

TRENDS IN LIMITING FUNDAMENTAL RIGHTS AND FREEDOMS IN THE PACIFIC

Lee-Anne Sackett

USP School of Law

Overview

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- Current limitations
 - ▣ Tuvalu
 - ▣ Others
- Proposed amendments

Current limitations - Tuvalu

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- Teonea v Pule o Kaupule of Nanumaga [2009] TVCA 2 – Falekaupule bans Brethren Church on Nanumaga.
 - ▣ TVCA overturns CJ’s decision “divisive and unsettling... threatening to traditional values”
 - ▣ “Reasonably justifiable in a democratic society” – depends on circumstances existing at time when decision is made, “balancing exercise is required” and not justifiable.
 - ▣ Falekaupule resolution was not customary law and inconsistent with freedoms of belief, expression, assembly and association (ss 23 – 25) that “should take priority in this case”

Constitutional Amendment – Constitution (Recognition of traditional standards, values and practices) Amendment Act 2010

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Amended sections:

- S12 ~~“Notwithstanding anything contrary in any other law”~~ to “Except in relation to any act that is done under a valid law which accords with traditional standards, values and practices”
- S15(6) – “any law... accords with traditional standards, values and practices shall not contravene ...[unless] regarded by an ordinary modern citizen of Tuvalu as one which should be eliminated”
- Ss26 and 27 also subject to s15 (reasonably justifiable in a democratic society) and not inconsistent with s23-27 to the extent the law makes provision regulating or placing restrictions on any exercise of the right to spread beliefs or communicate opinions, ideas and information if in conflict with s29(4) – divisive, unsettling or offensive or threaten Tuvaluan values or culture.

Religious Organisations Restriction Act 2010

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- *An Act to restrict the spread of beliefs and practices by religious organisations and associations of persons which undermines the traditional authority of the Falekaupule and the traditional values of island communities:*
 - Approval required from Falekaupule – must not directly threaten the values and culture of island community or be divisive, unsettling or offensive. Decision final – not questionable by any court of law.
 - No restriction on practicing religion in own house with people residing in that house.

Other limitations in the region

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Nauru/Kiribati:

- defence, public safety, public order, public morality or public health
- protecting other persons rights “including the right to observe and practise any religion without the unsolicited intervention of members of some other religion”
- Regulating secular education/reasonably justifiable in a democratic society

RMI Constitution

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Section 1. **Freedom of Thought, Speech, Press, Religion, Assembly, Association, and Petition.**

(2) Nothing in this Section shall be construed to invalidate reasonable restrictions imposed by law on the time, place, or manner of conduct, provided:

- (a) the restrictions are necessary to preserve public peace, order, health, or security or the rights or freedoms of others;
- (b) there exist no less restrictive means of doing so; and
- (c) the restrictions do not penalize conduct on the basis of disagreement with the ideas or beliefs expressed.

(3) Government permitted to extend non-discriminatory financial aid to religiously supported institutions if they furnish educational, medical or other services at no profit (only for reimbursing those purposes).

- 4. Secular State – founding principle of the State. All religions equal. State and religion separate.
- 6(5) – Rights and freedoms may be limited by: limitations prescribed in constitution (expressly, in other sections of Constitution or prescribed by law or actions under authority of law).
- 7(5) Interpretation – application must be considered contextually with regard to content and consequences, impact on individuals and groups of individuals.
- 22 – Freedom of religion, conscience and belief - (7) Limitations to protect, rights and freedoms of other persons or public safety, public order, public morality or public health; or to prevent public nuisance.

Proposed limitations

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- Solomon Islands Draft Federal Constitution (2nd Draft 2014)
- Proposed amendments to the Vanuatu Constitution (2016)
- Proposed amendments to the Samoan Constitution – 2016
- Tuvalu?

Solomon Islands Constitution

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- S3(b) freedom of conscience of expression and of assembly and association... “subject to respect for the rights and freedoms of others and for the public interest... subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment...does not prejudice the rights and freedoms of others or the public interest”
- S11 – Protection of freedom of conscience:
 - ▣ defence, public safety, public order, public morality or public health
 - ▣ protecting other persons rights “including the right to observe and practise any religion without the unsolicited intervention of members of some other religion”
 - ▣ reasonably justifiable in a democratic society

Solomon Islands Draft Federal Constitution

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- S1 – All sovereign authority of SI belongs to the people, who humbly acknowledge the place of Almighty God the Creator, the importance of personal faith in building meaningful lives, and the significant role of religion in the history and development of the Solomon Islands.
- S16 – Reasonable limits of rights and freedoms.
16(2) ...subject to any necessary limitation or qualification to accommodate a custom or customary practice...

SI Draft Federal Constitution cont.

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- S16(3) ...further subject to any limits that are set out in any law of the Republic, and... (b) are justifiable, considering both customary traditions and the principles of an open and democratic society based on human dignity...taking into account all relevant factors, including:
 - ▣ Nature of the right or freedom;
 - ▣ Importance of the purpose of the limitation;
 - ▣ Nature and extent of the limitation; and
 - ▣ Relationship between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

Proposed Vanuatu Constitutional amendments

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Article 5 – Fundamental rights and freedoms of the individual

(1) ... *subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, ~~welfare and health~~— “welfare, health, political integrity and political stability”*

- ▣ Purpose: allow for political party legislation to be passed by parliament

Vanuatu amendments

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Article 5 – Fundamental rights and freedoms of the individual

- (1) ... *subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health –*
- (a) life; (b) liberty....(f) freedom of conscience and worship
“subject to respect for the Christian principles and traditional Melanesian values of its people”
- ▣ Purpose: Non-stability related amendments, re-emphasise preamble in bill of rights

Samoa

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11. Freedom of religion – (1) Every person has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in a community with others, and, in public or private, to manifest and propagate his religion or belief in worship, teaching , practice and observance.

(2) Nothing in clause (1) shall effect the operation of any existing law or prevent the State from making any law in so far as that existing law or the law so made imposes reasonable restrictions on the exercise of the right conferred under the provision of that clause in the interest of national security or of public order, health or morals, or for protecting the rights and freedom of unsolicited interference of members of other religions.

Samoa

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- Proposal amendment to make Christianity the official religion of Samoa
- Possible ban of other religions? Supported by National Council of Churches
 - ▣ “Samoa must be cautious about embracing religions that promote violence and ‘murderous rage’ as a form of worship... clearly a need to reflect the situation of today...In the past when the Constitution was written, there were no extremists” – LT Tupufia, *PM Pushed ahead with Constitution amendment*, Samoa Observer, 21 May 2016
 - ▣ “Samoa’s Prime Minister said any proposed amendments to the country’s constitution would unlikely touch Article 11 on freedom of religion.” 20 May 2016, Radio NZ

Tuvalu

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- Part of 2016 constitutional review. Further amendments? Raised during May 2016 consultations.

Conclusion

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- Pre-Tuvalu changes – fundamental rights and freedoms only limited by generally accepted standards
- 4 PICs proposed amendments relating to the limitations on freedom of religion/conscience in 5 year period.
- Potential trend developing?

Thank you!