

Samoan customary lands at the crossroads - some options for sustainable management

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Introduction

Land is at the very core of everything connected to the faa-Samoa (Samoa way) - culture, titles, language, aiga (extended family) and people. It is often the cause of major conflicts between individuals, families, villages or districts. Drawn-out disputes are common due mainly to uncertainties over numerous beneficial owners with competing interests. One only has to visit the Lands and Titles Court at Mulinu'u in Upolu and Tuasivi in Savaii to witness the extent in which Samoans would fight to protect the pule (authority) over their customary lands. This forum does not permit legal representation but allows the beneficial owners to argue their own cases themselves before a panel of Samoan judges. For such an important issue in people's lives the subject of land is not openly discussed, except in court, giving the impression that either it is too complex to deal with or too personal to be anybody else's business.

In the mean time customary land while Samoa's main and most important natural resource is also the least utilised. Large areas remain under-developed as traditional owners seem unable or unwilling to determine how to equitably use them. Customary land cannot be used as collaterals making it very difficult to secure development capital. With increased population there is growing pressure on available land and associated resources like biodiversity, water and forests. This paper looks at three aspects of Samoan customary lands - socio-political, legal and economic. It examines the current status of customary lands over these areas and explores ways for sustainable land management

Background

Socio-political characteristics

The total population in 2001 was 176,848, living in about 330 villages mainly along the coast. Traditional social structures and cultural institutions are very strong in the Samoan society and is based on the aiga (extended family) system. Generally, each aiga is headed by a matai (holder of traditional title) who is responsible for family affairs, particularly in relation to lands and titles. Each village has a fono (council of matai) that controls community order and organisation and provide direction for village development including particular types of land use.

Samoa is comprised of two relatively large islands, Upolu and Savaii, two smaller inhabited islands, Manono and Apolima, and a number of smaller islands. The islands stretch over a distance of about 200 kilometres covering a total land area of about 2,800 square kilometers with about 40 per cent in Upolu and 60 per cent in Savaii. The main feature of Samoan land tenure is the overwhelming majority of land owned by the aiga under customary ownership. Traditionally customary land is awarded through historic claims and by family genealogy and connections. Its utilisation is determined through consensus among all members of the aiga

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who are the beneficial owners. Of the total land area, 81 per cent is held under customary ownership, 15 per cent government land and 4 per cent freehold.

While customary tenure guarantees ownership rights to all Samoans, it is often very difficult, for development purposes, to get agreement from all the different parties involved at any one time. Whenever customary land is affected by any form of development, disputes will invariably arise delaying progress, sometimes for extended periods of time. While knowledge of customary land boundaries handed down by word of mouth are known to family members the pule is often uncertain or disputed

Samoa became independent in 1962 after a period as a United Nations trust territory under the New Zealand administration. It has a Westminster system of government with a Head of State, and a Legislative Parliament consisting of 49 elected members. A Council of Deputies, with three members, is also elected by Parliament. Since 1991 all citizens over 21 years of age are eligible to vote but only matai are qualified to be nominated as parliamentary candidates. The Prime Minister is appointed by the Head of State, being the member that commands the confidence of a majority of members of the Legislative Assembly. The other eight Cabinet Ministers are also appointed by the Head of State from the sitting parliamentarians on the advice of the Prime Minister.

A general sense of political stability is evident, attributed mainly to the security of faa-Samoa and strong linkages to traditional institutions like the aiga, matai and fono. This in turn provides continued backing of the present land tenure, dominated by customary land ownership. Samoans as a group are therefore supportive of the present land system although there have been rumblings by individuals of the need for reforms to ensure that the system serves the national interest generally and the beneficial owners' in particular.

Legal implications

Many aspects of customary lands are enshrined by law as follows:

Constitution of the Independent State of Samoa

- Article 101 categorises all land in Samoa into customary land, freehold land and public or government land.
- Customary land is defined in Article 101(2) as land held in accordance with Samoan custom and usage and with the law relating to Samoan custom and usage.
- Article 102 prohibits the alienation of customary land except where an Act of Parliament may authorize (a) the granting of a lease or licence of any customary land or of any interest therein; and (b) the taking of any customary land or any interest therein for public purposes.
- Article 103 prescribes the establishment of the Land and Titles Court with exclusive jurisdiction to deal with matai titles and customary land as may be provided by the Act.

