

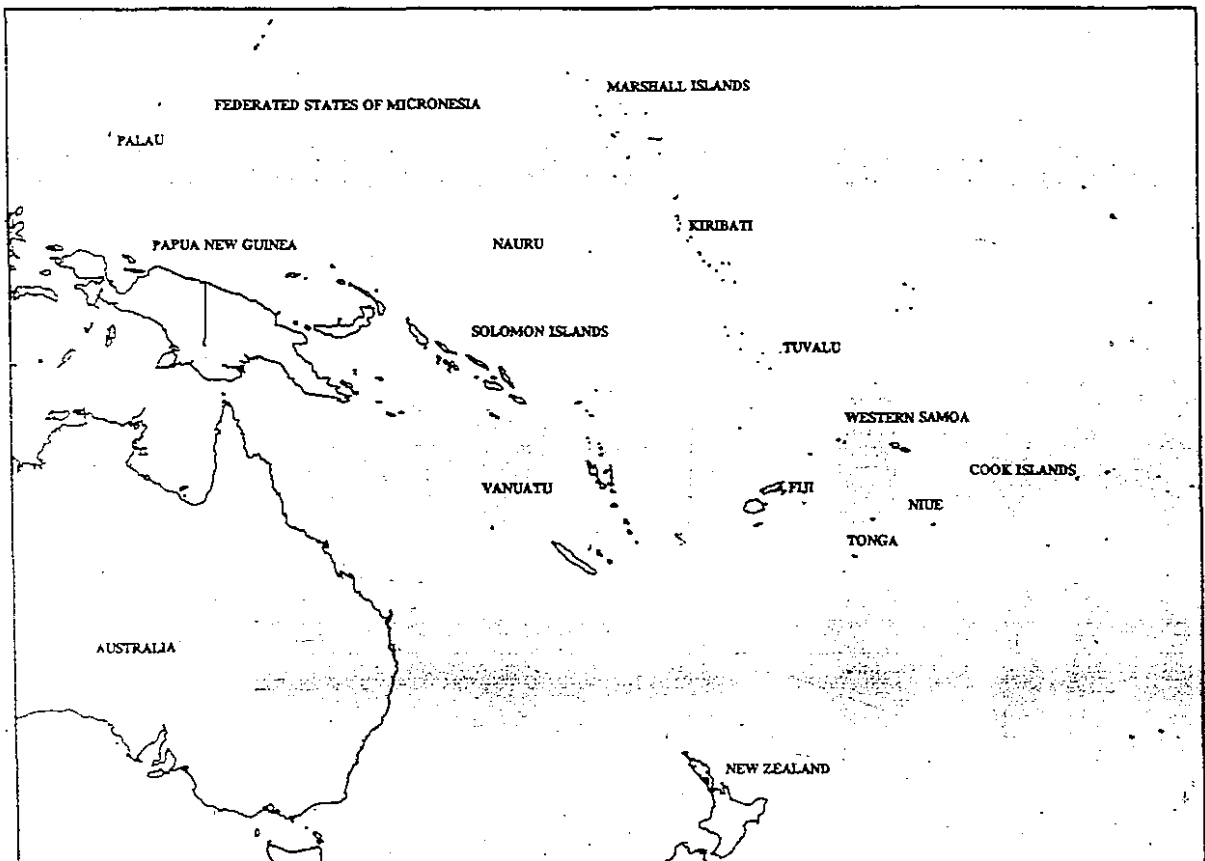


**An Overview of Constitutional and Legal
Provisions Relevant to Customary Marine
Tenure and Management Systems
in the South Pacific**

Mere Pulea
Pacific Law Unit, USP, Vanuatu

FFA Legal Services Division

FFA Report 93/23



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ABSTRACT

The effects of marine resource development, aggravated by the rise of population in some Pacific countries, are disturbing those elements on which life depends. Modern technology is making it possible for distant water fishing nations (DWFNs) to fish the Pacific Ocean and sometimes within the exclusive economic zones of Pacific Island countries. The coastal zones, the breeding grounds for marine life, are under pressure from overfishing, coastal run-offs and wastes dumped in the ocean. Efforts to secure sustainable development, conservation and management of the marine resources take place, firstly against a background of complex international, national and customary laws, and secondly against a background of plural legal systems where laws passed by a country's legislature, laws "received" during the colonial era, and customary law, all co-exist.

The plural legal systems in all Pacific countries rank constitutions, statutes, and the "received laws" (with some exceptions), supreme over customary law. The two key problems of customary law are its unwritten nature and its diversity. Any law in conflict with the constitution is void and of no effect. This is the very essence of constitutional law. Similarly, if unwritten customary law is in conflict with statutes, the statutes prevail. A dual system of law (ie. statutes and unwritten customary law) has little in its favour. It is uncertain and often perplexing for indigenous communities whose unwritten laws can easily be overridden by statutes. Decisive steps therefore had to be taken in constitutions of newly independent nations to develop principles that granted protection to customary rights and rules. In some areas, however, statutory law has been cautious in expanding the frontiers of customary law.

Under the constitutions of most countries, Parliament has the responsibility to provide for the proof and pleading of customary law and regulate the manner in which customary law is to be applied. Customary rules that are incorporated in statutes and by-laws are not custom but law. The courts act as a forum to translate customary rules into law. The protection of customary rights and customary practices and usages are essentially dependent upon these two forums. The extent to which customary law becomes an integral part of the legal system has broad implications for the exercise of customary tenure rights and the continuing exercise of customary conservation and management practices.

Customary marine management tools need to be further investigated as the safeguarding of the resources will become more and more important as years go by. Conservation and management provisions in statute law by themselves are not enough. The body of unwritten customary conservation and management laws within communities could play an important role in the action needed to effectively protect the marine environment.

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OVERVIEW OF CONSTITUTIONAL AND LEGAL PROVISIONS RELATING TO CUSTOMARY MARINE TENURE AND MANAGEMENT SYSTEMS

SECTION I INTRODUCTION

Over the past two decades, Pacific Island countries have been actively pursuing a policy of marine resource development. Initiatives by both governments and agencies, such as the South Pacific Regional Environment Programme, had become a necessity in order to formulate environmental ethics which would assert closer supervision of activities that deplete resources beyond the levels of sustainability. Critics of marine resource development assert that legal measures to protect and conserve marine resources are inadequate. For example, in most Pacific countries there is no legal requirement for environmental impact assessments. Where adequate conservation and management provisions exist, enforcement appears to be lax, particularly in small closely-knit and kinship based communities where internal conflicts could arise if management measures differ from customary practices.

The development of customary norms and principles on marine resource management within the legal system is limited by a number of factors, such as the lack of systematic recording of traditional knowledge, the wide variations of customary law and the fact that unwritten customary law does not, as yet, command the authority or respect of established statute law. Marine resource laws promulgated in the last five years (eg. Cook Island's Marine Resources Act, 1989; Tonga's Fisheries Act, 1989) have strengthened the legal requirements for management and conservation of marine resources but have given little or no attention to the role of customary conservation and management in the resources management framework. Despite the range of conservation measures in statutory law, marine resources continue to be vulnerable and in danger of depletion if more efforts are not made to safeguard the very resource that Pacific Islands are highly dependent upon for export, trade and domestic needs.

In recent testimony, the 1992 United Nations Conference on Environment and Development (UNCED) (also called the Earth Summit) in Rio de Janeiro observed:

" ... that despite national, subregional, regional and global efforts, current approaches to the management of marine and coastal resources have not always proved capable of achieving sustainable development and coastal resources and the coastal environment are being rapidly degraded and eroded in many parts of the world. Fishing in many areas under national jurisdiction, face mounting problems, including local overfishing, unauthorised incursions by foreign fleets, ecosystem degradation, increasing competition between artisanal and large-scale fishing and between fishing and other types of activities. Problems also extend beyond fisheries as coral reefs, and other coastal and marine habitats are under stress or threatened from a variety of sources, both human and natural. "

The above statement is included in Chapter 17 of Agenda 21, an action strategy endorsed by the Earth Summit for the next decade to guide the actions of countries and the international community. Coastal States, particularly developing countries whose economies are overwhelmingly dependent on the exploitation of the marine living resources, are encouraged to commit themselves to the conservation and sustainable use of marine resources in areas under national jurisdiction and to:

" ... take into account traditional knowledge and interests of local communities, small-scale artisanal fisheries and indigenous people in the development and management programmes. " (Agenda 21:17.78(b)),

as one of the objectives.

Within the same time as the endorsement of Agenda 21, the Forum Fisheries Agency (FFA), responding to regional concerns and the concerns of writers such as Johannes, Ruddle, Baines, Hviding and others (1) who have studied traditional management issues, convened a one day workshop on traditional management during the Sixth Technical Meeting of the Forum Fisheries Committee at Niue from 27-30 April 1992. The workshop recommended that:

" FFA should conduct a review of regional constitutional and legislative provisions and international law relevant to customary marine tenure and management systems. A report arising from this review should be made available to member countries before the annual session of the Forum Fisheries Committee in 1993; " (Recommendation 4).

The provision of an adequate national marine resource management framework requires proven management strategies deployed from all sources. The positive forces of customary management could be complementary to the range of management provisions set out in law. But dualism has little in its favour. It is uncertain and often perplexing for indigenous communities whose unwritten laws can be easily overridden by statutes. The solution is the effective integration of the principles of customary conservation and management with those in statute law. However, effective integration is also dependent upon a more flexible approach to the doctrine of repugnancy (ie. customary law in conflict with statute law is void and of no effect). Indigenous populations have developed principles of customary conservation and management of resources which could provide a clearly visible customary management model and, together with the range of management provisions in statute law, could provide more uniformity and give the fullest effect possible to a comprehensive management regime. Although some of the management principles of customary law and statute law are partially harmonised (eg. prohibitions and restrictions and closed areas), there is still a whole body of customary management laws, rooted in the culture of indigenous societies, that remains under-utilised.

Purpose

There is a number of purposes as to why a review of this nature is important:

- The extent to which customary law is recognised as an integral part of the legal framework and the extent to which customary management practices form part of a country's resource development and conservation strategy is unclear. What is even more unclear in a plural system of law, (a feature of Pacific legal systems), is the extent to which constitutions and statutory law have modified unwritten customary law.
- Customary law regulates tenure to marine areas and resources. At the inception of colonial administration, customary laws relating to property rights and tenure were considerably varied. For example, in countries under British rule, English law became the basic law as local customary law was irrelevant to new settlers. New laws, based on English law, regulated marine, property and fishing rights. This disrupted the network of rights and obligations between members of the community as these laws had no counterpart in customary law. Independence constitutions have cleared the ground for the re-emergence of customary law but the major problem facing customary law is how to restore certainty and the quality of permanence to customary practices before they are threatened with disintegration.

- The spread of literacy, trade and scientific-based technologies prompted the need to formulate rules addressing rights and responsibilities, particularly in the development of natural resources, and with the rise of a centralised system of government, authority to develop natural resources in the national interest. This development gave little (if any) recognition to the rules of custom as customary law provided insufficient guidance to deal with these new developments. The promotion of the sustainable use of resources in the 1980s has brought about legal reforms to strengthen the principles of conservation and management in law but this marked bias towards statute law gives little recognition to the elaborate customary management and conservation rules developed in some societies.
- In some countries there is an appearance of adequate allowances made in regulations and by-laws for customary law to be applied, but there are known problems that remain unaddressed which negates this belief. Scant references (if any) to the recognition and preservation of customary practices are made in statutes. Some opportunity exists for the inclusion of customary management practices in regulations but as the power to make regulations is discretionary, the inclusion of customary management practices is dependent upon the person who is responsible for promulgating the regulations.
- Pacific marine resources law is largely influenced by global trends. With the development of new concepts such as the Exclusive Economic Zone (EEZ) and stronger conservation and marine resource management measures under the United Nations Convention on the Law of the Sea (UNCLOS), the protection of all components of the marine environment has been addressed in a more positive fashion. Improvements have been achieved in most Pacific countries by the imposition of stronger conservation laws and regulations, changes in policies and goals to deal with the environment in a sustainable way. This has resulted in a much improved prognosis than was the case 20 years ago. Events in the past decades such as the increased fishing by distant water fishing nations in the EEZs of Pacific Island countries and the continued depletion of marine resources have brought about the discovery that some problems of marine resource management at the national and regional levels are more deep rooted and in need of a range of solutions.

This Review provides some background on the effects of introduced laws on customary law and the extent to which customary law and practices are safeguarded, which has broad implications for the preservation of customary marine tenures and traditional management systems. Whether customary law today plays a positive role in ensuring conservation of marine resources and sustainable development is largely dependent upon the extent to which customary law is permitted to exist as an integrated part of the legal system and recognised as a distinct body of law that can be enforced. Successful integration of customary law depends also on the ability to strike the appropriate balance between the social and cultural needs of the community and economic development.

The range of constitutional, legislative and international provisions relevant to the management of marine resources will be outlined to provide a framework against which the effective integration of customary marine tenure and traditional management systems into the legal system can be assessed. An attempt will also be made to define the extent to which Pacific Island countries have reformed marine resource laws and the efforts made to weld together positive elements of customary and statutory management laws in order to provide a superior management regime to deal with momentous changes taking place in the marine environment.

Structure

The structure of this Review is as follows:

Section I

- provides an introduction to the Review, the terms of reference and the justifications and reasons as to why a review of this nature is important.

Section II

- makes comment on the plural legal system; considers the various definitions of customary law; and describes the sources of law;
- collates the provisions made by the Constitutions and Statutes for the recognition of customary law: the role and status of customary law within the legal system; and the application and enforcement of customary law.

Section III

- describes customary rights to natural resources; and the changes to customary ownership rights;
- distinguishes between customary tenure and ownership;
- discusses the development and protection of customary marine tenure;
- discusses who is entitled to what rights and attempts to define what is meant by ancient, traditional and existing rights.

Section IV

- describes the legal arrangements in the marine environment;
- the marine boundaries under international and national law; and boundaries of the marine environment established under customary law;
- defines the differences between customary law and statute law over portions of the marine environment such as the foreshore and the seabed.

Section V

- describes the management and conservation of marine resources;
- outlines marine management strategies incorporated in legislation of selected Pacific Island countries; and;
- comments on customary management of marine resources.

Section VI

- comments on a number of issues relating to the incorporation of custom into the legal system, in a section titled "Commentary".

The Context

Many forces which impact on localities, particularly fishing communities, originate in national, regional or international processes. This wider environment influences the directions of change within a locality and could promote or constrain the scope of customary marine resource management and development. Amongst the more important changes occurring in a locality are:

- changes to the economic structure. Increased competition within the community, sometimes affecting the traditional hierarchical structure where this exists as a feature of society;

- social changes taking place in small communities resulting in the erosion of customary knowledge and practices;
- the introduction of technologically based manufacturing industries eg. fish processing and manufacturing industries;
- the changes in the size and scale of productive units and the expansion of self-employment opportunities;
- the intervention of multinational corporations in fisheries and the development of large-scale fishing industries;
- the marketing and management of fisheries based on a more market orientated industry.

These changes impact on all areas of marine resource management and control, inter-communal relationships and could prevent customary management systems from functioning effectively. If these changes threaten customary management practices to the point of disintegration, it is all the more reason why both statutory and customary law should adjust to these new circumstances.

The Study Area

This Review mainly focuses on the following countries of the FFA Region: Cook Islands, Federated States of Micronesia (FSM), Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa. It was not possible to include some countries within the review framework because of the complexities involved in their legal systems which would require time to research and the unavailability of material during the period of this Review.

