



MACQUARIE LAW WORKING PAPER SERIES

**LOCAL APPROACHES TO THE PROTECTION OF BIOLOGICAL DIVERSITY:
THE ROLE OF CUSTOMARY LAW IN COMMUNITY BASED CONSERVATION IN THE
SOUTH PACIFIC**

**Erika Techera
Macquarie University – Division of Law**

Macquarie Law WP 2007-2

August 2007

Disclaimer

Working papers are produced as a means of disseminating work in progress to the scholarly community in Australia and abroad. They are not to be considered as the end products of research, but as a step towards publication in scholarly outlets.

© Copyright: Erika Techera

Division of Law - Research
Macquarie University
Sydney NSW 2109
Australia

Tel 61 2 9850 7061
Fax 61 2 9850 7686
Email research@law.mq.edu.au
URL <http://www.law.mq.edu.au/research>

Associate Dean, Research Professor Bryan Horrigan
Research Officer Ms Gwyneth Teh

Macquarie Law WP 2007-2

LOCAL APPROACHES TO THE PROTECTION OF BIOLOGICAL DIVERSITY: THE ROLE OF CUSTOMARY LAW IN COMMUNITY BASED CONSERVATION IN THE SOUTH PACIFIC

Contact Details:

Phone: + 61 2 9850 7925
Fax: + 61 2 9850 7686
Email: Erika.Techera@law.mq.edu.au

Postal: Erika Techera
 Division of Law
 Macquarie University
 NSW 2109
 Australia

LOCAL APPROACHES TO THE PROTECTION OF BIOLOGICAL DIVERSITY: THE ROLE OF CUSTOMARY LAW IN COMMUNITY BASED CONSERVATION IN THE SOUTH PACIFIC

Erika Techera*

Abstract

Achieving biodiversity conservation whilst addressing the broader aims of sustainable development, is presenting a challenge for countries the world over. This is particularly so for small island developing states. Top down legal approaches have had limited success and attention has now turned to bottom up, participatory mechanisms. There have been many community-based marine biodiversity conservation projects in the South Pacific but in order to ensure their longevity and legitimacy greater legal support is necessary. One approach that may be effective in this regard involves the blending of customary law and legislation, as illustrated by the experiences of Samoa and Vanuatu.

Key Words

South Pacific, Vanuatu, Samoa, customary law, community based conservation, community based management, marine conservation.

I INTRODUCTION

In the last two decades the concept of sustainable development,¹ and its key principle of integration of social, economic and environmental concerns, has become almost universally accepted. However, whilst many environmental problems are global in their impact, international law has failed to achieve positive outcomes and attention has turned to localised approaches.² In terms of biodiversity conservation this has led to support for community based projects. But, despite some initial achievements, issues such as land tenure, lack of interactive communication and participation between communities and government, and power inequalities have not facilitated their long term success. It has now been recognised that legal frameworks are necessary to provide legitimacy and longevity to such initiatives and ensure that they are enforceable not only within the local communities but also against outsiders.³

The identification of best practice legal frameworks is particularly problematic in the South Pacific. Despite a long history of human occupation, in more recent times most South Pacific Island States have been governed by western countries that were both physically and culturally remote. However, during these periods of colonial rule the customary laws and traditional practices have endured and today they remain part of the Indigenous peoples' lifestyles. Whilst these countries are now independent, they have been left with western style legal and parliamentary systems, which often conflict with the customary laws and governance structures. This is most keenly felt in the field of environmental law and particularly protected area management and wildlife conservation. Therefore, the focus

* LLB (Hons) (UTS), GDLP (UTS), M Env Law (Macq), LLM (Macq). Associate Lecturer and PhD Candidate, Macquarie University, Centre for Environmental Law, Division of Law.

¹ Famously defined as '*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*' in *Our Common Future*. World Commission on Environment and Development. (1987). (Frequently referred to as the Brundtland Report after Gro Harlem Brundtland, Chairman of the Commission). Page 8.

