

Samoa: Law, Custom and Conservation

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Since gaining independence 30 years ago Samoa has been proactive in returning control of government, land and resources to traditional owners. The most recent challenges have been in the areas of biodiversity conservation and the creation of sustainable livelihoods. Samoa has taken a progressive approach by recognising the unique value in traditional knowledge and cultural practices that have developed over generations. By incorporating customary law and practice into natural resource management laws and policy, Samoa has created a multifaceted system empowering indigenous communities and maximising their participation. This article focuses upon Samoa's marine protection regime to illustrate the many advantages of blending old and new to create an effective, modern and sustainable conservation regime.

1. INTRODUCTION

The Independent State of Samoa occupies a central position in Polynesia and is located about halfway between New Zealand and Hawai'i in the South Pacific Ocean.¹ It comprises a small group of islands formed about seven million years ago,² the largest two being Savai'i and Upolu³. The total land area of Samoa is just less than 3,000 sq km, including 10 sq km of water and 403 km of coastline.⁴

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- 1 About 1700 miles north-east of New Zealand. *Samoa Sensation* at: www.samoa.co.uk/history.html (accessed 14 October 2005) 1.
- 2 *Ibid*, 1.
- 3 Only two others are inhabited being Manono and Apolima. The five other islands are known as Fanuatapu, Namu'a, Nuutele, Nuulua and Nuusafee. The country's capital, Apia, is located on the island of Upolu.
- 4 At: www.theodora.com/wfbcurrent/samoa/samoa_geography.html (accessed 23 February 2006).

The terrain is comprised of coastal plains with a rugged interior of volcanic mountains, the highest being 1,857 m.⁵ The climate is tropical with a wet season between October and March. Today the population is about 178,000 with 85.7 per cent of people living in 330 villages under the authority of 18,000 Samoan chiefs known as "matai". The majority of village land is held by traditional owners although there is some private freehold title and government-owned land.⁶

The economy is based to a large extent on international aid. There is a high unemployment rate. However, the majority of the workforce and 90 per cent of exports revolve around agriculture, with coconut and copra products being the most dominant. This has resulted in large-scale land clearing for permanent crops and arable use causing deforestation and soil erosion. It has been estimated that "about 80 percent of Samoa's lowland rainforests have been lost during the 3,000 year history of human habitation".⁷

The only major manufacturing industry in Samoa is the production of automotive wire harnessing. Tourism is expanding and, as will be discussed below, offers some excellent opportunities for the creation of sustainable livelihoods provided that environmental damage can be curtailed. Whilst Samoa suffers from the impact of large urban projects including an expanding manufacturing industry, it also is at risk from the cumulative impact of small-scale harvesting and expansion of urban areas into sensitive coastal regions. But, increasingly, traditional cultural practices in isolation are not effective to protect the environment.

This paper provides an overview of the legal developments affecting Samoan customary law and the consequential effects on environmental and natural resource management in Samoa. It includes a brief history of the settlement of Samoa and Samoan traditional relationships with the natural environment, including the evident conservation ethic. Specific reference will be made to the successful incorporation of customary law and traditional knowledge into the regimes for protection and management of marine biodiversity.

5 Mauga Silisili (Savaii), *World Fact Book — Samoa* at: www.cia.gov/cia/publications/factbook/geos/ws.html (accessed 12 October 2005) 2.

6 It is estimated that 81% of land is held by customary title, 15% by the government and only 4% of land in Samoa is held by freehold title: Tu'u'u leti Taule'alo, Soialo David Fong and Patea Malo Setefano, "Samoan Customary Land at the crossroads — some options for sustainable management" (2003) 4 *Proceedings of the 2002 National Environment Forum, Samoa* 2.

7 World Wildlife Fund Report at: www.worldwildlife.org/wildworld/profiles/terrestrial/oc/oc0112_full.html (accessed 21 September 2005).

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2. A BRIEF HISTORY

It has been estimated that Samoa has been inhabited by humans for approximately 3,000 years. Early human occupation is evidenced by shards of Lapita pottery found at Mulifanua on the western shore of Upolu.⁸ It is also known that in about AD 400 Samoa was invaded and conquered by Tongans. They stayed for 600 years until AD 1000 when the Samoans regained control.

Samoans have traditionally been tribal people, divided into family groupings governed by chiefs and influenced by beliefs in multiple deities. The hierarchical tribal structure developed over hundreds of years, and was influenced by both inter-tribal dealings within Samoa and relationships and interaction between Samoans and other nations through trade, occupation, and infighting.⁹ Tribal infighting continued to shape the hierarchical structures until that which remains today.

In 1722 Dutchman Jacob Roggeveen was the first European to sight the islands. In 1768 Louis-Antoine de Bougainville, the French explorer, named the islands the "Navigator Islands" on account of the Samoan sailors seen navigating the waters in small canoes. In the nineteenth century Europeans arrived in Samoa bringing with them disease and Christianity. Both had a devastating effect on traditional Samoan life. Missionaries from the London Missionary Society arrived in Samoa in 1830 and were responsible for the introduction of Christianity. This resulted in the almost complete destruction of the traditional Samoan religion to the extent that today 99.7 per cent of Samoans consider themselves as Christians.¹⁰ Many other customs and traditional practices were also destroyed by European religious norms.

By 1857 the Hamburg trading company, Godeffroy (later the German Trading and Plantation Company), had set up its headquarters in the capital city of Apia.¹¹ Samoa became a trading post in the Pacific, having further detrimental effects on the country and its people. Samoans were dispossessed of their land, much of which was cleared to make way for plantations. The Western common law legal model was introduced as it was considered superior and took precedence over the customary law. Thus continued the destruction of Samoan law, custom and traditional practices.