It is also not possible to describe in any detail the customary fisheries laws and management practices that are found in each country as customs are in the main confined to localities or communities and a large variation exists. The 6th FFA Technical Sub-Committee Workshop kept these constraints in view and further recommended that:

" In member countries with known effective customary marine resource management regimes in place, FFA should facilitate a series of case studies to assess opportunities for the application of these practices elsewhere. " (Recommendation 5).

Information

There is literature available on the various aspects of customary marine resource management and customary marine tenure in a number of Pacific Islands by writers such as Johannes, Sudo in Micronesia; Polunin in the Western Pacific; Baines in Fiji and Baines and Hviding in Solomon Islands, Sims in the Cook Islands (2) to name a few. Their work will be used as references to guide this Review. Whilst this Review draws on a number of these valuable contributions, the focus will be specifically confined to an examination of the juridical basis of customary law and its recognition within the legal system.

Information for this study comes from both primary and secondary sources. The various Constitutions and statute law relating to marine resources have been used and supplemented by more detailed information describing those aspects of the traditional tenure system thought to be of particular importance. A good deal of guidance and information on customary law is drawn from a number of sources and in particular from material prepared by Professor Paterson, Director of the Pacific Law Unit, University of the South Pacific and Professor Jean Zorn, Cuny Law School,

New York and prepared for the Pacific Law Unit of the University of the South Pacific. I wish to thank Michael Lodge, Legal Counsel, Forum Fisheries Agency for the helpful comments and suggestions made on the draft of this Review.

SECTION II

THE LEGAL FRAMEWORK

Plurality - A Feature of Pacific Legal Systems

Comparative legal scientists broadly divide the legal systems of the world into groups and make distinctions between the civil-law family (continental law, Romano-Germanic law), the common-law family, the family of socialist law and a family (or families) consisting of more exotic legal systems. The families of civil, common law and socialist law originate in countries in Europe (France/Germany, England and the Soviet Union respectively) but they have spread throughout the world by ideological and colonial expansion (Bogdan:1989). Pacific countries formerly under British administration (Fiji, New Zealand, Kiribati, Tuvalu, Solomon Islands) French rule (New Caledonia, French Polynesia) and United States administration (American Samoa, Marshall Islands, Federated States of Micronesia, Palau) live under legal systems that have their roots. legal concepts, institutions and traditions in the common law of England and the Western European continental legal systems. There are a few legal systems in the world which, because of their history, have been shaped by the common law and continental legal traditions, as in Vanuatu where parentage is shared by English and French laws.

With economic development, Pacific countries have been and continue to be faced with complex legal problems such as taxation, international contracts, carriage by air and sea and with the lack of adequate legal resources. As a result they have tended to adopt or copy laws that have been used elsewhere in order to fill the legal gaps and provide solutions. Small jurisdictions in the Pacific often have little choice but to do this due the lack of legal resources, and the ties with one or other particular greater legal system continue to remain strong.

The recognition of the role and status of customary law within the mixture of laws in Pacific legal systems varies significantly. Some constitutions recognise customary law as a distinct body of law embedded in the legal system and some statutes contain very specific provisions with the scope of its application finely defined. The recognition of customary law however is limited by the doctrine of repugnancy in all constitutions. Because of the unwritten nature of customary law, after over a hundred years of the administration of received law in some countries, there are still difficulties in promoting a dynamic compromise between the various branches of law (statute law, received common law, local common law and customary law) to unify the plural legal systems. Of the various branches, the role, status and functions of customary law have been incorporated with less ease.

(1) Terminology

Laws that are made by a country's legislature (statutes) or by ministers or heads of departments (regulations, by-laws) and by the courts (judicial rules) must be distinguished from those unwritten rules that govern and are followed by groups of people usually in small homogeneous societies all over the Pacific and which play a significant part in their daily lives. These unwritten rules are referred to in a number of ways: customary law, traditional law, native law or just custom. The term "custom" and "customary law" is the term most frequently used in legislation and by the Courts. Some prefer the usage of one term over the other but no term is a perfect description.

The terms: "custom", "customary law", "traditional law" and "native law" are sometimes used interchangeably in any one system and can cause confusion. The word custom is also often used loosely to describe a rule, behaviour or habits. Although there are several characteristics of custom, there are two essential features which distinguish custom from other legal concepts. The first is the existence of custom since time immemorial and the second, custom is confined to a

particular community or locality. If the custom extends to the whole country and is followed by members of the public, it is not custom but the common law of the land. It is essential to try and identify the essential characteristics of custom as they serve a practical purpose when attempting to prove custom.

The term "customary law" is also based upon the notions of community and mutual responsibility, but the emergence of the concept of "communal" is partly a European and partly a local myth (Crocombe:1974). All Islanders will use reciprocal help for a project whether it is building or gardening and whether for the use of the individual, household or the larger community. Although there are some cases of communal participation in gardening or fishing these are only for specific purposes such as for special feasts. In practice, Islanders are individual rather than communal except that the rights of the individual are usually less exclusive and usually more flexible (Crocombe:1974). Crocombe states that some colonial governments greatly strengthened the traditional powers of the chiefs in order to govern through them and accorded them powers which were only partly based on traditional precedent but were legitimated by being called "communal".

The term "traditional law" presumes that the rules of the clan or village never change. The existence of a cash economy has changed peoples expectations, perceptions and the way they traditionally do things, though the pace of change differs in urban and rural areas as well as from one community to another.

The term "native law" or "native custom" refers to the unwritten rules and norms that govern the life and behaviour of the native inhabitants. Thus "native law" refers to a legal system of the local indigenous population which was considered to be "more or less of a primitive kind unsuitable for application to all subjects" (3). The term "native law" used in legislation in the pre-independence era has given way to the use of the term "customary law" as noted in a number of current constitutions and statutes.

In the search for a definition of customary law, the use of the term in this Review includes both written and unwritten forms, as in some countries customary law is codified (eg. the Gilbert and Phoenix Island Land Code of Kiribati). Where no codification exists, customary law is difficult to define as wide ranging variations exist. In some cases, custom may not be a set of rules but a process or way of solving or providing alternative solutions to problems. Some of the rules or ways of solving problems state wide and general principles of morality and public policy and constitute a framework for justice (Pulea:1985). The effectiveness of customary law is dependent on those who are knowledgeable in the law to promote and enforce the rules. Greater population mobility due to improved systems of transportation, and the social changes occurring in small communities will generally result in the modification of custom or cause it to lapse altogether.

(2) Sources of Law

It is not possible to discuss the role and scope of customary law without some brief reference to the different sources of laws that are at the centre of Pacific legal culture and shape the legal system. The sources include the Constitution, statutes passed by the country's Parliament, statutes passed by the Parliament of the colonising country (the received law), common law and equity (of the colonising country), local common law and customary law.

(i) The Constitution

Since the early 1960s a number of countries in the Pacific have become independent. The independent countries in the FFA region and the years of their independence are as follows:

Cook Islands	1965
Federated States of Micronesia	1979
Fiji	1970 (1990)
Kiribati	1979
Marshall Islands	1979
Nauru	1968
Niue	1974
Palau	1981
Papua New Guinea	1975
Solomon Islands	1978
Tonga	1875
Tuvalu	1978 (1986)
Vanuatu	1980
Western Samoa	1962

Two countries, Fiji and Tuvalu have enacted more than one constitution in 1986 and 1990 respectively. The supremacy of the Constitution is expressly stated in the constitutions of the Federated States of Micronesia (Art.II), Fiji (s.2), Kiribati (s.2), Marshall Islands (Art.1.s.1), Nauru (s.2), Palau (Art.II.s.1), Solomon Islands (s.2), Tuvalu (s.2), Vanuatu (s.2) and Western Samoa (Art.2) whilst the supremacy of the constitution of the Cook Islands and Niue is stated in the Cook Islands Constitution Act 1964 and the Niue Constitution Act 1974 respectively. The Constitution Amendment Act 1990 of Tonga expressly provides for the supremacy of the constitution.

The Constitution itself is not the sole source of law. There are other sources which must be considered together with the Constitution and these are briefly dealt with below.

(ii) *Laws Enacting the Constitution*

Laws enacting the Constitution (eg Cook Islands Constitution Act 1964 and Niue Constitution Act 1974 passed by the New Zealand Parliament and Orders-in-Council made by the British Privy Council to bring into force the Constitutions of Fiji (1970), Kiribati (1979), Solomon Islands (1978) and Tuvalu (1978) contain important provisions which supplement the Constitution with some provisions that override the provisions of the Constitution. Two important areas where this occurs is where persons holding public office are allowed to continue even though they have not been appointed in accordance with the procedures set out in the Constitution; and the existing laws are allowed to continue in force even though the laws have not been made in conformity with the provisions of the Constitution.

(iii) *Common Law and Equity*

In the past, the common law rules, partly based on immemorial customs, were the most prevalent source of law especially in countries such as England. These rules, developed over time by the courts, were based on the customs of people living in particular localities and ideas of what was just, logical and in the public interest. These common customs came to be accepted and applied by the courts as common rules. The rules of equity a body of rules and procedure which grew up separately from the common law and which was administered by separate courts had a different origin.

In countries formerly under British rule, the English common law and equity were applied by the colonial courts as laid down by the courts in England. Over time, the English common law and equity has been modified in cases where Pacific courts have had to find solutions to particular localised situations where the English common law and equity were considered inadequate or inappropriate. Similarly in United States Territories and former Territories the applicable common laws are those that are generally applied by the United States Courts.

With the advent of independence, the former British colonies have had to make decisions as to the status of the English common law and its retention as part of the common law of the newly independent state or to replace it with other sources of rules such as custom, which had been largely ignored in the past by the law making bodies. In some cases, choices were made to retain some form of the English common law but subject to certain modifications. Thus the principles of common law and equity developed by the Courts in England continue to be applied but subject to two qualifications:

- (i) that they are not inconsistent with the Constitution or legislation or subsidiary legislation and not;
- (ii) inappropriate to the circumstances of the country. In some countries such as the Solomon Islands, the Constitution goes further, with the proviso that they are "not inconsistent with customary law".

The extent of the modifications to the English common law and equity has been minimal in some countries whilst in others, the modifications are quite extensive. As a general rule in many jurisdictions, the common law is to be applied but the courts could deviate from it in situations described in (i) and (ii) above. In some jurisdictions the resurgence of nationalism and the need to recognise and give legal status to the body of customary law illustrates the degree to which Constitutions and statutes have given direction to the role that customary law should play in the legal system. In some countries, the direction has been that the rules used by the courts to decide cases should not be based on decisions of the English courts but from customary law. The common law rules of England are to apply only if there are no relevant customary rules that can be applied.

(iv) *The Recognition of Customary Law*

One of the difficulties in having choices of law is that the system of unwritten customary law followed by indigenous communities is usually restricted and that positive written law often replaces unwritten customary rules. The extent and nature of the recognition of customary law as part of the legal system varies from one Pacific Island country to another but in general, the imported law ranks superior to unwritten customary law.

The ways in which customary law has been and is currently recognised in the legal system are as follows:

(a) *Codification*

The Legislatures of some countries have codified the rules of a particular aspect of customary law such as land, marriage, adoption and divorce. There are a number of examples found in the Pacific. In Kiribati, the Gilbert and Phoenix Islands Land Code and the Tuvalu Lands Code are essentially a codification of custom. In Tonga, the Lands Act is essentially a codification of custom and chiefly authority. Since many areas of customary law have not been codified, court decisions are an important source of law. But customary law itself is still under scrutiny by the courts as the courts act as a forum to ease the transition of unwritten customary rules to rules of law.

(b) *Constitutions, Statutes, Regulations and By-laws*

Independence has brought customary law to prominence. Where specific statutes codified particular areas of customary law, the establishment of customary law within the constitution firmly establishes the recognition of its role. But how widespread must an acceptance of a custom be before the courts can decide that it is customary law? The existence and validity of customary law causes further confusion as customary law is unwritten and in some cases undefined. Constitutions and statutes provide some guidance as to what rules of law can be deemed

customary law. An examination of the various terminologies used reflects the emphasis placed on the recognition of customary law.

Custom and Usage

Some Pacific constitutions and statutes define customary law as 'customs and usages' and leave it to the Courts to define the meaning of these words. Some countries have gone further by stating that 'custom and usage' must be of ancient origin before the courts could deem it part of customary law. The Cook Islands Constitution does not give a definition of custom but the Cook Islands Act 1915 defines custom as:

" the ancient customs and usage of the Natives of the Cook Islands" (s.2).

The Cook Island Act is silent on the interpretation of the word "ancient" but a possible interpretation could be that customs must have been in existence since "time immemorial" without interruption, and the custom has been followed by ancestors and their ancestors.

In Kiribati, the Laws of Kiribati Act 1989 provides for the recognition of customary law which is defined as the customs and usages, existing from time to time of the natives of Kiribati (s.5). Customary law is part of the law of Kiribati except to the extent that the custom is inconsistent with the constitution, an enactment or an applied law.

The Laws of Tuvalu Act 1987 defines customary law as "customs and usages, existing from time to time, of the natives of Tuvalu" (s.5(1)). Customary law is to have effect as part of the law of Tuvalu except to the extent that it is inconsistent with the Constitution, an Act, applied law or subsidiary legislation (s.5(2)).

Frequently, the terms "usage" causes confusion. The term "usage" implies long and continual habitual practice or conduct adopted by persons in a particular trade or occupation. For example, in certain towns where particular traders by long usage had the power to restrict trade in certain areas and to certain persons the rule of conduct amounts to a usage. There are several categories of usages such as usages between landlord and tenant, usages of merchants. Usages which affect land, by their nature, are usually of a local character. Usage lacks the essential features of custom in that it need not be in existence since time immemorial and it need not be confined to a community or locality. But for courts to take judicial notice of usage, the usage must be certain, uniform and legal. Legal in the sense that no usage will be allowed to prevail if it is in conflict with statute law. A well established usage, if sanctioned and adopted by the Courts, would become part of the common law.

Time Immemorial

Some constitutions recognise only those customs that have been in existence since "time immemorial" (a time preceding the memory of man).

The Papua New Guinea Constitution defines custom to include:

" the customs and usages of the indigenous inhabitants of the country existing in relation to the matter in question at the time when and the place in relation to which the matter arises, regardless of whether or not the custom or usage has existed from "time immemorial" " (Sch. 1.2).

This definition provides some flexibility for new customs to be included with those customs that have been in existence since time immemorial. As customs undergo processes of change it could present particular difficulties if the only customs accepted were those that have been in existence since time immemorial. Rules in existence since time immemorial, or ancient rules could be difficult to prove as people knowledgeable in customary law may have died or left the community and

those who remain may follow custom that may have been modified by social changes. Months and years are measures of time that mean little under customary law. Customs that have been followed by ancestors and forefathers are terms frequently used as proof of the existence and the validity of custom.

Customs Having the Force of Law

A number of Pacific Constitutions and statutes make the distinction between behaviour and rules and recognise only those customs that can be enforced as law. For example:

- The Constitution of the Marshall Islands makes provision that the law of the Marshall Islands includes "any custom having the force of law" (Article XIV).
- The Custom and Adopted Laws Act 1971 of Nauru provides that "the institutions, custom and usages of the Nauruans...shall be accorded recognition by every court, and have full force and effect of law" (section 3).
- The Constitution of Western Samoa provides that the law "includes...any custom or usage which has acquired the force of law in Western Samoa or any part thereof under the provisions of any Act or under a judgement of a court of competent jurisdiction" (Article 111).
- The Constitution of Vanuatu provides that "customary law shall continue to have effect as part of the law of the Republic" (section 93 (3)).