² For example, Richardson B J, 'Environmental Law in Post Colonial Societies: Straddling the Local-Global Institutional Spectrum' (2000) 11 *Colorado Journal of International Environmental Law and Policy* 1, at 29; Hari M Osofsky, 'Defining Sustainable Development after Earth Summit 2002' (2003) 26 *Loy LA International and Comparative Law Review* 91-106, at 96-97.

³ Michel P. Pimbert and Jules N. Pretty '*Diversity and sustainability in community based conservation*'. Paper presented at the UNESCO-IIPA regional workshop on Community-based Conservation, February 9-12, 1997, India. Accessed 12 June 2007 at <http://www.iied.org/NR/agbioliv/documents/DiversitySustainabilityPimbertPretty.pdf>; A Caillaud et al, 'Tabus or not Taboos: How to use traditional environmental knowledge to support sustainable development of marine resources in Melanesia'. *SPC Traditional Marine Resource Management and Knowledge Information Bulletin No. 17*. December 2004, pp 14-35 at 14.

of this paper is the identification of legal and institutional mechanisms that could be utilised to facilitate conservation of biological diversity by local communities through the incorporation of customary law. Two case studies will be discussed to illustrate approaches that have been taken in the South Pacific.

II APPROACHES TO BIODIVERSITY CONSERVATION

In Judeo Christian belief people are generally set apart from nature; humankind is considered to be unconnected with and superior to other life forms on Earth.⁴ The developed world, the north, is largely populated by this cultural group. The result has been significant environmental degradation in the industrialised nations. The damage is widespread, involving the destruction of habitats and loss of biodiversity through the over exploitation of natural resources, hunting and domestication of wildlife, conversion of land to agricultural uses, urbanisation and unsustainable development.⁵

During the 18th century this destructive path was first identified and laws were made to protect and manage wildlife resources.⁶ Such law generally involved legislating in accordance with the cultural belief by isolating land and wildlife from humans. It was characterised by centralised state ownership, control and management of natural resources, combined with a belief that humans and wilderness areas were not compatible.⁷ Thereafter, this national park concept of fortress conservation swept around the new world.⁸

In contrast the Indigenous people of non-western pre-industrialised nations have generally approached wildlife and its management in a different way.⁹ This stems from the much closer cultural and religious connection these people have with nature, commonly placing much greater value upon and

⁴ For example, generally see Lynn Townsend White, Jr, 'The Historical Roots of Our Ecologic Crisis', *Science*, Vol 155 (Number 3767), March 10, 1967, pp 1203-1207; Dilys Roe, James Mayers, Maryanne Grieg-Gran, Ashish Kothari, Christo Fabricius and Ross Hughes. *Evaluating Eden: Exploring the myths and realities of community-based wildlife management*. Series Overview. (2000). Biodiversity and Livelihood Group, International Institute of Environment and Development (IIED). At 18.

⁵ Ibid.

⁶ Ibid.

⁷ In the 19th century, John Muir in America argued for the setting aside of wild areas as national parks. This became known as the 'Yellowstone' national park model: Colchester, *Salvaging Nature: Indigenous peoples, protected areas and biodiversity conservation* (1994) UNRISD Discussion paper no.55 UNRISD Geneva, page 3.

⁸ Colchester, *ibid* at page 4. D Roe et al, above n 4, at 21.

⁹ D Roe et al, above n 4, at 18.

trust in wildlife resources - socially, economically and ecologically.¹⁰ Therefore, their motivation in managing wildlife comes from a spiritual connection with nature which places obligations upon the people as well as the right to take and use those resources for subsistence needs.

