

# CASE STUDY 38<sup>1</sup>

## Tatau<sup>2</sup>

*This case study is about the practice of tattooing (Tatau) in Samoa. It starts by presenting three policy approaches in the field of culture and development, assumed to be mutually compatible. The case study then tests this assumption by examining the case of the practice of tattooing (tatau) in Samoa.*

### THREE APPROACHES TO CULTURE AND DEVELOPMENT

There has been growing interest worldwide in protecting traditional knowledge and safeguarding ICH. In the Pacific Islands region this has found expression in policies based on three main approaches:

- (a) the deployment of new kinds of intellectual property protection (*sui generis* regimes) to vest ownership and exclusive control of traditional knowledge in its customary owners;
- (b) the promotion of cultural industries as a means of sustainable development; and
- (c) the safeguarding of intangible cultural heritage (ICH).

These three approaches were stimulated by a combination of concerns about misappropriation of traditional knowledge, decreasing transmission of that knowledge, dilution and loss of culture as a result of the forces of globalization, and the hope that traditional knowledge may be a resource that can be tapped to provide economic opportunity for local communities. Community or group ownership or control is increasingly seen as an attractive alternative to giving rights over traditional knowledge (or ICH) to the state, or to individuals.

### TATAU IN SAMOA: A CONSTANTLY CHANGING TRADITION

The *tatau* is performed by tattooing specialists known as *tufuga*. In the nineteenth century and even today to a large extent, these *tufuga* are associated with two main *aiga*' (extended families) in Samoa. The organization of these families is comparable to artisan guilds in other societies, and follows the system in which master craftspeople teach their apprentices the skill. Tattooing 'families' are organized in a hierarchical fashion, each with particular rules, standards and distinctive trademarks.

Historically, *tatau* was performed as a rite of passage to adulthood and would take place over a number of days, often accompanied by feasts and celebrations. The tattooing combs traditionally used by the *tufuga* were made from boar's tusks and the ink was made from candlenut soot mixed with water. Initially suppressed by missionaries in the 1830s, *tatau* went underground until the 1870s when the Catholic Church began to tolerate tattooing. Local and international interest in *tatau* has grown since the early 1960s. Today, *tatau* has become a statement of Samoan heritage and identity, particularly among those in migrant Samoan communities, rather than a ritual entrance to manhood. It is also now being regularly performed on non-Samoans. In some

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1. Case study from the material of the global UNESCO capacity-building programme for safeguarding intangible cultural heritage
  2. Text adapted for UNESCO workshop from Forsyth, M. 'Lifting the Lid on "The Community": Who Has the Right to Control Access to Traditional Knowledge and Expressions of Culture?' *International Journal of Cultural Property* (2012) 19:1–31. Aspects of the article (especially the commentary on the Intangible Heritage Convention) have been modified for use in this workshop and may not represent the views of Dr. Forsyth. Please read the full article for the original version.

contexts, *tatau* is now being performed using modern tattoo needles and modern ink. Designs traditionally used for men are now also tattooed on women. Western and other Polynesian (such as Maori) designs are being incorporated into the *tatau* design, although this seems to have been occurring since at least the 1930s. Finally, cash is increasingly being used to pay for *tatau*, either exclusively or together with customary objects of value.

## DIFFERENT STAKEHOLDERS CLAIM STEWARDSHIP OVER *TATAU*

There are significant disagreements within and between Samoans, the Samoan diaspora and *tufuga* families about the extent to which changes to the *tatau* traditions are positive developments, or not, and who should decide on and control these changes. In these debates, three different groups claim stewardship or ownership over *tatau*: the *tufuga* practitioners (especially the two main families historically tasked with the role), the State, and the general public.