These phrases indicate that it is only those customs that can be considered as "rules" and applied and enforced by the Courts that will be recognised.

(a) The Status of Custom as a Source of Law

As a general rule, statutory law ranks second to the Constitution to be followed in some countries by custom before the common law eg Papua New Guinea and Solomon Islands. In Fiji, the 1990 Constitution provides that Fijian custom has effect as part of the law of Fiji unless the particular custom is inconsistent with the Constitution or a statute or is "repugnant to the general principles of humanity" (s.100). The Constitution makes no reference to the common law in its list of authorities that are superior to custom. The Supreme Court Act 1875 provides that the rules of common law, equity and statutes of general application which were in force in England as of January 2, 1875 (the date in which Fiji obtained a local legislature) (s.22(1)) continue in effect in Fiji "as the circumstances of Fiji and its inhabitants... permit" (s.24). Thus, the pre-1875 English common law remains relevant as a source of law to the extent that it is not extinguished by statute or customary law.

The Constitution of Palau ranks statutory law and traditional law equally in Article V(2), by the following words "statutes and traditional law are equally authoritative." In cases of conflict between a statute and a traditional law, the statute shall prevail only to the extent it is not in conflict with the underlying principles of the traditional law. It would appear that in some circumstances, traditional law could rank above statute.

Constitutions that rank custom above the common law

The Vanuatu Constitution defines custom as law (s.93(3)) but directs the Court under section 45 (1) to resolve proceedings according to law and where "no law is applicable to a matter, the court shall determine it according to substantial justice and wherever possible in conformity with custom". Section 45(1) clearly directs the resolution of proceedings in accordance with the provisions of the Constitutions, statutory law and customary law and where no applicable rules from these three sources exist, then in accordance with justice and custom generally. There is no

mention made of the common law though the imported common law is available to the courts. Section 93(2) of the Constitution provides for "laws" which were in effect immediately before independence to continue to apply, unless they have been limited or repealed and "taking custom into account" which could suggest that if customary rules should conflict with the imported common law then customary rules should be given prior consideration before the common law.

The Constitution of the Federated States of Micronesia, Article XI, (the Judicial Guidance Clause) provides that decisions of the FSM courts must be consistent with the "Constitution, Micronesian customs and traditions, and the social and geographic configuration of Micronesia" (s.11) and with the prior decisions of the FSM Courts. The clause suggests that the FSM Courts in making decisions would need to first look at the Constitution and then custom and tradition and if there are no applicable rules from these two sources, then to the common law of other jurisdictions, ranking customary law above the common law.

The Constitution of Nauru includes custom as part of Nauruan law if Article 81 of the Constitution which defines law to include "an unwritten rule of law" is interpreted as customary law. The Constitution does not provide any specific ranking for customary law but the Customs and Adopted Laws Act 1971 directs the courts to give effect to the customs and usages of Nauruans. Reference is made in section 3 of the Act to legislation as being superior to custom and by implication it could be said that custom takes precedence over the common law.

The 1978 and the 1986 Constitution of Tuvalu refer to custom and traditional values in the Preamble which provides for "an Independent State based on Christian principles, the Rule of Law and Tuvaluan Custom and Tradition". The Laws of Tuvalu Act 1987, however, provides for a number of matters to be regulated by custom rather than the imported common law. These include, amongst other matters:

" the ownership by custom of rights in, over or in connection with any area of the territorial sea or any lagoon, inland waters or foreshore, or in or on the seabed, including rights of navigation, fishing or gathering;

ownership by custom of water, or of rights in, over or to water." (Sch 1.4(b)(c)).

The Act also directs that the courts have a duty to apply custom and decide cases based on customary rules and that the application or relevance of custom to a particular case is a matter of law (Sch.1(1)) except in cases where in the opinion of the court the recognition and enforcement of customary law would result "in injustice or would not be in the public interest" (Sch.1.2).

The Kiribati Constitution mentions custom in the Preamble as follows: "to cherish and uphold the customs and traditions of Kiribati." The Constitution does not elaborate on the ways in which the customs and traditions are to be upheld. The Laws of Kiribati Act 1989 provides for a number of matters to be regulated by custom and these include:

" the ownership by custom of rights in, over or in connection with any sea or lagoon area, inland waters or foreshore or reef, or in or on the seabed, including rights of navigation or fishing;

ownership by custom of water, or of rights in, over or to the water" (Sch.1.4(b)(c)).

The Western Samoan Constitution defines "Law" in Article 111 to mean:

" any law for the time being in force in Western Samoa; and includes this Constitution, any Act of Parliament and any proclamation, regulation, order, by-law or other act of authority made thereunder, the English common law and equity for the time being in so far as they are not excluded by any other law in force in

Western Samoa, and any custom or usage which has acquired the force of law in Western Samoa or any part thereof under the provisions of any Act or under a judgement of a court of competent jurisdiction".

Article 111 makes it conditional that custom and usage will be ranked as a source of law only if it has "acquired the force of law", presumably if it can be used and applied by the courts in making decisions. The English common law and equity may be excluded by "any other law in force" which could be interpreted to mean that the English common law and equity may be excluded by customary law only when it has "acquired the force of law" and, in certain instances when this occurs, it could rank customary law above the common law.

Uncertainty as to the status of Custom

In some jurisdictions, the status of customary law is uncertain. The Constitution of the Cook Islands does not specifically mention custom. The definitions provided under Article 1 of the Constitution define law to mean "any law for the time being in force in the Cook Islands; and includes this Constitution and any enactment"; a definition which may or may not include the common law and customary law. The words "any law ... in force" if given a wide interpretation could include customary law but on the other hand it may include only those laws passed by Parliament. Unless a court interprets this provision the status of customary law as part of Cook Islands law remains uncertain.

Custom not included as a Source of Law

In Tonga, custom is not expressly given status as a source of law in the Constitution which was adopted in 1875. The Constitution and a number of laws such as the Land Act codify the principles of customary law in relation to land rights and chiefly authority. The courts, in applying statutory law such as the Land Act, are in effect applying the principles of custom that have been codified. Although the status of customary law is not specifically ranked in the hierarchy of laws that make up the Tongan legal system, those principles of custom that have been codified form the basis of Tongan law.

A number of pre-independence statutes permit the recognition of customary law and are found mostly in laws relating to natural resources such as land and human relationships such as marriage, divorce and adoption.

(b) The Ascertainment and Application of Customary Law

Under the Constitution of the Solomon Islands, Parliament must make provisions for the application of laws, including customary law (s.75(1)). In making provisions under this section, Parliament shall have regard to:

" the customs, values and aspirations of the people of Solomon Islands" (s.75(2)).

The Solomon Islands Constitution has attempted to deal expressly with the question of customary law under Schedule 3 to the Constitution by the following provisions:

- " 3. (1) Subject to this paragraph, customary law shall have effect as part of the law of Solomon Islands.
- (2) The preceding subparagraph shall not apply in respect of any customary law that is, and to the extent that it is, inconsistent with this Constitution or an Act of Parliament.

(3) An Act of Parliament may:

- (a) provide for the proof and pleading of customary law for any purpose;
- (b) regulate the manner in which or the purposes for which customary law may be recognised; and
- (c) provide for the resolution of conflicts of customary law."

The Solomon Islands Constitution establishes that customary law is "law" and is part of the law of Solomon Islands but that customary law is allowed to exist if it is not inconsistent with the Constitution and statute. Parliament is to provide for the ways in which customary law is to be recognised.

The Constitution of Papua New Guinea provides for custom to be applied and enforced as part of the underlying law. But custom would not apply if it is inconsistent with constitutional law, statute or repugnant to the general principles of humanity (Sch.2.1.(1)(2)). An Act of Parliament may provide for proof and pleading of custom, regulate the manner and the purpose for which custom is recognised and provide for the resolution of conflicts of custom (Sch.2.1.(3)).

The Laws of Kiribati Act 1989 provides that customary law may be pleaded in all courts, except where, in the opinion of the court, an injustice would result or it would not be in the public interest (Sch.1.2).

The Laws of Tuvalu Act 1987 provides in Schedule 1 of the Act for the determination and recognition of customary law. Customary law is to be recognised and enforced and may be pleaded in all courts except in cases where it would, in the opinion of the court, result in injustice and would not be in the public interest (Sch.1(2)). In cases of conflict, the court will consider all the circumstances and may adopt those rules that it is satisfied the justice of the case requires (Sch.1.6). It should be noted that the Laws of Tuvalu Act does not affect the power of the Local Council to amend customary law when making by-laws under the Local Government Ordinance 1966 (s.50(4)).

The application of customary law by courts varies widely. The reasons why some courts do not apply customary law could range from the unwritten nature of the law, too many customs, too many groups applying variations of the custom thereby making the choice difficult as to which custom to apply, explaining customary concepts in the English language, and the difficulties involved in proving custom. Daly C.J. in the Solomon Islands case of Lilo & Another v. Ghomo Customary Land Appeal Court Case No.14/81, p.233/4, (unrep.) reflects the difficulties of courts when he stated that:

"... the problem is how can one express customary concepts in the English language? The temptation which we all face, and to which we sometimes give in, is to express these concepts in a similar manner to the nearest equivalent concept in the law received by Solomon Islands from elsewhere, that is the rules of common law and equity. The result is sometimes perfectly satisfactory in that the received legal concept and the Solomon Islands custom concept interact to give the expressions a new meaning which is apt to the Solomon Islands context. However, other concepts of received law have not developed a customary law meaning and the use of expressions which denote those concepts can produce difficulties of some complexity."

The ascertainment of custom by the courts is usually a question of fact and some guidance is given in statutes such as found in Fiji's Native Lands Act s.3 which provides:

" ... any dispute arising for legal decision in which the question of the tenure of land amongst native Fijians is relevant, all courts of law shall decide such disputes according to such regulations or native custom and usage which shall be ascertained as a matter of fact by the examination of witnesses capable of throwing light thereupon."

The Constitution of Vanuatu prescribes for:

" Parliament [to] provide for the manner of the ascertainment of relevant rules of custom, and may in particular provide for the persons knowledgeable in custom to sit with the judges of the Supreme Court or the Court of Appeal and take part in its proceedings. " (Art.49).

The use of the term "customary law" in the various constitutions and statutes has an advantage in that the term focuses on the rules of custom of the particular culture or subculture. Zorn (1992) states that customs that are defined as rules are less confusing and the court is better able to understand the relationship and the differences between statute law and customary law and the way they should be enforced. There is however preference by some judges to apply the common law rather than customary law even in countries where customary law is ranked superior to the imported common law. This pattern is not uncommon as no training in customary law is given either to judges or lawyers. There are examples of many cases in the Pacific where the courts apply the substantive rules of customary law but these apply in cases where customary law is pleaded in defence. The principles applied by the courts in such cases will in time provide the framework of customary law rules and become precedents that the courts can apply in deciding cases.

(c) *The Enforcement of Customary Law*

Throughout the colonial period, the institutions and traditional ways to resolve problems and disputes were maintained but basically operated outside the introduced legal system. As the principles through which land transactions, transfers, inheritance, offences and adoptions differ in statutes and in customary law, the colonial administration allowed them to operate as long as their functions and decisions were not in direct conflict with the colonial administration or any statutory law. Different laws involve different forums so that conflicts are resolved in forums that are at home with the law and thus avoid the problems associated with the application and enforcement of foreign law.

Special institutions were established in the legal systems of some countries to interpret and enforce customary law. These institutions, such as village courts, island courts and land courts, are charged with not only interpreting customary law but with enforcing them in accordance with the rules of custom. These customary courts were established by statutes are now part of the legal system, giving recognition to the ways in which indigenous people resolve disputes. For example, the Fiji Constitution 1990 provides that "there shall be Fijian Courts having such jurisdiction and powers as may be prescribed by Parliament" (s.122). There were Fijian Courts during the pre-independence era which were presided over by Fijians for Fijians but in 1968 these courts (Tikina Courts and Provincial Courts) were abolished (though the legislation has not been repealed) and the Court system centralised.

The Constitution of the Marshall Islands establishes two types of courts designed to apply substantive customary law - the Traditional Rights Court and the Community Courts. The Traditional Rights Court established by Article VI consists of a panel of chiefs who meet to advise the High Court on substantive customary law and in a sense does not fit into a court classification as it is not a dispute settlement agency using customary processes. The jurisdiction of the

Traditional Rights Court is limited to the determination of questions relating to titles to land rights and other legal interests depending wholly or partly on customary law and traditional practice (s.4(3)).

In Papua New Guinea, the Village Courts Act 1975 establishes village courts as part of the judicial system. The Courts may hear all civil cases except disputes over permanent interests in land that arise under customary law. Magistrates who serve on the courts have no formal legal training but are expected to be well versed in customary law.

In Solomon Islands, the Local Courts Act authorises the establishment of customary courts in each local government area. The courts may hear any claim arising under customary law and have exclusive jurisdiction over all disputes involving customary land. Justices of the Local Courts are not required to be legally trained but they are expected to be knowledgeable in customary law.

Section 50 of the Vanuatu Constitution mandates the establishment of village or island courts with jurisdiction over customary and other matters and Parliament shall provide for the role of chiefs in such courts.

The recognition within the legal system of the customary dispute settlement mechanisms of these once independent entities has also been curtailed to some degree by legislation through a system of appeals to higher courts.

Commentary

The independence Constitutions reflect a deliberate effort to accommodate customary law within the legal system. Conflict with statutory law is a challenge that the law making bodies have knowingly embraced and have considered that the recognition of customary law is essential to national identity and interest, but leaving it to the Courts and Parliament to determine the extent of the application. The recognition of customary law as part of the legal system requires both a legislative and judicial determination.

Opportunity exists for research of customary law judgements from these special courts to catalogue the principles of customary law relating to marine areas and customary practices.

Having defined the role and status of customary law in selected Pacific constitutions and statutes and the institutions through which customary matters are dealt with and enforced, it is important to attempt to define the extent to which customary rights to natural resources such as land and marine areas are given recognition in the constitution and statutes.

SECTION III

CUSTOMARY RIGHTS AND CUSTOMARY TENURE

Customary Property Rights

The rights held by indigenous owners in both land and marine areas represent a unique form of property right with statutory restraints against alienation. In the past, the acquisition by indigenous people of rights and interests in real property varied, in some cases by warfare, occupation, inheritance, gifting or by some other arrangement. During the colonial administration the rights and control over property altered considerably as in the case of British colonial rule where English law followed British subjects where ever they went. The vesting of lands, the sea, the seabed and subsoil in the Crown as part of the Sovereign's dominions flow from the ownership of territory. The circumstances in which territories became part of the Sovereign's dominions, by cession, conquest or settlement also affect the ways in which land and marine rights are framed in law. Customary rights may be extinguished in accordance with statute or allowed to exist unless the contrary is established.

Most constitutions make reference to customary land with customary rights to marine areas receiving less prominence. The general principle is that fisheries are by their nature mere profits of the soil over which the water flows, and that a title to a fishery arises from the right to the soil (4). A fishing right can no doubt become severed from the ownership of the soil but a fishing right resting solely on customary law could be overridden by statute or some other legal arrangement. In most countries in the Pacific the majority of the land is held by indigenous people (eg. Fiji 83%; Papua New Guinea 97%) under customary tenure, and in some cases the land is held in trust (Fiji, Niue) for their benefit. The enjoyment of lands held in trust is subject to the powers of the trustees which would lower the risk of customary titles being extinguished by acts of the State or Crown.