The first Western codified laws appeared in the 1830s. By that stage the United States of America, Great Britain, and Germany were all influential in the administration of Samoa. From 1873 to 1876 the Steinberger Constitution

8 *History of Western Samoa*, Interweb Inc site for the Government of Western Samoa at: www.interwebinc.com/samoanew/history.html (accessed 14 October 2005). See also *Samoa Sensation*, supra note 1, at 1.

9 The earliest evidence of trade between Tonga, Fiji and Samoa being around 200 BC.

10 *World Fact Book — Samoa*, supra note 5, at 3.

11 German Samoa — German Protectorates.

governed Samoa. This was followed by the Berlin Treaty which was drawn up in 1889. Under the Treaty the Samoan King retained independence but all decisions in relation to Samoa were to be made on the advice of Germany, Great Britain and the USA. In reality, little control was given to Samoa and during the 1890s an often violent civil war raged in the islands.¹² In 1900 Samoa was divided up under the Tripartite Treaty and German Samoa and American Samoa were created. The islands of Upolu and Savai'i became part of the German Samoa protectorate and Tutuila and Manu'a part of American Samoa.

German Samoa existed from 1900 until 1914 when the New Zealand Expeditionary Force took control. From World War I until 1946 it was occupied by New Zealand and administered as a mandate. Then from 1947 it was a League of Nations, later United Nations, trust territory. During this time many political changes were made including majority representation by Samoans in the Legislative Assembly until, finally, the Samoan people became unified in their determination to regain independence. With the strengthening of the "Mau a Pule" movement much pressure was placed upon the UN to pave the way for self-determination.

On 1 January 1962 Western Samoa became the first Polynesian nation to re-establish independence in the twentieth century, and in 1970 it became a member of the Commonwealth. In 1997 it became known simply as Samoa, but remains a separate and distinct country from American Samoa.

3. MODERN SAMOA

What remains today, of traditional Samoan society, are the land use divisions and hierarchical village structures. Customary land is divided into village land, plantation land, and settlement land (land used for residential purposes). There are two types of chiefs — "tulafale", the oratory or talking chief, and "ali'i", the high chief. All village land is controlled by the village chiefs, whereas residential and plantation land is controlled by family chiefs.¹³

The Samoan matai are chiefs who are really the heads of large extended families ("aiga"). Matai are responsible for village lands and resources and represent the clan in the village council ("Fono"). The Fono is responsible for community order, the organisation of the village, and development. In addition to this structure, the national government appoints a village mayor

12 Robert Louis Stephenson wrote an account of the civil war which can be found at: <http://www.samoa.co.uk/books/1893war.html> (accessed 14 October 2005). Somewhat famously, Robert Louis Stephenson died in his home in Vailima in 1894.

13 Posa Skelton and Robin South, *Fisheries By-Laws in Samoa*, Traditional Law and the Environment: Final Report at: www.impac.org.au/training/documents/Traditional_Law_finalreport_000.pdf (accessed 6 June 2005) 33.

(“pulenu’u”) who presides over the village council.¹⁴ Decision-making is based upon consensus, which often means that no decision is reached at all. This has resulted in slow progress in the development of community-based management plans, as set out below.

Some parts of the original Samoan religions remain, including the spiritual connection with the natural environment, particularly the land itself. Land is at the very heart of “Faa-Samoa” (the Samoa Way). Certain animals are considered sacred (“i’a sa”) and were therefore protected,¹⁵ and stories have been told for generations in relation to Samoan wildlife.¹⁶

Today there remains a high unemployment rate, but the majority of the population is not without food. Most villagers still live on a subsistence basis as they have for many generations. This continuity has been fortuitous in preserving many traditional customs and practices. Due to the small size of the populated islands, heavily dependent as they were on harvests from the sea, it became necessary for the villages to develop traditional conservation measures. This conservation ethic took the form of limits on over-harvesting to protect an essential natural resource by placing bans or restrictions (“tabus”) over areas where stocks had declined or were threatened. The penalty for breaking a tabu was a monetary or produce fine or in some cases physical punishment.¹⁷ On land, tabus usually took the form of sticks of certain trees placed to indicate a “no take” zone. In addition, under customary law coastal waters were included as part of village property. In relation to marine areas, tabus prohibited villagers from hunting certain marine life during specific periods corresponding with breeding season or during migratory travels or where a particular species had been over-harvested.

There are many other examples of the traditional knowledge of Samoan people. This is particularly evident in agricultural practices which included multi-storeyed fallow systems, utilising bush or grass fallowed for several years with root crops and intercropped with coconut and other tree species.¹⁸

14 UNESCAP-DRPAD, *Integrating Environmental Considerations into the Economic Decision-Making Process: Modalities for environmental assessments* at: www.unescap.org/drpad/publication/integra/modalities/samoa/4sm02c00.htm (accessed 12 October 2005) 1.

15 For example, turtles were considered sacred and only ever hunted for special traditional ceremonies.

16 These stories are very similar to the Aboriginal Dreamtime legends of Australia’s indigenous population: *Samoa’s Pe’avao: An Endangered Animal* at: www.mnre.gov.ws/biodiversity/documents/Newspaper/17%20August%202003-%20Samoa%20Pea%20Vao%20An%20Endangered%20Species.pdf (accessed 1 November 2005).