Many Indigenous people have cultivated and used biological diversity in a sustainable way for thousands of years, and have a wealth of traditional knowledge and customary laws and cultural practices to protect it. Whilst, not all traditional practices have benefited wildlife (and some have been positively destructive),¹¹ historically where these cultural groups have relied upon restricted hunting or gathering taboos, and populations were small, their traditional wildlife management practices have been successful. This traditional or Indigenous management is evident throughout the countries of the South Pacific.¹²

The national park conservation model has failed to achieve the longer term goals of conserving biodiversity, becoming economically sustainable or benefiting those who have borne the cost of their establishment.¹³ It is in direct conflict with traditional land ownership rights and in many parts of the world has had a devastating impact on Indigenous livelihoods.¹⁴ In the South Pacific top down legislation has failed to achieve positive biodiversity outcomes, largely due to lack of support from local communities combined with national governments' lack of capacity and resources for its effective implementation.¹⁵ In many of the South Pacific Island states, traditional

¹⁰ In the South Pacific Islands, Polynesian and Melanesian beliefs include humans as part of nature not superior to it, with a stewardship role in relation to the living environment: Michael J Manfredi and Ashley A Dayer, 'Concepts for Exploring the Social Aspects of Human-Wildlife Conflict in a Global Context'. *Human Dimensions of Wildlife* Vol.9 No.4, 317-328, at 322.

¹¹ It was noted in the Evaluating Eden project that even where conservation outcomes were achieved this was not necessarily the conscious aim of the Indigenous communities: D Roe et al, above n 4 at 21; Also by Darrell Posey in *Cultural and Spiritual Values of Biodiversity*. Compiled and edited by D. Posey, (1999), at 6.

¹² For example, sites in Fiji, Tonga, Samoa, Solomon Islands and Palau were reported on in *Voices from the Village: A comparative study of coastal resource management in the Pacific Islands*. A World Bank Report. (2000) at pages 4 and 16. Accessed on 15 June 2006 at http://www.onefish.org/cds_upload/11105.Voices_from_the_Village,_A_comparative_Study_of_Coastal_resource_management_in_the_Pacific_Islands.2001-1-31.pdf; In addition the LMMA Network operates in Fiji, Indonesia, Palau, Papua New Guinea, the Philippines, Pohnpei (Federated States of Micronesia) and the Solomon Islands: *LMMA Network Annual Report 2004* accessed on 19 June 2006 at <http://lmmanetwork.org/pdfs/LMMA%202004%20Annual%20Report.pdf>.>at page 4.

¹³ D Roe et al, above n 4, at 3; Kenneth McDonald, *Community based Conservation: A Reflection on history*. At 21. Accessed 24 October 2006 at <http://www.iucn.org/themes/ceesp/Publications/TILCEPA/CCA-KMacDonald.pdf>.

¹⁴ Ibid at 22.

¹⁵ Colchester, above n 7, at 2.

owners regained land tenure on independence, yet in none of these countries have the western legal models been abandoned. What remains is a situation in which centralised management and control is retained by the national government but most of the population live a lifestyle based, at least in part, on a different set of cultural beliefs and customary laws. It was in the context of these post colonial societies that alternative management and protection mechanisms were sought by the global community, with a particular emphasis on sustainable management and use of natural resources.

Community based conservation and management has ancient origins in Indigenous populations throughout the world and usually formed part of everyday life.¹⁶ It could be said that the touchstones of community based conservation are the involvement and participation of all relevant stakeholders resulting in stewardship of resources (not necessarily legal ownership) for the conservation of ecosystems and wildlife.¹⁷ Whilst it might seem obvious to involve all stakeholders in conservation, this has largely been overlooked in the western national park model where top down control was often exercised with little if any community input. It has now been accepted that key stakeholders should be involved in biodiversity conservation and use.¹⁸ Management categories and guidelines for national parks and protected areas have gradually been changed to recognise this but actual best practice conservation is taking much longer to implement. What has been recognised is that in order to protect biodiversity sustainably, consideration must be given to the social and economic activities that are reliant upon the environment and plan for sustainable livelihoods that achieve these aims.

There is no one model of how successful community based conservation can be achieved.¹⁹ There are however, many different approaches that have been adopted, ranging from projects where land is owned and fully controlled by Indigenous people according to their traditional practices and customary laws, to programmes facilitating community involvement but relying upon government agencies and national legislation.²⁰ Over time the preferred

¹⁶ D Posey, above n 11 at 7. This largely came about as a result of religious and cultural beliefs as to the relationship of people and nature.

¹⁷ Ibid at viii and 14.

