciary. The fact that all members of the JSC (with the exception of the Minister of Justice’s appointee) are formally appointed by the Head of State makes it easier for the Prime Minister and Cabinet to exert pressure on the members of the JSC, who may feel pressured to support the position of the executive

in order to minimise the risk of being dismissed themselves. Consequently, the involvement of the JSC in the procedure for the dismissal of judges poses serious problems with regard to respect for the principles of independence of the judiciary and separation of powers.

In relation to the derogatory remarks made by the caretaker Prime Minister against young women lawyers who are members of the Samoa Law Society Council, we would like to underline that international standards provide that adequate protection of human rights and fundamental freedoms requires that all persons have effective access to legal services provided by an independent legal profession, and call on Governments to take all appropriate measures to ensure that lawyers are able to perform all of their professional functions without any intimidation, harassment or improper interference and without suffering, or being threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics. If confirmed, such discriminatory and sexist remarks made by public office bearers may arguably constitute harassment against women lawyers in their world of work.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and comments which you may have on the above mentioned allegations.
2. Please provide detailed information on the measures adopted by the State to guarantee the independence of the judiciary, and to ensure that all State authorities, including the executive branch of power, respect and observe the independence of the judiciary.
3. Please provide detailed information on the Proclamations issued by the Head of State on 2 May 2021 and 4 July 2021 and explain how their content can be regarded as being consistent with the independence of the judiciary and the principle of separation of powers.
4. Please provide detailed information on the measures the State intends to adopt to guarantee the independence of the Judicial Services Commission.
5. Please provide detailed information on the measures that Samoa has taken, or intends to take, to address the derogatory remarks made by the then caretaker Prime Minister on young female lawyers of the Samoa Law Society with a view to preventing reoccurrence and creating a safe and enabling environment for young women professionals.
6. Please provide detailed information on the measures adopted by the State to guarantee the free and independent exercise of the legal

profession, and to ensure that lawyers are able to perform their professional functions without any intimidation, harassment or improper interference.

This communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

We may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

Please accept, Excellency, the assurances of our highest consideration.

Diego García-Sayán
Special Rapporteur on the independence of judges and lawyers

Melissa Upreti
Chair-Rapporteur of the Working Group on discrimination against women and girls

Annex

Reference to international human rights law

The independence of the judiciary is enshrined in a number of international and regional human rights treaties to which Samoa is a party, including the International Covenant on Civil and Political Rights (ICCPR), acceded by Samoa on 15 February 2008.

Article 14 of the ICCPR provides that “everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law”. Your country’s adherence to this treaty means that it must, *inter alia*, adopt all appropriate measures to guarantee the independence of the judiciary and protect judges from any form of political influence in their decision-making.

In General Comment No. 32 (2007), the Human Rights Committee noted that the requirement of independence of a tribunal is “an absolute right that is not subject to any exception.” The requirement of independence “refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.” The Human Rights Committee clearly stated that “[a] situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal” (para. 19).

Additionally, the UN Basic Principles on the Independence of the Judiciary (hereinafter, the Basic Principles) state, *inter alia*, that it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary (principle 1); that the judiciary shall decide matters before them impartially (...) without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason (principle 2); and that there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision (principle 4). The Basic Principles also affirm that it is the role of the judiciary to determine whether an issue submitted for its decision falls within its jurisdiction as defined by law (principle 3).

International and regional standards on the independence of the judiciary recognise that judges may be subject to disciplinary proceedings and penalties, up to and including removal from office, only for sufficiently serious misconduct. Principle 18 outlines that as a general rule, judges can only be suspended or removed from office for serious misconduct, disciplinary or criminal offence or incapacity “that renders them unfit to discharge their duties”. Disciplinary sanctions can only be imposed on the basis of an appropriate and fair procedure (principle 17) and in accordance with established standards of judicial conduct (principle 19), and should be subject “to an independent review” (principle 20).

We would also like to refer your Excellency’s Government to the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba) from 27 August to 7 September 1990.

Principle 16 requires governments to take all appropriate measures to ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference, and to prevent that lawyers be threatened with prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

Principle 23 provide that like other citizens, lawyers are “entitled to freedom of expression, belief, association and assembly” and have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights. Lawyers must also “enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority” (principle 20).

Women’s right to participate in the public and political life of the country, without discrimination, is guaranteed in the International Convention on the Elimination of Discrimination against Women (CEDAW), acceded by Samoa in 1992. The Working Group on discrimination against women and girls has underlined the obligation of States to eliminate discrimination against women in political and public life, to fulfil women’s civil and political rights in their interrelatedness and interdependence with other human rights, and to provide equal opportunity and ways and means for the empowerment of women in these areas, in accordance with international human rights law. The Working Group further stressed that women’s right to substantive equality in all aspects of political and public life is a human right essential to women’s human dignity (A/HRC/20/28).

The Working Group has pointed out that stereotypes of women’s capacities and roles that negatively affect women’s effective participation in political and public life persist around the world and that stigmatization, harassment and outright attacks have been used to silence and discredit women who are outspoken as leaders, community workers, human rights defenders and politicians. The Working Group emphasized that there can be no true democracy without women’s full and equal participation in all its institutions and that women’s substantive equality in political and public life can be fully realized only in conditions of democracy (A/HRC/23/50).

In its thematic report on family and culture (A/HRC/29/40), the Working Group expressed its concern about gender-based stereotypes, often justified in the name of cultural norms or religious beliefs and the failure to eliminate these stereotypes leading to the generalization of practices that are harmful to women and girls. The sexist stereotypes present in the media contribute to the perpetuation of a culture of discrimination and violence against women.

In its country visit report to Samoa (A/HRC/38/46/Add.1), the Working Group observed the prevalence of a repeated discourse that aimed to maintain the status quo of inequality between men and women and discrimination against women on the ground of the uniqueness of Samoan culture and tradition. The Working Group recognized that significant efforts have already been made but major progress is necessary in creating a change in mindsets regarding cultural perceptions about women and their place in society and that this change cannot happen without the leadership of the Government and community and religious leaders, alongside women and men at all levels of society, titled and untitled. Samoa needs champions for

change. The stakes are high for ensuring sustainable development and building resilience as a nation.