The Alienation of Customary Land Act 1965

- In Section 4, the Minister may lease or license customary land for an authorised purpose such as a public purpose, agricultural, forestry, forest produce, hotel, industrial, commercial or business purpose; as trustee for the beneficial owners.
- Beneficial owner includes any Samoan who is entitled in equity to occupy the customary land or to share in the occupation thereof or to have the income there from or a share in the income paid to or held in trust for him, or who is entitled in equity to any such benefit contingently or in reversion; and does not include any Samoan who holds any such land or interest only by way of trust, mortgage or charge.

The Land and Titles Act 1981

- Establishes the Land & Titles Court with exclusive jurisdiction to deal with all matters pertaining to Samoan titles and Samoan customary land;
- Part III of the Land & Titles Act 1981 deals with customary land:-
- Section 8 defines customary land as: (a) Samoan freehold land (within the meaning of Section 13 of Samoa Land & Titles Protection Ordinance 1934 (SLPTO) declared by the Court pursuant to Section 16 of the SLPTO to be held in accordance with the customs and usages of the Samoan people; (b) Samoan freehold land (within the meaning of Section 13 of the SLPTO where further to S17 of SLPTO, there has been a recital or declaration made pursuant to a Government or other grant, will, conveyance, lease, assurance or other deed or document that such land to be held in accordance with the customs and usages of the Samoan people; and (c) Any land ordered by the Court to be customary land under Section 9 of this Act.
- In Section 9, an Order of the Court made with the consent of all the parties declaring such land to be customary land.
- Section 10 provides for the survey of customary land as required by the Registrar to define any land or boundary the subject of a petition or in respect of an application for a pulefaamau (declared authority).
- Sections 11-13 provide for the registration of customary land. Section 11 requires the Registrar of the court to transmit to the Land Registrar every judgment of the court concerning the title or status of any customary land; and every Order or Declaration made under Sections 8 and 9. The Land Registrar is required by Section 12 to register every judgment, order or declaration received under Section 11; and to enter a memorial in the Land Register to that effect.

Taking of Lands Act 1964

- Provides for the compulsory taking by government of customary land and freehold land for public purposes in return for a fair and just compensation;
- Sets out the procedure for taking;
- Provides for application to be made to Court to determine what a fair and just compensation is in the event that compensation offered by government is not accepted by the owners of the customary land taken.

Village Fono Act 1984

- Section 5 empowers the Village Fono to (a) make rules for the maintenance of hygiene in the village; (b) to make rules governing the development and use of village land for the economic betterment of the village; and (c) the power to direct any person or persons to do any work required to be done pursuant to rules made in accordance with the powers granted or preserved by paragraphs (a) and (b).
- Section 5(3) - Every person is guilty of village misconduct and may be punished by his Village Fono by failing to obey any rule or direction made or given in accordance with the powers granted or preserved by this section.
- Punishment is in accordance with the custom and usage of the village and includes (a) the power to impose a fine in money, fine mats, animals or food; or partly in one or partly in others of those things; and (b) the power to order the offender to undertake any work on the village land.

Economic implications

While land and asset valuation had been practised in Samoa for some time, it is only in recent years that attempts were made to formalise it as a land management tool and incorporate it into national economic development. Some of the main problems faced at present include: (a) absence of a formal valuation system leading to inconsistent results; (b) lack of qualified valuers; (c) absence of legislation to regulate the valuation system and practice.

In 2000 Cabinet approved the valuation practice policy to be administered by the Ministry of Natural Resources and Environment (MNRE). The policy deals with the licensing of valuers setting out the required qualification and experience as well as the procedures for obtaining licences and annual practicing certificates. A Valuation Licensing Committee was established to consider applications and make recommendations to the Minister (on licences) and Chief Executive Officer (on practicing certificates) for approval. This Committee is also responsible for overseeing the work of graduate-valuers until they acquire the requisite experience for licensing.

The proposed MNRE principal legislation reviewed the Ministry's functions and responsibilities and identified land valuation as one of its new functions. Draft land valuation regulations have also been developed and will be submitted to Cabinet for approval once the MNRE Bill is passed. These will facilitate national valuation practices as well as control the valuation sector. In the absence of relevant legislation, however, it is extremely difficult to enforce proper standards or monitor compliance with good practice.

A valuation section has been established within the technical division of the MNRE. Amongst its tasks are the compilation of land transaction prices from the land register into a database and the publication of quarterly average prices for the different valuation zones throughout the country.

In the absence of proper standards there are wide variations and numerous inconsistencies in the estimates of land values. This is a major concern for investment planning where values for mortgagee sales were well below values of associated loans. Customary lands as acquired by the government for public purposes are particularly susceptible to these uncertainties as there are no market values for such. In a recent case involving Salelologa village in Savaii, the government valuer had assessed land for a new township at \$3.2 million while the same land was valued privately at \$44 million.