Under customary law, absolute ownership of land is usually vested in a group who retain control over the use of land and its transfer. In order to interpret indigenous ownership rights to land and marine areas, it is necessary to look into the wordings of Treaties (such as the Treaty of Waitangi New Zealand); Deeds (such as the Deed of Cession Fiji); Acts of Acquisition and Settlement; and statutes regulating native lands and fisheries, to assess the extent to which customary rights are recognised. As these early legal arrangements and statutes occupy a fundamental place in the legal systems of Pacific countries and are of some constitutional significance it could become the subject of separate research and interpretation.

Marine Areas

Land is perceived under customary law to include both land, water, sea areas, reefs and shelves. The marine environment is viewed conceptually under customary law as forming part of the land and the principles of marine tenure differ little, if at all, from land tenure. Marine areas are viewed as an extension of a country's land boundaries.

Baines (5) explains that:

" land, and all that grows upon it, together with the people who derive their sustenance from it, are one and indivisible in many South Pacific Island communities. Adjacent reefs and intervening lagoons, mangroves and estuaries are seen as integral components of that land, not as distinct entities separated from land from a certain tidal level. It is difficult for outsiders to comprehend this close identification of Pacific Islanders with their resources "

In some Pacific societies customary rights to marine areas or marine resources are usually retained by the social group which has rights to the adjacent land. Nakayama and Ramp (1974) provide examples in Micronesia where they cite that among the Central Carolinians, ownership of property extends out from land to include the lagoons and all known submerged reefs regardless of their distance from the land.

It is of interest to note that Fiji's Land Transfer Act 1971 specifically includes watercourses in the definition of land. The Land Development Act 1961 also defines "land" to include:

"... land covered by water within Fiji and the Continental Shelf as defined in the Continental Shelf Act (s.2)."

Vanuatu's Land Reform Act 1980 defines land to include:

"... improvements thereon or affixed thereto and land under water including land extending to the sea side of any offshore reef but no further." (s.1).

It is possible that other examples can be found in the legislation of countries in the Pacific.

There appears to be little evidence that customary law concepts and rights to marine areas are integrated into the framework of state laws. The ownership rights devised by colonial laws to water and marine areas differ from customary property rights. Fisheries laws do not create exclusive rights of fishing in favour of particular sectors of the population as generally, such laws give all, ie the public, the right to fish in the sea and in rivers and streams. In countries formerly under British jurisdiction, the law of fisheries is similar to fisheries laws in England, where, based on the common law of England, the law regulates all fisheries and preserves fisheries for all. The recognition of customary fishing rights or customary fishing grounds, if specifically defined, would be embedded in land or fisheries laws.

Changes to Customary Ownership Rights

During the colonial administration the only dominant customary right recognised was customary ownership of land. Customary rights to marine areas were generally disregarded as such areas vested in the state, the government or the Crown by law. The essential characteristics of land holdings under customary law changed considerably as land was alienated by the administration for public purposes (ie. for the development of towns and government administration) and those negotiated by private individuals with customary owners or transferred to foreigners were converted to "freehold land". These various arrangements altered the proportion of land held under customary ownership. Laws were introduced to prescribe the ways in which land can be held under customary tenure and categorised the remainder of land into various holdings such as Crown or government land, freehold land, and those lands unoccupied or unused by customary owners were classified as "vacant" land. In some countries such as Fiji, land classified as vacant land also belonged to the Crown.

The recognition by colonial administrators of the ownership of land under customary law did not extend to marine areas nor to other waters such as rivers and streams which were rights under customary law as part of the customary ownership of lands on which fishing was done. A number of arrangements were devised in the Pacific as can be seen by the following examples:

Fiji's River and Streams Act 1882 provides the following formula:

" All waters in the Colony ... shall with the soil under the same belong to the Crown and be perpetually open to the public for the enjoyment of all rights incidental to rivers [s.2]

" The banks of rivers to the breadth of twenty feet from the ordinary water line in the wet season and the highest spring tide shall be subject to an easement in favour of the public...[s.3]

" All streams...and the bed thereof belong to the Crown to be perpetually open to the public...[s.5]

" Proprietors of land or towns and villages or inhabitants adjacent to rivers or streams shall...have the fullest enjoyment of the same as part of the public but...may also be granted permanent or temporary rights by the Governor in Council..." [s.7].

The River and Streams Act does not confer special water or land rights on customary owners but the rights are vested in the Crown and the Crown permits the exercise of rights in those areas to which the Act relates to all persons (including indigenous persons) as members of the public.

The Samoan Constitution Act 1920 designated all land lying between high and low water mark and all tidal lands and waters within the limits of the territory to be vested in the Crown and to be free from any right, title or interest in any other person and subject only to the public right of fishing and navigation (s.266). The Constitution of Western Samoa 1968 prescribes three categories; land customary land, freehold land and public land (Art.101). All land lying below the line of high water mark is designated as public land (Art.104).

The Cook Islands Act 1915 provides, if the High Commissioner (now Queen's Representative) is satisfied, that where any land vested in Her Majesty is free from native customary title, "whether because it has never been subject thereto or because that title has been extinguished, he may, by warrant, declare the land to be Crown land free from native customary title..." (s.417). Native customary title does not extend to any land below the line of high water mark and all such land is declared Crown land (s.419).

The Niue Constitution Act 1974 vests Niuean land in the Crown but to be held by Niueans according to the customs and usages of Niue (s.33(5)). So long as Niuean land is vested in the Crown, the Crown as proprietor of the land permits the land to be held by Niueans in accordance with customs and usage.

Article X of the Constitution of the Marshall Islands preserves traditional rights of land tenure and provides that nothing in the Bill of Rights (Art.II) shall be construed to invalidate customary law and traditional practice concerning land tenure or any related matter (which is not defined) in any part of the Marshall Islands including, where applicable, the rights and obligations of traditional leaders. Customary land may not be alienated without the approval of the traditional leaders. Under Article III(2) the Council of the Iroij (Chiefs) could request the reconsideration of any Bill affecting customary law, or any traditional practice, or land tenure, or any related matter which has been adopted on the third reading of the Nitijela (Parliament). It is the responsibility of the Nitijela to declare, by Act, the customary law of the Republic and the declaration may include any provisions which are necessary and desirable to supplement the established rules of customary law or take account of any traditional practice. A joint committee of the Nitijela and the Council of Iroij must consider any Bill or any amendments that declares customary law to report on the matter (Art.X (2)(3)).

Although the words "any related matter" in Article X is not defined, the Council is uniquely placed to exercise its rights in embodying customary principles and declaring what should or should not be traditional practice.

Over the years, legislation has been developed to address the ownership rules to the various categories of land and marine areas, reflecting in some cases misunderstanding by law makers and administrators of the rules of customary ownership of land which includes marine areas. Government's goal to promote economic development had to be balanced against the rights of customary owners resulting in a wide range of different legislative provisions to deal with the problems associated with these changes. The problems associated with land were and continue to be complex and the way in which some countries have dealt with such problems at independence was to transfer all land, irrespective of existing rights, to indigenous custom owners and restrict the transfer of land to foreigners.

This measure was adopted in Vanuatu. The Constitution of Vanuatu provides in Articles 71-73 that all land belongs to the indigenous custom owners and their descendants (Art. 71). It is only indigenous citizens who have acquired their land in accordance with a recognised system of land tenure "... shall have perpetual ownership of their land" (Art. 73). Government may own land if it has acquired it for the public interest (Art. 78) but Parliament after consultation with the national Council of Chiefs may make different provisions for different categories of land (Art. 74). The Land Leases Act 1983 provides that customary land may be leased by customary owners to other persons for a period of 75 years.

Customary Tenure

When people speak of "customary tenures" or "traditional tenures" they often imply that these were the forms of tenure practised by islanders of those localities before contact with industrial societies. In that sense there is no customary or traditional tenure in the Pacific Islands (Crocombe:1974). Customary tenures implies that the current practices have been in existence since pre-contract times. What is called customary or traditional tenure in many parts of the Pacific today may be more accurately called "colonial tenure":

" a diverse mixture of varying degrees of colonial law, policy, and practice with varying elements of customary practices as they were in the late nineteenth century after many significant changes had been wrought on the pre-contract tenures by steel tools, guns which facilitated large scale warfare, population decline, labour recruiting, increased mobility and absentee right holding, cash cropping and alienation in the post contact but pre-colonial era. "

Many pre-contract tenures operated without written records and the absence of writing tends to force continuing adaptation to the present and the recent past, obliteration and reinterpretation of the distant past (Crocombe:1974). Tenures which are now accepted as customary even though they are in many cases substantially different from pre-contract tenures is the interpretation used in this Review.

(i) *What is tenure?*

While it is not possible to be categorical about the rules of tenure without considerable research, it is possible to discuss the nature of customary tenure.

The word "tenure" denotes a form of right under which property (primarily land in the physical sense) is held with varying degrees of obligations attached. There are different forms of tenure eg. land tenure, marine tenure, and every tenure system usually (but not always) contains obligations in respect of the area held by the tenant such as rendering services or by paying a fee. The term

"land" in its legal significance includes all that is above it and beneath it such as the soil, minerals, water, forests and anything fixed to the land such as buildings. For the purposes of ownership, land may be divided and separate ownership may exist for the various components of land such as water, minerals and buildings. Under the statutory definition of land in Fiji's Property Law Act 1971 "land" includes all estates and interests in land. The phrase "interests in land" is wide enough to include all rights (including any tenure) in the land.

Most traditional tenure systems in the Pacific recognise a widespread obligation to allow areas such as land, reefs or fishing grounds to be used on an informal basis by non-right holders (Crocombe:1984). The basic principle of tenure in some communities is that absolute ownership of a particular area is vested in the kingroup who retain control over its allocation and use. But within the group, individuals and their families have rights to use particular portions of the area whilst ultimate control lies with the kingroup.

There are several kinds of tenure eg. those individuals or families that only have rights to fish in certain limited areas held in common by the kingroup or local group; or gardening rights held by individuals or families in major land rights held by the local group. In a system of primogeniture, land is automatically inherited by the eldest son and tenure in that land is largely dependent on local custom. According to Crocombe (at p.43)

"for several decades most colonial tenures gave primary emphasis to group rights. Only since World War II have we seen a major extension of legal provisions for individuals to establish firm rights within their groups through leases (in which an individual pays his group an annual rental) and occupation rights (in which, once given group approval to occupy, the individual has secure title without payment for such time as he or his direct heirs occupy and use the land)."

Crocombe further adds (at p.45) that changes in law and policy do not necessarily lead to changes in tenure in practice, and that,

"the legal tenure system is never the only determinant of how the system works. Sometimes it is rather a small part of the actual principles which determine who uses what land, for what purpose and how productively".

Crocombe (1968) also states that the word "communal tenure" is also misleading as the words are often used to denote that all rights are held equally by all people in the community. There is no such tenure system in the Pacific as members of the group have different rights and different obligations which are determined by status, gender and roles. Especially in the Pacific, it is misleading to speak of traditional Pacific islands' tenure systems as communal. There is no single word which could describe what is meant by "traditional tenure systems" as the use of a single term could lead to the erroneous conclusion that tenure systems in the Pacific are very much the same. Crocombe further states that:

"... as all South Pacific tenure systems were based on custom (that is on practice rather than written law) it may be appropriate to call them "customary" systems. But it must be appreciated that customary systems vary a great deal from one another. The word "traditional" is also satisfactory, as all the systems were based on customs and practices which were passed by tradition from one generation to the next." (p.2)

Group control is however only one characteristic of tenure in a sense that areas of land and sea are apportioned according to the rules of the group. In other respects tenure is not communal as a family has to look to its own members for support and labour and any produce is exclusive.

The power of chiefs and traditional leaders to interpret and change custom can also affect the system of tenure but generally traditional leaders, like other members of the group hold a share in the community property and exercise rights, as other members, only over that portion of the area allocated. Any services rendered to traditional leaders by other members of the group are not as tenants but are given in forms of contributions as a mark of respect for the position held. Each member exercises exclusive rights over portions of the areas owned. For example, in Micronesia, the patterns of tenure range from ownership of specific areas by individuals or families over tracts of land, ocean areas, coastal zones, mangrove swamps. But the term "ownership" under customary law has a different meaning to the term used in a western legal sense.

(ii) Ownership

The use of the word "ownership" is often misleading and Crocombe (at p.1) explains that in relation to land, a person does not really own land as different rights in the same piece of land (eg. the right to plant, gather coconuts) are usually owned by different people or groups of people. Thus when one talks about "ownership" of a particular area, this means that a person has ownership of one or some rights but not ownership of all the rights. Crocombe cautions (at p.1) when discussing "ownership" as it is necessary "to define clearly which rights we are talking about". Some countries have specifically addressed the question of ownership rights to marine areas and the application of customary law.

The Laws of Tuvalu Act 1987 specifically deals with ownership rights to marine areas and permits customary law to be applied by the courts in a case in relation to:

"... the ownership by custom of rights in, over or in connection with any area of the territorial sea or any lagoon, inland waters or foreshore, or in or on the seabed, including rights of navigation, fishing or gathering;

the ownership by custom of water, or of rights in, over or to water;" (s.4(b)(c)).

Section 13 of the Fiji Fisheries Act 1942 protects the customary fishing rights of the mataqali (subdivision of the Fijian people who are linked by descent) registered by the Native Fisheries Commission in the Register of Native Customary Fishing Rights.

But customary marine tenure is not widespread and Polunin (1990) referring to Indonesia and Papua New Guinea states (at p.197) that although there is evidence that ownership of marine areas have developed widely in the region, it hardly supports the notion that marine tenure is, or has been, universal. Polunin qualifies this statement by adding that the coverage of maritime topics, unlike land tenure, has been far from adequate for the Pacific region. He further states that evidence is commonly given that marine tenure is known but not enough detail is given "to provide the inference with any foundation.". He adds that:

"... this lack represents a certain bias in the reporting of maritime matters as a whole is supported by an apparent disinterest in marine exploitation. Frequently, one is informed that fishing is a significant activity for a particular group of people, but again the details of its performance are left to the imagination. This discrepancy has been noted elsewhere, the most comprehensive review being that of Emmerson (1980). Anell (1955), among others, refers to the paucity of data on fishing in his historical review. At the same time, however, it seems certain that either marine tenure never existed in certain areas, or if it existed, it disappeared sometime ago." (p.197).

Johannes, Sudo (Micronesia), Teiwaki (Kiribati) and Baines (Fiji, Solomon Islands) provide sufficient evidence of the existence of marine tenure systems in the various parts of the Pacific.

Customary Marine Tenure

Customary marine tenure in Pacific societies is complex because of the variations that exist in any one country. No description of customary tenure can be assumed to have general application. For example, tenurial rights could be dictated by the rules of succession or by village leaders or elders. Customary marine tenure is not universal as observed by Polunin (1990) who further states (at p.195) that:

" ... this patchiness may be determined by a general inclination of people to give greater attention to the land than to the sea in their subsistence patterns. When it did develop, tenure probably arose most commonly as a result of conflict over marine areas, and this competition was intensified, not diminished, when certain resources became economically viable. Such disputes were bound to be influenced by a number of factors pertaining to marine exploitation directly, but also including social and political issues and problems not necessarily relating to marine biological resources, but rather because they tended to exploit more and eventually came up against neighbouring people doing the same sorts of things."

Polunin points out (at p.196) that it is important to clearly show that traditional people were either aware of conservation as we perceive it today or that their practices had conservation effects as a by-product, even if instigated for other reasons. There is also an assumption that the conditions for which traditional practices were appropriate in terms of conservation are similar to those prevailing today.

