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New Impulses in the Interaction of Law and Religion: A South Pacific Perspective

*Don Paterson**

I. INTRODUCTION

This article will look at the way in which new religions were introduced first from Britain and Europe and then later from the United States of America into all island countries of the South Pacific during the nineteenth century. The next part will examine the extent to which the laws of those countries provide freedom of religion and it will then consider certain legal and sociological limitations upon the actual practice of religion in these same countries. The article will conclude by looking to the future and trying to suggest ways to ease the tension that exists between individual freedom to practice the religion of his or her choice and community concern for preserving peace and harmony in the community.

II. HISTORICAL BACKGROUND

The islands of the South Pacific first came to the European's attention following the voyages of explorers and traders in the sixteenth century from Portugal (Telez, de Sequeira, and de Meneses) and Spain (Magellan, de Mendana, and de Quiros).¹ Dutch explorers (Schouten, Le Maire, and Tasman) followed in the seventeenth century,² and in the eighteenth century came the British explorers (Byron, Wallis, Cartaret, and Cook)³ and the French explorers (La Perouse, de Bougainville, D'Entrecasteaux, and

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1. See J.C. BEAGLEHOLE, *THE EXPLORATION OF THE PACIFIC 15-80* (3d ed. 1966); see also DAVID & LEONA CRAWFORD, *MISSIONARY ADVENTURES IN THE SOUTH PACIFIC 17-18* (1967).

2. See BEAGLEHOLE, *supra* note 1, at 108-64.

3. See *id.* at 194-315.

D'Urville)⁴ so that by the end of the eighteenth century most of the islands in the South Pacific had become known to Europeans.⁵

A. Introduction of New Religions

When the British explorers brought back information confirming that the newly discovered island countries had native populations who clearly had never heard of Christianity, great excitement erupted in the churches in England.⁶ Those churches had recently undergone a great spiritual re-awakening in a movement often referred to as the Great Revival.⁷ They were, therefore, very anxious to demonstrate that they would accept and follow, even unto death, Christ's parting command that his followers go forth and preach the holy gospel to the unconverted heathen—the Great Commission (*Matthew* 28:19).⁸ Several denominational missionary societies were formed in the late eighteenth century, such as the Baptist Missionary Society, the Church (of England) Missionary Society,⁹ and the Wesleyan Methodist Missionary Society.¹⁰ An important non-denominational missionary society was formed in 1795—the Missionary Society, renamed in 1818 the London Missionary Society (“LMS”)—and

4. See BEAGLEHOLE, *supra* note 1, at 194–228; see also CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK 2002: FRENCH POLYNESIA, <http://www.cia.gov/cia/publications/factbook/geos/fp.html> (last updated Mar. 19, 2003) (“The French annexed various Polynesian island groups [including French Polynesia] during the 19th century.”); CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK 2002: NEW CALEDONIA, <http://www.cia.gov/cia/publications/factbook/geos/nc.html> (last updated Mar. 19, 2003) (New Caledonia was “[s]ettled by both Britain and France during the first half of the 19th century” and was “made a French possession in 1853.”).

5. See generally BEAGLEHOLE, *supra* note 1; HOWARD VAN TREASE, THE POLITICS OF LAND IN VANUATU: FROM COLONY TO INDEPENDENCE 206–58 (1987); see also CRAWFORD, *supra* note 1, at 17–47; Gottfried Oosterwall, *Introduction to Part I: Missionaries and Anthropologists*, in MISSION, CHURCH, AND SECT IN OCEANIA 31, 31–32 (James A. Boutillier et al. eds., 1978).

6. See JOHN GARRETT, TO LIVE AMONG THE STARS: CHRISTIAN ORIGINS IN OCEANIA 8 (1982); see also Sione Lātūkefu, *The Impact of South Sea Islands Missionaries on Melanesia*, in MISSION, CHURCH, AND SECT IN OCEANIA, *supra* note 5, at 91, 91.

7. See GARRETT, *supra* note 6, at 8.

8. See *id.*; James A. Boutillier, *We Fear Not the Ultimate Triumph: Factors Effecting the Conversion Phase of Nineteenth-Century Missionary Enterprises*, in MISSIONS AND MISSIONARIES IN THE PACIFIC 13, 16 (Char Miller ed., 1985).

9. See generally EUGENE STOCK, THE HISTORY OF THE CHURCH MISSIONARY SOCIETY, ITS ENVIRONMENT, ITS MEN, AND ITS WORK (1899–1916) (four volumes).

10. See generally GEORGE GILLANDERS FINDLAY & WILLIAM WEST HOLDSWORTH, THE HISTORY OF THE WESLEYAN METHODIST MISSIONARY SOCIETY (1921–24) (five volume historical treatise).

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included members from all denominations, particularly from the Congregationalist and Calvinist forms of fundamental Protestantism.¹¹ Accordingly, the missions set up by the LMS usually followed fundamental Protestant doctrine and practice.

The LMS was the first to begin evangelizing, and in 1796 they dispatched the Duff, replete with missionaries, to the South Seas.¹² In 1788, Britain had proclaimed New South Wales, Australia, a colony for the purpose of establishing a penal colony there.¹³ At that time, an Anglican clergyman had been appointed to the settlement, so the LMS decided to establish its base at Tahiti in the Society Islands, in eastern Polynesia on the other side of the South Pacific.¹⁴ Tahiti was probably the island in the South Pacific that was best known in England because of Captain Cook's visits in the 1770s to observe the transit of the planet Venus across the face of the sun,¹⁵ because of Cook's return with an islander, Omai—who was lionized in London as the archetype of the noble savage¹⁶—and because of the ill-fated voyage in the 1780s of Captain William Bligh in the ship, the *Bounty*, which culminated in the celebrated mutiny.¹⁷ After initial hardships, the LMS was able to establish a base there, and during the 1830s, its missionaries moved westward across the Pacific to Samoa, Tonga, and the New Hebrides (Vanuatu), where the leading LMS missionary, John Williams, was murdered as he stepped ashore in 1839.¹⁸ LMS then moved northward to the Gilbert (Kiribati) and Ellice (Tuvalu) Islands.¹⁹ Several decades later, in the 1870s, LMS missionaries entered Papua, or southern New Guinea, and successfully established a mission there.²⁰ Much later, Nauru

11. *See generally* NORMAN GOODALL, A HISTORY OF THE LONDON MISSIONARY SOCIETY, 1895–1945, at 1–14 (1954); 1 RICHARD LOVETT, THE HISTORY OF THE LONDON MISSIONARY SOCIETY 1795–1895, at 3–42 (1899); 2 *id.* at 747–48.

12. *See* 1 LOVETT, *supra* note 11, at 48; *see also* GARRETT, *supra* note 6, at 4–15.

13. *See* TRINITY COLL., AUSTRALIA'S SETTLEMENT AND EARLY HISTORY, at <http://library.trinity.wa.edu.au/subjects/sose/austhist/settle.htm> (last updated Feb. 25, 2003).

14. *See* 1 LOVETT, *supra* note 11, at 38–39, 56–57; CHARLES W. FORMAN, THE ISLAND CHURCHES OF THE SOUTH PACIFIC: EMERGENCE IN THE TWENTIETH CENTURY 3 (1982).

15. *See* BEAGLEHOLE, *supra* note 1, at 231, 236–37.

16. *See id.* at 269, 287–88.

17. *See id.* at 288.

18. *See* 1 LOVETT, *supra* note 11, at 376–77.

19. *See* FORMAN, *supra* note 14, at 3–4. *See generally id.* at 117–476.

20. *See* 1 LOVETT, *supra* note 11, at 448.

(which had been informally evangelized in the late nineteenth century by an i-Kiribati pastor and then more formally by a missionary sent by the American Board of Commissioners for Foreign Missions) received the services of an LMS mission in 1914, when Nauru came under the control of Britain, Australia, and New Zealand after the expulsion of Germany.²¹

In the 1830s, Wesleyan Methodists were able to establish a mission in Tonga where they were successful in converting several very prominent chiefs, including the future ruler of Tonga, Taufa'ahau;²² from there, they moved northwest to Fiji.²³ In the 1880s, the New South Wales and Queensland branches of the Wesleyan Church in Australia were invited by the Australian authorities in Papua, or southern New Guinea, to assist in the Christianization of Papuans, which had previously been undertaken almost solely by LMS missionaries.²⁴ The Wesleyans established themselves at the eastern end of Papua in the early 1890s.²⁵

The Presbyterian and Lutheran Churches also evangelized in the South Pacific. Presbyterianism was introduced into New South Wales in the early 1800s and into the far south of New Zealand, Otago, and Southland in the 1840s.²⁶ It was introduced into the New Hebrides (Vanuatu) in 1848 by a Presbyterian missionary from Nova Scotia, Canada, who, with support from Australia and New Zealand, made a strong impact throughout the southern and central islands of

21. See GARRETT, *supra* note 6, at 290–91; JOHN GARRETT, *FOOTSTEPS IN THE SEA: CHRISTIANITY IN OCEANIA TO WORLD WAR II* 274–78 (1992).