17 C Schuster, *Tradition Matters* at: www.ourplanet.com/imgversns/95/Schuster.html (accessed 23 September 2005) 2.

18 Pitakis Tikai and Aaron Kama, “A study of indigenous knowledge and its role to sustainable agriculture in Samoa” (2004) 5 *Proceedings of the 2003 National Environment Forum, Samoa* 2. The report contains many details of the traditional knowledge relating to farming practices in Samoa.

Indigenous knowledge has been used to select disease-resistant varieties of crops and to use natural pest repellents.

As discussed below, although these traditional practices have worked for hundreds of years, they are no longer sufficient to protect Samoa's biodiversity. Increasing populations have resulted in boundaries between neighbouring villages being reduced. Where the matai can control residents within their village, they have little effect on people of another village. In addition, urban growth and increasing industrialisation have had an exponential impact on the natural environment, which these customary laws and practices have not evolved to meet.

Unfortunately, conventional Western-style protected area management has also been unsuccessful at meeting these challenges in Samoa. This is unsurprising as such methods usually involve isolating an area of land from the indigenous population. Such a system is unlikely to work where the majority of the population have a close affinity to the land and rely upon it for their basic needs, to varying degrees. However, as will be discussed below, rather than merely continue to impose top-down command-and-control conservation measures Samoa has chosen to blend traditional customary law and practices with Western law and policy. This has resulted in a more participatory protection regime that has both the support of traditional landowners and the Samoan government. This has only been made possible because of Samoa's progressive attitude towards traditional landowners and customary law.

At the international level it has long been espoused that biodiversity conservation will only succeed if it is considered in the context of sustainable development and livelihoods and with the participation of all stakeholders. However, many nations have not incorporated these principles into national law and policy. Samoa provides excellent examples of active programmes which do support these principles. Despite limited national legislation, international organisations and assistance have been utilised to create mechanisms that achieve the dual purposes of establishing sustainable livelihoods for the indigenous population and protecting Samoan biological diversity. A further indirect benefit has been the recording of traditional laws and practices, ensuring their support and future survival.

4. GOVERNANCE IN SAMOA

Colonisation of Samoa in the eighteenth and nineteenth centuries resulted in most indigenous Samoan people being dispossessed of their land, and their customs and traditional practices being destroyed or at the very least isolated and marginalised. However, since independence Samoa has moved to restore much of what was lost. Therefore, today many of the governance problems and

difficulties facing indigenous people in other parts of the world have already been overcome in Samoa.

For example, the Convention concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (ILO 169) applies to tribal peoples in independent countries whose social, cultural, and economic conditions distinguish them from other sections of the national community and peoples in independent countries who are regarded as indigenous on account of their descent. Samoa is an independent country where the indigenous people comprise the majority of the population. Therefore, in one sense the Convention is not aimed at and arguably does not apply to Samoa.¹⁹

Following independence, the Samoan Constitution was passed, providing a democratic foundation for national administration based upon the Westminster system. The Constitution is based on "Christian principles and Samoan custom and tradition".²⁰ The elected head of state is a traditional king, known as "O le Ao o le Malö",²¹ with the prime minister and cabinet of ministers controlling the executive. Since 1990 all Samoans over 21 years are eligible to vote, but only matai of eligible age can be elected to the legislative assembly.²²

The Constitution provides for the establishment of a Supreme Court²³ and Court of Appeal.²⁴ In addition there are subordinate courts including the Magistrates' Court and Land and Titles Court which has jurisdiction in relation to matai titles and customary land.²⁵ No legal representation is permitted in the Land and Titles Court and villagers represent themselves before a panel of Samoan judges to argue land claims.

The Constitution provides the basic umbrella under which all other legislation falls. However, under Article 114, all laws existing prior to independence remain in force until they are repealed or amended. Therefore, the range of laws in force in Samoa is the result of its chequered past. Whilst the Constitution is drafted in a Western style it also makes specific provision for Samoan custom and practice. For example, Article 100 provides that a matai title shall be held in accordance with the law relating to Samoan custom and usage. Furthermore,

19 This Convention has not been ratified by Samoa.

20 Preamble to the Constitution of the Independent State of Western Samoa 1960.

21 Article 16.

22 Tu'u'u leti Taule'alo, Soialo David Fong and Patea Malo Setefano, supra note 6, at 2. See also *Fishery Resources Development in Samoa — Integrating Environmental Considerations into the Economic Decision-Making Process — Modalities for Environmental Assessment* at: www.unescap.org/drrpad/publication/integra/modalities/samoa/4sm02c00.htm and www.unescap.org/drrpad/publication/integra/modalities/samoa/4sm02c02.htm (accessed 12 October 2005) 2.

23 Article 65, Constitution of the Independent State of Western Samoa 1960.

24 Article 75.

25 Article 103. For further details of the Court structure see Samoa's Court System Information.

Article 101 provides that all land in Western Samoa is customary land, freehold land, or public land. Significantly, most land is held according to customary title which cannot be alienated.²⁶ However, an Act of Parliament can authorise the taking of customary land under Article 102.²⁷ In addition, under s 4 of the Alienation of Customary Lands Act 1965, the responsible Minister can authorise the leasing or licensing of any customary land for an authorised purpose, as trustee for the beneficial owners.

