EMERGING PATTERNS IN ENVIRONMENTAL LEGISLATION IN PACIFIC ISLAND COUNTRIES

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ABSTRACT

There is a widespread assumption that Pacific Island Countries (PICs) should enact environmental legislation. Much of this appears to be driven by commitments under international conventions. PICs have been evaluating their needs in this regard, in the case of some countries for a number of years. For the most part, however, proposals remain in the form of Bills, and some of these have been through a number of iterations, indicating that the issues they address are difficult and controversial. This paper surveys recent legal developments in a number of PICs. It takes as its starting point that the need to enact environmental legislation must be carefully justified rather than assumed, and the precise components of that legislation must be tailored to the policy context and needs of PICs and not based on imported models from developed countries. In light of this, it argues that more attention needs to be given to the development of community-driven, strategic land use planning processes.

INTRODUCTION

Starting in the closing decades of the twentieth century, most Pacific Island Countries (PICs) began to develop legislation which claims on its face to be broadly concerned with environmental issues.[1] In some cases, this has led to the enactment of statutes, but other proposals have not got this far, sometimes languishing in the form of Bills for a number of years. The issue of environmental legislation is clearly controversial. There are a number of reasons for this.

In the first place, environmental protection and conservation have a relatively low priority in countries where people suffer from relative disadvantage in terms of unemployment, educational opportunities and health care. The primary commitment of PICs is to economic development. Legislation which presents itself as being concerned with the environment, and the threats posed to the environment by human beings, risks being depicted as a barrier to economic development, rather than being seen as an intimate component of *sustainable* development.

Secondly, where legislative proposals involve setting up an environmental agency, or empowering an existing one, they arouse intense suspicion from those other government agencies that have traditionally dealt with aspects of environmental management and fear loss of prestige, power and resources.

Thirdly, any proposal which smacks of land use regulation will create varying degrees of anxiety in the broader community. Environmental law is often focused on attempts to induce people to adjust their current use of land or to modify, or even abandon, proposals to develop it. Traditionally, this has taken the form of command and control regulation, or orders backed by the threat of criminal sanction in the event of breach.

The precise amount of anxiety generated in the community will turn on a number of factors. These

include:

- the extent to which landholders already participate in, or perceive themselves as likely to participate in, a regulated activity;
- the extent to which the benefits of the activity are seen to outweigh the environmental problems which it is perceived to create;
- the extent to which landholders engaging in the regulated activity perceive themselves as benefiting from the regulation because of the constraints imposed on others engaging in the activity.

So, for example, controls over large scale polluting development carried out by overseas interests are more likely to be tolerated than habitat protection laws that affect a large number of small landholders. Regulation is more likely to be welcomed if its perceived benefits, for example pollution control, are seen to outweigh the benefits of development, particularly employment and other wealth-creating opportunities. The short-term benefits of controlling noise pollution and smell in an urban environment are much more easily seen than the long-term rewards flowing from restrictions imposed to conserve biological diversity in a rural setting. In addition, controlling the location of pig pens, and other polluting activities in which many members of the community participate, can nevertheless be presented as a measure which benefits all, and one to which all must submit.

Fourthly, although there are long-established traditions of non-enforcement of environmental legislation in many countries, both in the Pacific and elsewhere, the enactment of legislation nevertheless risks creating expectations, both at home and overseas, that it will be implemented. Implementation can be politically controversial. It is also resource intensive, particularly where state of the art strategies copied from developed countries are incorporated.

Fiji's Sustainable Development Bill 1999 provides a good example of the implementation issues raised by proposed environmental legislation. It creates a very detailed umbrella for government institutions and the community to work within. It ambitiously requires the completion of a Natural Resource Inventory as a basis for a National Resource Management Plan.[2] The Plan is to provide the basis for determining the 'carrying capacity' of Fiji's natural resources and ensure sustainable development of those resources. It must identify the most appropriate use of resources, and identify areas appropriate for a range of purposes, including urban settlement, commercial and industrial activities, and transportation, service and communication systems. There must be an implementation programme.[3] All activities connected with soil, agriculture, water, energy or mineral resources must be undertaken in accordance with the Plan.[4] Sustainable development policies developed by government agencies are to be compatible with the Plan.[5] Where an agency is responsible for giving environmental approvals, it is required to establish an Environmental Management Unit to deal with environmental assessment.[6] Every development proposal that will cause a significant environmental or resource management impact is subject to environmental assessment.[7] Each assessment report must include a management plan and a monitoring programme.[8] Commercial and industrial facilities which 'engage in any activity that may have an adverse impact on human health or the environment' must adopt Codes of Environmental Practice within 3 years.[9] Where possible a Code must be based on the ISO-14000 series of standards for environmental management systems.[10] Regular environmental audit reports must be submitted, showing the extent of compliance with a Code.[11]

Fifthly, as the Fijian example shows, environmental legislation can be both lengthy and intricate. There is a good argument for seeing such projects in small PICs as being evolutionary ones, just as they have been in many developed western countries. Compared with Fiji's proposals, however, Niue's Environment Bill 1999 goes to the opposite extreme. It simply sets up an institutional framework and leaves substantive

obligations to regulations to be made under the legislation once it is in operation. The Environment Unit, which is to be set up under the proposed legislation, is to design these programmes.[12] Regulations can be made, for example, to set up procedures for environmental impact assessment, to provide for waste management and pollution control measures, to protect species and their habitats, to provide for the preservation of historic areas and to provide for 'planning and natural resource management'.[13] One of the problems with this minimalist approach is that there is no guarantee that Regulations will ever be made.