¹⁸ For example, D Roe et al, above n 4 at 14.

¹⁹ This has generally been the result with evaluation of community based conservation and management approaches. For example, the Evaluating Eden project: D Roe et al, above n 4, Chapter 8, at 84-103.

²⁰ Ibid. See also, *Managing Fisheries for Biodiversity: Case Studies of Community Approaches to Fish Reserves among the Small Island States of the Pacific*. K T MacKay. GEF Biodiversity Planning Support Programme. Canada South Pacific Ocean Development. Specifically, in relation to marine areas.

approach both internationally and nationally) has been to incorporate the principles of sustainable development, ensuring that local communities establish sustainable livelihoods based on utilisation of natural resources and not simply allowing those communities to control wildlife resources.²¹

III LEGAL SUPPORT FOR COMMUNITY BASED MANAGEMENT

Today most of the South Pacific Island States face similar problems each of which contribute to biodiversity loss: Large Indigenous populations holding land according to native tenure and predominantly adhering to traditional customs, practices and laws; the failure of existing top down legislation due to lack of community support; Governmental resource and capacity issues affecting monitoring and enforcement of national laws; and growing populations placing pressure on natural resources. The question is what legal frameworks will adequately protect the environment whilst also addressing the social and economic interests of the population. A potential solution is to utilise the traditional native governance structures and customary laws to achieve these triple bottom line goals. However, whilst recognition of customary law is desirable,²² it also raises many issues. Firstly, there are the problems associated with legal pluralism,²³ particularly where customary laws contradict the dominant legal system. Secondly, customary law is inherently difficult to define as it includes not only the western concept of law²⁴ but also incorporates religious practices and other social and cultural relationships such as rights and responsibilities in relation to land and water.²⁵ Thirdly, in today's more globalised and commercialised world,

²¹ This was recognized in almost all the countries appraised in the *Evaluating Eden* project. For example, D Roe et al, above n 4, at 45. Also, specifically in relation to LMMAs, the Learning Framework recognizes the importance of economic considerations including livelihoods and this forms a key part of the program: *Learning Framework of the Locally managed Marina Area Network*. A Foundations of Success Learning Portfolio. LMMA Network, Suva, Fiji. Version 2.1. June 2004. Livelihood Factors page 4-36.

²² Law Reform Commission of Western Australia, *Aboriginal Customary Law: The interaction of Western Australian law with Aboriginal law and culture*. Final Report. Project No. 94. September 2006. Chapter 4 – Recognition of Customary Law, p.70. For a number of reasons including principles of justice and equity and the empowerment of Indigenous people: Ibid at 72.

²³ Legal Pluralism occurs where two or more legal orders operate within a society rather than one unified system of law. There is a wide ranging discourse on legal pluralism, a discussion of which is beyond the scope of this paper: S Merry 'Legal Pluralism' (1988) 22 *Law and Society Review* 869-896; FV Benda-Beckmann 'Who's afraid of legal pluralism?' 47 *Journal of Legal Pluralism* 38-82.

²⁴ Law can be defined, for example, as a body of rules which set standards of conduct for human behaviour and are enforceable in courts: Latimer, P *Australian Business Law*. 21st Edition. (2002). At 2.

²⁵ Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, above n 22, at 64. One definition of customary law is the traditions and practices that have become

tradition alone is not enough to protect the earth's fragile biodiversity. Outside influences often play a significant part in degradation and destruction, beyond mere localised, community problems that are easily controlled at the village level. Lastly, customary law must continue to evolve or else it runs the risk of becoming ineffective and eventually fossilised. Whilst there are many ways in which these issues could be dealt with, utilising and combination of customary law and legislation is one method that would have a number of advantages including stakeholder support and strengthened enforcement mechanisms. In this context, two legal approaches have emerged. Firstly, that customary law should be formally recognised alongside the western legal system thereby creating a pluralist system.²⁶ The second approach is the functional recognition of customary law within the national legal framework but for defined and specific purposes.²⁷ There are many examples of the integration of customary law into national legal frameworks evident in South Pacific Island States,²⁸ however the experiences of Samoa and Vanuatu are emphasised in this paper.