In the decades that followed independence, specific legislation was passed giving further effect to indigenous governance structures and traditional customs and practices. Significantly, the tribal hierarchical structures have been recognised under the Village Fono Act 1990 ("Fono Act"). This Act was passed to "validate and empower the exercise of power and authority by the village Fono in accordance with custom and usage of their villages".²⁸ The village Fono is effectively the village council comprised of the assembly of Alii ma Faipule (chiefs and leaders). Under the Fono Act a register is to be kept of all villages with a functioning village Fono. The Act provides that every village Fono shall exercise its powers in accordance with traditional custom and usage of that village.²⁹ Additional powers are given to the Fono in relation to the maintenance of hygiene and the development and usage of village land for the betterment of the village.³⁰ Power is given to the Fono to punish anyone, in accordance with custom and usage of the village, who fails to obey any direction of the Fono.³¹ If any villager is dissatisfied with a decision of the Fono there is a right of appeal to the Land and Titles Court under s 11 of the Fono Act. This is this same court that is given jurisdiction over Samoan chiefly titles and customary land issues under Article 103 of the Constitution.³²

The Fono Act provides a mechanism for decisions to be made in relation to customary land, utilising the customary governance institution of the Fono, and for those decisions to be enforced according to customary law. However, the jurisdiction of the Fono is limited to persons ordinarily resident in the village, except those on government, freehold, or leasehold land. Therefore,

26 A mechanism is provided in ss 8 and 9, Land and Titles Act 1981 for land to be declared customary land. Reference is made to the former Samoan Land and Titles Protection Ordinance 1934 pursuant to which land could be held according to Samoan customs and usage. Such land is declared to be customary land. In addition, s 9 provides for Samoans to make application to have land declared to be customary land.

27 The Taking of Lands Act 1964 provides that just and fair compensation must be paid.

28 See the Preamble to the Fono Act.

29 Fono Act, s 3(2).

30 Section 5.

31 Sections 5(3) and 6.

32 This Court is separate from the Magistrates' Courts, which are otherwise the inferior courts in the judicial hierarchy for non-customary land issues and general criminal and common law actions.

for example, any decision of the Fono could not be enforced against a resident of a neighbouring village or a tourist. Nor does the Fono jurisdiction extend to land outside the village, preventing district or regional environmental land management issues from being considered. This has proved to be a major stumbling block in relation to biodiversity protection, as will be discussed below.

It can be seen that much of what is advocated in the *Draft Declaration on the Rights of Indigenous Peoples*³³ has already been put into effect in Samoa. Specifically, Article 3 of the Declaration provides that indigenous people should have the right of self-determination. By the inclusion of traditional matai in the Legislative Assembly in Samoa, this has already been put in place. Article 10 provides that indigenous people shall not be forcibly removed from their lands or territories. Pursuant to Article 12 indigenous people should have the right to practise and revitalise their cultural traditions and customs, and Article 33 provides the right to promote institutional structures, juridical custom and traditional practices. The Fono Act has given the force of law to customary institutions and traditional practices.

The Draft Declaration also states that indigenous people should participate fully at all levels of decision-making which might affect their lives and in devising legislative or administrative measures: Articles 19 and 20. Article 30 provides the right to determine and develop priorities and strategies for the development or use of lands and resources. Again, specific jurisdiction, in relation to the development of customary land, has been granted to the Fono under s 5 of the Fono Act. In addition, as set out below, the Samoan government has actively pursued a policy of encouraging community-based action and management plans in relation to the protection of marine biodiversity.

Articles 26 and 27 relate to the right to own and control traditional lands. These rights have been given back to Samoans by the restitution of customary title to land. However, as will be discussed below, according to custom Samoans owned not only their land but also coastal waters. The Constitution provides that waters below the high-water mark remain the property of the government. In this respect the government has failed to return complete control of traditional marine territory to the indigenous people. However, a considerable amount of control of marine resources has been granted to villagers, albeit in consultation with the government.

5. SAMOAN ENVIRONMENTAL LAW

At the international level, Samoa is a party to a number of environmental treaties and conventions including the Convention on Biological Diversity ("CBD"),³⁴

³³ The Declaration has not yet been adopted by the United Nations General Assembly.

³⁴ Samoa has been a party to the CBD since 12 June 1992 (ratification 9 February 1994) and

Convention on Migratory Species, RAMSAR Convention,³⁵ Framework Convention on Climate Change,³⁶ Convention to Combat Desertification,³⁷ Convention on the Law of the Sea,³⁸ Nuclear Test Ban Treaty,³⁹ and Vienna Convention for the Protection of the Ozone Layer.⁴⁰ However, as with many small nations, Samoa has had difficulty implementing these treaties due to a lack of funds and technical expertise. In Samoa this has been compounded by the strong tribal social structures and customary land ownership.

At the regional level, Samoa is a party to the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region ("Noumea Convention") and the South Pacific Forum Fisheries Agency Convention, 1977.⁴¹ The Forum Fisheries Agency is working with South Pacific countries to ensure that the tuna marine resource is sustainably managed. In addition, Samoa has ratified the Convention on Conservation of Nature in the South Pacific ("Apia Convention") and its Amendment.⁴²

Samoa is a member of the Alliance of Small Island States, South Pacific Commission, and Food and Agriculture Organisation of the United Nations ("FAO"). Samoa is also a member of the Pacific Regional Environment Programme ("PREP").⁴³ PREP comprises 25 members, 21 Pacific Island countries and territories and four developed countries. Its purposes are to promote cooperation in the South Pacific and to assist its members to protect and improve their environment and to ensure sustainable development for the present and future generations. It does this by coordinating regional plans,

also ratified the Cartagena Protocol on 11 September 2003: <http://www.sidsnetpacific.org/coventions.htm> (accessed 14 October 2005).