22. See GARRETT, *supra* note 21, at 141–49. Today, the predominant religion in Tonga is Christianity and over 30,000 of the nation's inhabitants are members of the Free Wesleyan Church. See CENT. INTELLIGENCE AGENCY, *THE WORLD FACTBOOK 2002: TONGA*, <http://www.cia.gov/cia/publications/factbook/geos/tn.html> (last updated Mar. 19, 2003) [hereinafter *WORLD FACTBOOK 2002: TONGA*]. In fact, the Tonga Constitution implies a constitutional preference for Christianity, mandating that “[t]he Sabbath Day shall be kept holy in Tonga and no person shall practise his trade or profession or conduct any commercial undertaking on the Sabbath Day except according to law; and any agreement made or witnessed on that day shall be null and void and of no legal effect.” See *TONGA CONST.* pt. I (Declaration of Rights), cl. 6.

23. See GARRETT, *supra* note 6, at 102–15.

24. See GARRETT, *supra* note 21, at 36, 44–51; I LOVETT, *supra* note 11, at 431–69. See generally I A. HAROLD WOOD, *OVERSEAS MISSIONS OF THE AUSTRALIAN METHODIST CHURCH* (1975).

25. See GARRETT, *supra* note 6, at 230–36; GARRETT, *supra* note 21, at 36.

26. See FORMAN, *supra* note 14, at 6.

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the New Hebrides (Vanuatu).²⁷ A smaller mission was later established in Fiji. In northern New Guinea, German trading interests had established a firm foothold by the 1880s, and when northern New Guinea was proclaimed a German protectorate in 1884, Lutheran missionaries moved into the protectorate and established significant missions there.²⁸ The original Lutheran missionaries (*Neuendettelsau*) were later joined by other forms of Lutheranism (*Rhenish* or *Barmen*), but because of doctrinal differences, the German authorities of New Guinea endeavored to ensure that they operated in different areas of New Guinea.²⁹

In 1788, the Anglican Church (the Church of England) appointed a clergyman to minister to the needs of the penal settlement established in New South Wales, Australia, and a young assistant priest, Samuel Marsden, who was of the evangelistic spirit, joined him in 1793.³⁰ At first, Marsden tried to convert Australian aborigines, but having no success, he decided to establish a mission for the Maori from the neighboring islands of New Zealand. Marsden commenced a New Zealand mission on Christmas Day 1814.³¹ The Anglican Church in New Zealand was greatly strengthened by the establishment of a diocese there in the early 1840s.³² The first Anglican bishop of New Zealand, George Augustus Selwyn, who arrived in 1842, was a very active man who believed strongly that missionary work was the business of the church and not of missionary societies.³³ He therefore enthusiastically evangelized throughout New Zealand, but he did not confine his activities to New Zealand. Taking advantage of an error in the official wording of the boundaries of his diocese, he was

27. See 1 J. GRAHAM MILLER, *LIVE: A HISTORY OF CHURCH PLANTING IN THE NEW HEBRIDES TO 1880*, at 1, 147–50 (1978); 2 *id.* (1981); see also GARRETT, *supra* note 6, at 168–71; BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *INTERNATIONAL RELIGIOUS FREEDOM REPORT 2002, VANUATU*, <http://www.state.gov/g/drl/rls/irf/2002/13915.htm> [hereinafter *INTERNATIONAL RELIGIOUS FREEDOM REPORT 2002, VANUATU*] (noting that “[m]issionaries representing several Western churches brought Christianity to the country [of New Hebrides] in the 19th and early 20th centuries”).

28. See FORMAN, *supra* note 14, at 58–61; GARRETT, *supra* note 21, at 1–27.

29. See FORMAN, *supra* note 14, at 58–61.

30. See A.T. YARWOOD, *SAMUEL MARSDEN: THE GREAT SURVIVOR* 7, 22–30 (1977).

31. See *id.* at 152, 173–75; see also GARRETT, *supra* note 6, at 63.

32. See generally GARRETT, *supra* note 21, at 125–29.

33. See HENRY WILLIAM TUCKER, *MEMOIR OF THE LIFE AND EPISCOPATE OF GEORGE AUGUSTUS SELWYN, D.D.* 1–34, 291–302 (1879).

able, with the assistance of the martyred Bishop John Patteson,³⁴ to extend the influence of the Anglican Church far northwards into the northern New Hebrides (Vanuatu) and the Solomon Islands.³⁵

In the 1830s, Roman Catholic missionaries of the Marist order arrived in eastern Polynesia and established missions there, and from there they moved northwest to Wallis and Futuna.³⁶ At much the same time, in the early 1830s, a separate Marist mission was sent to the Western Pacific. It established mission stations in New Caledonia and the New Hebrides (Vanuatu), and, these mission stations spread to Fiji, Samoa, Tonga, and Gilbert Island (Kiribati).³⁷ In 1885, a separate Roman Catholic mission of the Sacred Heart made its way, after great tribulations, and in the teeth of the Australian colonial authorities' disapproval, to Papua (or southern New Guinea) and began establishing missions in what had until then been solely LMS and Methodist territory.³⁸

Initially, the religious denominations that were introduced into the South Pacific island countries were, understandably, from churches in Britain or Germany, or from the Roman Catholic Church. As the nineteenth century progressed, however, a number of denominations that had evolved in the United States of America also made their entry into the South Pacific. Probably the first of these to appear was that of the Latter-day Saints ("Mormons").³⁹ Although only established in the United States in the 1830s,⁴⁰ Mormon missionaries appeared in eastern Polynesia in 1846, in New Zealand in 1854, and later in other island countries.⁴¹ The Seventh-

34. For an account of Bishop Patteson's missionary efforts, see CHARLOTTE MARY YONGE, *LIFE OF JOHN COLERIDGE PATTESON: MISSIONARY BISHOP OF THE MELANESIAN ISLANDS* (1874).

35. See DAVID HILLIARD, *GOD'S GENTLEMEN: A HISTORY OF THE MELANESIAN MISSION, 1849-1942*, at 10-16 (1978).

36. See GARRETT, *supra* note 6, at 96-101; RALPH M. WILTGEN, *THE FOUNDING OF THE ROMAN CATHOLIC CHURCH IN OCEANIA, 1825-1850*, at 68-88, 101-21 (1981).

37. See *id.* at 101-121.

38. See GARRETT, *supra* note 6, at 237-44. See generally JEAN BAPTISTE FRANÇOIS POMPALLIER, *EARLY HISTORY OF THE CATHOLIC CHURCH IN OCEANIA* (1888).

39. See FORMAN, *supra* note 14, 148-51; GARRETT, *supra* note 6, at 59.

40. See JAMES B. ALLEN & GLEN M. LEONARD, *THE STORY OF THE LATTER-DAY SAINTS* 47 (1976).

41. See S. GEORGE ELLSWORTH, *ZION IN PARADISE: EARLY MORMONS IN THE SOUTH SEAS* 6-7 (1959); ALLEN & LEONARD, *supra* note 40, at 419-20; see also GARRETT, *supra* note 21, at 139, 150-51, 189, 239, 246, 425.

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day Adventists, who also evolved in the United States in the 1830s,⁴² came later to the South Pacific, arriving first on Pitcairn Island in 1883 and then establishing missions in Fiji, Samoa, and Tonga in the 1890s, and in the New Hebrides (Vanuatu) and the Solomon Islands in the early 1900s.⁴³ Churches of Christ, which had also developed in the eastern states of America in the early 1800s, were introduced into Australia in the 1840s and from there were brought into the New Hebrides (Vanuatu) by indentured New Hebridean laborers returning to their homeland near the end of the century.⁴⁴ Smaller numbers of Jehovah's Witnesses, who developed in Pennsylvania in the 1880s, and of Christian Scientists, who had evolved in the early 1800s in Boston, made their way to the South Pacific but did not establish significant missions.⁴⁵ Much more significant were missionaries from the Assemblies of God, which were formally established in Arkansas in 1914, who established significant congregations in Fiji and in Vanuatu.⁴⁶ Similar pentecostal-type churches, such as the Apostolic Church, the Holiness Fellowship, and the Renewal Ministry, which place emphasis on fundamentalist Christian teaching and on very enthusiastic displays of religious fervor and special personal relationships with God, have also increasingly made their mark in many South Pacific island countries.⁴⁷

It remains to mention that indentured laborers, who were recruited from Fiji by colonial authorities in Fiji in the late

42. See generally ARTHUR WHITEFIELD SPALDING, *ORIGIN AND HISTORY OF SEVENTH-DAY ADVENTISTS* (1961-62).

43. See FORMAN, *supra* note 14, at 20-21, 52-54; GARRETT, *supra* note 21, at 59, 78, 106, 150, 189, 247, 252.

44. See FORMAN, *supra* note 14, at 47-49.

45. See *id.* at 200.

46. See *id.* at 29-35, 200; see also Don Paterson and Stephen A Zorn, *Fiji, in* SOUTH PACIFIC ISLANDS LEGAL SYSTEMS 30-31 (Michael A. Ntuny ed., 1993); also CENT. INTELLIGENCE AGENCY, *THE WORLD FACTBOOK 2002: VANUATU*, <http://www.cia.gov/cia/publications/factbook/geos/nh.html> (last updated Mar. 19, 2003) [hereinafter *WORLD FACTBOOK 2002: VANUATU*]; CENT. INTELLIGENCE AGENCY, *THE WORLD FACTBOOK 2002: FIJI*, <http://www.cia.gov/cia/publications/factbook/geos/fj.html> (last updated Mar. 19, 2003) [hereinafter *WORLD FACTBOOK 2002: FIJI*]. Fifty-two percent of the Fijian population subscribes to some type of Christian faith today. *Id.* Of the remaining forty-eight percent, thirty-eight percent are Hindu (arising mainly from Indian heritage), eight percent are Muslim, and two percent belong to other faiths. See *id.*