REACTIVE ENVIRONMENTAL ASSESSMENT AND REGULATION

Two of the most recently enacted pieces of PIC legislation fall in between the two extremes represented by the Fijian and Niue Bills. Recent Kiribati[14] and Solomon Islands'[15] Acts set up systems for pollution control and ad hoc regulation[16] and environmental impact assessment of major development proposals as and when they are put forward by developers.

There is a two tier system of environmental assessment: by 'public environmental report' (Solomon Islands) or 'initial environmental evaluation report' (Kiribati), and, at the higher level, by environmental impact statement.[17] A separate pollution licence is required where specified premises discharge waste or emit noise, odour or electromagnetic radiation.[18] Types of development subject to these provisions are listed in detail in schedules to the Acts. They essentially cover heavy industry, tourism and public works.[19]

By contrast, the earlier Papua New Guinea *Environmental Planning Act* [Cap 370] is laced with administrative discretion when it comes to the identification of projects subject to environmental assessment .In spite of the reference to planning in the title to the Papua New Guinea legislation, like the Solomon Islands and Kiribati legislation discussed above, it provides not for strategic planning but for regulation and environmental impact assessment of specific projects.[20] 'Environmental plans' are the equivalent of environmental impact statement. The requirement for a developer to provide an environmental plan only applies to classes of project for which guidelines have been issued.[21] A 1996 Discussion Paper indicated that guidelines had at that stage only been developed for forestry.[22] Even where guidelines are issued, the Minister is left with substantial, largely unreviewable discretion. An environmental plan is only required where the Minister reaches the conclusion that 'the proposal may have significant environmental implications'.[23] The Minister must then trigger the preparation of a plan by issuing a specific requisition: no onus is placed on proponents of development to consider the applicability of the legislation to their proposal.

This illustrates the problems associated with framework legislation that effectively leaves substantial discretion to administrative agencies or Ministers.[24] By comparison, the Solomon Islands and Kiribati legislation, commits to environmental assessment of specifically identified categories of development, and these are listed in the legislation itself. The drawback of this approach is that the listing may not be comprehensive when it comes to identifying activities likely to have a significant impact on the environment. The Papua New Guinea Environment Bill,[25] which would repeal the *Environmental Planning Act*, seeks to pursue a mid-way course by providing for the identification of projects subject to environmental assessment requirements, not in the Act itself, but in Regulations made under the Act.[26]

Another feature, which sets the Kiribati and Solomon Islands' Acts apart from the Papua New Guinea *Environmental Planning Act*, is that they are not restricted to assessing and regulating large-scale activities carried out by corporations. Public authorities must at least *consider* the effects that *all* development proposals will have on the environment before giving an approval, where this is required, regardless of

whether the type of development is listed in the schedule as being subject to environmental impact assessment.[27] In addition, both Acts contain a general prohibition on polluting emissions from *all* premises where they unreasonably interfere with health, welfare, convenience, comfort or amenity. This is enforced through pollution abatement and stop notices.

These are symbolically important statements about the nature of environmental impact, regardless of the extent of the commitment to implementation. For they make it clear that environmental impact is not something that can be externalised by the broader population as being confined to the activities of a few, but is pervasive.

Yet the Kiribati and Solomon Islands' legislation remains fundamentally *reactive*. It responds to particular issues – development proposals, pollution incidents - as and when they arise. It does not take the proactive approach of setting out in advance of particular development initiatives the land use parameters within which development can be carried out, looking across the broad landscape and assessing the differing capacities and suitabilities of different sites, escaping the confines of a reactive approach to the particular site. This is what I will refer to as strategic[28] land use planning.

The focus of environmental impact assessment legislation is on the specific impact of particular development, rather than the cumulative impact of the myriad small-scale developments that go to make up the slow creep of urbanisation and agricultural expansion and intensification. The cumulative impact of this development cannot be adequately addressed by procedures that regulate and assess particular development proposals. To deal with the issue of cumulative impact, there needs to be a holistic and integrated approach to land use/development and natural resource management through the development of strategic land use plans.

This is the approach which has traditionally been taken within what has traditionally been referred to as town and country planning, most commonly reflected in the development of planning schemes and zoning arrangements. These attempt to take the initiative by indicating which development is appropriate in which areas. More recently, in Australia, town and country planning has been reinvented as environmental planning as it increasingly takes on board rural issues, moving away from the traditional focus on the urban environment, and rejecting the lines which have been drawn in the past between land use planning, environmental protection and resource management.[29] This has been accompanied by attempts to move away from prescriptive zoning arrangements towards the greater flexibility inherent in approaches that emphasise outcomes to be achieved rather than the precise methods to be employed to achieve them.