- 35 The Convention came into force in Samoa on 6 February 2005: http://www.ramsar.org/profile/profiles_samoa.htm (accessed 14 October 2005).
- 36 Signed 12 June 1992 and ratified 29 November 1994. Samoa also ratified the Kyoto Protocol on 27 November 2000: http://unfccc.int/parties_and_observers/parties/items/2186.php (accessed 14 October 2005).
- 37 Accession 21 August 1998 and entry into force 19 November 1998: <http://www.unccd.int/> (accessed 14 October 2005).
- 38 Ratification of the main Convention on 14 August 1995 and Samoa consented to be bound by the Part XI Agreement. The Agreement on Straddling and highly Migratory Fish Stocks, 25 October 1996: http://www.un.org/Depts/los/reference_files/status2005.pdf (accessed 14 October 2005).
- 39 Signed 9 October 1996 and ratified 27 September 2002: www.ctbto.org (accessed 14 October 2005).
- 40 Acceded to Vienna Convention and Montreal Protocol on 21 December 1992 and the Amendments 4 October 2001: http://hq.unep.org/ozone/Treaties_and_Ratification/ (accessed 14 October 2005).
- 41 The Agency provides advice to member countries on conservation and optimum utilisation of living marine resources.
- 42 Convention ratified 20 July 1990. The Amendment was ratified 26 February 2001: <http://www.sidsnetpacific.org/coventions.htm> (accessed 23 February 2006).
- 43 Formerly the South Pacific Regional Environment Programme (SPREP).

providing technical and advisory assistance, promoting best practice, and facilitating regional and national action.

Somewhat fortunately for Samoa, PREP is headquartered in Vailima. Initially, PREP assisted Samoa in the direct implementation of environmental plans, but more recently has taken a more background role in providing technical support, advice, and resources.⁴⁴ Most of the assistance is provided through the Minister for Natural Resources and the Environment (“MNRE”). Specifically, PREP is currently working with the Samoan government in the International Waters Project (“IWP”) aimed at improving water catchment areas and sources of fresh water⁴⁵ as well as the conservation and sustainable management of coastal and ocean resources.⁴⁶

There are also a number of local Samoan NGOs actively working in the area of environmental protection. One example is the O le Siosiomaga Society, which has been instrumental in the establishment of the Uafato Conservation Area.⁴⁷

AusAID is actively involved in Samoa. Currently it is working with the Ministry of Agriculture to assist people to improve food and resource security and generate income opportunities in the agricultural, fisheries, and forestry sectors.⁴⁸ In addition, AusAID has funded a project to enable a Facilitated Community Action Process (“FCAP”) to help villages develop and implement their own management plans for adjacent waters. The FCAP will be discussed in detail below.

At the domestic level, legislation has been passed in relation to terrestrial and marine resource management and conservation. The National Parks and Reserves Act 1974 provides for the establishment, preservation, and administration of national parks and reserves on public land. The Lands, Surveys and Environment Act 1989 (“Lands Act”) was enacted to “make provision for the conservation and protection of the environment and the establishment of National Parks and other forms of protected areas”.⁴⁹ Part VIII of the

44 F Vitolio Lui, “SPREP in Samoa” (2004) 5 *Proceedings of the 2003 National Environment Forum, Samoa* 2.

45 Lepa on Apolima is the pilot village for the IWP. The villagers are being encouraged to practise conservation and sustainable use methods in partnership with the government and NGOs.

46 Notably tuna stocks.

47 For a complete report on the Uafato Conservation Area refer to *Participatory Techniques and Conservation Programs*, Ministerial Conference on Environment and Development in Asia and the Pacific 2000 at: www.unescap.org/mced2000/pacific/background/samoa.htm (accessed 30 September 2005).

48 Aid Activities in Samoa — Improved Management of Natural Resources, AusAid at: http://www.ausaid.gov.au/country/cbrief.cfm?DCon=9205_8231_8940_8250_1457&CountryID=18&Region=SouthPacific (accessed 23 February 2006).

49 Preamble to the Lands Act.

Lands Act relates to the environment and conservation. Under the Lands Act "environment" is given a narrow definition anchored in the "physical features of the surroundings of human beings".⁵⁰ There is no reference to the social, cultural, or economic issues which affect biodiversity conservation in the context of sustainable development and livelihoods.

However, under s 104 the Minister of Lands, Surveys and Environment is given wide powers to establish land use and environmental management guidelines for village authorities, assess the environmental implication of any development, carry out monitoring, promote and carry out publicity relating to the environment for village communities, and enter into agreements with owners and occupiers of customary lands for the purpose of protecting their natural resources and environment. In addition, specific powers are given to make management plans for the protection, conservation, management, and control of areas covering both freehold and customary land.⁵¹ In the preparation of such plans regard is to be had to the list of matters set out in s 116(4). Specific reference is made to the "protection, conservation, and management of wildlife and natural features" and use and enjoyment by the public. Whilst the power to make plans is clearly a proactive step, no mention is made of the relevance of traditional uses, customs, and village practices such as traditional hunting rights and spiritual purposes.

Section 146 of the Lands Act again gives the Minister wide powers, in this case to pass regulations. Again, no reference is made to customary law and traditional practices. The only such reference is in s 104 which provides that the Minister shall ensure that all important issues relating to the natural and "socio-cultural" environment have been adequately addressed before committing capital funding support to any particular project. "Socio-cultural" is defined in s 2 as relating to "traditional social and cultural use of the environment from which the Samoan way of life has developed". The failure to require "socio-cultural" issues to be taken into account in drafting plans and regulations would appear to be a significant omission.