47. See, e.g., J. GRAHAM MILLER, *LIVE: A HISTORY OF CHURCH PLANTING IN VANUATU (BOOK THREE)* 92 (1985).

nineteenth and early twentieth centuries, brought with them their Hindu and Muslim religions.⁴⁸ Those who remained in Fiji, and their descendants, have not proselytized, so these religions have largely remained confined to the Indians of Fiji. In very recent years, however, small numbers of Muslim missionaries have appeared in some countries.⁴⁹ The Chinese, who have come to set up businesses in most South Pacific island countries, also brought with them their own religions, but they have not sought to proselytize. Thus, their religions have similarly remained confined to Chinese communities and have not touched the indigenous populations of the countries. On the other hand, in very recent times, small numbers of adherents of the Bahai religion, which originated in the 1860s in the country that is now Iraq, have entered some island countries of the South Pacific and are very actively proselytizing among indigenous populations of those countries.⁵⁰

Thus by the middle of the twentieth century, the island countries of the South Pacific had been largely evangelized by introduced religious denominations. Forms of Congregationalism, deriving from the LMS, predominated in the Cook Islands, Ellice Island (Tuvalu), Nauru, Western Samoa, and parts of Papua.⁵¹ Methodism predominated in Fiji and Tonga, as well as in other parts of Papua.⁵² Anglicanism predominated in the Solomon Islands and the northern New Hebrides (Vanuatu).⁵³ Presbyterianism predominated in central and the southern New Hebrides (Vanuatu).⁵⁴ Roman Catholicism predominated in New Caledonia, Kiribati, Wallis, and Futuna and had strong missions in Fiji and the New Hebrides (Vanuatu).⁵⁵ In most countries, there were minorities of Latter-day Saints and Seventh-day Adventists, smaller groupings of other Christian

48. See FORMAN, *supra* note 14, at 33–35, 211.

49. See *id.*

50. See *id.* at 200.

51. See *id.* at 21–29, 55–63.

52. See *id.* at 29, 35, 56–57.

53. See *id.* at 47–50.

54. See *id.* at 45–49. See generally J. GRAHAM MILLER, A HISTORY OF CHURCH PLANTING IN THE REPUBLIC OF VANUATU (BOOK FOUR) (1986).

55. See Alan Berman, *1998 and Beyond in New Caledonia: At Freedom's Gate?*, 7 PAC. RIM. L. & POL'Y J. 1, 11 (1998) (noting that “French missionaries converted almost all Kanak [in New Caledonia] to the Protestant and Catholic religions”); FORMAN, *supra* note 14, at 27, 31, 54, 110.

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denominations from the United States, and some members of other religions from China and, in Fiji, from India.⁵⁶

B. Introduction of New Governments

While these great changes were occurring in the South Pacific islands at a religious level, there were also momentous changes occurring at a political level. When the missionaries first entered the South Pacific, the countries and communities they encountered were all independent of foreign control, but by the end of the nineteenth century, all of the island countries of the South Pacific had come under the political control of a foreign country—either Britain, France, Germany, or the United States of America.⁵⁷ Britain began by proclaiming New South Wales a colony in 1788⁵⁸ and followed this up by progressively declaring colonies throughout the rest of the Australian continent.⁵⁹ In 1840, Britain announced that neighboring New Zealand was also a British colony.⁶⁰ Fiji was ceded by its chiefs to a somewhat reluctant Britain in 1874, but in 1884 Britain declared Papua, or southern New Guinea, a protectorate. In the succeeding decade, Britain extended its protection to the Cook Islands, Niue, southern Solomon Islands, Gilbert Island (Kiribati), Ellice Island (Tuvalu), Pitcairn Island, and Tonga.⁶¹ The other great

56. See FORMAN, *supra* note 14, at 177–78. For further discussion about the entry of religions from Britain, Europe, and the United States into the island countries of the South Pacific, see GARRETT, *supra* note 6; GARRETT, *supra* note 21; TONY SWAIN & GARRY TROMPE, *THE RELIGIONS OF OCEANIA* (1995). See also Charles Forman, *Foreign Missionaries in the Pacific Islands During the Twentieth Century*, in MISSION, CHURCH, AND SECT IN OCEANIA, *supra* note 5, at 36–37, 39–41.

57. See SOUTH PACIFIC ISLANDS LEGAL SYSTEMS, *supra* note 46, at xviii; see also CENT. INTELLIGENCE AGENCY, *THE WORLD FACTBOOK 2002*, <http://www.cia.gov/cia/publications/factbook/index.html> (last visited Mar. 14, 2003) (containing links to web pages containing historical and statistical information about the nations of the world).

58. See PARLIAMENT OF NEW S. WALES, *EARLY SETTLEMENT OF NEW SOUTH WALES: 1788–1810*, at <http://www.parliament.nsw.gov.au/prod/web/PHWebContent.nsf/PHPages/PastandPresentEarlyEuropeanSettlementofNewSouthWales17881810> (last visited Mar. 14, 2003).

59. See TRINITY COLL., *supra* note 13.

60. See CENT. INTELLIGENCE AGENCY, *THE WORLD FACTBOOK 2002: NEW ZEALAND*, <http://www.cia.gov/cia/publications/factbook/geos/nz.html> (last updated Mar. 18, 2003).

61. See *generally* DECENTRALISATION IN THE SOUTH PACIFIC (Peter Larmour & Ropate Qalo eds., 1985). The Cook Islands, named after Captain James Cook who sighted them in 1770, became a British protectorate in 1888. See CENT. INTELLIGENCE AGENCY, *THE WORLD FACTBOOK 2002: COOK ISLANDS*, <http://www.cia.gov/cia/publications/factbook/geos/cw.html> (last updated Feb. 13, 2003). By 1900, New Zealand exercised administrative

European naval power in the early nineteenth century, France, acquired Tahiti and some surrounding islands as a colony in 1842 and proclaimed New Caledonia a colony in 1853 and Wallis and Futuna colonies in 1887.⁶² Britain and France acted together in 1886 to establish a joint naval commission to maintain peace in the New Hebrides (Vanuatu). This was followed in 1906 by an Anglo-French Convention that brought the archipelago fully under the joint administration of both powers.⁶³ The nation-state of Germany, which came into being after the Franco-Prussian War (1870–71), was quick to emulate its rivals, Britain and France, and promptly sought to acquire colonies in the South Pacific, as well as in Africa and Asia. Germany brought northern New Guinea under its control in 1884,⁶⁴ Nauru in 1887,⁶⁵ and Western Samoa in 1900.⁶⁶ The same gathering of the great powers of Europe in Berlin in 1900 that confirmed Germany's acquisition of Western Samoa (now known as Samoa) also confirmed the right of the United States of America to

control over the islands, and in 1965, the island residents chose to govern themselves in free association with New Zealand. *Id.*; see also Alan Berman, *The Noumea Accords: Emancipation or Colonial Harness?*, 36 TEX. INT'L L.J. 277, 277 (2001). Similarly, Fiji was a British colony for nearly a century before gaining its independence in 1970. See WORLD FACTBOOK 2002: FIJI, *supra* note 46. Papua New Guinea was divided between Germany and Britain in 1885, Germany taking possession of the northern part of the island and Britain occupying the southern part. See CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK 2002: PAPUA NEW GUINEA, <http://www.cia.gov/cia/publications/factbook/geos/pp.html> (last updated Mar. 19, 2003). Like the Cook Islands, both the Solomon Islands and Tonga were placed under British protectorate as the nineteenth century came to a close. See CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK 2002: SOLOMON ISLANDS, <http://www.cia.gov/cia/publications/factbook/geos/bp.html> (last updated Mar. 19, 2003); WORLD FACTBOOK 2002: TONGA, *supra* note 22. The islands known as the New Hebrides (modern day Vanuatu) were settled by the British and French in the nineteenth century. See WORLD FACTBOOK 2002: VANUATU, *supra* note 46.

62. See generally SOUTH PACIFIC ISLANDS LEGAL SYSTEMS, *supra* note 46; DECENTRALISATION IN THE SOUTH PACIFIC, *supra* note 61; see also *supra* note 4.

63. See Don Paterson, *Vanuatu*, in SOUTH PACIFIC ISLANDS LEGAL SYSTEMS, *supra* note 46, at 365; WORLD FACTBOOK 2002: VANUATU, *supra* note 46.

64. See John Nonggorr, *Papua New Guinea*, in SOUTH PACIFIC ISLANDS LEGAL SYSTEMS, *supra* note 46, at 202.

65. See Tony Deklin, *Nauru*, in SOUTH PACIFIC ISLANDS LEGAL SYSTEMS, *supra* note 46, at 142.

66. See C. Guy Powles, *Western Samoa*, in SOUTH PACIFIC ISLANDS LEGAL SYSTEMS, *supra* note 46, at 395–96.

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acquire Eastern Samoa (now known as American Samoa) and the right of Britain to exert control in Tonga.⁶⁷

Thus by the end of the nineteenth century, all the previously independent countries of the South Pacific had fallen under the control of Britain, France, Germany, or the United States of America.