IV CASE STUDY ONE: SAMOA

Samoa is comprised of a small group of islands, the largest two being *Savai'i* and *Upolu*.²⁹ Today the majority of the people living in Samoa lead a traditional lifestyle under the authority of chiefs known as *matai*.³⁰ Under customary law village land was held communally and also included coastal marine waters. Customary conservation laws took the form of limits on over-harvesting by the placing of bans or restrictions (*tabu*) over areas where stocks had declined or were threatened. On land *tabus* usually took the form of sticks of particular trees placed to indicate a "no take" zone. In addition

enforceable within a community: *Introduction to South Pacific Law*. Jennifer Corrin Care, Tess Newton and Don Paterson. (1999). At 24.

²⁶ Such recognition could be constitutional, administrative, statutory or judicial: Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, above n 22, at 71.

²⁷ Ibid.

²⁸ For example, the Papua New Guinea approach where custom is used in preference to imported common law and the Solomon Islands where custom is not recognised until proven as if it were a foreign law: J Corrin Care and J G Zorn 'Legislating Pluralism Statutory 'developments' in Melanesian customary law' (2001) 46 *Journal of Legal Pluralism* pages 49-101 at page 49. Also, the Samoan recognition of customary law and specifically the power given to the village *fono* to pass by-laws enforceable in State courts: *Village Fono Act, 1990*.

²⁹ 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*.

³⁰ 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, *Samoa Customary Land at the crossroads – some options for sustainable management*. Proceedings of the 2002 National Environment Forum, Samoa. No.4 2003. At 2.

tabus prohibited villagers from hunting certain marine life during breeding seasons or during migratory travels or where a particular species had been over harvested. The penalty for breaking a *tabu* was a monetary or produce fine or in some cases physical punishment.³¹

However, over time, adherence to these customary laws was eroded. Increasing populations, urban growth and industrialisation had a significant impact on the natural environment and customary laws and practices did not evolve to meet the new challenges. Whilst the *matai* can control residents within their villages, they have little effect on people of another village, tourists and other outsiders.

Historically, conventional top down conservation approaches, such as protected area management, have been unsuccessful in protecting Samoa's biodiversity for the reasons set out above.³² But more recently, a legal framework has been developed in Samoa that blends customary law and western legislation resulting in a more participatory protection regime that has both the support of traditional land owners and the Samoan Government.

Firstly, the traditional Indigenous governance institutions have been recognised under the *Village Fono Act, 1990 (Fono Act)*. The village *Fono* is the village council and the *Fono Act* both empowers these councils and validates their decision made “*in accordance with custom and usage of their villages*”.³³ Power is given to the *Fono* to punish anyone who fails to obey any direction of the *Fono* according to the traditional custom and usage of the village.³⁴ Under s.11 of the *Fono Act*, if a villager is dissatisfied with a decision of the *Fono*, then he or she may appeal to the Land and Titles Court. This is the same court that has jurisdiction over Samoan chiefly titles and customary land issues under the Constitution.³⁵

Thus the *Fono Act* provides a mechanism for legal enforcement of village decisions properly made by the *Fono*. However, the jurisdiction of the *Fono*

³¹ Cedric Schuster, *Tradition Matters*. Accessed 23 September 2005 at www.ourplanet.com/imgversn/95/Schuster.html. At 2.

³² 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*”.

³³ See the Preamble to the *Fono Act*.

³⁴ Sections 5(3) and 6 *Fono Act*.

³⁵ Article 103 of the Constitution of Samoa. 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.

is limited to persons ordinarily resident in the village, except those on government, freehold or leasehold land. Therefore, a decision of the *Fono* could not be enforced against an outside such as a resident of a neighbouring village or a tourist. This was recognised as a significant loophole in the ability of the *Fono* to protect natural resources. In relation to marine areas, this has been addressed by the development of fishery by-laws. Government agencies and individual villages work together in close co-operation to draft and implement suitable by-laws. Under the *Fisheries Act, 1988* these by-laws can be enforced by the local village authorities (*Fono*). In the first instance this occurs at the local village level. If this is unsuccessful the *Fono* can take the matter to the Fisheries Division and then to the formal court system to enforce them. This system 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.