The second piece of legislation relating to this area is the Fisheries Act 1988. The somewhat ambitious purposes of the Act are said to include conservation, management, and development of fisheries including the exploration of living resources and their preservation.⁵² To this end the Minister is required to "consult" with village representatives concerning conservation, management, and development of fisheries⁵³ and to make by-laws not inconsistent with these aims.⁵⁴ Certain environmentally dangerous fishing methods are prohibited under

50 Lands Act, s 2.

51 Ibid, s 116.

52 Fisheries Act 1988, s 3.

53 Ibid, s 3(2)(c).

54 Ibid, s 3(3)(d).

s 4, and formerly common practices, such as fish dynamiting, have been banned. The regulation powers are set out in s 25 permitting the head of state to pass regulations for a range of matters including licensing of fishing, regulating aquaculture, and prevention of marine pollution. The first regulations were passed in 1996.

Under s 4 foreign fishing licences are restricted. However, the Act does not distinguish between villagers fishing to supply only that village and large-scale commercial fishing. The definition in s 2 of the Act provides that a commercial fishing vessel includes any vessel not used solely for pleasure or recreation and that is used in the "course of any business or in connection with any commercial transaction". "Commercial" is not defined but arguably would include a village fisher who is supplying other villagers (even on a barter system). Additionally, there are many instances where traditionally villagers have traded on a small scale. Some differentiation should be made between large-scale activities and those associated with traditional Samoan life.

These environmental Acts provide for the Samoan government to control natural resource exploitation. In practice, the top-down approach has not worked, largely due to the laws being ignored or misunderstood by villagers.⁵⁵ Environmental damage has continued, including escalating deforestation and overfishing.⁵⁶ More recently it has been recognised that only through the empowerment and participation of local communities that any programme can be made sustainable and effective. In Samoa this has been achieved through a combination of national legislation, utilisation of international aid and assistance, and local community-based projects.

5.1 Case Study: Fisheries Management in Samoa

Marine biodiversity is essential for indigenous Samoans, who are heavily reliant on harvests from the sea for sustenance. It has been estimated that 70 per cent of Samoans live in villages in coastal areas of the islands. Seafood is estimated to account for 77 per cent of the food source of villages on Upolu, and 80 per cent of families on Savai'i consider themselves subsistence fishers.⁵⁷ These essential

55 For example, early attempts were made to protect the forested interior and mangrove swamps of Pohnpei. The villagers threatened the survey teams with bush knives and sticks causing the government to back down. Deforestation continued: *Participatory Techniques and Conservation Programs*, supra note 47, at 4.

56 Funeali Lumaava Sooa'emalelagi and Steve Brown, "The Green Turtle Tour Project — a successful approach to aiding natural resource management in Samoa" (2004) 5 *Proceedings of the 2003 National Environment Forum, Samoa* 1.

57 Zann 1991 and Mulipola 1997 reproduced in *World Summit on Sustainable Development Assessment*, Chapter 7 — "Marine Resources" at: [ww.mnre.gov.ws/documents/reports/WORLD%20SUMMMIT%20ON%20SUSTAINABLE%20DEVELOPMENT_SUSTAINABLE%20DEVELOP%85.pdf](http://www.mnre.gov.ws/documents/reports/WORLD%20SUMMMIT%20ON%20SUSTAINABLE%20DEVELOPMENT_SUSTAINABLE%20DEVELOP%85.pdf) (accessed 12 October 2005).

marine resources are at risk both from natural hazards including typhoons and volcanoes, as well as over-harvesting and environmental damage by humans.

Under customary law the waters adjacent to a village were considered part of the land controlled by that village. Much traditional knowledge about species and their habitats, breeding cycles, and migratory behaviour was acquired, and laws and practices evolved to protect marine biodiversity. At one time village customary laws alone would have protected this biodiversity. No take zones would have been declared by the imposition of tabus, and fines such as money or pigs imposed on villagers. However, at present while the Constitution and Fono Act give control of customary lands to villagers, this does not extend to marine areas. Under the Constitution, the land below the high-water mark is owned and controlled by the government of Samoa.⁵⁸ Even the Fono Act only gives a village power over citizens ordinarily resident in it or those owning customary land under its control.

Increasingly, industrialisation, urban growth, and population expansion has resulted in encroachments on the boundaries of individual villages, but the Fono remains powerless to control residents of other villages and outsiders. Traditional customary law has failed to evolve rapidly enough to meet these challenges.

Meanwhile, the Samoan government has failed to halt environmental degradation and conserve Samoa's rich biodiversity. Original surveys conducted in the 1970s and 1980s identified areas of significance to be protected. However, only government owned or controlled land was set aside at that time. As with many other countries with customary land tenure, conventional protected area management has not worked in Samoa. This has largely been due to a lack of community support for national parks and reserves, that excluded indigenous people from traditional lands that had been used sustainably for thousands of years. The situation has been compounded by the problem of access to remote areas, necessary for the purposes of surveying and monitoring ecosystems and biodiversity.