III. LEGAL FRAMEWORK ALLOWING EXERCISE OF FREEDOM OF RELIGION

When Christian missionaries first came to the island countries of the South Pacific, they found communities that were subject solely to the control of their chiefs and elders, who enunciated and applied the customs and traditions of their communities.⁶⁸ Customary rules were the sole source of law, and it was for the chiefs and elders to state and apply those customary rules.⁶⁹

The missionaries and the religious principles that they introduced were allowed to exist and operate to the extent that they were acceptable to the chiefs and elders of the community.⁷⁰ In some cases, they were not acceptable at all, and the missionaries paid for their fortitude with their lives. The noble list of martyrs in the South Pacific is a long one. No doubt, John Williams, who was clubbed to death on Erromango in the New Hebrides (Vanuatu) in 1839;⁷¹ St.

67. See *id.* at 396; Mary McCormick, *American Samoa*, in SOUTH PACIFIC ISLANDS LEGAL SYSTEMS, *supra* note 46, at 443, 433–34; C. Guy Powles, *Tonga*, in SOUTH PACIFIC ISLANDS LEGAL SYSTEMS, *supra* note 46, at 135, 315–16 (Michael A. Ntuny ed., 1993).

68. See Jean G. Zorn, *The Republic of the Marshall Islands*, in SOUTH PACIFIC ISLANDS LEGAL SYSTEMS, *supra* note 46, at 100; Isaac Adzoxornu et al., *The Cook Islands*, in SOUTH PACIFIC ISLANDS LEGAL SYSTEMS, *supra* note 46, at 3. See generally DECENTRALISATION IN THE SOUTH PACIFIC, *supra* note 61.

69. See JENNIFER CORRIN CARE, TESS NEWTON & DON PATERSON, INTRODUCTION TO SOUTH PACIFIC LAW I (1999).

70. See Catherine Giraud-Kinley, *The Effectiveness of International Law: Sustainable Development in the South Pacific Region*, 12 GEO. INT'L ENVTL. L. REV. 125, 129 n.10 (1999) (“[C]onflicts have occurred in some Melanesian countries, such as Vanuatu, between the rules of the church and existing practices, such as headhunting, at the time of Western colonization.”); Francis X. Hezel, *Indigenization as a Missionary Goal in the Caroline and Marshall Islands*, in MISSION, CHURCH, AND SECT IN OCEANIA, *supra* note 5, at 251, 251–73; James D. Nason, *Civilizing the Heathen: Missionaries and Social Change in the Mortlock Islands*, in MISSION, CHURCH, AND SECT IN OCEANIA, *supra* note 5, at 109, 109–36.

71. See I LOVETT, *supra* note 11, at 376–77.

Pierre Chanel, who was axed to death on Futuna Island in 1841;⁷² and Bishop John Patteson, who was beaten to death on Nukapu in the Solomon Islands in 1871,⁷³ are the most famous of those who died for their faith, but there were scores of others less well known who suffered a similar fate.⁷⁴

If missionaries were successful in establishing themselves, they were sometimes able to bring about significant changes to the customary laws and the application of those laws. Cannibalism, infanticide, polygamy, and the strangling of widows were some of the more notorious practices permitted by many customary laws throughout the South Pacific, which missionaries were often able to reduce, if not eradicate.⁷⁵ Kava drinking and erotic dancing were other vices that some missionaries were able to control if not eliminate.⁷⁶ In some countries, such as the Cook and Ellice (Tuvalu) Islands, religious leaders were able to attain positions of great authority in the community, second only to the chief, and they were even able to promulgate written laws.⁷⁷

Tonga was the only South Pacific island country during the nineteenth century in which the indigenous ruler, King Taufa'ahau Tupou, was sufficiently strong to assert his hegemony throughout the whole country and sufficiently conscious of the importance of establishing a firm legal system to promulgate a written constitution (in 1875) and a code of written laws.⁷⁸

As the nineteenth century advanced and the South Pacific island countries fell under the control of foreign countries,⁷⁹ the colonial administrators did not, as a rule, concern themselves with matters of religion. They did not establish a state religion, nor did they actively promote any religion or denomination. Nor, on the other hand, did they restrict or prohibit the practice of religion. For a short period during the 1920s in Tonga, which had become a protected state of

72. See FORMAN, *supra* note 14, at 6.

73. See HILLIARD, *supra* note 35, at 66–67.

74. See, e.g., *id.* at 62–66; GARRETT, *supra* note 6, at 181, 192–93, 241–42 (discussing early missionaries' desire to become martyrs).

75. See FORMAN, *supra* note 14, at 109–12.

76. See *id.* at 107–09, 112–16.

77. See Adzoxornu et al., *supra* note 68, at 3; see also GARRETT, *supra* note 6, at 27, 75–78 (noting the influence of Henry Nott, William Ellis, Charles Barff, and John Thomas on the laws of Tahiti, Huahine, and Tonga).

78. See Powles, *supra* note 67, at 315–19; see also GARRETT, *supra* note 21, at 141–49.

79. See *supra* Part II.B.

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Britain (i.e., Britain was responsible for foreign affairs and defense) the Legislative Assembly prohibited the entry of Latter-day Saints missionaries. This ban did not last for long, and it appears that it was more an indirect result of internal rivalries among the indigenous ruling classes of Tonga than of any concerted attack by the Tongan authorities or Britain against a particular branch of religion.⁸⁰

In the latter part of the twentieth century, commencing shortly after the end of World War II in 1945, all of the anglophone island countries of the South Pacific, except American Samoa and Pitcairn Island, obtained independence or, in the case of the Cook Islands and Niue, self-governance.⁸¹ Tonga already had a written constitution, but the other countries had not. The departing colonial administrators of Britain, Australia, and New Zealand thought that the island countries should be provided with a written constitution that would function as a basic framework of government to assist these countries on their path of independence or self-governance.⁸² Three countries—Nauru, Papua New Guinea, and Western Samoa—decided that these constitutions would be made by constitutional conventions established in the country and comprised of legislators and community representatives.⁸³ In the other countries—the Cook Islands,⁸⁴ Fiji,⁸⁵ Kiribati (formerly the Gilbert Islands),⁸⁶ Niue,⁸⁷ the Solomon Islands,⁸⁸ Tuvalu (formerly the Ellice Islands),⁸⁹ and Vanuatu (formerly the New Hebrides)⁹⁰—the constitutions were

80. See GARRETT, *supra* note 21, at 151.

81. See FORMAN, *supra* note 14, at 164. See generally DECENTRALISATION IN THE SOUTH PACIFIC, *supra* note 61; SOUTH PACIFIC ISLANDS LEGAL SYSTEMS, *supra* note 46. Self-governance in this context means full power to regulate internal affairs and a large measure, but not total control, of external affairs and defense.

82. See Edward Wolfers, *Decentralisation: Meaning, Forms, Objections and Methods*, in DECENTRALISATION IN THE SOUTH PACIFIC 1, 1–3 (Peter Larmour & Ropate Qalo eds., 1985).

83. See Deklin, *supra* note 65, at 145; Nonggorr, *supra* note 64, at 205; Powles, *supra* note 66, at 396.

84. Cook Islands Constitution Act, 1964 (N.Z.), amended by the Cook Islands Constitution Amendment Act, 1965 (N.Z.).

85. Fiji Independence Order, 1970 (U.K.).

86. Kiribati Independence Order, 1979 (U.K.).

87. Niue Constitution Act, 1974 (N.Z.).

88. Solomon Islands Independence Order, 1978 (U.K.).

89. Tuvalu Independence Order, 1978 (U.K.).

90. *Exchange of Notes Between British and French Foreign Affairs Ministries in London and Paris*, BRITISH SERVICE GAZETTE, Nov. 5, 1979.

enacted by the departing foreign country as one of its last acts of authority but only after wide consultation among the leaders of the country.⁹¹

All these written constitutions, except those of the Cook Islands and Niue, contained from the outset a part relating to fundamental rights and freedoms. In 1981, the Constitution of the Cook Islands was amended to include a section relating to fundamental rights and freedoms,⁹² leaving Niue as the only independent or self-governing island country in the South Pacific that does not contain any express protection of fundamental rights and freedoms in its written constitution.⁹³

The written constitutions of the South Pacific island countries, including Tonga but not including Niue, all contain a provision that recognizes the right to freedom of conscience and religion. Freedom of conscience and religion is not expressly defined in the constitutions of American Samoa, the Cook Islands, Tonga, and Vanuatu. However, the constitutions of Kiribati,⁹⁴ Fiji,⁹⁵ Nauru,⁹⁶ Papua New Guinea,⁹⁷ Samoa,⁹⁸ the Solomon Islands⁹⁹ and Tuvalu¹⁰⁰ all expressly provide that freedom of religion includes the right to

91. See generally SOUTH PACIFIC ISLANDS LEGAL SYSTEMS, *supra* note 46.

92. COOK IS. CONST. (Constitution Amendment (No. 9) Act, 1980–81) pt. I (Fundamental Human Rights and Freedoms), §§ 64–66.