Development of Marine Tenure

Polunin discusses a number of conditions (in relation to Indonesia and New Guinea) that are critical to the development of marine tenures. He states that in general it can be expected that ownership of marine areas will develop where some benefit accrues to the people involved and the resources may be particularly valuable or easy to defend.

Is marine tenure well developed among people for whom marine resources are especially important and whose livelihood depends on it? Has ownership developed amongst coastal people in especially productive areas? Productivity alone cannot explain why in some areas with an abundance of marine resources there has not been a well developed tenure system. Polunin states that marine tenure could have existed in certain areas but in time tenure has been lost or swamped by outside commercial interest. Marine tenure can also be abolished by law. Polunin cites an example where marine tenure which once existed around Enggano (off Sumatra) was abolished in the last century by decree of the Dutch Resident to prevent feuds and to prohibit fishing.

Polunin suggests that the patchiness of marine tenure in the region is mainly due to the following:

- (a) if more reliable forms of human sustenance is available on land, people seem in most cases to choose the land. Faced with a land sea-based livelihood, people will choose the land as providing a surer source of food than the sea.
- (b) in some areas from Polunin's accounts some people are averse to the sea.

In other parts of the Pacific, there is evidence of marine tenures playing a more prominent role in Polynesia.

Protection of Customary Marine Rights

Most Pacific Constitutions provide special protection of customary rights to the indigenous population. The protection of customary rights to land is embodied in both constitutions and statutes but customary rights specifically relating to marine areas have received less attention. The Constitution of the Marshall Islands states that the Council of Iroij could request the reconsideration of any Bill affecting customary law, or any traditional practice or land tenure, or any related matter (Art.III(s.2(b))), the term "any related matter" appears wide enough to include customary marine rights. The 1990 Fiji Constitution protects the owner of registered customary fishing rights from the deprivation of property without compensation (s.9(7)).

The Kiribati Fisheries Ordinance 1978, s.21 protects the ancient customary fishing grounds of any kainga (clan), utu (family) or other subdivision of the people. Teiwaki provides in some detail a discussion on marine rights in Kiribati in "The Management of Marine Resources in Kiribati" (1988).

The interpretation of the extent of customary tenure, if not specifically protected in the constitution or legislation lies with the courts and the recognition of customary tenure could range from interpreting customary tenure as legal tenure to the non-recognition of customary tenure.

Who is Entitled to What rights?

In some countries legislation highlights either customary fishing rights, or both customary fishing rights and the area to which these rights relate. Customary rights can be protected in legislation providing for customary land or fisheries. For example, in Tuvalu, customary fishing rights are protected under the Native Lands Ordinance 1957 which provides as follows:

" The court shall adjudicate on all cases brought before it concerning the determining of native customary fishing rights. " (s.17).

In countries where this arrangement occurs it might be assumed that customary fishing rights fall within the customary title to land and that such rights might be related to land and may not have a separate existence. The customary fishing rights could be perceived as inclusive within the ownership of land. The Tuvalu Native Lands Ordinance vests customary fishing rights in "natives", defined in the Interpretation and General Provisions Act 1988 to mean indigenous inhabitants of Tuvalu and descendants of indigenous inhabitants, whether wholly or partly of indigenous descent (s.10)

Where fishing rights are perceived by law makers as having a separate existence from the ownership of land, fishing rights can become vested in a particular section of the population. For example the Fiji Fisheries Act s.13 refers to the "rights of any mataqali or other subdivision of the Fijian people".

In the Federated States of Micronesia (FSM) Title 18 (1982 Revised Code of the Federated States of Micronesia) providing for Territorial Boundaries and Economic Zones and Ports of Entry refers to traditionally recognised fishing rights in submerged reef areas (s.106). Title 24 providing for Marine Resources makes reference in section 111(4)(b)(i)(ii) to "customary inhabitants" who have authority to control the fishing over reefs. It is only that sector of the population who fall within the meaning of "customary inhabitants" and whose traditional fishing rights to reef areas and to no other area that is preserved and protected by this particular statute.

Title 27 of the Palau Nautical Code (PNC), Chapter 3 - Fishing Zones, also preserves and respects traditionally recognised fishing rights in submerged reef areas (s.146) but the Act does not stipulate that the traditionally recognised fishing rights are those of customary inhabitants as found

in the FSM legislation. If a foreign fishing vessel wishes to apply for a permit to fish in the EEZ or EFZ, the Palau Maritime Authority is required to solicit views of "appropriate persons in the Republic" with no express distinction made between those "having traditionally recognised fishing rights" from those members of the public who may be permitted by statute to fish, therefore giving those who have traditional fishing rights to submerged reefs no greater or special right to be consulted than other members of the population. Traditionally recognised fishing rights are interpreted to mean those rights existing at the time the Palau Fishery Zones Act came into force and have not been extinguished by legislation.

The Fisheries Act 1988 of Western Samoa does not confer any special rights to any particular sector of the population. The purpose of this Act is to promote conservation, management and development of fisheries; to promote exploration of the living resources; to promote marine scientific research and to promote protection and preservation of the marine environment (s.3). The Director of Fisheries however is required to consult with fishermen, industry and village representatives concerning conservation, management and development measures of the fisheries resources. The Director may prepare by-laws, and any by-law affecting the conservation and management of fisheries in lagoon waters must be issued to the Pulenu'u (Village Mayor) of adjacent villages at least 7 clear days before it comes into force. This could imply that the Director has discretionary power to override customary practices but in reality customary rights are respected and permitted provided they have not been extinguished by statute. The requirement that the Director must issue any by-law to the Pulenu'u of adjacent villages suggests a relationship between the village and the marine areas adjacent to it and the existence of customary fishing rights in those areas.

The Fisheries Act 1972 of the Solomon Islands does not make reference to the preservation of fishing rights by Solomon Islanders nor the recognition of customary rights. The continued existence of traditional rights are established independently of this Act and the Delimitation of Marine Waters Act 1978. Traditional rights, privileges and usages are recognised by the Provincial Government Act 1981 s.3(7) which provides:

" Nothing in this section shall be construed as affecting traditional rights, privileges and usages in respect of land and fisheries in any part of the Solomon Islands."

Ancient Rights, Traditional Rights and Existing Rights

In all Pacific countries the preservation of customary, traditional, ancient and existing rights to marine resources are found in fisheries, land or some other legislation. Unless the legislation specifically defines these expressions, it is usually up to the courts to define what these terms mean. Some of the rights are limited by the legislation to certain portions of the marine environment such as reefs, as ownership of other components of the environment such as the foreshore, the seabed, the territorial sea are usually vested in the State. Some commentary is necessary on the use of these expressions.

✓ Some legislation uses the term "ancient" when reference is made to fishing rights or fishing grounds. Section 21 of the Kiribati Fisheries Ordinance 1977 refers to "ancient customary fishing grounds". Although these words are not defined in the Ordinance, ancient customary grounds could mean the area to which members of a group claim customary ownership rights where ancestors and their successors have fished.

Baines (1990) states that some writers assume that traditional rights are rights of ownership in a western sense but others define traditional rights as rights of use. He states that:

" Close examination of the relationship between resources and traditional Pacific Island societies would seem to indicate a custodial, rather than a possessive attitude of people to their resources. Thompson (1949) demonstrates this for the Lau Island areas of Fiji, whereas Spoehr (1965) flatly rejects the notion that an equivalent of Western ownership of resources might have been part of traditional Pacific Island cultures. "

It would be more accurate, then, to define traditional fisheries rights as various rights of use, rather than of "ownership". This indeed is the definition incorporated in the formal fisheries laws of Fiji.

Baines further notes that rights of use can be exclusive in that they can be interpreted to mean those holding primary rights may have a subsidiary right to prevent others from using certain resources within the area over which traditional control is exerted. With respect to the Solomon Islands, it is generally held that traditional marine resource rights imply full, exclusive "ownership" of the area concerned.

The question of "existing fishing rights" have been discussed in a number of landmark cases in New Zealand with respect to Maori fishing rights. The New Zealand Supreme Court in Inspector of Fisheries v. Weepu [1956] NZLR 920, F.B. Adams J. considered the question of "what are existing Maori fishing rights?". As the Fisheries Act of 1908 did not provide a definition of the expression "existing Maori fishing rights" F.B. Adams J. stated:

" The only kind of right suggested in the argument was one based on an allegation that a Maori fishery existed at ... the time of the Treaty of Waitangi in 1840 ... which conferred and guaranteed to the Maoris:

'the full exclusive and undisturbed possession of their Land and Estates, Forests, Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession'.

The nature of these rights ... are not legal rights in the full sense of those words, and to describe them as "rights" is really a misnomer. Nevertheless, I am of the opinion that a fishery preserved by the Treaty and still unextinguished is an "existing Maori fishing right" within the meaning of s.77(2) (of the Act). I construe s.77(2) of the Fisheries Act 1908 as referring to Maori fishing rights existing at the date when the Act came into operation. Otherwise the word "existing" is otiose.

Giving the matter the best consideration I can, I am satisfied that "existing Maori fishing rights" includes, if it does not mean, customary fishing "rights" (including rights incidental to customary ownership of the lands on which the fishing is done) that are for the time being within the protection of the Treaty of Waitangi."

In Keepa v. Inspector of Fisheries [1965] NZLR 322, Boys J. held that customary Maori fishing rights were extinguished when title was granted or a freehold order was made in respect of land bordering the sea. The judge referred (at p.324) to the Privy Council decision in Nireaha Tamaki v. Baker where, in interpreting the meaning of words in a section of the Native Rights Act 1865 which recognised Maori rights under the Treaty of Waitangi, the Judicial Committee said:

" ... the Supreme Court [is] bound to recognise the fact of the "rightful possession and occupation of the Natives" until extinguished in accordance with (statute)..." ([1901] NZPCC 371, 383).

This citation proved troublesome because it would apply to a fishery proved to exist before the Treaty and Boys J. stated at p.328:

" The point which caused me difficulty is therefore answered when dealing with the main contention. The point of time when any customary fishing rights on the foreshore between high and low water mark at a particular place (if they ever existed) are extinguished, is when title is granted or a freehold order made in respect of the land boarding the sea at that spot. Thereafter the Maori has no greater fishing rights than his pakeha neighbour "

In a more recent case of Te Weehi v. Regional Fisheries Officer [1986] 1 NZLR 680 Williamson J. was faced with the question whether or not s.88(2) of the Fisheries Act 1983 which reads: "Nothing in this Act shall affect any Maori fishing rights", provided a defence to an alleged fishing offence. In this case, Te Weehi was charged with being in possession of undersized paua. In his defence to the charges, Te Weehi argued that he had obtained permission of the Ngai Tahu tribe and was taking the shellfish in the customary Maori way for personal and family consumption. He claimed that he was exercising a Maori fishing right and that his actions were not prohibited by legislation.

The Court held that s.88(2) of the Fisheries Act introduced an exemption in favour of a person charged with carrying out activities which were intended to be completely prohibited by the Act or its regulations if that person was exercising a Maori fishing right but the defendant must prove, on the balance of probabilities, that he was exercising a Maori fishing right before he was exempt from the prohibitions of the Act. The evidence established that Te Weehi was exercising a Maori fishing right within the meaning of s.88(2). As the customary right claimed had not been expressly extinguished by statute, it continued to exist.

Section 88(2) of the Fisheries Act recognises Maori rights protected under Article 2 of the Treaty of Waitangi and guaranteed by it. The phrase "Maori rights" have been considered in several New Zealand judgements and any consideration of Maori rights often commences with a discussion of the Treaty of Waitangi signed in 1840 which guaranteed:

" .. to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties..."

The Judge, in coming to the conclusion that customary rights retained by Maori tribes under the Treaty of Waitangi remain in being and are enforceable unless specifically and explicitly extinguished.

Chilwell J. in Huakina v. Waikato Valley Authority [1987] 2 NZLR stated (at p.210) that such decisions "invites the conclusion that the Treaty is not part of municipal law of New Zealand in a sense that it gives rights enforceable in the Courts by virtue of the Treaty itself". Notwithstanding the observation of Williamson J. in Te Weehi v. Regional Fisheries Officer that customary rights retained by Maori tribes under the Treaty remain in being and are enforceable unless specifically extinguished, it was a case in which New Zealand municipal law specifically recognised the fishing rights in issue with the words: "Nothing in this Act shall affect any Maori fishing rights". Chilwell J. in Huakina v. Waikato Valley Authority stated (at p.210) that case authorities show that:

" ... the Treaty was essential to the foundation of New Zealand and since then there has been considerable direct and indirect recognition by statute of the obligations of the Crown to the Maori people."

Chilwell's J. views in 1987 were different from those held in 1914 in Waipapakura v. Hempton 33 NZLR 1065 where the Full Court concluded that, unless statutorily recognised, Maori fishing

rights were incapable of recognition in a Court of law; the Treaty was not in itself sufficient to create such rights cognisable in a Court of law.

SECTION IV

LEGAL ARRANGEMENTS IN THE MARINE ENVIRONMENT

The sea area of most Pacific Islands over which sovereign rights are claimed as a result of the formula of the 200 miles Exclusive Economic Zone (EEZ) established under the United Nations Convention of the Law of the Sea (UNCLOS) is in all cases many times larger than their land area. For example, the land area in the Cook Islands is 240 sq. kms with a sea zone of 1,830,000 sq. kms and Kiribati with a land area of 719 sq. kms has a sea zone of 3,600,000 sq. kms. The laws enacted on the different components of the marine environment by Pacific Island countries are largely influenced by international law which divides ocean areas into components such as internal waters, the territorial sea, contiguous zones, archipelagic waters, continental shelf and the exclusive economic zone.

International Law

From 1949, there were a number of international developments on marine law which engaged the attention of the United Nations International Law Commission. By 1958, the following four conventions were adopted at the first United Nations Conference on the Law of the Sea:

- Convention on the Territorial Sea and Contiguous Zone;
- Convention on the High Seas;
- Convention on Fishing and Conservation of the Living Resources of the High Seas; and the
- Convention on the Continental Shelf.

These Conventions separated the marine environment into different zones with precise measurements but the Convention on the Territorial Sea and the Contiguous Zone left unsettled the precise breadth of the territorial sea. The Conventions provided collectively a regime which governed the use of, and rights as to the open sea and the territorial sea. These instruments also in effect paved the way for, and provided basic foundations for the comprehensive United Nations Conference on the Law of the Sea signed in Montego Bay on 10 December 1982 (Starke:1989).

After the adoption of the four Conventions, time proved that they were inadequate, as fishing grounds continued to be depleted, underdeveloped countries were being exploited by developed countries with modern technologies and there was uncertainty in two key areas ie. the precise breadth of the territorial sea and the rights of littoral states over the resources of the reefs, continental shelves and areas beyond these limits. With advances made in modern technology, new ideas were developed to exploit mineral resources on the continental shelves and beyond and thus the Convention on the Continental Shelf was considered as inadequate (Starke:1989). Catastrophes in the marine environment such as oil spills and pollution prompted other Conventions such as the International Convention on Civil Liability for Oil Pollution Damage 1969 (referred to as the Liability Convention) and the Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties 1969 (referred to as the Intervention Convention). The testing of weapons of war in the marine environment prompted an arms control treaty, the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and Ocean Floor and in the Subsoil Thereof, which was opened for signature on the 10th February 1971. This Seabed Arms Control Treaty was a major step, not only in prohibiting the placing of weapons on the seabed and ocean floor within and beyond the limits of the 12 miles coastal seabed zone, but in defining a 12-mile component of the marine environment.