The Samoan government recognised that further mechanisms were needed. Whilst the Fisheries Act 1988 and Fisheries Regulations 1995 provide a framework for the management of fishery resources, historically, there was little recognition of cultural practices. The government has now recognised the value of customary law and traditional practices and encourages the participation of the Fono and other stakeholder groups in management and planning decisions. It has become the policy of the government to control commercial fishing and devolve responsibility for local fishing regulation to the villages. Commercial fishing licences are now only issued outside the reef areas, and inside them

58 Article 104 of the Constitution of Samoa provides that waters below the high-water mark are public rather than customary land.

fishing is managed by local villages.⁵⁹ The government is working with local communities and international organisations to adopt a range of grass-roots biodiversity conservation mechanisms. These now have the support of the local customary landowners, giving them the best possible chances of success.

The mechanisms include, firstly, the utilisation of Fisheries Regulations to permit villages to pass by-laws for marine protection of adjacent waters; secondly, community-based Marine Protected Areas ("MPAs"); and thirdly, NGOs and the government are working with villages to create Fishery Management Plans ("FMPs").

5.1.1 Fishery by-laws

As set out above, under the Fono Act the village Fono's jurisdiction extends only to residents of the particular village. The government recognised the need to close this loophole by giving village-level by-laws the force of law.⁶⁰ Under the Fisheries Act, by-laws have been passed which the local village authorities (Fono) have the power to enforce. This has the dual purposes of ensuring government regulations are complied with and also empowering local communities to protect their own adjacent waters from outside exploitation.

These by-laws are subsidiary legislation and therefore must not be inconsistent with national laws. However, by close cooperation between government agencies and individual villages, suitable by-laws have been drafted and put into effect. In the first instance the by-laws are enforced within the village. If this is unsuccessful the Fono can take the matter to the Fisheries Division and then to the formal court system.

The by-law provisions effectively decentralise the policing of marine environmental laws. This is a critical feature in a country where most of the population is split between two islands and living in dispersed villages. A further benefit is that many interconnected villages have passed similar by-laws, which has created a network conservation strategy for coastal marine resources. At the time of writing, 57 village by-laws are currently in force.⁶¹

5.1.2 Fishery Management Plans

Villages are being assisted by the government and NGOs to establish Fishery Management Plans ("FMPs"). Local matai representatives are selected to form the Fisheries Management and Advisory Committee ("FMAC") of each specific

59 Food and Agriculture Organisation of the United Nations, *Information on Fisheries Management in Samoa*, April 2002 at: www.fao.org/fi/fcp/en/WSM/body.htm (accessed 13 November 2005) 1 and *Tradition Matters*, supra note 17, at 3.

60 *Fisheries By-Laws in Samoa*, supra note 13, at 34.

61 *World Summit on Sustainable Development Assessment*, supra note 57, at 42.

village. The FMACs develop FMPs, in conjunction with the government, that empower villages to manage their own resources. Marine resource policies are developed including maximum harvesting rates, controlling catches, and setting aside sites for protection of species and their breeding grounds and recovery zones. The AusAID-funded Facilitated Community Action Process ("FCAP") has been fundamental in assisting villages both with preparation of the FMPs and ensuring food security. The project has also helped the communities identify other possible sources of income such as ecotourism and mariculture — clam, fish and seaweed farms.

AusAID has also supported the Samoa Fisheries Extension and Training Project. This project was aimed at educating village councils to enable them to better contribute to the development of FMPs. It resulted in the production of a series of information sheets written in Samoan and English, distributed to the village Fonos.⁶²

As at 2004, 83 villages had established FMPs, with 62 agreeing to set up fish reserves.⁶³

5.1.3 Community-owned Marine Protected Areas

The Samoa Marine Protected Areas Programme ("Samoa MPA Project") is one example where local communities have been empowered to effectively protect and manage coastal marine biodiversity and to achieve sustainable use of marine resources. This has been achieved by establishing community-based Marine Protected Areas ("MPAs").

The Project ran from 1999 to 2004 and involved two areas in the districts of Safata and Aleipata which are surrounded by coral reefs creating important lagoon features. In addition, Safata has a significant area of mangrove habitats.⁶⁴ Both of these areas have been used by local communities for many generations as part of their culture and livelihoods. However, the areas have experienced a dramatic decline in stocks due to destructive fishing methods, overfishing, and general environmental degradation — notably soil erosion. Local communities are now working with the Samoan government, with funding provided by the World Bank through the IUCN, to achieve the dual outcomes of biodiversity protection and creation of sustainable livelihoods.

The Project has three phases: management planning, management implementation, and sustainability. Initially, District Committees were established comprising matai of the 11 villages in Aleipata and nine villages in Safata. The Committees make decisions about work plans and budgets for the MPAs. They

⁶² *Fishery Resources Development in Samoa*, supra note 22, at 1.

⁶³ *Fisheries By-Laws in Samoa*, supra note 13, at 34.

⁶⁴ IUCN — World Commission on Protected Areas at: www.iucn.org/themes/wcpa/region/pacific/pacific.html (accessed 12 October 2005).

provided voluntary labour for building district centres and ensure records are kept of all decisions that are made. Management plans have been drafted by the Committees in collaboration with government, utilising resources provided by international organisations. The management plans for these areas include provision for ecotourism, cultural heritage protection, general fishery and coastal management, aquaculture, and no take zones.⁶⁵ Project staff have assisted with capacity-building by training local people, increasing public awareness, and disseminating educational material. Having obtained baseline data, the local communities are now involved in monitoring mangrove and lagoon habitats. In addition, the areas' biodiversity information has been obtained through the mapping of species and traditional knowledge workshops.⁶⁶ The Project commenced in 2000 and all villages continue to be actively involved in their MPAs.⁶⁷

The districts provide an example of MPAs created to great effect. There is the potential that the Aleipata and Safata MPAs may be declared formally under the Fisheries Act, but that has not happened to date.