Neither the Kiribati nor the Solomon Islands' environment legislation attempts to draw links with older town planning legislation, which has been in place for some time in both countries.[30] Under the Solomon Islands' *Town and Country Planning Act 1979*, for example, each province is intended to have its own Town and Country Planning Board, with responsibility for preparing a Local Planning Scheme and wide powers to control development. This legislation, then, does provide a strategic planning dimension, but, according to Boer, writing in 1996, its operation in practice is primarily confined to urban areas, and, on top of this, it does not apply to customary lands, thereby excluding 87% of the land in the country.[31]

However, the recent Solomon Islands' environmental legislation[32] does at least pay lip service to the need for strategic land use planning. One of the functions of the Environment and Conservation Division which it sets up is to 'assist in developing legislation for systems of environmental planning at national, provincial and local level, and the development of national, provincial and local environmental plans'.[33]

TAKING A PROACTIVE AND STRATEGIC PERSPECTIVE

There are few examples in PICs of environmental legislation or proposed legislation that contains a

strategic land use planning dimension. One of the earliest exceptions was the Marshall Islands *National Environmental Protection Act 1984.* This provides for the National Environmental Protection Authority to develop a Land Use Scheme for recommendation to the Minister, which may include 'a method for exercising control by the Government ... over the use of land in areas where environmental control is deemed necessary'.[34]

In Samoa, the *Lands, Surveys and Environment Act 1989* allows the Minister to make 'management plans' covering freehold and customary, as well as government land.[35] The concept of *management* planning has traditionally been associated with the conservation of natural areas and protection of threatened species rather than with planning for deliberate, human-induced change. However, the Samoan legislation allows plans to be made to address issues of pollution, soil erosion, and waste and litter disposal, as well as the protection, conservation, management and control of national parks, reserves, water and water resources, coastal zones and indigenous forests. Management plans can also be made for 'any other matter relating to the environment which in the opinion of the Board will benefit from a management plan'.[36] But the potential scope of this is limited by the narrow definition of 'environment'. This is principally confined to the 'physical features of the surroundings of human beings', including only the 'biological features of animals and plants'.[37] There is no reference to the social, cultural and economic context in which land and other resources are inevitably utilised, other than the very limited reference to 'the social features of aesthetics'.[38] In practice, while coastal management plans have been made, none have been made in accordance with the provisions of the legislation.

Currently, the Samoan Government is considering a proposal that would fill these gaps in the existing legislation. This would involve the development of an integrated urban planning and management system, based on strategic planning at the village, district and regional levels.[39] As far as possible, plans are to be based on agreement between communities and government. While the key driver of the proposal is the need to address issues arising from rapid urbanisation in Apia, the capital, one of the outcomes sought is sustainable natural resource management, including management of the impacts of population growth on urban catchments, wetlands and the coastal environment. It is envisaged that the planning system to be instituted could later be extended to other areas beyond Apia.

Like the existing Samoan provisions in the *Lands, Surveys and Environment Act 1989*, the reach of the management planning provisions of the Cook Islands' *Rarotonga Environment Act 1994-95*[40] is also restricted by a narrow definition of environment in the legislation.[41] Here environment is defined to mean:

> The ecosystems and the quality of those ecosystems as well as the physical, biological, cultural, spiritual, social and historic processes and resources in those ecosystems, including but not limited to land, water, air, animals, plants and other features of the human habitat.[42]

This concentrates attention on the purportedly 'natural' environment[43] and fails to take into account the broader land use and infrastructure arrangements required of environmental planning in urbanising contexts.[44]

One example of a PIC proposal which clearly provided for a strategic planning mechanism and integrated the natural and human-made environment, was Tonga's Land Use, Natural Resource and Environmental Planning Bill[45], introduced into Tonga's Parliament as long ago as 1982.[46] The Bill sought to set up a tiered system at the strategic planning level, comprising Town, District and Regional Planning Schemes, as well as a National Planning Scheme. Town planning schemes for urban areas would take into account such things as the design and arrangement of land uses and make provision for land uses and activities

appropriate to the circumstances of the town. Regional planning schemes would consider among other things the 'preservation and development of the region's natural resources, including water, marine resources, coral reefs, soil, air and other natural systems, farmlands, forest, fisheries and minerals'.

A more recent, and considerably narrower Bill has recently been circulated in Tonga,[47] and it now appears that the earlier proposal is effectively dead. Baillie has suggested that the most significant reason why the earlier Bill did not become law was the reluctance to have traditional freedoms in relation to land restricted.[48]

Fiji's innovative, but complex and resource-intensive, Sustainable Development Bill, outlined above, also contains a real attempt to integrate traditional land use planning concerns in urban contexts with broader issues of natural resource and environmental management. Here, the concept of 'natural resources' is defined expansively for the purpose of the National Resource Management Plan which is to be developed. 'Natural resources' include not only minerals, forests and water catchment areas, but also

> • human resource activities, including population centres, industrial and commercial centres, settlement patterns, communication corridors, educational and social support services and infrastructure, and civil works including electricity networks, waste management sites, sewage works and potable water networks; and
> • economic development activities and infrastructure, including tourism developments, mines and quarries.[49]

The Papua New Guinea Environment Bill, although not as explicitly as the Fiji and Tongan proposals, also contains a potential mechanism for strategic land use planning. It enables *environment policies* to be made, specifically contemplating sectoral policies targeted at such things as contaminants, industry, waste management, land, air and water quality, noise, litter and particular environmental values. However, policies can be made, more generally, 'in relation to the environment', [50] and, inferentially,[51] in relation to particular areas, as distinct from specific issues. Environment is defined expansively to include, among other things 'ecosystems and their constituent parts including people and communities and including human-made or modified structures and areas'.[52]

Unlike the early Tongan proposals, however, neither the Fiji nor the Papua New Guinea proposals provide for tiered plans at the local, regional and national level. Although they both provide for community participation, plan-making is essentially a national, 'top-down' exercise.[53] This does not facilitate ownership of the end-product. This is only likely to result from active engagement in the plan-making process at a local community level.