93. See NIUE CONST. (Constitution Act of 1974). The Constitution of Niue provided instead by Article 31 that no legislation could be enacted by the Niue Assembly so as to affect the laws relating to criminal offences, arrest, bail, criminal procedure, evidence, extradition, marriage, divorce, affiliation, adoption, maintenance, and affiliation unless the Chief Justice had been invited to comment on the proposed legislation and the comments of the Chief Justice had been placed before the Assembly. This process was apparently considered a sufficient protection for fundamental rights and freedoms and preferable to the inclusion of provisions recognizing fundamental rights and freedoms. See Alison Quentin-Baxter, *The Constitutions of Niue and the Marshall Islands: Common Traits and Points of Difference*, in PACIFIC CONSTITUTIONS 97, 112–14 (Peter Sack ed., 1982). Article 31 was repealed in 1992 by the Constitution Amendment (No. 1) Act (1992) (Niue), but no provision was made to recognize fundamental rights and freedoms.

94. KIRIBATI CONST. (Constitution of 1979) ch. II (Protection of Fundamental Rights and Freedoms), § 11.

95. FIJI CONST. ch. 4 (Bill of Rights), § 35.

96. NAURU CONST. pt. II (Protection of Fundamental Rights and Freedoms), § 11.

97. PAPUA N.G. pt. III (Basic Principles of Government), § 45.

98. W. SAMOA CONST. pt. II (Fundamental Rights), § 11.

99. SOLOM. IS. CONST. ch. II (Protection of Fundamental Rights and Freedoms of the Individual), § 11.

100. TUVALU CONST. pt. II (Bill of Rights), § 23.

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change religious belief and to worship and observe religious practices, both in private and in public. They go further and acknowledge that freedom of religion also includes the right to teach religion, in private and in public, and to establish teaching institutions which provide religious instruction, although no one can be forced in such institutions to receive instruction or to take part in any religious practice that is not his or her own.¹⁰¹

All the constitutions, with the exception of Niue, also provide that the principal court of the country, the high court or the supreme court, has jurisdiction to hear complaints of non-compliance with the provisions of the constitution that relate to fundamental rights and freedoms.¹⁰²

Thus, it can be said that in all island countries of the South Pacific, except Niue, there is recognition in the written constitutions of the right to freedom of religion and conscience and that this right can be enforced by the principal courts. In practice, this freedom of religion is widely exercised and enjoyed.¹⁰³ Looking at each country as a whole, there are, in most countries, many forms of public and private worship, especially on Saturdays and Sundays. There are many churches, and in most countries there are some schools operated by churches. Moreover, there are usually religious observances at public meetings as well as at private meetings of any significance—prayers are usually said both at the beginning and also at the end of such meetings. Even when people gather to share a meal, or a bowl of *yagona* or kava, they usually also offer a religious

101. *See, e.g.*, KIRIBATI CONST. ch. II, § 11(2)–(3); FIJI CONST. ch. 4, § 35(3); W. SAMOA pt. II, § 12.

102. *See, e.g.*, FIJI CONST. ch. 4, § 41(1) (stating that a person who feels his rights have been violated can “apply to the High Court for redress”); VANUATU CONST. ch. 2, pt. I (Fundamental Rights), art. 6 (“The Supreme Court may make such orders, issue such writs and give such directions, including the payment of compensation, as it considers appropriate to enforce the right.”); BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2002, SAMOA, at <http://www.state.gov/g/drl/rls/irf/2002/13908.htm> (released on Oct. 7, 2002) [hereinafter INTERNATIONAL RELIGIOUS FREEDOM REPORT 2002, SAMOA] (noting that the American Samoa constitution and law “provide for the protection of the right of religious freedom and effective remedies for violation of that right” and noting that “[j]udicial remedies are [also] accessible and effective [in American Samoa]”).

103. *See, e.g.*, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2002, VANUATU, *supra* note 27; INTERNATIONAL RELIGIOUS FREEDOM REPORT 2002, SAMOA, *supra* note 102; BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2002, TONGA, at <http://www.state.gov/g/drl/rls/irf/2002/13912.htm> (Oct. 7, 2002); *see also* CARE, NEWTON & PATERSON, *supra* note 69, at 4–5.

prayer as a grace for the refreshment. So there is much exercise of the right to freedom of conscience and religion throughout the island countries of the South Pacific.

IV. LEGAL LIMITS TO THE EXERCISE OF FREEDOM OF RELIGION

Having acknowledged that, taken as a whole, each island country of the South Pacific allows for very extensive and widespread practice of religion, it must also be recognized that there are certain limits upon the exercise of the freedom of conscience and religion within each island country. In part, these limits are imposed by the law; in part, they are imposed by the sociological conditions of the countries themselves. This Part will consider the limits upon the exercise of freedom of religion and conscience that derive from the law, which have two sources: the written constitution and legislation.

A. Constitutional Limits upon Freedom of Conscience and Religion

In all the written constitutions of South Pacific countries that recognize the right to freedom of conscience and religion, the same provisions that recognize that right also place limits on its exercise. The rights and freedoms recognized by the constitutions are not absolute or unlimited but are subject to some limits or restrictions in all countries. These limits are not always expressed in the same words, but they tend to fall into the following five categories: (1) the rights and freedoms of others; (2) the interests of the community; (3) existing laws; (4) existing cultural values; and (5) other limitations on the scope of enforceability of fundamental rights and freedoms.

1. The rights and freedoms of others

The constitutions of the Cook Islands, Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, the Solomon Islands, Tuvalu, and Vanuatu all expressly state that the rights and freedoms of the individual, including the right to freedom of religion, are subject to the rights and freedoms of others.¹⁰⁴ Unfortunately the constitutions

104. See COOK IS. CONST. pt. IVA (Fundamental Human Rights and Freedoms), § 64(2); FIJI CONST. ch. 4, § 35(4)(a)(i); KIRIBATI CONST. ch. II, § 11(6)(b); NAURU CONST. pt. II, § 11(4)(b); PAPUA N.G. pt. III, § 45(1); W. SAMOA CONST. pt. II, § 11(2); SOLOM. IS. CONST. ch. II, § 11(6)(b); TUVALU CONST. pt. II, § 23(6); VANUATU CONST. ch. 2, pt. II, art. 7.

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do not spell out the implications of this limitation. Nor has there been any reported judicial discussion about how the freedom of conscience of the individual relates to the rights and freedoms of others. Presumably, some sort of balancing test must be applied. But, if so, what weight, if any, is to be given to the number of people whose freedoms of conscience are affected? What weight, if any, is to be given to the period of time during which the freedoms of conscience have been exercised or to the fact that the freedom of conscience of some was exercised before the freedom of conscience of others? Furthermore, what weight, if any, is to be given to the relative ages of the persons concerned? To these and other interesting questions that arise from this constitutional requirement that regard must be had to the rights and freedoms of others, no assured answer can be given at this stage.

2. The interests of the community

The constitutions of the Cook Islands, Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, the Solomon Islands, Tuvalu, and Vanuatu all recognize that the rights of an individual to freedom of conscience and religion are subject to the interests of the community—usually expressed as public security, defense, order, health, welfare, or morality.¹⁰⁵ In Fiji, the constitution adds “a public nuisance.”¹⁰⁶ In the Constitution of Tonga, the community interest is expressed a little differently, although the general thrust is the same: “it shall not be lawful to use this freedom [of religion] to commit evil and licentious acts or under the name of worship to do what is contrary to the law and peace of the land.”¹⁰⁷

Usually, the constitutions also state that this limit extends only to such laws as are “necessary” or “reasonable” to protect the interests of the community.¹⁰⁸ The Supreme Court of Samoa has emphasized the importance of the words “necessary” or “reasonable.” In *Sefo v.*

105. See COOK IS. CONST. pt. IVA, § 64(2); FIJI CONST. ch. 4, § 35(4)(a)(ii); KIRIBATI CONST. § 11(6)(a); NAURU CONST. § 11(4)(a); PAPUA N.G. pt. III, § 45(1); SOLOM. IS. CONST. ch. II, § 11(6)(a); TUVALU CONST. pt. II, § 23(6)(a); VANUATU CONST. ch. 2, pt. II, art. 7; W. SAMOA CONST. pt. II, § 11(2).

106. FIJI CONST. ch. 4, § 35(a)(ii).

107. TONGA CONST. pt. I, cl. 5.

108. See, e.g., FIJI CONST. ch 4, § 35(4) (“necessary”); KIRIBATI CONST. ch. II, § 11(6) (“reasonably required”); W. SAMOA CONST. pt. II, § 11(2) (“reasonable”).

Attorney-General,¹⁰⁹ the Supreme Court of Western Samoa held that a customary law made by the chiefs of a village in Samoa that restricted the number of religious denominations in the village to three was unconstitutional because it was in conflict with the fundamental freedom of conscience and because it was not “reasonable” restriction.¹¹⁰ Justice Wilson said:

Even if it is feared that some unrest or disharmony may result, consent to the establishment of a new church cannot be withheld or insisted upon, if, to do so, infringes a fundamental right guaranteed under the Constitution.

. . .