The by-law provisions effectively decentralise the monitoring and enforcement of marine environmental laws. This is important as the Government itself would have difficulty monitoring adherence to the laws in a country where the majority of the population live in rural villages dispersed over the two main islands. A further benefit is that the system has become so popular that many adjacent villages have passed by-laws. This provides greater prospects of long term marine conservation outcomes by effectively creating an interconnected network of marine conservation by-laws.

Further efforts have been made to empower local communities to protect and manage their coastal marine biodiversity and to achieve sustainable use of marine resources under the Samoa Marine Protected Areas Programme (Samoa MPA Project).³⁶ The Project involved two areas in *Safata* and *Aleipata*, both of which are surrounded by coral reefs with important lagoon features and mangrove habitats.³⁷ The areas have significance to the local Indigenous community, both culturally and for livelihoods. The villages are working to achieve the dual outcomes of biodiversity protection and sustainable livelihoods through the creation of MPAs. The Project involved the creation of District Committees to make decisions about work plans, devise budgets for the MPAs, provide voluntary labour for building district centres and ensure records are kept of all decisions are made. Management

³⁶ The Project ran from 1999 to 2004. Although to date all villages continue to be actively involved in their MPAs: *Aleipata and Safata Marine Protected Areas*. Accessed on 7 November 2005 at http://www.mnre.gov.ws/biodiversity/documents/newspaper/030824_Aleipata&SafataMarine.pdf at pages 1-3.

³⁷ IUCN – World Commission on Protected Areas – Pacific Region. Accessed on 12 October 2005 at www.iucn.org/themes/wcpa/region/pacific/pacific.html.

plans include provision for ecotourism, cultural heritage protection, general fishery and coastal management, aquaculture and no take zones³⁸ and are drafted by the Committees in collaboration with government agencies. Attention is also paid to capacity building through training local people, increasing public awareness and disseminating educational material. The local communities are now involved in monitoring mangrove and lagoon habitats having been assisted in the collection of baseline data obtained through the mapping of species and traditional knowledge workshops.³⁹

The approach taken in Samoa combines the recognition and empowerment of traditional governance structures with the creation of community based fishery by-laws and the MPA Project. This would appear to be an effective way to provide legal support to community based conservation projects in the context of a post-colonial society.

V CASE STUDY TWO: VANUATU

Vanuatu is comprised of more than 80 islands dispersed over 1,300 kilometres.⁴⁰ As with most of the South Pacific Island States, most of the population lives in rural communities widely dispersed across these islands. Since its independence in 1980 ownership and use of all land is now based upon customary law.⁴¹ Today the majority of land is held by traditional owners many of whom live in the biodiversity rich remote rural areas. Approximately 80% of the 200,000 strong population are are involved in subsistence farming.⁴²

Vanuatu has a wide range of biodiversity⁴³ much of which is endemic to that country. This biodiversity is essential to the Indigenous community for subsistence needs and livelihoods as well as for its cultural and spiritual value. Compared with many other Pacific Island countries Vanuatu has not suffered any major environmental problems. However, it does face risks in

³⁸ The no take zones represent about 10% of the total MPA area: *Aleipata and Safata Marine Protected Areas* above n 35, at 2.

³⁹ Samoa MPA Project. Accessed 17 August 2007 at www.icran.org/SITES/samoa.html. At 1-3.

⁴⁰ Environment Vanuatu, *Vanuatu's Biodiversity*. Accessed 12 June 2007 at www.biodiversity.com.vu/vans_biod.htm.

⁴¹ Article 74 Constitution. In addition, no land may be bought and sold by outsiders without government approval.

⁴² Vanuatu Protected Area Initiative. *Vanuatu Brief Overview and Map*. Accessed on 12 June 2007 at http://www.positiveearth.org/vpai/vanuatu_map.htm.