WHAT ROLE FOR COMMAND REGULATION?

PIC environmental legislation and proposed legislation still relies heavily on what has been referred to as command and control regulation to achieve its objectives. This is the shape taken by colonial wildlife protection laws, which remain on the statute book in many PICs, and, more recently, by environmental assessment and pollution control legislation. In essence, command and control regulation consists of government demands, made of those who choose to engage in particular activities, backed up by the threat of fines and other criminal penalties.

In an environmental context the demand is usually that they must not engage in a particular activity unless they first secure an approval/permit/licence from a government agency, and, if successful, that they comply with detailed conditions attached to it, designed to ameliorate environmental impact. Criminal sanctions are ordinarily available in the event of breach. For example, under the Papua New Guinea Environment Bill, it is a criminal offence to cause a *serious* or *material* environmental harm without an

environment permit or some other kind of authorisation.[54] Except in certain specified circumstances,[55] it is not automatically a criminal offence to cause environmental harm falling short of serious or material. The Bill takes what is an innovative approach in the South Pacific context of imposing a duty of care on all of those engaging in activities likely to cause environmental harm to take 'all reasonable and practicable measures' to prevent or minimise the harm.[56] Breach of this duty is not in itself a criminal offence, but the duty can be enforced by the Director of Environment making a special order, such as an environment protection order,[57] which will flesh out in greater detail the very general requirements of the duty. It then becomes an offence to breach this order.[58] The duty of care can also be fleshed out by the Minister making a code of practice,[59] and compliance with this, although voluntary,[60] constitutes a defence to a criminal charge.[61]

'Environmental harm' in the Papua New Guinea Environment Bill is broadly defined. '"Material environmental harm', for example, includes harm which is 'not trivial or negligible in nature, extent or context'.[62] The proposal goes considerably further than the recent environmental initiatives in Pacific Island countries discussed above, which have focused on the regulation and environmental assessment of major projects and point-source pollution control.

To the extent that legislation does rely on command and control regulation, it raises issues of law enforcement. Enforcement agencies are inevitably left with substantial discretion in this context. A phenomenon which has been documented in some developed countries is that, where industrial point-source pollution is concerned, agencies may adopt a policy of relying on prosecution as a last resort, only to be used when a prior record of incidents indicates a lack of any commitment to improved performance in the future, or there has been a major incident accompanied by a public outcry. In this context, there has been increased emphasis on the use of other, more efficient, mechanisms of inducing industry to comply.[63]

Where regulation seeks to constrain private and customary land use and development in a context in which this has traditionally been unfettered, enforcement agencies are going to be particularly reluctant to bring criminal proceedings. Other factors militating against vigorous enforcement activity include the costs of prosecution, and fear that a prosecution that ends in failure will give the wrong message to the regulated community.

In some overseas jurisdictions, the search for alternatives to prosecution has led to the development and use of civil enforcement proceedings, where the objective is to obtain an order to restrain and remedy breaches rather than to punish.[64] These may include broad standing provisions which allow proceedings to be brought by any member of the community.

In this context, the Niue Environment Bill 1999 provides that not only enforcement agencies, but any member of the community can bring proceedings for an order to remedy or stop a breach of the Act or Regulations, even when their interests are not directly affected.[65] Such proceedings are facilitated by other provisions that would allow the court to order costs only in exceptional circumstances, and prevent it from requiring from the plaintiff in advance security for costs or damages which the defendant might later claim.[66] One of the crucial issues here is whether enabling provision such as these, which have been so successfully used in developed countries, can readily be transplanted to Pacific Island countries.

Increasingly, regulatory theorists are arguing that command and control regulation must itself be seen as a last resort.[67] European theorists increasingly point to the benefits of reliance on environmental *agreements* between government and industrial corporations.[68] Most of this literature has been targeted at large scale industrial point source pollution. But there are important lessons here when it comes to developing strategies for inducing behavioural change on land in customary and freehold ownership. In

this context too, PIC governments need to seek out alternative mechanisms to command and control regulation handed down by central governments. It is one thing to regulate the construction of buildings to ensure safety, it is quite another to tell landholders what they can and cannot do on their land. In this context, the language of regulation should be used only as a last resort and the focus must be on developing innovative mechanisms to cement agreement with landholders and communities on preferred land use and development.

In practice, there are few examples of policy instruments in PIC legislation or proposed legislation which have been developed to take into account the specific issues and sensitivities associated with customary land tenure, and traditional patterns of development in the Pacific.

One significant exception is the process in the *Rarotonga Environment Act 1994-95*[69] which, in essence requires a voluntary agreement to be reached between government and landholders before regulatory measures can be brought to bear on those who do not comply.

The process is, however, complex. An environment notice, specifying conditions and restrictions relating to land use, cannot be issued by the Environment Council for the purpose of implementing a management plan covering native land[70] unless those with interests in the land have entered into a 'shared resource management agreement' with the Director of the responsible government agency.[71] Such an agreement provides for a management plan and covers its implementation, including any restrictions to which the land should be subject to achieve the objects of the plan.[72] Even if an agreement has been concluded, an environment notice does not automatically come into operation. The Director must first apply to the High Court, which can issue an 'environment protection order' bringing the notice into effect, on being satisfied the parties intend the land to be subject to a notice. Only after a notice has come into operation do the land use regulations come into play.[73] At this point, the Director's consent is required before any activity can be carried out which is contrary to the notice or the shared resource management agreement, or is likely to jeopardise the objectives of the management plan.[74]

In spite of their complexity, these provisions contain an important commitment to the principle that command and control regulation relating to the use of land should be seen as a last resort. The underlying argument is that landholder ownership of a forward vision for land use management and development in an area, and specific land use parameters, must be secured by setting up processes which allow the community which is to be regulated to play a significant role in determining the precise form they should take. This is particularly important where the objectives of a management plan cannot be achieved simply by restricting land use, but require landholders to actively manage their land for conservation purposes.