The **tufuga** in general take the view that they have to move with the times. Some are active agents in the dissemination of the tradition, organizing festivals and teaching different people to perform the art. Some want to keep the designs the same. Within this group, members of the two main *tufuga* families argue that they have special rights over the practice of *tatau* because of their historical connections. They trace their 'gift' back to a mythical story in which a pair of twin goddesses came to Samoa and gave a basket of *tatau* combs and instructions on how to use them to their ancestors. These families want to copyright the traditional designs and control their use on banknotes, fabrics and other items. Other *tufuga* – especially a possible third 'family' – challenge this claim. All *tufuga* want to retain the right to make decisions about *tatau* and to benefit financially from the practice.

The **State** claims *tatau* as a national symbol and wishes to use it to differentiate Samoa as a tourism destination. The State therefore promotes *tatau* as a national marker of its culture and heritage through its tourism office, at international sporting events and in other international forums. *Tatau* designs are also incorporated on Samoan banknotes. *Tatau* is an art form that has proved to be much admired by outsiders and can be unambiguously identified with the geographical area of Samoa.

The **general public**, both in Samoa and in migrant communities overseas, claim *tatau* as part of their cultural identity: increasing numbers of Samoans are being tattooed in Samoa and across the Samoan diaspora. Many community members are concerned about the new directions in which the *tufuga* are taking *tatau* and accuse them of doing it for commercial reasons. Some Samoans started a Facebook page

'to stop people who are trying to acquire these traditional tattoos without proper cultural etiquette/knowledge of *Tatau/Malu* and their sacred significance. ... As Samoans we are all co-owners of that intellectual cultural property. And we don't want our treasured jewel being dragged through the mud anymore.'

This attitude expressed the desire to preserve and limit the practice to its premodern form to reinforce a Samoan sense of identity and cultural pride.

## HOW DIFFERENT POLICIES AFFECT TATAU SAFEGUARDING

### Intellectual property protection through a sui generis regime

The National Traditional Knowledge policy and legislation in Samoa, currently under discussion, was inspired by the Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture (2002) and other regional instruments. These broadly follow the UNESCO-WIPO Model Provisions (1985).<sup>3</sup> They aim to prevent the misappropriation of traditional knowledge by conferring upon owners of traditional knowledge the right to authorize others to exploit their traditional knowledge, and to prevent others from exploiting it without their free, prior and informed consent. They also aim to facilitate the commercialization of traditional knowledge so that it will contribute to sustainable development for the region.

Such policies would likely vest proprietary rights over all aspects of tatau to the 'knowledge holders' (tufuga) in perpetuity. This would allow tufuga to determine who is allowed to practice tatau and to use tatau motifs. It will be difficult to identify who are the traditional knowledge holders in this case. Potential claimants include the tufuga within the two main families, all members of these families (complicated by the fact that membership is not strictly hereditary), and, possibly, a number of other families who have put forward their own claims to practice tatau as well. Samoan tufuga living overseas also claim rights.

If the legislation treats the practitioners as a single group, each time anyone (even one of the tufuga) wanted to use tatau for a non-customary purpose, they would need to get the consent of all the other tufuga. The pace of change of the practice would therefore be determined by the most conservative of the tufuga, whereas in the past a particular individual has been able to undertake a new initiative independently.

### Promotion of cultural industries

Samoa has not yet ratified the UNESCO 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The development of cultural industries in the region is being shaped largely through the framework of the *Structuring the Cultural Sector in the Pacific for Improved Human Development* project funded by the European Union. The ultimate goal is for all stakeholders in culture—including the government, communities, individuals, artists, academics, traditional knowledge holders and leaders—to have ownership of, and thus ongoing investment in, the cultural sector. Cultural mapping programs are used to determine what cultural resources actually exist. Culture is thereby viewed as an 'asset' or 'resource'. The cultural industries approach focuses on creating opportunities for a broad spectrum of the population to use these cultural assets for commercial gain.

Advocates of this approach say that regulating the practice of traditional cultural expressions by giving tufuga legal rights over it is 'bound to have a chilling effect on fair use and artistic expression'. A regulatory framework for cultural industries would thus ensure widespread access to the practice of *tatau* by all Samoans, rather than assisting the tufuga to control it. This could undermine the authority of tufuga families who have traditionally controlled some aspects of *tatau* practice. However, it may not result in dramatic changes to the practice of *tatau*. Many members of the Samoan public and diaspora wish to retain more traditional features of *tatau* than the tufuga families do.