The other important breakthrough that developed leading up to the Law of the Sea Convention was that deep seabed resources beyond the continental shelf limits should be recognised as the common heritage of mankind " and to be developed in the interests of all States, with special regard to the needs of disadvantaged developing countries. " (Starke:1989).

A number of new developments in the early 1970s prompted the Seabed Committee to have interstate consultations and steps were taken by the United States in 1970 to issue a new Policy on the Oceans which resulted in the adoption by the General Assembly of two important resolutions on 17th December 1970, one consisting of a Declaration of Principles Governing the Seabed and Ocean Floor and the Subsoil Thereof beyond the Limits of National Jurisdiction and, the other, to convene a Third United Nations Conference on the Law of the Sea in 1973, later to be known under the acronym, UNCLOS.

(i) Convention on the Law of the Sea (UNCLOS)

This Convention, negotiated over fourteen years, introduced new concepts into the international law of the sea and codified those principles of customary law which had broad support. The compendium of rules formulated in 1958 in the four Conventions has been codified, with the addition of new rules of international law, in the Law of the Sea Convention. The most important new concept, the Exclusive Economic Zone (EEZ) measured from baselines on the coast to 200 nautical miles seaward was incorporated into the Convention bringing new areas of seas and marine resources under national jurisdiction. Important new rules were laid down for the protection and preservation of the marine environment and the conservation and optimum utilisation of the living resources of the sea. The Convention, under Article 51(1) places an obligation on archipelagic States to respect existing agreements with other States and recognise traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters.

(ii) Continental Shelf

The 1958 Convention on the Continental Shelf defined the term "continental shelf" to mean: (a) the seabed and subsoil of the submarine area adjacent to the coast but outside the area of the territorial sea to a depth of 200 meters or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands. Coastal states exercise sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources. These rights are exclusive but limited by Article 5(1) which provides that any exploration or exploitation must not interfere unjustifiably with navigation, fishing, or the conservation of the living resources of the sea or scientific research.

Articles 76 to 85 of the UNCLOS deals with the continental shelf. The continental shelf is defined by the UNCLOS as comprising:

" the seabed and subsoil of the marine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance " (Art.76(1)).

The rules for the outer limits of the continental shelf is set out in paragraphs 47 of Article 76. The coastal state's rights to the shelf is similar to those set out in Article 2 of the 1958 Convention.

(iii) *High Seas*

The High Seas Convention 1958 defines the high seas as all parts of the sea that are not included in the territorial sea or in the internal waters of a state. The definition would also exclude the EEZ. On the high seas, freedom of navigation, fishing, the laying of submarine cables and freedom of flight are exercised by all states with reasonable regard to the interests of other states in their exercise of the freedom of the high seas (Art. 2). Part VII of the UNCLOS deals with the high seas. Under Article 86, the high seas are all parts of the sea that are not included in the EEZ, territorial sea, internal waters or in archipelagic waters of archipelagic states. This definition has changed the concept of the high seas as set out in the 1958 Convention. The freedoms of the high seas of navigation, fishing, overflight, scientific research, laying of submarine cables and pipelines are open to all states but in the exercise of such freedoms due regard must be taken of the interests of other states exercising the same freedoms (Art.87).

Recognition of Customary Law and Practices in Global Conventions

Unlike early international Conventions, the more recent global convention in 1992, the United Nations Convention on Biological Diversity, specifically acknowledges the customary conservation practices of indigenous and local communities. The Convention on Biological Diversity contains provisions that are intended to ensure effective national action to curb the destruction of biological species, habitats and ecosystems. The Contracting Parties to the Convention are urged (subject to national legislation) to:

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

(Art.8(j))

The 1992 United Nation's Conference on Environment and Development (UNCED) Agenda 21 (a global action strategy for the 21st century) includes the recognition and strengthening of the role of indigenous people and their communities in chapter 26 which provides for:

" ... the recognition of their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development."

as one of the objectives.

Consideration of space and time precludes detailed examination and references to these international arrangements.

National Legal Arrangements

The degree of sovereignty exercised by countries over different parts of the oceans varies according to area and the nature of the activity. National legislation of Pacific countries has sliced up the marine environment into specialised areas and the activities in each zone such as the territorial sea and the EEZ are regulated by separate laws. The laws regulating the various zones were promulgated at different times following global trends. For example, the Pacific Island countries that have passed Acts to regulate activities on the continental shelf include:

- Cook Islands Continental Shelf Act 1964 (NZ);
- Fiji Continental Shelf Act 1970;

- New Zealand Continental Shelf Act 1964;
- Tonga Continental Shelf Act 1970;
- Papua New Guinea Continental (Living Natural Resources) Act 1980.

Further examples of laws enacted at different times can be seen with Tuvalu's Foreshore and Land Reclamation Ordinance which was promulgated in 1969 and the Marine Zones (Declaration) Act which was promulgated in 1983. In addition, these separate laws on the marine environment are administered by more than one Department or Ministry. Although this approach is not without precedent, it is sometimes at the expense of promoting consistent underlying legal and customary law principles on management and the conservation of resources.

Before the adoption of the Law of the Sea Convention in 1982, the South Pacific Forum countries at their meeting in 1977 in Port Moresby issued a Declaration undertaking

" ... to complete as early as practicable and, if possible by March 31 1978, the legislative and administrative actions necessary to establish extended fisheries jurisdiction to the fullest extent permissible under international law..." (6).

Implementing the Port Moresby Declaration, a number of Pacific Forum countries moved to enact legislation declaring 200 nautical mile exclusive economic zones and sovereignty over those areas. This is the reason why statutes demarcating components of the sea and extending sovereignty over areas in line with the draft text of the Law of the Sea Convention in a number of countries predate the adoption of the Convention on the Law of the Sea in 1982. The countries that enacted legislation before the adoption of the Law of the Sea Convention include:

- Cook Islands (Territorial Sea and Economic Zone Act, 1977);
- Fiji (Marine Spaces Act, 1977);
- New Zealand (Territorial Sea and Economic Zone Act, 1977);
- Solomon Islands (Delimitation of Marine Waters Act, 1978);
- Tonga (Territorial Sea and Exclusive Economic Zone Act, 1978).

Other countries only declared 200 miles exclusive fisheries zones (EFZs). The extension of fisheries limits to 200 nautical miles provides opportunities for countries to fish for high value pelagic species which could be exploited under joint venture arrangements and contribute substantially to foreign exchange earnings. The following countries have declared fisheries zones:

- Australia (Fisheries Amendment Act 1978);
- FSM (Fisheries Zones Jurisdiction Act);
- Kiribati (Proclamation under the Fisheries Ordinance 1977);
- Marshall Islands (Marine Resources Jurisdiction Act 1978);
- Nauru (Marine Resources Act 1978);
- Palau (Public Law No. 6714);
- Solomon Islands (Fishery Limits Ordinance 1977);
- Tuvalu (Proclamation under the Fisheries Ordinance 1978).

Since the adoption of the Law of the Sea Convention, new legislation was enacted in Kiribati (Marine Zones (Declaration) Act, 1983); in Marshall Islands (Marine Zones (Declaration) Act 1984); and in Tuvalu, (Marine Zones (Declaration) Act, 1983), transforming their exclusive fisheries zones into exclusive economic zones.

The categories of marine areas claimed by countries are as follows:

	Territorial Sea	Contiguous Zone	Fishery Zone	Exclusive Economic Zone	Other
Australia	12		200		
Federated States of Micronesia	12			200	
Fiji	12			200	
Kiribati	12			200	
Marshall Islands	12	24		200	
Nauru	12		200		
New Zealand	12			200	
Niue	12			200	
Palau	3		EFZ 12 Extended 200		
Papua New Guinea	12		DFZ 200		Offshore Seas 200
Solomon Islands	12			200	
Tonga	12			200	
Tuvalu	12	24		200	
Vanuatu	12	24		200	
Western Samoa	12			200	

Public Domain

In most Pacific countries the coastal and marine areas and submarine areas are vested, depending on the jurisdiction, in the government, State or Crown. Any customary rights, if recognised in marine areas, are included in the legislation. Those areas that are treated as "commons" come under the public domain and generally supersede customary rights to those areas. In the "commons", custom owners are given no special rights but have access to them as members of the public. Note has been taken of Fiji's Rivers and Streams Act which provides for portions of the river banks to be "perpetually open to the public". A further example is found in Tuvalu's Foreshore and Land Reclamation Ordinance 1969 where the ownership of the foreshore and the seabed vests in the Crown but this is subject to any public and private rights of navigation and fishing and passing over the foreshore (s.3). Both public and private rights could be extinguished on the publication of a proposed reclamation of the foreshore or for the construction of the causeway or landing place (s.6). Anyone wishing to submit a claim for compensation for the extinguishment of a private right would need to do so within a period of 3 months after the completion of the causeway or landing place. No claim can however be made for the extinguishment of both public and private rights if the injury results from a reclamation (s.7).

Foreshores

In countries formerly under British administration, the Crown is by prerogative right the prime facie owner of all lands covered by the narrow seas adjoining the coast, and the foreshore, that is the land between high and low water mark. The foreshore is a source of food supply, particularly shellfish, for customary owners, and for communities living near or adjacent to it. Sometimes there is confusion over ownership rights to the foreshore. An example of the confusion surrounding the ownership of the foreshore and Maori customary fishing rights came under discussion in the case of In re the Ninety Mile Beach [1960] NZLR 673. In the Court of Appeal ([1963] NZLR 461) Turner J. stated that:

"... with the establishment of British rule in this country (New Zealand) the whole of its area became the property of the Crown from who all titles must be derived.

The foreshores must be included in this statement of the law for it is beyond dispute that the Crown is *prima facie* entitled to every part of the foreshore between high and low water mark and that a subject can only establish a title to any part of the foreshore, either by proving an express grant thereof from the Crown, or by giving evidence from which such a grant...will be presumed."

It would appear that the above statement by Turner J. is still the current law in countries where the foreshores are vested in the Crown.

Other Components of the Marine Environment

In Pacific countries, the various areas of the marine environment are established and defined by statutes. The principle statutes have been noted earlier. Space precludes a detailed recording of the provisions of the various statutes in the division of the oceans but for the purposes of this Review, brief comments on the internal waters, the territorial sea, contiguous zone, exclusive and extended fisheries zones and the exclusive economic zone will be made. Other special bodies of water such as archipelagic waters and the high seas will not be included.

(i) Internal Waters

Under the UNCLOS and the statutes of the various Pacific countries, internal waters are all those waters lying behind the baseline of the territorial sea. For example, Cook Islands Territorial Sea and Exclusive Economic Zone Act 1977 defines internal waters "to include any areas of the sea that are on the landward side of the baseline of the territorial sea of the Cook Islands" (s.4). A State exercises absolute control over internal waters and no rights of innocent passage can be presumed in internal waters, although in practice, vessels are not denied rights of access to ports. The practice in some countries is to limit access by certain types of ships such as regulating or prohibiting access by nuclear powered ships eg. in New Zealand. Internal waters enjoy the same status as territory.

(ii) Territorial Sea

Tuvalu's Marine Zones (Declaration) Act 1983 defines the territorial sea as "those parts of the sea within 12 nautical miles from the baseline of Tuvalu" (s.7(1)). Where archipelagic baselines are drawn, "the breadth of the territorial sea shall be measured from those baselines to the extent to which they are outside the outer limits of the internal waters of Tuvalu" (s.7(2)). A State exercises sovereign rights including control over the airspace and subsoil but subject to certain rights of the international community such as the right of innocent passage. Under Fiji's Marine Spaces Act 1978 "ships and aircraft of all States shall have the right of innocent passage through and over the territorial seas and archipelagic waters" (s.10(1)). The coastal states exercise absolute control over the territorial sea for security, health and resource purposes.

The Cook Islands Territorial Sea and Exclusive Economic Zone Act vests the bed of the territorial sea and internal waters in the Crown as follows:

"... the seabed and subsoil of submarine areas bounded on the landward side of the low water mark along the coast of all islands of the Cook Islands and on the seaward side of the outer limits of the territorial sea of the Cook Islands shall be deemed to be and always to have been vested in the Crown." (s.6)

(iii) Contiguous Zone

Under the 1958 Convention on the Territorial Sea and Contiguous Zone, a State can establish a zone contiguous to its territorial sea and may exercise control necessary to "prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea

(Art.24(1)(a)). The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured (Art.24(2)). The UNCLOS makes provision for a new contiguous zone extending twelve miles beyond a twelve mile territorial sea. Article 33(2) provides that "the contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured"... The Marshall Islands, Tuvalu and Vanuatu have established contiguous zones.

(iv) Exclusive/Extended Fisheries Zone

A number of countries in the Pacific have established exclusive fisheries zones (EFZ). The Republic of the Marshall Islands established an EFZ and an extended EFZ under the Marine Resources Jurisdiction Act 1978 which is now repealed by the Marine Zones (Declaration) Act 1984. As it is of legal interest to study the legislative scheme determining the EFZ and the extended EFZ, the provisions of the 1978 Act are cited below. Section 8.403 established an EFZ contiguous to the territorial sea as follows:

" The inner boundary of the exclusive fisheries zone is the seaward boundary of the territorial sea, and the outer boundary is a line, every point of which is twelve nautical miles seaward of the nearest point on the baseline from which the territorial sea is measured."

Section 8.405 established an extended fisheries zone (EFZ) as follows:

" The inner boundary of the extended fisheries zone is the seaward boundary of the exclusive fisheries zone, and the outward boundary is a line, every point of which is two hundred nautical miles seaward of the nearest point on the baseline from which the territorial sea is measured. "

The Marshall Islands Marine Zones (Declaration) Act 1984 establishes the Republic's 200 nautical miles exclusive economic zone extending seaward from the baselines from which the breadth of the territorial sea is measured (s.8(1)).

Nauru's Marine Resources Act 1978 defines the exclusive fisheries zone as comprising:

" ... those areas of the sea which are beyond and adjacent to the territorial waters of Nauru, having as their outer limits a line measured seaward from the baseline of the territorial waters of Nauru, every point of which is distant 200 miles from the nearest point of that baseline. " (s.3(1))

The Constitution of the Republic of Palau provides under Article 1(1) that Palau has jurisdiction and sovereignty over its territory which consists of all the islands of the Palauan archipelago, internal waters, the territorial waters, extending to two hundred nautical miles from a straight archipelagic baseline, the seabed, subsoil, water column, insular shelves, and airspace over land and water, unless limited by international treaty obligations assumed by Palau. The Constitution provides for each State to have exclusive ownership of all living and non-living resources, except highly migratory fish, from the land to twelve (12) nautical miles seaward from the traditional baselines; provided, however, that traditional fishing rights and practices shall not be impaired (Art.1(2)).

Before the adoption of the Law of the Sea Convention some Pacific Island countries, under pressure from foreign fishing nations, declared a two hundred mile fishing zone as a protective measure which gave them exclusive functional jurisdiction over fisheries in this zone but subject to the principle of sharing any fish over and above what countries could not themselves harvest. A number of countries in the world such as Spain, Portugal and Japan also adopted the 200 miles fishing zone before the adoption of the Law of the Sea Convention. The principle of sharing

surplus fish stock is enshrined in Article 62 of the Law of the Sea Convention. Five countries in the FFA region have established fisheries zones.

(v) *Exclusive Economic Zone (EEZ)*

Part V of the Law of the Sea Convention establishes the new concept of the exclusive economic zone. Under Article 57 the EEZ shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. Coastal states exercise sovereign rights over the EEZ and the resources, seabed and subsoil and have jurisdiction to explore and exploit the marine resources for economic development reasons as well as to protect and preserve the marine environment within this zone. Twelve countries within the FFA region have established EEZs

Boundaries established by Customary Law

Statutory law makes distinctions between various divisions of the marine environment and each division is administered according to its own set rules and regulations. The precise demarcations in nautical miles are not known under customary law.