A crucial question is whether, and if so under what circumstances, compensation for loss of land value should be paid to make land use restrictions more palatable. The general approach taken by PICs is not to compensate landholders where land use is regulated in the public interest,[75] although in practice governments will purchase or lease land in extreme cases. Where substantially all economically beneficial use is foreclosed, there is a compelling argument for either outright purchase of land by government, land exchange or the payment of compensation. [76] Loss of all economically beneficial use is not, however, an easy concept to define.

A preferable approach to compensating for lost expectations is to offer incentives to landholders so as to make alternative land uses economically viable in situations where their preferred land use is not permitted. Agreements between landholders and government could provide for landholders to be recompensed for providing active management of particular areas which are subject to constraints on development (for example, for providing public services in relation to tourism or nature conservation). Another approach would be to make commitments to provide Government services to communities

dependent on good land management practices.

CONCLUSION

Sustainable development decision making processes in PICS need to address not only the impact of large projects but also the cumulative impact of small scale development generated by processes of urbanisation, particularly the expansion of urban areas into water catchments and sensitive coastal areas, as well as agricultural expansion and intensification. These issues cannot be addressed by reacting to individual project proposals. The argument advanced in this paper is that in those PICs where such processes are proceeding apace, consideration must be given to acting proactively, to channel land use change by putting in place strategic land use planning systems which cover both urban and rural areas, and extend to all land tenures, freehold, customary and government. The primary argument for strategic land use planning is that it allows us to look at desirable land use in the context of the broader landscape, beyond the particular site, and to fix land use parameters in advance of particular development proposals, based on a forward vision of land use management and development in an area.

Yet the history of attempts to introduce a strategic planning dimension in PICs does not give rise to optimism. There are many examples of old town planning legislation which has fallen into disuse. More recent proposals have not been enacted into legislation, are restricted in their operation to particular contexts, or have not been implemented in practice. This suggests a degree of suspicion of the holistic approach that strategic land use-planning proposals mandate. In light of this, it is important to attempt to dispel at least some of the concerns identified in the Introduction to this article.

In the first place, strategic land use planning is intimately related to economic development. Rather than environmental impact being depicted as an obstacle to economic progress, PICs see sustainable land use and development as an integral component of economic development.[77] Strategic land use planning is not just about environmental protection, but it does force decision-makers to address the issue of unsustainable cumulative impacts.

Secondly, planning is about coordination of government activities. It does not seek to take away the powers of departments of public works to make roads, or electricity commissions to lay electricity lines. But it insists that these activities be performed in a coordinated way,[78] which takes into account desired patterns of development. This requires representatives from these other agencies to be actively involved in the planning process, not simply recipients of directives. So, for example, the proposed National Council of Sustainable Development under Fiji's Sustainable Development Bill 1999, which is responsible for signing off the National Resource Management Plan and coordinating government's environmental and resource management activities, would have a membership which includes the Permanent Secretaries of every Ministry, as well as community representatives. In discussing the most recent version of the Bill, which has a strong focus on planning, Singh emphasises that it does not seek to take from existing government agencies their existing roles, but rather to coordinate them.[79] It is superimposed on other relevant legislation, rather than amending or replacing it.

Thirdly, planning legislation does not have to be complex and lengthy, although in many overseas jurisdictions it certainly is, borne out of a desire to insulate it from litigation. Planning legislation facilitates rather than dictates. It facilitates a process. The plans, which are the end product of this process, create the detailed commitments, both by landholders and government. Some land use planners are in fact hostile to so-called *statutory* planning, preferring to produce plans which are not made in accordance with rules set out in legislation, and not legally binding, allowing greater flexibility. There are, however, persuasive arguments that plans should at least be made in accordance with legally mandated, transparent procedures in which members of the community have a clear stake. Even if plans are not made legally *binding* on landholders, the fact that they are made in accordance with procedures spelt out in legislation

is likely to enhance the accountability of those responsible for implementing them, making it less likely that plans will sit on shelves gathering dust.

Finally, a key feature of strategic land use planning is its well-established association with community consultation, and, increasingly, community participation in decision-making processes. Planning processes can facilitate members of the community playing an active role in framing the rules according to which they will manage and develop their land. While strategic planning usually does result in command and control regulation of land use, in an ideal world these will be rules that have been vigorously debated within the community during the plan-making process. The expectation is that this will lead to increased ownership of the rules and greater compliance, leaving law enforcement as an absolutely last resort. This places a premium on ensuring that communities are not simply consulted but are an intimate part of the planning process, and able to spell out their aspirations. Their views need to be actively canvassed, not just simply invited, and there must be a commitment to strive for consensus. This emphasis fits neatly into the way Pacific Island communities have traditionally gone about their business.