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3. UNESCO-WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions

## Safeguarding of intangible heritage

Samoa ratified the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (the Convention) in 2013. The main aim of the implementation of the Convention is safeguarding ICH and awareness raising about its importance (article 1). In this process the widest possible participation of the communities, groups and individuals concerned is encouraged (article 15). The Convention together with its Operational Directives provides a normative framework at the international level, within which communities should be free to take decisions on their own safeguarding measures and approaches, within the boundaries of the State's legal system. At present there is no specific ICH legislation in Samoa.

Under the Convention, States Parties are required to ensure that inventories of ICH are compiled in their territory, in a way that contributes to safeguarding (articles 11-12). States Parties shall furthermore endeavour to ensure the widest possible participation of communities, groups and where appropriate, individuals, in the framework of its safeguarding activities (Article 15).

The term 'communities, groups and individuals concerned' has been interpreted as including both practitioners and those who identify the ICH practice as part of their cultural heritage (following article 2.1). In the case of *tatau*, the 'communities, groups and individuals concerned' would include not just the *tufuga* families, or *tufuga* in general, but also all Samoans and the Samoan diaspora who identify with the practice as their own. Ideally, these rather disparate groups would all need to have a say in how to identify *tatau* as ICH for any inventorying process, and what should be done (if anything) to safeguard it. An inventorying process would usually rely on community representatives to represent these views. The framework within which the inventory is compiled, and the perceived benefits of inclusion on it, are therefore likely to affect the negotiations within the community and determine whose voices are heard.

The Convention notes the importance of respect for 'customary restrictions on access' in ensuring public access to the ICH (article 13), which may mean that some individuals or groups within the community concerned may retain more control over the ICH than others. In regard to *tatau*, 'customary restrictions on access' are likely to be disputed by those who want it to be a symbol of Samoa in general, and supported by those who want it to be limited to traditional initiation into Samoan identity. *Tufuga* families may seek to retain their authority over the use of the practice while ensuring their income.

Inventorying *tatau* under the 2003 Convention would not result in the assignment of new legal rights to a specific group of people (such as the *tufuga*), but if the ability to claim proprietary rights in traditional knowledge is realized through national intellectual property legislation in Samoa, the creation of inventories of ICH will likely be used as evidence of ownership. The owners of traditional knowledge (assuming they can be identified) may claim the exclusive right to say what (if any) safeguarding measures are put in place.

The Operational Directives of the Convention encourage States Parties to ensure, in particular through the application of intellectual property rights [...], that the rights of the communities, groups and individuals concerned are duly protected when raising awareness about their heritage or engaging in commercial activities (paragraph 104). Indeed, activities such as documentation and inventorying of ICH may create new intellectual property rights (over documentation or databases), that might be owned by State agencies, researchers or NGOs involved in creating these records by default. They may therefore need to be specifically assigned to the communities, groups and individuals concerned. If the copyrights are assigned to community members, an important question is who should own these rights - the *tufuga* or a general community organization?

## CONCLUSION

In conclusion, the objectives of the three identified policy approaches are broadly aligned, but also diverge in some respects. In particular, they suggest very different answers about who should benefit from, and control the use of, ICH such as *tatau*. It is therefore important to consider how these three policy approaches might interact with each other, and to what extent any tensions between them can be mitigated or managed in the context of *tatau* safeguarding.

## QUESTIONS TO ADDRESS:

1. Which approaches to culture and development have influenced responses to *tatau* safeguarding in the Pacific Islands? How do these approaches relate to international and regional law?
2. Why does the case study suggest the three policy frameworks will have different outcomes on the safeguarding and promotion of *tatau* in Samoa? Do you agree with this analysis, or not?
3. What examples relating to different policy frameworks can you think of from your own experience?