In my judgment, limiting the number of churches in a village is neither a restriction imposed by existing law (a customary law) nor does it impose “reasonable” restrictions, on the exercise of the right to freedom of religion [affirmed by] . . . [Article 11(2)]. It is a form of religious intolerance or discrimination on the ground of religion.¹¹¹

It is evident from this judgment that the limit of the community interest will not be invoked by the Supreme Court of Samoa unless the new religion or religious denomination is likely to produce more than “some unrest or disharmony.” It appears that substantial or severe disharmony must be shown to be likely.

3. *Existing laws*

Some constitutions expressly provide that all or some of the fundamental rights and freedoms are subject to (and limited by) existing laws.¹¹² In other words, fundamental rights act only on future laws, not on laws in existence at the time that the fundamental rights provisions were enacted. Samoa has such a constitution wherein Article 11(1) recognizes the right to freedom of conscience and religion, but Article 11(2) provides that “Nothing in clause (1) shall affect the operation of any existing law”

109. *Sefo v. Attorney-Gen.* (Sup. Ct. W. Samoa July 12, 2000), available at http://www.vanuatu.usp.ac.fj/paclawmat/Samoa_cases/N-Z/Sefo_v_AG.html.

110. *Id.*

111. *Id.* (first alteration added).

112. *See, e.g.*, W. SAMOA CONST. pt. II, § 11(2); PAPUA N.G. CONST. pt. III, § 45(1); TONGA CONST. pt. I, cl. 5.

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The Cook Islands is another example. In 1985, the Court of Appeals of the Cook Islands held in *Clarke v. Karika*¹¹³ that there should be implied into the fundamental rights provisions of the constitution, which were inserted by a subsequent amendment in 1981, a limitation that those fundamental rights provisions did not apply to laws in existence at the time that the amending provisions were enacted.¹¹⁴ In that case, it was argued that an act enacted by the Cook Islands Parliament in 1980, the Rehearing of the Te Puna Lands Act of 1980, was unconstitutional since it contravened the fundamental right to equality before the law along with other fundamental rights and freedoms, which were added to the constitution by an amendment to the constitution which came into force on June 5, 1981.¹¹⁵ The *Clarke* court upheld the act by holding that the fundamental rights and freedoms introduced by the constitutional amendment of 1981 were to be interpreted as not applying to laws in existence at the time the amendment came into force on June 5, 1981.¹¹⁶ This would have been the outcome even if the court would have considered the act a contravention of the fundamental right to equality to before the law.

The effect of such an express or implied provision is obviously to exempt existing laws from the fundamental rights provisions, in particularly the fundamental right to freedom of conscience and religion. In the *Sefo* case, the defendants argued that this exemption applied so as to exempt a customary practice adopted in some Samoan villages of limiting the number of churches that could operate in the village from the operation of Article 11(1) of the Constitution of Samoa (recognizing the fundamental right to freedom of conscience and religion).¹¹⁷ Justice Wilson of the Supreme Court of Samoa gave this argument short shrift, holding that this customary practice had not acquired the status of being part of the customary law of Samoa:

113. [1985] LRC (Const.) 732 (Cook Is. 1983).

114. *Id.*

115. *See id.*; *see also* COOK IS. CONST. (incorporating the 1981 amendment).

116. *See Clarke*, [1985] LRC (Const.) 732.

117. *See Sefo v. Attorney Gen.* (Sup. Ct. W. Samoa July 12, 2000), *available at* http://www.vanuatu.usp.ac.fj/paclawmat/Samoa_cases/N-Z/Sefo_v_AG.html.

That practice [of limiting the number of churches in a village] has not, like banishment, “acquired the force of law in . . . Samoa”

In my judgment limiting the number of churches in a village is neither a restriction imposed by an existing law (a customary law) nor does it impose “reasonable” restrictions on the exercise of the right of freedom of religion affirmed by Article 11(2).¹¹⁸

4. Existing cultural values

As discussed earlier, many constitutions make an express limitation upon fundamental rights and freedoms in respect to the interests of the community, which community interests are usually described in terms of defense, security, public order, health, morality, and welfare.¹¹⁹ In the Tuvalu Constitution, an express exemption from the application of the fundamental right to freedom of conscience (and also freedom of expression) is made in respect to laws that place restrictions on that right if the exercise of that right “(a) may be divisive, unsettling or offensive to the people; or (b) may directly threaten Tuvaluan values or culture.”¹²⁰

There does not appear to have been any judicial discussion about the effect of this exemption, but it seems clearly designed to allow for laws restricting freedom of religion on a much wider basis than that normally provided in other constitutions.

5. Other limitations on the scope of enforceability of fundamental rights and freedoms

In the constitutions of some South Pacific island countries, e.g., the constitutions of Papua New Guinea and Tuvalu, it is expressly stated that fundamental rights and freedoms are binding not only upon the state and its agencies, but also upon private individuals as well.¹²¹ They therefore can be enforced not only against agencies of the state but also against private individuals. On the other hand, the

118. *Id.*

119. *See, e.g.*, FIJI CONST. ch. 4, § 35(4); KIRIBATI CONST. ch. II, § 11(6)(a); NAURU CONST. pt. IVA, § 11(4)(a); SOLOM. IS. CONST. ch. II, § 11(6)(a); *see also* PAPUA N.G. CONST. pt. III, § 32(1).

120. TUVALU CONST. pt. II, § 29(4).

121. *See* PAPUA N.G. CONST. pt. III, § 34(a); TUVALU CONST. pt. II, § 12(1)(a).

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Constitution of Fiji expressly states that the fundamental rights and freedoms provisions are binding only upon the state and upon persons holding public office, and thus are not binding upon private individuals.¹²²

Most other constitutions of South Pacific island countries do not expressly state who is obliged to respect the fundamental rights and freedoms recognized by those constitutions. This is significant because the chiefs and elders who control life in rural communities throughout the South Pacific¹²³ are not regarded as agencies of the state. The Judicial Committee of the Privy Council, which is the highest judicial body in the Commonwealth, has held on several occasions that where a written constitution is silent as to who is required to observe the fundamental rights and freedoms provided by the constitution, it should be interpreted as requiring the state to observe those fundamental rights and freedoms but not requiring private individual observance.¹²⁴ These decisions all related to the Constitution of Trinidad and Tobago, the fundamental rights and freedoms provisions of which are in similar terms to the constitutions of most island countries of the South Pacific.¹²⁵ However, they were followed in 1987 by the High Court of Kiribati in *Teitinnong v. Ariong*.¹²⁶ In that case, some chiefs and elders of a village in Kiribati prevented a man owning land in that village from entering the village and prevented his children from passing through the village because he had refused to pay a fine which they had imposed upon him that he considered unfair. He brought proceedings against the chiefs and elders on the ground that their actions were in contravention of his fundamental right to freedom of movement.¹²⁷ The High Court of Kiribati held that it could not entertain proceedings brought by the man. The court based this decision on several grounds, including that the fundamental rights and freedoms provisions in the Constitution of Kiribati were binding only on agencies of the State

122. See FIJI CONST. ch. 4, § 21(1).

123. See *infra* Part V.C.

124. *Maharaj v. Attorney-Gen. of Trin. and Tobago*, 1979 A.C. 385, 396 (P.C. 1978) (U.K.) (appeal taken from the Court of Appeal of Trinidad & Tobago); *Thornhill v. Attorney-Gen. of Trin. and Tobago*, 1981 A.C. 61, 70 (P.C. 1979) (U.K.) (appeal taken from the Court of Appeal of Trinidad & Tobago); *Attorney-Gen. of Trinidad and Tobago v. Whiteman*, 2 A.C. 240, 247 (P.C. 1991) (appeal taken from the Court of Appeal of Trinidad & Tobago).

125. See TRIN. & TOBAGO CONST. ch. 1, pt. 1, §§ 4–5; *supra* notes 104–08.

126. 1987 LRC (Const.) 517 (Kiribati).

127. See *id.*

and not upon private individuals, such as the chiefs and elders of the village.¹²⁸

On the other hand, in Samoa, where the constitution is silent as to who is bound by the fundamental rights and freedoms provisions, the Supreme Court in the 1980 case *Tuivaiti v. Faamalaga*¹²⁹ upheld a villager's claims against the chiefs and elders of his Samoan village. The villager alleged contravention of his fundamental right to freedom of religion, in that the chiefs and elders banished him from the village and forbade villagers from riding in buses that he owned because he refused to attend the church in the village. In that case, the issue of whether the fundamental rights and freedoms provisions in the constitution were binding on private individuals or only on the state was not argued before the court.¹³⁰ In *Sefo v. Attorney-General of Western Samoa*,¹³¹ the parties and the court also apparently assumed that the fundamental right to freedom of religion was binding on, and had to be observed by, the chiefs and elders of the village of Saipipi. Again it is not clear that this point was the subject of specific argument by counsel.

In *Loumia v. Director of Public Prosecutions*,¹³² this point was specifically argued in relation to the fundamental right to life recognized by the Constitution of the Solomon Islands,¹³³ which,

128. *See id.*

129. (Sup. Ct. W. Samoa July 12, 2000), *available at* http://www.vanuatu.usp.ac.fj/paclawmat/Samoa_cases/N-Z/Tuivaiti_v_Faamalaga.html.