To this extent, these rules would differ significantly from regulations handed down directly by government. While it is highly likely that central governments will still want to retain the power to veto land use parameters developed within communities, and to act as the final arbiter where there remains significant conflict, this will be the exception rather than the rule. Governments will find it difficult to intervene where there is substantial community consensus.

Similar issues to those discussed here have arisen in debates about the role in PICs of 'community-based conservation areas'.[80] The 'community based conservation area' concept has been developed in response to the failure of the western model of national parks to protect biological diversity in the Pacific.[81] Between 1993 and 2001, the South Pacific Biodiversity Conservation Programme supported the establishment of seventeen such areas in twelve out of fourteen participating countries, covering more than 1.5 million hectares of land, with another seventeen set up by other groups.[82] Community-based conservation areas are not simply about biodiversity conservation, but sustainable development. They encourage the utilisation of resources in a sustainable manner (for example, ecotourism, bee keeping) while at the same time promoting the conservation of biological diversity.[83]

One of the unresolved issues is the role that law should play in the constitution and management of community-based conservation areas. On the one hand, there is a suspicion of legal mechanisms because of the fear that this may mean command and control regulation implemented by central government agencies. On the other hand, there is a very persuasive argument that legal underpinning is needed, not to empower governments, but rather to empower communities, by clarifying and delimiting the respective roles which each will play. Reti has pointed to the need for the role of the community to be 'recognised and supported' by legislation.[84]

Legislation that facilitates strategic land use planning can provide this recognition and support. Strategic land use planning can be carried out at a variety of spatial levels, and, as we have seen, it is not restricted to urban areas. The initial constitution and ongoing management of a community-based conservation area is essentially a strategic land use planning exercise at the local level. Most significantly from the perspective of the argument advanced above, the role of the community is seen to be crucial. Areas must be 'community-driven and owned'.[85] This is based on the premise that communities are more likely to comply with rules where they have been closely involved in their development and policing.[86]

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[1] This paper was originally presented to the Pacific Islands Judges Symposium on Environmental Law

and Sustainable Development, Brisbane, February 2002. I would like to thank Paul Jones for his comments on the earlier version. I am very grateful to Andrea Volentras of the South Pacific Regional Environment Programme (SPREP) for assisting me in gaining access to a number of pieces of draft legislation. The survey of proposals does not saim to be comprehensive, and secondary sources were relied on for information relating to certain bills, notably Baillie, B. G., *Environmental protection in the coastal zones of small Pacific island states: the need to regulate use of private lands* (M Phil thesis, University of Hong Kong,1999). The Bills examined were in the versions available in the first half of 2002, and may well have evolved since that time. Attempts to obtain information about initiatives in other jurisdictions, notably Vanuatu, were unsuccessful. This paper does not cover legislation dealing specifically with marine issues.

[2] Sustainable Development Bill 1999, s 53.

[3] Ibid s 54.

[4] Ibid s 58.

[5] Ibid ss 12, 56.

[6] Ibid s 20.

[7] Ibid s 25.

[8] Ibid s 27.

[9] Ibid s 41.

[10] Ibid s 43.

[11] Ibid s 49.

[12] Environment Bill 1999, s 6.

[13] Ibid s 32.

[14] *Environment Act* 1999.

[15] The analysis is based on the Environment Bill 1998, but the Bill has now been enacted into law (correspondence between Moses Biliki, Department of Forests, Environment and Conservation, Western Samoa, and Andrea Volentras, Legal Officer, South Pacific Regional Environment Programme, 26/4/99).

[16] By requiring approval to be obtained for all development listed in a Schedule to the legislation as being subject to environmental assessment.

[17] Environment Bill 1998 (Solomon Islands), s 17; *Environment Act* 1999(Kiribati), s 14.

[18] Environment Bill 1998 (Solomon Islands), s 38; *Environment Act* 1999(Kiribati), s 34.

[19] Environment Bill 1998 (Solomon Islands), s 16 and Second Schedule; *Environment Act* 1999(Kiribati), s 13 and Schedule.

[20] Compare Tonga's Environmental Impact Assessment Bill 1999 which allows the Minister to prepare a comprehensive management plan where he considers that any area of Crown land deemed suitable for development would benefit from the making of a plan.

[21] *Environmental Planning Act* s 4.

[22] Department of Environment and Conservation, Papua New Guinea, *Proposed Environmental Regulation Framework: A Discussion Paper* (25 March 1996).

[23] *Environmental Planning Act* s 4.

[24] Courts in other jurisdictions have on occasions interpreted legislation such as this as raising issues of jurisdictional fact, giving them a role to play in determining whether environmental impacts are significant. See *Timbarra Protection Coalition Inc v Ross Mining Nl & Ors.* [1999] NSWCA 8.

[25] Draft of 16/10/2000.

[26] Regulations are to identify activities as level 1, 2 or 3 activities. Activities that involve listed matters of national importance (s 5, insuding the protection of areas of significant biological diversity and the habitats of rare, unique or endangered species) or which may result in serious environmental harm can be prescribed as level 3 activities (s 42). All proposed level 3 activities and certain level 2 activities are

subject to environmental impact assessment (s 50). See also Tonga's Environmental Impact Assessment Bill 1999, ss 6-12, which provides for major project assessment and minor activities assessment. The activities falling into these two categories can be identified in Regulations, but in the meantime the approach is that matters which have a significant impact on the environment are subject to major project assessment.