The sea rights in waters adjacent to a particular island may be divided into an inner and an outer zone. The criteria of defining the inner zone are not uniform and the criteria for defining the outer zone vary considerably within the Pacific region (Ruddle:1989). For example, in Kiribati, land boundaries run from the lagoon to the reef and are determined by the limited and unproductive nature of the land. To have further access to both lagoons and reef resources and the produce of the land, the boundaries extended from lagoon to ocean (Betero:1987). In Tuvalu, there are three or four divisions of sea areas between Funafuti and Vaitupu (7).

Mokoroa Paiere writing on customary rights to the use of sea and water (unpub. MS) on Atiu, Cook Islands states that there are four main natural reservoirs of water known to the people besides the sea. These are:

" (1) Vaipuna (2) Vairoto (3) Vaiana and (4) Vai maunga. Owning one of these water reservoirs adds wealth and prestige to a family or tribe. To own one or two of these reservoirs, depends on the acquisition of land. If a Vaipuna is in a particular person's land, that would then belong to that person. This right also extends to the water in the sea. From inside the lagoon and out beyond the reef at the place where the ta'ungakoperu is. The right to own the sea may sound strange to some people, especially to those who do not understand the custom. To maintain valuable resources, one has to obtain the territory and put a mark around it. In this particular case, the taungakoperu is the boundary in the sea as tree or hills are the (boundary) mark on land. Whoever owns the land, that same right extends into the sea to the site known as the taungakoperu."

The Bativuda Yavusa (Fiji) claim fishing rights in areas that extend from the land adjacent the village into the sea for 2 miles to approximately 200 yards beyond the reef. There are no clear boundaries to identify the area other than such landmarks as reefs and channels through the reefs. Most of the villages have a similar criteria for identifying their fishing rights areas. Each person is aware of his neighbour's areas through oral tradition (Iwariki:1983).

In some areas rights to sea areas have not been claimed by particular segments of the population. Crocombe & Marsters (1987) state that it is probably due in part to the difficulties in demarcation that beaches, reefs and lagoons have never been subdivided.

The Relationship between State Rights and Customary Rights

The laws of the various countries that establish and define the Territorial Sea, the Exclusive Economic Zone or the Exclusive and Extended Fisheries Zone all have one basic rule in common and that is the State asserts exclusive authority over these areas and the resources found in them. Under customary law, one of the most critical areas of marine rights is a description of the right itself. Customary rights to marine areas can be preserved in legislation such as found in s.13 of the Fiji Fisheries Act and s.21 of the Kiribati Fisheries Ordinance but where no mention is made of marine area rights in the constitution, legislation or by-laws, customary marine rights as a general rule continue to exist and co-exist with other rights unless extinguished by statute or legal grant.

Exceptions to the Rule

Where the State exercises exclusive and sovereign rights over the various components of the marine environment there are two key exceptions ie. public rights of access and customary rights. For example, Fiji's River and Streams Act 1882 where the soil under rivers and streams belong to the Crown and the banks of rivers

" ... to the breadth of twenty feet from the ordinary water line in the wet season and the highest spring tide" (s.3)

is open to the public and inhabitants of towns and villages adjacent to rivers or streams will only have the full enjoyment of those parts as members of the public. There are however exceptions to this rule where rights to fish in components of the marine environment in certain Pacific Islands are vested by custom with a particular clan, group or individual. For example, despite the provisions contained in Fiji's Rivers and Streams Act, under the Fisheries Act, an offence is created if any person takes fish or shell fish or cockle from any reef or shellfish bed in any area where the rights of any mataqali (subdivision of Fijian people) have been registered by the Native Lands Commission in the Register of Native Customary Fishing Rights (s.13).

Under FSM's Territory, Economic Zones and Ports of Entry Act, Title 18, the Federated States of Micronesia exercises sovereignty over its internal waters and territorial sea as well as over the living and non living resources in those areas, the seabed and subsoil (s.103). But traditional fishing rights in submerged reef areas wherever located within the fishery zones is to be preserved and respected (s.106).

Similarly under Palau's Fishery Zones Act, the National Government has exclusive management, conservation and regulatory authority over all living resources within the extended fishery zone to the full extent recognised by international law (s.144(b)). However, traditionally recognised fishing rights in submerged reef areas wherever located within the fisheries zone must be preserved and respected in accordance with the regulations of the Palau Maritime Authority (s.146). The term traditional rights is not defined under the Act. If traditional rights can be interpreted to mean customary rights exercised by Palauans, then it appears in both the Federated States Territory, Economic Zones and Ports of Entry Act and Palau's Fishery Zones Act that traditional fishing rights and management of marine resources are limited to submerged reefs.

SECTION V

MANAGEMENT AND CONSERVATION OF MARINE RESOURCES

A number of writers (eg. Johannes, Baines) have consistently urged further investigation of customary management practices before they are broken down and lost due to the introduction of the cash economy, the decline of traditional authority and the introduction of countervailing laws and practices by colonial or independent governments (Clarke:1990). The calls for investigation are significant as the knowledge possessed by island communities and the local fishermen about marine resources and the management of local ecosystems and fisheries conservation "would take tens of years and many researchers to discover independently" (Johannes:1981). National waters, properly managed, are capable of meeting not only a large portion of the growing demands for commercial fisheries but can also accommodate a wide range of uses such as aquaculture development, fish farming and recreation. Whilst in some countries commercial fisheries represent a large slice of the national income, the potential for other forms of development in the marine environment eg. mineral exploration and energy, have implications for future economic growth.

A brief review into the structure of legal management controls in selected countries of the FFA region is set out below, firstly to indicate the degree of emphasis made by the law on management and conservation of marine resources whilst at the same time promoting development, and secondly the extent to which traditional management is included to reinforce legal measures to form a "functioning whole" management system. The Review will also indicate what customary management controls (if any) are included in the general body of the law. The scope of conservation and management strategies in legislation and by-laws has been expanded in more recently promulgated marine laws to deal with the challenges of marine resource development and exploitation. The dominating feature in the legislation of all countries is the conservation and management of fisheries. Fisheries in most legislation are widely defined and includes fish, mammals and other forms of marine life.

Cook Islands

Under the Marine Resources Act 1989, the Minister may by notice in the Cook Islands Gazette authorise a fishery (ie. one or more stocks of fish) as a designated fishery if it is important in the national interest and requires management and development measures for "effective conservation and optimum utilisation". In designating a fishery such factors as scientific, economic, environmental and other relevant consideration must be taken into account (s.3(1)). Fish is defined to mean any aquatic plant or animal, whether piscine or not; and includes any oyster or other mollusc, crustacean, coral, sponge, holothurian (beche de mer), or other echinoderm, turtle and marine mammal and includes their eggs, spawn, spat and juvenile stages (s.2).

A fisheries plan for the management and development of any designated fishery is to be prepared and kept under review. In devising the plan it is mandatory that a number of factors be included such as: the management objectives to be achieved; the development strategies to be adopted; the state of exploitation of the species and their characteristics; and the licensing programme to be followed. It is also mandatory that account must be taken of any relevant traditional fishery methods and principles (s.3(2)).

Where the plan directly affects fisheries in lagoons over which Island Councils exercise jurisdiction, the Act requires that consultations must be held with Island Councils, any Local Fisheries Committees, or local fishermen likely to be affected by the plan (s.3(4)). All fisheries plans require Cabinet approval (s.3(5)).

Local Fisheries Committees are appointed by the Secretary for Marine Resources in outlying islands for the purpose of advising the Ministry on local management and development of fisheries (s.4). The Fisheries Committees may make recommendations to the Local Island Council to adopt by-laws in relation to any designated fishery but any recommendation made must be consistent with the fisheries plan (s.5(2)). It is mandatory under the fisheries plan to take into account any relevant traditional fishing methods and principles.

Management Measures

The Island Councils have two primary management strategies. The first is the power to declare:

- ✓(a) closed seasons, during which time fishing for particular species is prohibited and fishing in areas specified in the declaration is also prohibited; and
- (b) open seasons, during which time fishing for the species or in the area or areas specified in the declaration is permitted (s.6).

The second is the power to issue licenses to any person engaged in fishing or any related activities. The Island Council may impose any conditions considered necessary for conservation and management but the conditions must be consistent with any by-laws or with the provisions of the Marine Resources Act (s.7).

Protection of Particular Species

The Cook Islands State of the Environment Report 1992 points out that over harvesting of fisheries resources, particularly clams in Aitutaki is a problem. Destructive fishing methods and overfishing will lead to the depletion of the local fish resources if Government and Island Councils do not actively intervene (p.57/8).

The Outer Island (Aitutaki Paua) By-laws (20/88) prohibits the taking of paua (giant clam) of the species *Tridacna maxima* without a permit. The conditions imposed by the Council could relate to the number of pauas taken. Anyone acting in contravention of this by-law is liable to a fine and/or three months imprisonment (s.5).

The Aitutaki Fisheries Protection By-laws 1990 prohibits the taking and removal of shellfish named in the Schedule to these by-laws (ie. Paua, Kai and Ariri) or the selling of fish without a permit from the Aitutaki Island Council. The Council may impose conditions considered necessary to safeguard particular species from over exploitation.

The Manihiki Pearl and Pearl Shell By-laws 1991 (made pursuant to sections 15 and 16 of the Outer Island Local Government Act 1987 and section 5 of the Marine Resources Act 1989) allows for pearl shell farming under a permit system. In granting the permit, the Council may impose conditions and may restrict the period in which pearl shell in the lagoon can be farmed (s.9). The method of taking pearl shell is also restricted under the by laws as a special pearl shell diving permit must first be obtained if diving for any naturally occurring pearl shells (s.4). If Island Councils consider that pearl shell stocks are likely to be over exploited, all or some of the pearl shell diving permits will be revoked by public notice (s.7(1)).

Under section 60 of the Marine Resources Act 1989, the Queen's Representative is empowered to make regulations on a number of matters and may prescribe measures for the conservation, management, development, licensing and regulation of fisheries; regulate or prohibit fishing within any lagoon; restrict the time of the year during which fishing may occur; prohibit, approve or restrict the equipment or methods which may be used.

Fiji

The Fisheries Act 1942 protects the customary fishing rights of a Fijian mataqali (a subdivision of the Fijian people) provided the right of the mataqali has been registered by the Native Fisheries Commission in the Register of Native Customary Fishing Rights (s.13). Customary fishing right areas are generally regarded as extensions of the land boundaries of right holding groups. Customary fishing rights in the reefs and shellfish beds are recognised.

Fish is defined in the Act to mean any aquatic animal whether piscine or not and includes shellfish, sponges, holothurians (beche de mer), sea urchins, crustaceans, turtles and their eggs (s.2)

Management Measures

A fishing permit may be granted by the Divisional Commissioner (Government administrator of the Division) to others who are not members of the mataqali to take fish from a registered customary fishing area but such permits are not necessary in the case of persons taking fish with a hook and line, spear or portable fish trap that can be handled by one person. The permit may however exclude fishing for particular species of fish, or exclude fishing in particular areas or by particular methods. The grant of the permit is at the discretion of the Commissioner but consultations with the local Fisheries officer and the mataqali whose fishing rights will be affected is mandatory before a permit is issued.

The Fisheries Regulations provide details of conditions for offshore fishing licenses. The Minister has power to prohibit fishing for species listed under a fishery category, determine the size of the nets to be used and direct that details of the weight of each species caught in specified geographical locations be recorded in returns sent on a monthly basis to the Director of Fisheries (r.4B).

Section 3 of the Act gives the Minister power to appoint honorary fish wardens whose functions are to detect and prevent offences and enforce the provisions of the Act. Section 9 of the Act gives the Minister power to make regulations to: prohibit any practices or the use of any method or equipment that is likely to injure the maintenance and development of fish stock; prescribe areas and seasons within which the taking of fish is prohibited; restrict the taking of fish either entirely or with reference to any particular species; prescribe limitations on the size and weight of fish to be taken; and prescribe limits on the size of nets and the mesh to be employed.

The Fisheries Regulations 1976 and more recent amendments made to the Fisheries Regulations in 1990/91 provide in considerable detail, (too numerous to record here) the conservation measures not only on the size and limits of fish to be taken and the equipment to be used but the restrictions applying to the taking of particular species such as crabs (r.9), turtle (r.20), trochus (r.21), davui (*Charonia tritonis*) (r.22), giant helmet shell (*Cassis cornuta*) (r.23), giant clam (r.25A) and beche de mer (r.25b). The Regulations also prohibit the use of poison (r.8), the use of nets for fishing in estuaries (r.7) and fresh waters (r.10) and prohibit the taking of fish in restricted areas without permission (r.11).

The Marine Spaces Act 1978 also provides in Part III for the management and conservation of fisheries in the archipelagic waters and the waters in the exclusive economic zone.

Federated States of Micronesia

Title 24 of the Code of the Federated States of Micronesia dealing with marine resources provides in section 101, a Statement of Purpose which reads as follows:

" The resources of the sea around the Federated States of Micronesia are a finite but renewable part of the physical heritage of our people. As the Federated States of Micronesia has only limited land based resources, the sea provides the primary means for the development of economic viability which is necessary to provide the primary means for the foundation of political stability. The resources of the sea must be managed, conserved, and developed for the benefit of the people living today and for the generations of citizens to come. For this reason the harvesting of this resource, both domestic and foreign, must be monitored, and when necessary, controlled. The purpose of this Title is to promote conservation, management and development of the marine resources of the Federated States of Micronesia, generate the maximum benefit for the nation from foreign fishing, and to promote the development of a domestic fishing industry."

Fish is defined to mean any living marine resource (16).

Management Measures

Section 301 of Title 24 establishes a Micronesian Maritime Authority and amongst its many functions the Authority is required to adopt regulations for the conservation, management and exploitation of fish in the exclusive economic zone (s.1(a)) and to issue permits for fishing in the Territorial Sea or internal waters of a State (s.303(3)). The Authority may deny the issue of a permit for foreign or domestic based fishing within one nautical mile of the edge of a coral reef that is wholly submerged during high tide (s.111(4)(a)). Where the Authority permits fishing on or within one mile of the reef area within the EEZ, it is required to submit a copy of the application to the State concerned and to the customary inhabitants who have authority to control fishing over the reef areas. The State concerned would be required within 30 days to communicate any objections to a permit being issued over the reef areas to which customary inhabitants have control (s.111(4)(b)).

The Authority also has the power to determine the levels of total allowable level of fishing in respect of any stock of fish and set levels in accordance with requirements of optimum sustainable yield determined by scientific evidence, conservation, management and development measures contained in fishery management plans (s.108).

Kiribati

Kiribati has a highly developed system of regulations for traditional fisheries. Some of the principal traditional regulatory systems were codified and given legislative effect in the Island Regulations (Tuan Aonteaba) of 1950. These were abolished in 1967 when Local Government Councils were established under the Local Government Ordinance 1966. The 1966 Ordinance was in turn repealed and replaced by the Local Government Act 1984. Under the 1984 Act, Local Government Councils may be established by warrant. The warrant establishing the Council sets out the functions which the Council shall or may perform. These functions, which are set out in the Schedule to the Ordinance include the power:

- to provide for the improvement and control of fishing and related industries; and
- to prohibit, restrict, or regulate the hunting, capture, killing or sale of animals, reptiles, birds or fish of any specified kind of animal, reptile, bird or fish.