130. The court reasoned

The freedom [of religion] expressed in Article (11) is the freedom not to have any religion at all, the freedom to practice a religion in such manner as the individual thinks fit and the freedom to change both his religion and his practices in relation to it. Practice of religion includes every manifestation of religious life. It includes wearing of insignia, mode of dress, and every activity generated by religious observance such as choir practice, contributions towards church projects or contributions towards any project which is connected with the practice of any religion or observance of religious rites. Since independence, the village council has no power to enforce attendance at church or choir practice, or to compel contribution towards any church project and any punishment of any member of the village for failing to do any of those things is prohibited by those circumstances it may amount to a civil conspiracy and they can [be] liable therefore and can have damages awarded against them.

Id.

131. (Sup. Ct. W. Samoa July 12, 2000), *available at* http://www.vanuatu.usp.ac.fj/paclawmat/Samoa_cases/N-Z/Sefo_v_AG.html.

132. 1985/86 Solom. Is. L. Rep. 158.

133. SOLOM. IS. CONST. ch. II, § 4.

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like that of Samoa, is silent as to whether the fundamental rights and freedoms provisions bind only the state or private individuals as well. In *Loumia*, a man accused of killing another man claimed that his actions were justified under his customary law because a relative of the victim had previously attacked a member of the accused's family. This was therefore a revenge or "pay-back" killing sanctioned by his custom.¹³⁴ Two of the three members of the Court of Appeal of the Solomon Islands held first that the customary law could not prevail over the terms of the constitution which was the supreme law of the country. They also held that the provision in the constitution recognizing the right to life was binding on private individuals, such as the accused, as well as upon the state.¹³⁵

Thus, when a constitution is silent as to who is bound by its fundamental rights and freedoms provisions, it is unclear whether the courts in the South Pacific will accept them as binding upon private individuals as well as the state, or whether they will regard them as binding only upon the state and not upon private individuals, such as chiefs and elders.

B. Legislative Limits upon Freedom of Religion

Turning now to consider what legal limits upon the exercise of freedom of religion are imposed by legislation in the island countries of the South Pacific, it is evident that there are presently no direct legislative prohibitions against the practice of any particular religion or religious denomination. As mentioned earlier, during the 1920s, legislation was enacted by the Legislative Assembly of Tonga prohibiting the entry Latter-day Saint missionaries into Tonga, but it appears that this was a by-product of internal strife between members of Tonga's ruling classes rather than a specific assault upon a particular church. In any event, it was very short-lived—the Mormon Exclusion Act was enacted in 1922 and repealed in 1924.¹³⁶

In 1995, the Parliament of Vanuatu enacted legislation, the Religious Bodies (Registration) Act of 1995, that required all

134. See *Loumia*, 1985/86 Solom. Is. L. Rep. 158.

135. See *id.*

136. See also GARRETT, *supra* note 21, at 150–51.

religious bodies to register with a government department.¹³⁷ But this legislation was repealed in 1997.¹³⁸

The immigration and labor legislation of island countries of the South Pacific provide a more indirect form of legislative control over religious bodies. In all these countries, permission to enter and reside in the country, and to carry on work in the country, requires approval from a government department.¹³⁹ Such legislative requirements are aimed only at foreigners coming into the country to work in religious activities—they do not apply to indigenous people. Fiji enacted subordinate legislation that provides that applications by certain religious groups must be made by the Fiji Council of Churches.¹⁴⁰ In other countries, although the legislation or subordinate legislation does not so require, a country's Council of Churches is often consulted by immigration officials where they are doubtful about a particular application from an overseas religious body.

Although the powers under the immigration and labor legislation relating to the granting of entry permits or work permits do allow the opportunity for government officials to delay, obstruct, or refuse the granting of permits to religious personnel from overseas, this does not seem to occur. There has been no public outcry that government officials in any of the island countries of the South Pacific have abused their statutory powers in this regard.

Thus, it can be seen that in island countries of the South Pacific there is effectively no current legislative restriction or limitation upon the exercise of the fundamental right to freedom of religion.

137. See INTERNATIONAL RELIGIOUS FREEDOM REPORT 2002, VANUATU, *supra* note 27.

138. See Religious Bodies Registration (Amendment No. 9) Act of 1997 (Vanuatu).

139. See, e.g., AM. SAMOA CODE ANN. § 41.0304 (2002), <http://www.asbar.org/Newcode/Title%2041.htm#s304> (“It shall be the duty of every alien now or hereafter in American Samoa who is 14 years of age or older, has not been registered and photographed under this chapter, and remains in American Samoa for 30 days or longer, to apply for registration and photographing before the expiration of such 30 days.”).

140. A Council of Churches is a voluntary association of the leaders of the main Christian denominations, which is formed in many island countries of the South Pacific. A Council of Churches has no statutory authority except in Fiji, where its approval is required for applications for entry and work permits for certain religious bodies. The National Councils of Churches have formed a regional Pacific Council of Churches, with headquarters in Suva, Fiji.

V. SOCIOLOGICAL LIMITS TO EXERCISE OF FREEDOM OF RELIGION

As discussed in Part IV, the written constitutions of all island countries in the South Pacific, except Niue, recognize and protect fundamental rights and freedoms, including the right to freedom of religion, within certain limits that have so far not been very fully explored. It is important to recognize that in addition to such narrow legal limitations upon the right to religious freedom, some important sociological factors act as significant practical limits to the exercise of the right to freedom of religion provided by the law, especially in the rural areas.

A. Large Proportion of Population Living in Rural Areas

In most South Pacific island countries, the great majority of people live in villages in rural areas, remote from easy communication and transport. The villages vary in size from the very small, comprising only a married couple and their sons and daughters-in-law, to medium sized villages of 100–200 people, to very large villages comprising 1000 or more inhabitants. The very large villages are, however, not the norm, and most villages are small, usually between 50 and 100 people.¹⁴¹

Small villages find it difficult to sustain and support, physically and financially, more than one church.¹⁴² Accordingly in the small villages, it is very difficult to exercise any freedom of choice in religion. As a matter of reality and practicality, whatever church is established first in a small village is likely to remain the only church for the people of that village. Some villages are so small that they cannot support even one church, in which case persons wishing to worship must make their way to another village; the nearest village within walking distance with a church is likely to be the only one available to them. Freedom of religion is thus also limited by the tyrannies of distance and lack of transportation.

141. In Vanuatu, as few as twenty-one percent of the people live in what can be classified as urban areas. See *Population and Development Indicators for Asia and the Pacific, 2000*, Population and Rural Development Division, at http://www.unescap.org/pop/data_sheet/data2000.htm. Other islands, such as the Northern Mariana Islands, have as high as ninety percent of the people living in urban areas. See *id.*

142. See Charles Forman, *Playing Catch-up Ball: The History of Financial Dependence in Pacific Island Churches*, in *MISSIONS AND MISSIONARIES IN THE PACIFIC*, *supra* note 8, at 91.

When one moves to larger villages and the towns, the picture changes completely. In these much larger communities, there are enough people to establish and maintain more than one church, and so greater freedom of choice becomes possible.

B. Influence of Custom

In the rural areas, the influence of traditional practices and customs is very strong.¹⁴³ Most people have lived next to the same neighbors for the previous ten years; they work in and around the same village; and they see the same people every day. Their grandparents have never had any formal education, and the parents have probably attended only primary school. Not all children attend school, and those who do usually have to travel to institutions that are far from their villages. At the secondary level, children leave the village to board at the school and only return at holiday times. Upon their return from school, students rapidly slip into the pattern of life in their community, following their older relatives. Thus, neither the schools nor the students have much impact in introducing new ideas into the village communities. There are no regular newspapers, radios are rarities, and television sets even more so. Virtually all meetings are either social gatherings, such as weddings and funerals, or meetings to discuss land disputes.

In such an environment, people, quite apart from the influence of their chiefs and elders, tend to do what was done by their parents and grandparents, and they tend to have little interest in, or desire to explore new ideas or pursue different spiritual principles and values.

In the urban and peri-urban areas, the position is quite different. In these areas, the social environment is more diverse and allows for greater access to new information and ideas. People change places of residence from time to time, and their neighbors also are changing. Those who are working do so away from their homes and meet a variety of people. The children normally attend large schools within walking distance. There are regular newspapers; most households have a radio; and some households have television. There are thus

143. See INTERNATIONAL RELIGIOUS FREEDOM REPORT 2002, SAMOA, *supra* note 102 (noting “strong societal pressure at the village and local level to attend church, participate in church services and activities, and support church leaders and projects financially” in American Samoa). In some churches in American Samoa, “financial contributions often total more than 30 percent of family income.” *Id.*; see also Wolfers, *supra* note 82.

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many more contacts with different people than in rural areas creating, a more diverse and challenging environment that is more likely to open up the possibilities of different spiritual interests.

C. Influence of Chiefs and Elders

In rural areas, the influence of chiefs, traditional leaders, and elders is very strong. Every village has as its leader at least one chief, and the larger villages usually have several assistant chiefs. These chiefs are advised and assisted by elderly or senior members of the community.¹⁴⁴

Chiefs are entitled to control all aspects of the life of their people, and permission of the chief must be obtained for any new development in the village, including, of course, any new development regarding the religious practices of the people.¹⁴⁵

Chiefs and elders, like the other inhabitants of villages, tend to follow what has been done in the past. As the enunciators and enforcers of village customs, chiefs and elders are generally unwilling to allow any conduct that would be regarded as a breach of custom. As guardians of their people, they are naturally anxious to ensure that the villagers do not over-commit themselves in the support of churches and that the people do not become divided due to different religious affiliations. Further, if they have strong religious allegiances themselves, chiefs and elders tend to be unwilling to see new religious movements in the village that may rival their own religious denomination.¹⁴⁶ Thus, there are a number of factors that may cause

144. See generally DECENTRALISATION IN THE SOUTH PACIFIC, *supra* note 61 (discussing local government in chapters devoted to individual South Pacific nations).