Future options

The governance of Samoan customary lands has seen little change in the past two thousand years. It has remained firmly under family ownership, controlled by the matai with the guidance of the Village Fono. Land owners have a strong reluctance to compromise their pule to choose what to do with their own land¹. Such personal attitudes were formed over many years under the present system. Living in an isolated island environment has reinforced the socio-political context of insularism leading to a slow pace of change and democratic reforms². There is an inertia that conspires to stop things getting done and the personal partisan politics can create insecurity and poor institutional memory³. Entrenched traditional mindset and cultural values over land have made it extremely difficult to initiate change for sustainable management.

The focus then is to improve the governance of customary lands by engaging the whole community in a partnership for change. Somehow the matai must encourage family participation in land management and promote the transparent allocation of land resources.

Lack of certainty over land access seems to drive people away from the village to the urban area or migrate overseas. The taking of customary lands for public purposes should also be made more transparent so that the beneficial owners are closely involved in the process⁴ and share the benefits from such transactions.

A growing trend in customary tenure is the individualisation⁵ of customary lands. This is where land is claimed by whoever develops it from virgin bush and can be passed on from parents to their children. While such arrangement would undermine the communal ownership of customary lands and may lead to even more restricted access, there is little evidence that this is a major concern at this stage and that it will necessarily lead to any significant change in family control of customary lands generally.

Through wide community consultation, policies should be developed to ensure the appropriate utilisation and equitable access to family land. Environmental impact assessment is required for land development including the appropriate utilisation of lands in accordance with soil capability. This will ensure sustainable use and the protection of land and other resources.

To avoid uncertainties the ownership of customary land must be clearly defined by law, with the matai as the titular head of every aiga to be the trustee of family land. The matai therefore stands in a fiduciary relationship towards the family members who, along with the 'matai' are the beneficiaries of the customary land trust. In all customary land matters therefore, the matai represents the interests of his family; he acts on behalf of his family and he holds customary land on behalf of his family; so that every member of the family including himself shares in this trust ownership of customary land. There is therefore no room for the matai to act alone for his own personal interest or for the interests of his immediate family only; otherwise this will constitute a breach of trust. This is the common law doctrine of trust that should be adopted in the administration of customary lands.

With the matai assuming full control of customary lands it is not unusual to find a matai using the benefits from customary land - whether by way of leasing, licensing or compensation from the taking of customary land by government for public purposes - for himself and his immediate family at the exclusion of other beneficial owners. While the law is designed for the matai to receive the rents or compensation monies; the law does not provide safeguards on how this money ought to be applied by the matai in recognition of his position as trustee for the aiga. The law as it stands does not go far enough to provide for an equitable distribution of benefits from customary land amongst all the beneficial owners of customary land.

The legal boundaries of customary land vested in Samoan family-titles are not always clearly defined. Much of this problem is manifested in numerous cases coming before the Lands & Titles Court to define boundaries of customary land for disputed parties. Section 10 clearly provides for the survey of customary land whenever the Registrar is of the opinion that a survey is necessary to define any land or boundary the subject of a petition or in respect of which an application for a pulefaamau has been made. However this legal requirement is seldom practised and followed. This failure to follow the requirement of the law to survey customary land has resulted in many of customary land that have become the subject of petitions before the Lands & Titles Court on land-boundary disputes as well as pulefaamau matters in Samoa have not been surveyed to define their legal boundaries.

Equally important is the requirement for the registration of customary land. At present customary land is not registered in the Land Register created and established under the Land Registration Act 1992/1993. Consequently, the legal boundaries of customary land are not clearly defined. Much of this problem arises from the failure to observe and follow the requirements of the Lands & Titles Act 1981 relating to the registration of customary land. This could be facilitated under present legislation where the Registrar of the Court is required to transmit to the Land Registrar every judgment of the Court concerning title or status of any customary land or interest in such land. The Lands & Titles Court, however, would have to ensure that the boundaries approved by its decision are indeed the surveyed boundaries prepared for registration.

The most challenging issue for customary land is - can it be used as security for loans to allow for its development for the benefit of beneficial owners? Given the law as it stands, with the exception provided by the leasing and licensing of customary land, the simple answer is 'no'.