⁴³ *UN Earthwatch System: Island Directory: Vanuatu*. Accessed on 12 June 2007 at <http://islands.unep.ch/CLT.htm>. For a complete list of Vanuatu's biodiversity and protected areas see the EarthTrends web page, accessed 12 June 2007 at (for terrestrial areas) http://earthtrends.wri.org/pdf_library/country_profiles/bio_cou_548.pdf and (for coastal and marine areas) http://earthtrends.wri.org/pdf_library/country_profiles/coa_cou_548.pdf.

the future because of economic development involving logging for timber and land clearing for agricultural purposes, specifically around lowland areas and small islands where the population is concentrated.

Similarly to Samoa, the traditional methods of biodiversity protection included *tabus* in the form of restrictions on the use of land or specific resources. These can be imposed by chiefs and Indigenous landholders or may be based on traditional beliefs and preserved as local custom (*kastom*). Boundaries of protected areas are often marked with stones and landforms and many *tabu* areas are clearly marked by the leaves of specific trees.⁴⁴ However, the *tabus* are not legally enforceable under Vanuatu's legislation and to be effective they require people to show respect for chiefs and customary law. In addition, non-Indigenous residents or visitors, who have not been educated in their significance, can misunderstand or ignore them.

National legislation under the *Decentralisation and Local Government Regions Act* 1994 and conventional mechanisms under the *National Parks Act* 1993 and *Forestry Act* 1982 failed to achieve successful biodiversity conservation outcomes. It was with this background that the *Environment Management and Conservation Act* 2002 ("EMCA") was passed in 2003.⁴⁵ The legislation is described as an '*Act to provide for the conservation, sustainable development and management of the environment of Vanuatu, and the regulation of related activities*'. It provides for Environmental Impact Assessments (EIA), Bioprospecting arrangements and Community Conservation Areas (CCAs). However, only the CCA provisions will be considered in this paper.

The EMCA provides for the environmental protection and registration of CCAs where a site possesses unique genetic, cultural, geological or biological resources⁴⁶ or if it constitutes the habitat of species of wild fauna or flora of unique national or international importance. If the customary landowners agree to establish a CCA the government provides assistance to verify land rights and accurate boundaries of the area and evaluate the conservation, protection and management options proposed.⁴⁷ Most importantly an appropriate conservation, protection or management plan

⁴⁴ Cycad leaves (namele), wild canes and Cordyline leaves (nangaria) are common markers, but by no means the only ones: Environment Vanuatu, *Vanuatu's Biodiversity*, above n 39.

⁴⁵ The EMCA was assented to on 31 December 2002 and commenced on 10 March 2003.

⁴⁶ Under s. 2 EMCA biological resources includes "*genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity*".

⁴⁷ S. 36 EMCA.

must be developed prior to registration to ensure that the conservation objectives are achieved.⁴⁸ This approach permits active conservation management and allows for the establishment of sustainable livelihoods. It encourages communities to play a significant role in determining the conservation plan which can incorporate traditional practices and customary laws and take into account Indigenous landowners' issues.⁴⁹ Therefore, the provisions are superior to both protected area management under the *National Parks Act* and a simple customary conservation plan.⁵⁰ Additionally, the scheme provides a mechanism by which the Government can effectively conserve remote areas of land which would otherwise be too financially and technically expensive for the Vanuatu Environment Unit to monitor.

A further advantage of the CCA is that it provides a mechanism by which traditional knowledge and practices can be preserved for the future. This cultural material is often under threat due to modernisation, urbanisation, reduced respect for chiefs and imposition of western legislation. Although customary law is enforceable under the Constitution, traditional knowledge and practices are not protected. In a country such as Vanuatu with a long history of Indigenous knowledge and cultural practices, much of which incorporates sustainability principles and management strategies, it is essential that this valuable knowledge and practices is preserved.