145. See, e.g., INTERNATIONAL RELIGIOUS FREEDOM REPORT 2002, VANUATU, *supra* note 27. In Vanuatu rural areas

traditional Melanesian communal decisionmaking predominates. If a member of the community proposes to introduce a significant change within the community, such as the establishment of a new church, the chief and the rest of the community must agree. If a new church is established without community approval, the community views the action as a gesture of defiance by those who join the new church and as a threat to community solidarity. However, subsequent friction generally has been resolved through appeals from traditional leaders to uphold individual rights.

Id. In Fiji, “[w]hen newcomers were admitted to a village, they were often required to pay tribute to the village chief, as the representative of the community.” See Paterson & Zorn, *supra* note 46, at 30.

146. Cf. INTERNATIONAL RELIGIOUS FREEDOM REPORT 2002, VANUATU, *supra* note 27 (noting that “[a]lthough traditions of communal decisionmaking at times conflict with the

chiefs and elders to be reluctant to allowing new religious movements and new churches in their villages.

In the urban areas, on the other hand, the influence of the chiefs and elders is not as strong. People from the same village on an island tend to become more dispersed in urban areas. Also, village chiefs and elders do not normally reside in the urban areas but instead remain in rural villages so that they have to be represented in the urban areas, if at all, by representatives who do not necessarily have the same social status or authority as the village chiefs have in their villages.¹⁴⁷

Accordingly, in urban areas, the permission of the chief does not normally have to be sought for a person to join a different religious denomination, to establish a new religious denomination, to build a new church, or to make changes to an existing church, although as a matter of courtesy he would normally be informed.¹⁴⁸ The power of a chief to refuse permission for any new religious development in urban areas is virtually non-existent because he is out of the territorial ambit of his jurisdiction.

D. Influence of the First Established Church

Whichever church is first established in an area will naturally wish to keep the people of that area for its own. It undertook the hard labor of converting those people by going from house to house, by preaching to hostile or uncomprehending listeners, and by building a church house and a residence for the officiating clergy or ministers. It is understandable that the established church will not be happy to see or contemplate the dwindling of its flock or the shifting of its members' allegiance to another church.¹⁴⁹

In the nineteenth and the early twentieth centuries, in many islands of the South Pacific, disputes between Protestant missionaries

introduction of new churches in rural communities, government officials use modern law and traditional authority to maintain amicable relations among established and new churches").

147. See, e.g., Yash Ghai, *Vanuatu*, in *DECENTRALISATION IN THE SOUTH PACIFIC* *supra* note 64, at 42, 43–44, 49.

148. In American Samoa, "the matai (village chiefs) often choose the religious denomination of the aiga (extended family)." See *INTERNATIONAL RELIGIOUS FREEDOM REPORT 2002, SAMOA*, *supra* note 102.

149. Although "amicable relations [exist] between the religious communities in Vanuatu, some churches and individuals object to the missionary activities of nontraditional denominations and continue to suggest that they be curtailed." See *INTERNATIONAL RELIGIOUS FREEDOM REPORT 2002, VANUATU*, *supra* note 17.

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of different denominations and between Protestant and Roman Catholic missionaries were legion.¹⁵⁰ In the later twentieth century, they became less overt, vociferous, and pugnaciously denominational, but there still often remains in the first established church a certain feeling that it has prior claim by virtue of its earlier establishment. This feeling includes a reluctance to share its followers with any other church.¹⁵¹

E. Summary

The result of these various factors is that in the rural areas of South Pacific island countries, where the majority of indigenous people live, there are significant sociological impediments to the full exercise of the right to freedom of religion that the constitutions guarantee within certain limits. Several recent incidents reported from different parts of the South Pacific illustrate the problems that still exist in the rural areas. In the Samoan village of Saleimoa, five villagers were reported in May 2002 to have been forced to leave their village homes in the village because they had attended an Assemblies of God church in the capital of Apia.¹⁵² At much the same time it was reported that ten families had been evicted from their Samoan village of Falealupo because they had refused to discontinue Bible study sessions in the village of which the chiefs and elders disapproved.¹⁵³ It was also reported, about the same time, that

150. See FORMAN, *supra* note 14, 202–04.

151. In American Samoa, “village councils—in the name of maintaining social harmony within the village—sometimes banished or punished families that did not adhere to the prevailing religious belief in the village.” See INTERNATIONAL RELIGIOUS FREEDOM REPORT 2002, SAMOA, *supra* note 102. However,

civil courts take precedence over village councils, and courts have ordered families readmitted to the village. The 1990 Village Fono Act gives legal recognition to the decisions of the fono (village courts) and provides for limited recourse of appeal to the Lands and Titles Courts and to the Supreme Court. In July 2000, the Supreme Court ruled that the Village Fono Act could not be used to infringe upon villagers’ freedom of religion, speech, assembly, or association.

Id. In 2002, the U.S. Department of State received no reports of persons who were “banished by villages due to their practicing religion differently from that practiced by the village majority.” *Id.*

152. See *Samoa Villagers Forced out for Going to ‘Wrong’ Church*, TRADING POST (Vanuatu), May 4, 2002, at 9; see also *Five People Exiled Within Samoa for Attending Wrong Church*, AGENCE FRANCE PRESSE, Apr. 30, 2002.

153. See Terry Tavita, *Samoa Religious Exiles Enjoy Relative Peace*, TRADING POST (Vanuatu), May 4, 2002, at 7.

on the small island of Lelepa, off the north coast of the island of Efate in Vanuatu, there had been a confrontation one Saturday evening between Seventh-day Adventists and Presbyterians, which had resulted in the arrest of a chief and a former police officer.¹⁵⁴

On the other hand, in urban areas where traditional constraints are not so strong and where there is greater diversity of action and thought, indigenous people of South Pacific island countries are able to exercise freely the right to freedom of religion that the written constitutions recognize and protect.

VI. CONCLUSION: SOME SUGGESTIONS FOR THE FUTURE

It is apparent that many religions and religious denominations have been introduced into the island countries of the South Pacific and that the written constitutions of these countries, with the exception of Niue, recognize and protect the right of the individual to practice the religion or religious denomination of his or her choice.

The constitutions recognize that the right of the individual to freedom of conscience is not an absolute or unqualified right; it is subject to the exercise of others rights and freedoms and to the community's interests, in defense, security, public order, health, morality, and welfare. Whether those limitations on the individual's right to freedom of conscience are sufficient in small rural communities is open to debate. In Tuvalu, the 1986 constitution goes further and provides that an individual's freedom of religion is subject to social cohesion and traditional cultural values.¹⁵⁵ There have been calls for similar changes to be made to the constitutions of Samoa and Vanuatu.

It seems that the time has come when governments of the South Pacific island countries should show more interest and concern about what is happening in the rural areas of these countries with regard to religious practice. In the urban areas, which are free of the constraints of small rural populations that are entrenched in traditional practices and cultural values as articulated and enforced by local chiefs and elders, indigenous persons can usually exercise freely their individual right to freedom of conscience and religion. But it is

154. See Evelyn Toa, *Ecumenical Conflict at Lelepa, North of Efate . . . But There Are No Victims*, PORT VILA PRESSE (Vanuatu), May 18, 2002, at 8.

155. TUVALU CONST. pt. II, § 29.

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very different in the rural areas, and very recent incidents have made it clear that there are ongoing problems in these rural areas with regard to the individual's ability to exercise the religious freedom that the constitutions recognize and enshrine.

In Fiji, one could expect the Fiji Human Rights Commission to take responsibility for dealing with problems of religion in rural areas. But that body is advisory and recommendatory, and it does not seem to have made much progress in this direction, possibly because it has such a wide scope of responsibility. What is called for is a committee or council on religious affairs with responsibility to: (1) give instruction on the social and cultural conditions in the country to missionaries and religious bodies establishing themselves in the country for the first time; (2) give instruction to chiefs and elders about the individual's constitutional right to freedom of conscience, within certain limits; (3) monitor areas where conflict has arisen or may arise; and (4) provide mediation and conciliation services to resolve any conflict that may arise with regard to religion. Such a committee or council could consist of representatives of existing religious denominations in the country, representatives of the chiefs of the country, representatives of interested government departments (e.g., Education and Internal Affairs) and some interested members of the community, all under a neutral chair.

If a committee or council of this kind, with the powers that have been suggested and the composition that has been recommended, is not considered to be the most appropriate solution, then it is urged that thought be given to developing an alternative mechanism that would be more appropriate for dealing with the present problems of religious practice in the rural areas of South Pacific island countries.

The search for the correct solution must continue. To leave matters as they are, without any assistance from governments, is surely a betrayal of the promise of individual freedom of religion that is enshrined in the constitutions, the promise of protection of others' rights and freedoms, and the promise of protection of community interests, which are also recognized and affirmed by the constitutions of the South Pacific island countries.