The safeguard for customary land built into the Samoan Constitution is the prohibition of the alienation of customary land. Much can be said of the wisdom of this constitutional safeguard; for without this restriction, much of the customary land would have been lost by sale. Customary land cannot therefore be mortgaged so there is no way under present legislation that customary land can be offered as security for loans for development purposes. One such option would be to involve the government in the leasing process by providing a guarantee that would encourage financial institutions to feel compelled and confident to provide finance for the development of customary land. The Government should develop legal and financial mechanisms to facilitate the use of lease agreements to guarantee loans as is the case with freehold lands. Agreements can also be worked out to allow for the subleasing of customary land so that funds provided by financial institutions could be repaid within the leased term where mortgagees have defaulted on their loans.

Appropriate legislation should be established to facilitate valuation practice, incorporating the licensing procedures as per the Cabinet policy and setting out the professional standards and ethics and compliance requirements. A national valuation system for customary lands should be established based on the local needs and conditions. Investment decisions by financial institutions should then be governed by approved land values incorporating best land use practice. In other words the value of a proposal to plant crops in areas with inappropriate soil capabilities would be lower than otherwise. With only five local licensed valuers the training of more valuers is essential to maintaining standards.

It is expected that in the long-term the private sector will provide valuation services while the MNRE will become the valuation regulatory authority. During the early stages of industry development, MNRE will regulate practice until such time when capacity is available to self-regulate. As part of its functions MNRE will continue to publish the mean land prices on a quarterly basis based on registered sales. Any substantial deviation from such should be carefully assessed and the implication of any assumptions being adopted should be fully considered.

To provide investment certainty it is very important that land values are consistent and based on best practice. Leasing rents should be determined based on land values through open consultations between land owners and lessees and the banks. Reliable land values are critical

to the development of viable market values and the promotion of customary lands for loan guarantees.

Conclusion

The governance of Samoan customary lands is indeed at the crossroads - to maintain the status quo and alienate many of the population who will drift to Apia or migrate overseas, or to embark on changes that will promote community development and nation building. The strong demand for freehold land would seem to indicate that customary lands are not meeting people's needs⁶. To achieve sustainable development there is an urgent need to undertake reforms in the management of customary lands and Samoans themselves must accept the need for such change⁷.

Without popular acceptance for change there is no political commitment to support⁸ it. This is the first step in the process of instituting measures to effect change through genuine and wide consultation⁹ amongst all affected stakeholders. In this regard the role of the village fono is paramount¹⁰ as it controls the structures of social systems that are responsible for control and management of village level activities¹¹. There is an urgent need to adapt traditional attitudes to reflect the expectations and aspirations of the present population. Uppermost amongst these is the need to be inclusive, equitable and for greater democracy in land access and allocation.

Sharing the rewards and benefits from leasing and licensing of customary lands amongst the beneficial owners is central to the new reforms. It will necessitate changing the law to provide mechanisms to ensure the equitable sharing of benefits by customary landowners instead of the matai enjoying a monopoly on these rental monies from the leasing and licensing of customary land. Finally establishing a formal framework for land valuation will ensure investment certainty in the national economy. It should also develop the basis for a financial market in customary lands based on leasing.

¹ Taule'alo, T.I. 2002. Planning for sustainable drainage and sewerage services in Apia. In Dubois-Taine (ed.) Sustainable development urban services. Noumea semina report, November.

² Jones, P. 1996. Changing faces of the islands. *Australian Planner* 33(3),

³ McEloy, J.I., Albuquerque, K. & Towel, E. 1987. Old problems and new directions for sustainable development in the islands. *Ekistics Journal of Human Settlement*, 323/324.

⁴ Peteru, M.V. 2003. Land acquisition and resettlement framework. Report for the Infrastructure Asset Management Project Phase II, MNRE.

⁵ O'Meara, J.T. 1990. *Samoan planters: traditional and economic development in Polynesia*. Fort Worth, USA: Holt Rinehart & Wilson)

⁶ Fairbairn-Dunlop, P. 2001. Changing perception of land: Samoa 2000. *Samoan Environment Forum* No. 2.

⁷ Taule'alo, T.I. 2000. Unsustainable village development: reflections on changes at Lepa. *Samoan Environment Forum* No. 1

⁸ Taule'alo, T.I. 2001. Urban Planning in Samoa - issues for decision-making. *Samoan Environment Forum*. No. 2

⁹ Taule'alo, T.I. 2000. Planning for sustainable resource management at Uafato. *Samoan Environment Forum* No.1

¹⁰ Jones, P. & Kohlhase, J. 2002. Urban planning and management in Apia - everybody's or nobody's business. *Samoan Environment Forum*, No. 3.

¹¹ Jones, P., Taule'alo, T.I. & Kohlhase, J. 2002. Growing Pacific towns and cities. *Australian Planner* 39(4).