In June 2004 the Vatthe Community Conservation Area (Vatthe CCA) was officially declared a CCA under the EMCA. It was the first such area to be registered under the Act and illustrates the practical implementation of the provisions. The Vatthe CCA is of particular cultural significance to the Indigenous community.⁵¹ It is also ecologically important as it is home to at least four endemic bird species and one endemic fruit bat species within probably the largest lowland rainforest area in Vanuatu.⁵²

⁴⁸ S.37 EMCA.

⁴⁹ David Farrier, 'Emerging Patterns in Environmental Legislation in Pacific Island Countries' [2003] *Journal of South Pacific Law* 5, at page 8. Professor Farrier notes that this is rare for Pacific Island Jurisdictions. The exception being the *Raratonga Environment Act* 1994-1995 enacted in the Cook Islands.

⁵⁰ Declaration of a National Park or reserve would restrict land use by the traditional owners. Alternatively, if a customary agreement were reached in relation to land use it would be open to abuse or inter village dispute without the provisions of the EMCA to support it and provide for legal enforcement.

⁵¹ It has long been known as a holy place of peace and power guarded by the snake spirit Alawuro *History of the Vatthe Conservation Area* at page 1.

⁵² Royal Forest and Bird Protection Society. *Vatthe Conservation Area*. Accessed 12 June 2007 at <http://www.forestandbird.org.nz/vanuatu/conservation.asp>.

The process of registration of the Vatthe CCA involved firstly capacity building in terms of education of customary landowners and then cooperation with them in conservation and management planning of the CCA, and lastly empowering the Indigenous community to implement and legally enforce the plan to meet its objectives.⁵³ The Conservation Management Plan provides for biodiversity protection by prohibiting the killing of certain species⁵⁴ whilst permitting the limited hunting of other species.⁵⁵ All harvesting is overseen by local monitors who have the power to impose fines or order community service work. In this way it provides for the controlled continuation of traditional subsistence uses of forest resources including the collection of plants for medicine and timber for canoes, firewood and houses.

This project provides an example of the use of customary law and practices to improve biodiversity protection measures whilst also maintaining sustainable livelihoods. The power of the EMCA is that it facilitates new law that incorporates the customary laws and traditional knowledge of local communities. The challenge for Vanuatu is to utilise the CCA provisions more widely, especially in areas previously identified as rich in biodiversity such as forests and marine areas but also in urban land management.⁵⁶

VI CONCLUSION

Many South Pacific Island States have limited financial and technical resources and historically their focus has been upon purely economic rather than sustainable development. However, both Samoa and Vanuatu have adopted approaches which place biodiversity conservation in the context of establishing sustainable livelihoods and Indigenous participation. It has been recognised that community based conservation will be more successful if it involves local governance, participation, capacity building and enforcement.

⁵³ This is an important point as in other areas of biodiversity protection the decisions of Chiefs in village courts are not legally enforceable: *Environment and development in coastal regions and in small islands. Assessment of village-based marine resource management measures*. Accessed on 12 June 2007 at www.unesco.org/csi/pub/papers3/vanu7.htm at page 4. However, land disputes settled by the Chiefs are enforceable under the *Customary Land Tribunal Act 2001*.

⁵⁴ Such as turtles, coconut crabs and megapodes.

⁵⁵ The hunting of the pacific flying fox and pacific imperial pidgeon is permitted during a limited season. Bullocks and pigs are also protected. Fishing in the Matantas River is permitted only if a villager is sick or an older person needs meat. Fishing in the Jordan River is also controlled for the first time.

⁵⁶ *Vanuatu Forest Conservation Area*. Interview with Russell Nari. Accessed on 12 June 2007 at http://www.unescap.org/dpad/vc/conference/fl_vu_125_vca.htm at page 6. Russell Nari indicated in 2002 that a park was being considered on Efate in a more urban area. However, at the time of writing, little other information was available.

The two case studies illustrate that strengthened legal and institutional arrangements can be implemented to underpin community based management projects by the incorporation of customary law and practice into national law and policy. This is practically viable and desirable in the context of the South Pacific Island States. More broadly, the examples of Samoa and Vanuatu demonstrate that it is possible to synthesise customary law with western style legislation, provided the political will to do so is present.