[27] Environment Bill 1998 (Solomon Islands), s 15; *Environment Act* 1999(Kiribati), s 12. See now the Papua New Guinea Environment Bill (draft of 16/10/2000), s 65(3), setting out the factors to be considered by the decision-maker where an environment permit is required. Permits are required for proposed, but not existing, level 2 and 3 activities (s 44).

[28] Strategic is a much-maligned word in the planning context. It is used here narrowly, to distinguish what is often referred to as statutory planning from project or development control. What I have in mind has also been labelled, less eloquently, forward planning. Strategic land use planning is carried out under processes spelt out in legislation, and often results in precise and enforceable land use parameters, going beyond broad objectives and general strategies. It looks at land availability and suitability for development across a broad area with a view to satisfying a community's social and economic needs within environmental constraints. It explores the interrelationships between different uses and the cumulative impact of development. It sets both a forward vision and specific development control parameters. It can be carried out at a number of different spatial scales, ranging from the village to the regional level, and even the national. Development control, on the other hand, is concerned with the assessment and regulation of specific project proposals on individual plots of land.

[29] See, for example, *Environmental Planning and Assessment Act* 1979 (NSW). In practice, however, the potential of the legislation has not been realised. See David Farrier, 'Fragmented Law in Fragmented Landscapes: The Slow Evolution of Integrated Natural Resource Management in New South Wales' (2002) 19 *Environmental and Planning Law Journal* 89.

[30] *Land Planning Ordinance* [Cap 48] (Kiribati); *Town and Country Planning Act 1979* (Solomon Islands).

[31] Boer, B., "Solomon Islands" in Boer, B., ed., *Environmental Law in the South Pacific*, Environmental Law and Policy Paper No. 28 (SPREP and IUCN, 1996), pp 199-201.

[32] See above, note 15.

[33] *Environment Act* s 6(1)(d). See also, Environment Management Bill 2002 (Tonga), s 7(1)(e).

[34] *National Environmental Protection Act 1984*, ss 27, 28.

[35] *Lands, Surveys and Environment Act 1989*, Part 8, Division 4. See also the *Watershed Protection and Management Regulations* 1991, made under both the *Forests Act* 1989 and what is now the *Lands, Surveys and Environment Act* 1989. These regulations provide for the making of watershed management plans, to "provide the framework for rational and effective management of the watershed". No plans appear to have been made in practice.

[36] *Lands, Surveys and Environment Act 1988*, s 116.

[37] Ibid s 2.

[38] Ibid.

[39] *An Integrated Planning and Urban Management System for Samoa* (Joint Government of Samoa and Asian Development Bank Technical Assistance Project, Final Report, December 2001). The author was a member of the project team. A Bill to implement these proposals was being developed in mid-2002, but was not available for comment.

[40] *Rarotonga Environment Act 1994-95*, Part IV. There is a proposal for new environmental legislation. The Environment Bill 2000 retains many of the provisions of the *Rarotonga Environment Act* but applies them to other Islands.

[41] The broad enabling provision is, for essential purposes, identical to the provision discussed above in the Samoan legislation: *Rarotonga Environment Act 1994-95*, s 37(1)(h).

[42] *Rarotonga Environment Act 1994-95*, s 2.

[43] However, like the Samoan *Lands, Surveys and Environment Act*, there is a specific power to make a management plan in relation to pollution and waste: s 37(f).

[44] The *Rarotonga Environment Act* is not integrated with the *Land Use Act 1969*, which provides for a zoning system and requires prior approval for any building construction in a zoned area. According to Pulea, the *Land Use Act* has been 'dormant for some years': Pulea, M., "Cook Islands" in Boer, B., ed., *Environmental Law in the South Pacific*, Environmental Law and Policy Paper No. 28 (SPREP and IUCN, 1996), p 33.

[45] A copy of the Bill could not be located. The discussion is based on the summary by Baillie, B. G., *Environmental protection in the coastal zones of small Pacific island states: the need to regulate use of private lands*, (M Phil thesis, University of Hong Kong, 1999), para 7.1.2.3.3.

[46] Pulea, M., "Kingdom of Tonga" in Boer, B., ed., *Environmental Law in the South Pacific*, Environmental Law and Policy Paper No. 28 (SPREP and IUCN, 1996), pp 133, 135.

[47] Environmental Impact Assessment Bill 1999. See also Environment Management Bill 2002, which provides for administrative arrangements relating to environmental management.

[48] Baillie, B. G., *Environmental protection in the coastal zones of small Pacific island states: the need to regulate use of private lands* (M Phil thesis, University of Hong Kong, 1999), p 267.

[49] Sustainable Development Bill 1999, s 53(4)(e) and (f).

[50] Environment Bill (draft of 16/10/2000), s 31.

[51] Policies must "identify the boundaries of any area affected": ibid s 32(1)(c).

[52] Ibid s 2.

[53] Environment Bill (PNG), (draft of 16/10/2000), s 33; Sustainable Development Bill 1999 (Fiji), Part V.

[54] Environment Bill, (draft of 16/10/2000), ss 10-12.

[55] Ibid s 13.

[56] Ibid s 7.

[57] Ibid s 7(3).

[58] Ibid ss 101-107.

[59] Ibid s 38.

[60] Ibid s 38(2).

[61] Ibid s 10(2).

[62] Ibid s 2.

[63] See for example, Hawkins, K., *Environment and Enforcement: Regulation and the Social Definition of Pollution* (1984). See generally, Ayres, I., and Braithwaite, J., *Responsive Regulation: Transcending the Deregulation Debate* (1992); Gunningham, N., and Grabosky, P., *Smart Regulation: Designing Environmental Policy* (1998).