6. CONCLUSION

Environmental law has continued to gain in popularity over the last 50 years as public awareness of environmental damage has become heightened. Initial conservation mechanisms, such as protected area management on the Yellowstone model, have failed in Samoa as in other Pacific Island States. These regimes often involve isolating people from their land and means of survival. Traditional owners have preferred to rely on customary laws to protect natural resources as they continue to need their land for spiritual, cultural, and domestic purposes.

It is now recognised that best practice conservation measures involves the necessary participation of all stakeholders. What better way to implement this than by utilising customary institutions and legal systems? The current Samoan fisheries management regime does this by blending Western-style legislation and government policy with traditional Samoan governance structures, customary laws, knowledge, and practices.

One of the unique aspects of law and policy in Samoa is that it utilises a range of mechanisms to achieve the joint goals of biodiversity protection and

65 The no take zones represent about 10% of the total MPA area: *Aleipata and Safata Marine Protected Areas* at: www.mnre.gov.ws/biodiversity/documents/newspaper/030824_Aleipata&SafataMarine.pdf (accessed 7 November 2005) 2.

66 *Samoa MPA Project* at: ww.icran.org/SITES/samoa.html (accessed 30 September 2005) 1-3.

67 *Aleipata and Safata Marine Protected Areas*, supra note 65, at 1-3.

sustainable development, all of which incorporate some level of customary law: a general recognition of customary laws through the Fono Act; village-based marine by-laws; formal declaration of some Marine Protected Areas; community-based Marine Protected Areas and village Fishery Management Plans.

The marine protection regime proactively allows villages to provide for future fishery problems and management in advance. A further benefit of local-level planning is that the customs of individual villages can be accommodated. One argument against the use of customary law is that it is unwritten and diverse. By permitting villages to incorporate their customary laws and practices into legally enforceable plans and by-laws, the customary law is recorded and incorporated into written law.

The marine protection regime satisfies Samoa's obligations under the provisions of Article 8(j) of the Convention on Biological Diversity.⁶⁸ The success of the marine protection regime has also enabled Samoa to ratify more international treaties because it has built capacity to implement their provisions. For example, the Migratory Species Convention was ratified in 2004. On 6 February 2005 Samoa ratified the RAMSAR Convention. One area has now been named as a Wetland of International Importance.⁶⁹

Some criticism can be levelled at Samoa's national environmental legislation. The provisions in relation to land and fishery resources could be strengthened to ensure indigenous involvement and particularly that social, cultural, and economic issues are addressed. This would guarantee that the focus remains on sustainable development and livelihoods. It would also ensure that indigenous involvement occurred even in more urbanised areas. Whilst new legislation has been advocated to address these deficiencies, particularly in areas of rapid urbanisation, none has emerged to date.⁷⁰

Formal environmental assessment legislation is essential. Whilst s 104 of the Lands Act empowers the responsible Minister to assess the environmental implications of any development, there is no obligation to do so. This is a significant shortcoming in future development planning. For example, the ecotourism industry offers good opportunities to achieve the dual aims of biodiversity conservation and the creation of sustainable livelihoods. Yet it

68 Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.

69 Lake Lanoto'o.

70 D Farrier, "Emerging Patterns in Environmental Legislation in Pacific Island Countries" (2003) *Journal of South Pacific Law* 5.

appears that the environment continues to be damaged by many tour operators. Clearly there are some success stories,⁷¹ but the enactment of environmental impact assessment legislation should ensure that development takes place with minimal damage to natural resources.

Under the Constitution, customary land cannot be mortgaged, but the government can authorise leasing or licensing for proper purposes as trustee for the beneficial owners. Such leases and licences could be better utilised to secure loans to provide capital for sustainable development. This could provide funding for new projects and ensure equitable benefit sharing.

Whilst coastal management plans have been made, they have not been drafted pursuant to the Lands Act.⁷² This under-utilisation of the legislation has been recognised by the Samoan government. The proposed National Marine Biodiversity Conservation Programme ("NMBCP") is aimed at addressing this issue amongst others.⁷³ Other issues include the development of specific legislation for the better protection of marine biodiversity. Such legislation would provide uniformity of coastal management rather than depending upon ad hoc FMPs which do not always interconnect. However, it would lack the flexibility of FMPs and by-laws which allow for specific villages' customs and usage.

Many South Pacific Island nations are poor — their focus is economic development and they embrace industrialisation and globalisation. However, what is needed is for governments to focus not purely on economic development but rather a triple bottom line that balances financial, social, and economic concerns to achieve sustainable development. Progressive governments such as that in Samoa have seen that in relation to biodiversity conservation, incorporation of customary law and practice into national law and policy can achieve those aims. The range of mechanisms adopted have the acceptance of the local people, incorporate community participation, and assist in capacity building both in terms of monitoring and collection of data and enforcement.

It can be seen that much of the recent success in Samoa is due to a deliberate government policy which utilises basic provisions in the national environmental legislation. Arguably, the linchpin of the system is the empowerment of the village Fono and formal legal recognition of traditional customs and practices under the Fono Act. Samoa has shown that there is no impediment to synthesising customary law with the imported common law, and creating an indigenous common law system if the political will to do so is present.

71 Notably the Green Turtle Tour Project, *supra* note 56.

72 Farrier, *supra* note 70, at 5.

73 The NMBCP was due to commence in January 2005; however, at the time of writing it could not be confirmed whether or not the project was under way.