[64] See for example, *Environmental Planning and Assessment Act 1979* (NSW), s 23; *Protection of the Environment Operations Act 1997* (NSW), s 253. Note that provisions authorising any member of the community to seek an order to restrain breaches of legislation allow not only civil enforcement proceedings brought against those who breach land use regulations, but also proceedings in the nature of judicial review of administrative action. The allegation in that context is that public officials have failed to comply with legal requirements relating to their decision-making responsibilities, including environmental assessment and community participation. Fiji's Sustainable Development Bill 1999, specifically provides that anybody can bring legal proceedings to compel government agencies to perform their duties under the legislation. This would not authorise civil enforcement proceedings.

[65] Environment Bill 1999, s 18. Those who have suffered loss as a result of an environmental incident can bring civil proceedings seeking damages: s 20.

[66] Ibid s 19(2), (3).

[67] Ayres, I., and Braithwaite, J., *Responsive Regulation: Transcending the Deregulation Debate* (1992).

[68] Teubner, G., Farmer, L., and Murphy, D., *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization* (1994).

[69] *Rarotonga Environment Act 1994-95*, ss 32-36. The Cook Islands' Environment Bill 2000 adopts this process and would extend it to the outer islands.

[70] Native customary and native freehold land: *Rarotonga Environment Act 1994-95*, s 2.

[71] *Rarotonga Environment Act 1994-95*, s 32(3). The relevant agency is the Tu'anga Taporoporo, which comprises the Environment Council, and Environment Service: *Rarotonga Environment Act 1994-95*, s 5.

[72] Ibid s 32(4).

[73] Ibid s 32(5), (6).

[74] Ibid s 32(7).

[75] For an exception see Samoa's *Watershed Protection and Management Regulations 1991* which allow the Minister to make an order on the recommendation of the Watershed Management Committee prohibiting cultivation or any other soil or vegetation disturbance of an area for up to five years. If refusal of permission or the conditions attached cause hardship, then compensation is payable.

[76] *Lucas v South Carolina Coastal Council* 112 S. Ct. 2886 (1992). See Farrier, D., "Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations" (1995) 19 *Harvard Environmental Law Review* 303.

[77] See *Action Plan for Managing the Environment of the Pacific Islands Region 2001-2004* (SPREP 2000), which emphasises the need to promote the full integration of environmental issues into social and economic development at natural and regional levels. See also *Action Strategy for Nature Conservation in the Pacific Islands Region* 2003-2007 (SPREP 2002), which adopts a "mainstreaming approach" to conservation that "recognises that a successful conservation strategy will improve quality of life through a vibrant economy, a prosperous society and a healthy environment".

[78] See Environment Management Bill 2002 (Tonga), s 7(1)(b), (d)

[79] Singh, A. K., "Sustainable Development Bill 1999: Objects and Reasons" Attorney General's Chambers, Suva, Fiji (October 1999).

[80] Replication of these areas is a major focus of the *Action Plan for Managing the Environment of the Pacific Islands Region 2001-2004* (SPREP 2000), para 5.1. See also *Action Strategy for Nature Conservation in the Pacific Islands Region* 1999-2002 (SPREP 1999), Regional and International Key Actions 1.8 and 2.6.

[81] Miller, S. and Reti, J., "From Tonga to FSM" in *6th Pacific Conference on Nature Conservation and Protected Areas*, Volume 3, Conference Papers (SPREP 2001), Annex 3; Sheppard, D., "Expanding Partnerships and Support for Community-based Protected Areas – Implications from Global Experience for the South Pacific" in *6th Pacific Conference on Nature Conservation and Protected Areas*, Volume 3, Conference Papers (SPREP 2001), p 217; Reti, J., "Current Status of Biodiversity Conservation in the Pacific Islands Region," Paper presented to the *ADB Regional Biodiversity Experts' Consultation*, Marula, Philippines (March 2001).

[82] South Pacific Biodiversity Conservation Programme, *SPBCP Terminal Report* (SPREP, November 2001).

[83] South Pacific Biodiversity Conservation Programme, *User's Guidelines* (SPREP, October 1994); Sesaga, S., "Necessary and Sufficient Conditions for Sustaining Community-Based Conservation Area Projects: Experiences from the South Pacific Biodiversity Conservation Programme (SPBCP)" in *Protecting Our Environment Island Style*, Proceedings of the Nineteenth Annual Pacific Islands Conference, American Samoa (June 2000), p 33.

[84] Reti, J., "Current Status of Biodiversity Conservation in he Pacific Islands Region," Paper presented to the *ADB Regional Biodiversity Experts' Consultation*, Marula, Philippines (March 2001). The *Action*

Strategy for Nature Conservation in the Pacific Islands Region 1999-2002 (SPREP 1999), Local and National Key Action No 3.2 goes even further in making a commitment to empower communities "through legislation and policy measures that legalise or recognise their ownership and control of their resources".

[85] South Pacific Biodiversity Conservation Programme, *User's Guidelines* (SPREP, October 1994).

[86] Sheppard, D., "Expanding Partnerships and Support for Community-based Protected Areas – Implications from Global Experience for the South Pacific" in *6th Pacific Conference on Nature Conservation and Protected Areas*, Volume 3, Conference Papers (SPREP 2001), p 219.

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