The 1984 Act empowers the Local Government Council to make by-laws for the carrying into effect and for the purposes of any of the functions conferred upon it (s.50(1)). Any proposed by-laws or amendments must be publicised, debated and discussed at public meetings convened by the Council for that purpose (s.51).

The Fisheries Ordinance 1946 provided for the recognition of customary "ownership" and fishing rights by the kainga (clan) and utu (family). The Ordinance established a procedure for the registration of these customary rights and for the adjudication and settlement of disputes. The Commission was charged with the duty to inquire into the title to all customary fishing rights and to record the boundaries and situations of such rights in a Register of Native Customary Fishing Rights. Unfortunately, it appears that little was done to implement the provisions of the Ordinance. The Native Lands Commission, which was established to define and register rights of land tenure, dealt with certain types of marine tenure, including rights over fish traps, fish ponds, sea walls and reclaimed land. The ownership of such rights were vested in individuals, rather than the kainga or utu. Teiwaki (1988) argues (at p.40) that registration to individuals was inappropriate and, in fact, weakened the existing customary system which depended upon far more complex social relationships. Rights of individual ownership were given statutory recognition in the Gilbert and Phoenix Islands Lands Code 1963. The current Fisheries Ordinance 1977 pays particular attention to the development and exploitation of fisheries resources for the benefit of the country (s.3(1)). The Ordinance however, provides for regulations to be made in relation to the conservation and protection of all species of fish; the establishment of closed seasons; the designation of prohibited areas, the taking of coral and seaweed; the quantity of fish to be caught and the limits on the size of fish to be taken. Regulations may also be made to prohibit certain types of fishing practices and the use of equipment that is likely to damage fish stock (s.22).

"Fish" and "fishing" are defined broadly to include the taking or harvesting of any aquatic animal such as turtles and their eggs, molluscs, crustaceans, sea urchins and beche de mer as well as coral, sponge and seaweed.

Management Measures

Under the Fisheries Ordinance a special licence is required from the Minister responsible if outsiders wish to fish in any sea or lagoon area or on any reef forming part of the ancient customary fishing ground of any kainga (clan), utu (family) or other division or subdivision of the people (s.21(1)) giving recognition to the customary rights of the I-Kiribati.

Some of the main traditional fishing norms of all the islands from Makin to Arorae were incorporated as part of Island Regulations in 1950 but the regulations were abolished in 1967 when the local government councils were established (Teiwaki:1988). A proposal from the Atoll Research Unit (USP) in Kiribati to the Ministry of Environment and Natural Resources to carry out research into traditional conservation practices and strategies is understood to have been accepted. Farrier (1992) states that the nurturing of such practices and the use of regulations which build on them is likely to prove the most effective method of influencing behaviour, given the enforcement difficulties in this area. It is important to first identify those practices which are sensitive to the conservation of fish stocks and those which have a detrimental impact. There are however local by-laws that regulate local fishing practices and some of these may have direct conservation significance, such as the limiting of the catch, although the primary objective may be to protect those who are still using traditional practices from commercial operations and an increasing resort to new technologies, such as outboard motors.

Farrier (1992) sets out the following by-laws regulating certain fishing practices which includes:

- Te Ororo, where a crowbar is used in combination with a net to frighten the fish (Abaiang Island Council Fishing (Te Ororo) By-law 1988);
- Using lights other than coconut torches (Arorae Island Council (Fishing) By-laws 1990; Onotoa Island Council (Fishing) By-laws 1971);

- breaking the alignment of canoes while fishing for flying fish (Arorae Island Council (Fishing) By-laws 1990; Onotoa Island Council (Fishing) By-laws 1971);
- use of motor boats in areas normally used by canoes (proposed Onotoa Island Council (Fishing) (Amendment) By-Law 1991);

Certain fishing practices are prohibited at certain times:

- using torches or any other methods of fishing than nets during the Kawariki season (Arorae Island Council (Fishing) By-laws 1990);
- fishing between midnight and sunrise in certain areas (Arorae Island Council (Fishing) By-laws 1990); and
- certain fishing practices are prohibited to types of fish, for example:
- catching flying fish or lobsters by certain methods (Arorae Island Council (Fishing) By-laws 1990; Marakei Island Council (Control of Flying Fish) By-laws 1976).

Some Island Councils provide for the registration and protection of stone fish traps by prohibiting fishing within a certain distance. (Teinainano Urban Council (Control of Fish Trap) By-laws 1982).

Lodge (1993) in his recent research into legislation relating to traditional fisheries management in Kiribati provides the following list of by-laws made by the various Island Councils:

- Abaiang Island Council (Pearl Shells) By-laws 1972;
- Tamana Island Council (Fishing) By-laws 1970;
- Kuria Island Council (Fishing) By-laws 1970;
- Kuria Island Council (Control of Fishing Appointing Prohibited Areas for Trolling Using Outboard Motors) By-laws 1981;
- Marakei Island Council (Control of Flying Fish) By-laws 1976;
- Teinainano Urban Council (Te Bun) By-laws 1978.

Lodge (1993) states that many traditional management practices are reflected in these by-laws. The Tamana (Fishing) By-law prohibits trolling within 2,000 yards of the shore, the use of lights other than burning coconut flares and taking out a canoe between midnight and 6 am. In Kuria, the Council may declare any season to be "te ana" season. During this time, it is prohibited to use a canoe in a prohibited area, or to use a torch or other light while fishing. It is forbidden to allow any light to show out to sea on the western side of the island. Lodge (1993) comments that there seems to be a renewed interest in customary marine tenure in Kiribati and it would appear that there is considerable scope for greater integration of traditional methods of resource management with the existing regulatory framework.

Protection of Particular Species and Prohibited Fishing Areas

Particular marine species are also given protection under the Fisheries Conservation and Protection (Rock Lobsters *Panulirus* Species) Regulations 1979 which prohibit the taking and selling of immature rock lobsters and females bearing eggs (r.3). The Prohibited Fishing Areas (Designation) Regulations 1978 prohibits fishing in certain areas such as the Azur Lagoon, Pelican Lagoon, Isles Lagoon, the Tonga Channel and the adjoining Artemia Ponds (all in Kiritimati).

The UNCED Report points out the need for effective regulation of lagoon and inshore fisheries adversely affected by commercial exploitation for export (eg. lobsters and prawns) as well as serving the local markets and growing population. The Report particularly singles out the increasing use of small mesh gill nets and the decline of traditional controls (p. 51/2). Ecosystems Analysis Incorporated involved in the Tarawa Lagoon project is about to commence a study to investigate the biology and ecology of lagoon fish for the purposes of conservation and management of marine resources. The Atoll Research Unit's research on pelagic fish hopes to complement this as it is considered crucial to the development of effective conservation and management strategies (Farrier:1992).

Marshall Islands

The Marshall Islands Marine Resources Authority Act 1988 (Title 33, Marshall Islands Revised Code) establishes a Marine Resources Authority "to provide for exploration, exploitation, regulation, corporation and management of marine resources and for matters connected therewith or incidental thereto". The 1988 Act repeals the Marine Resources Jurisdiction Act 1978.

The 1988 Act defines fish to include shellfish, crustaceans, marine animals and the eggs, span, spat, and juvenile stages of fish, shellfish, crustaceans and marine animals (s.2).

Management Measures

The Act establishes a Marshall Islands Marine Resources Authority to which the Nitijela (Parliament) delegates authority to promulgate regulations for the conservation, management and exploitation of marine resources. The regulations may relate to:

- the conservation, management and protection of fish and other aquatic organisms;
- the fixing of terms of fishing licences;
- the determining of appropriate catch levels and fixing quotas of catch;
- specifying the seasons and areas of fishing; type, size and amount of fishing gear to be used, vessels to be used and age and sizes of fish and the species to be caught; and any other matter deemed necessary or appropriate for the conservation and management of the resources (s.12).

Any application for a local fishing licence is made to the Authority and in processing the application the Authority is required to take into consideration the principles of conservation and management in any relevant fisheries management programme (s.24). The Authority may also take measures it considers necessary to develop local fisheries, but in any development programme it is mandatory that the Authority take into account the principles of conservation, management and optimum utilisation. The Authority is required to hold consultations, where appropriate, with Local Government Councils in the development and proper management of the fisheries resource but each Council is responsible for the management and development of the reef and inshore fisheries within its waters (s.23).

The powers and duties of the Authority are set out in section 11 of the Act and they include the following:

- to conserve, manage and control the exploration and exploitation of all living and non-living resources in the Fishery Waters, seabed and subsoil;
- to establish and implement an Exclusive Economic Zone Management programme in accordance with the Act;
- issue fishing licences and negotiate and conclude foreign fishing agreements. Foreign fishing agreements require Cabinet approval.

The use of explosives, poisons or noxious substances to take or catch fish carries a penalty of up to fifty thousand dollars (US \$50,000) fine (s.38) and the use or possession of prohibited fishing gear or gear that does not conform to the prescribed standards carries a penalty of up to one hundred thousand dollars (US \$100,000) fine (s.39).

Nauru

The Marine Resources Act 1978 establishes the exclusive economic zone of Nauru and makes provision for the exploitation, conservation and management of resources of fish and aquatic animals.

Fish is defined to mean fish and shell fish and their young, fry and spawn and every description of aquatic animals and their young (s.2).

Management Measures

The Act gives the Minister responsible the power to grant licences to fishing craft to fish within the territorial sea or the EEZ or in any specified area. The Act then sets out under section 7(3) a list of conditions that may be attached to licences such as:

- the season, times and voyages during which fishing is authorised;
- the species and subspecies of fish and the aggregate quantity of fish which may be taken;
- the size and age of the fish species which may be taken;
- the periods of the year and the methods by which fish may be taken.

The Minister may also vary the terms and conditions of the licences (s.9).

Section 19 of the Act empowers Cabinet to make regulations prescribing measures for the conservation and management of fish resources.

Niue

The Niue Fish Protection Ordinance 1965 defines Niue waters to mean the sea adjacent to the coast of Niue within one mile of the external reef line and includes all waters between that line and the coast (s.3).

Fish is defined by this Ordinance to mean:

" every description of fish or shell fish and their young or fry or spawn and includes every other marine animal, whether mammal, reptile, or crustacean, and any other organic marine product whatsoever. " (s.3).

Management Measures

Under section 6 of the Ordinance, a fono for fish (ie. a prohibition placed on a fishing area) can be declared by public notice over any part of the reef or Niue waters and the effect of the fono for fish is that whilst it is in force no one may enter the area over which the fono has been declared; take inorganic substance, material or matter from any part of the area or take or kill fish in any such area (s.7). Anyone committing an offence is liable to a fine but an exception is made if human life is at stake due to stress of weather.

The Ordinance, giving custom legal expression, prohibits the taking of bait fish known as "ulihega" except from a bait fish area recognised for that purpose according to local custom. The taking of bait fish from a particular area is confined to those periods as decided by local custom or

by-law. The local custom or by-law shall be deemed to include a provision that all bait fishing groups proceeding to the same general area must depart from the shore for the bait fishing grounds simultaneously. No ground or line bait other than coconut may be used to lure or catch the bait fish (s.8).

Palau

The Fishery Zones and Regulation of Foreign Fishing (Title 27) legislation was promulgated to manage, conserve and regulate the harvesting of fish, both within the reef areas of islands and atolls and in other areas within the jurisdictional competence of the Republic.

Fish is defined to mean any living resources (s.102).

Management Measures

Section 121 establishes the Palau Maritime Authority. One of the functions of the Authority is to adopt regulations for the conservation, management and exploitation of all living resources in the extended and exclusive fishery zones (s.123(a)). Traditionally recognised fishing rights in submerged reef areas within the fishery zone are preserved and respected in accordance with the regulations of the Authority (s.146). The Palau Constitution also preserves traditional fishing rights and practices under Article 1(2)). This subsection gives each State exclusive ownership of all living and non-living resources, except highly migratory fish, from the land to twelve (12) nautical miles seaward from the traditional baselines; provided that traditional fishing rights and practices are not impaired.

Foreign fishing vessels are only permitted to fish in waters under national jurisdiction through a permit system. In any review of permit applications, the Authority is required to solicit views of appropriate persons in the Republic and hold public hearings where necessary. The application may be approved on such terms and conditions and with such restrictions as the Authority deems appropriate (s.168(c)). A special bait fishing permit is issued to foreign fishing vessels at the sole discretion of the Authority. The Authority may include such terms and conditions (which could include conservation conditions) as considered appropriate for proper management (s.172).

Papua New Guinea

The Papua New Guinea Fisheries Act (Chap.214) applies to the declared fishing zone and internal waters and to all persons (including foreigners) and boats (including foreign boats). The Act does not apply to the taking of fish by traditional fishing methods defined in section 1 to mean "fish taken in a manner that is substantially in accordance with the traditions of the indigenous inhabitants of Papua New Guinea".

Fish is defined in this Act to include: (a) turtles; (b) dugong; and (subject to paragraph (e), crustacean, molluscs, trochus and beche de mer, but does not include (d) any species of whales; or any organism that is a sedentary organism for the purpose of the Continental Shelf (Living Natural Resources) Act.

Management Measures

The Minister responsible for fisheries may by notice in the National Gazette:

- prohibit at all times or for the periods specified, the taking of fish or particular species of fish from any area of waters;
- prohibit the taking of fish which are less than the size specified in the notice;
- prohibit the use of certain methods or equipment used in the taking of fish (s.5(1)(b)).

The prohibition can also be extended to the taking of female rock lobsters with eggs or spawn (s.5(3)).

The Minister, in exercising his powers in relation to this Act "shall have regard to the principle that fish stocks should be managed so as to ensure production from those stocks of the optimum sustainable yield" (s.20A(a)).

Solomon Islands

The Fisheries Act 1972 provides for the promotion and regulation of fishing and fishing industries in the Solomon Islands.

Fish is defined in this Act to mean:

" ... any aquatic animal, whether piscine or not, and includes shellfish, crustaceans, sponge, holothurian (beche de mer), crocodile and turtle and the young and eggs thereof. " (s.2)

Management Measures

There is a number of management measures that can be implemented by way of regulations under this Act. Section 20 of the Act gives the Minister power to make regulations for the conservation and protection of fish of any species; establish closed seasons for any area of Solomon Islands; place a limit on the amount, size or weight of fish to be caught or traded; designate prohibited fishing areas for all fish or certain species; designate prohibited methods of fishing; prohibit certain types of fishing gear or methods of fishing and in relation to fishing nets, specify the minimum mesh size.

The Principal Fisheries Officer is charged with the responsibility to promote the development of fishing and fisheries and ensure that the fisheries resources of Solomon Islands are exploited to what appears to be the "maximum reasonable extent consistent with sound fisheries resources management" (s.3(2)).

Protection of Specific Species

The Fisheries Regulation 1972 (amendment 1977) makes it an offence for anyone to catch, retain, expose or sell:

- any crayfish (*Panulirus* spp.) measuring less than 25 cm from the tip of the beak to the end of the shell of the centre flap of the tail;
- any trochus shell under 2 ½ inches in diameter measured across the base (r.9);
- any crocodile, where the belly width is less than 50cm, or skin; or
- any turtle less than 75 cm in carapace length (r.10).

Tonga

The purpose of the Fisheries Act 1989 is to provide for the management and development of Fisheries. A new Ministry for Fisheries was established in February 1991 as previously, Fisheries was part of the Ministry of Agriculture, Fisheries and Forestry. The 1989 Fisheries Act has brought into effect significant changes by Government to manage fisheries resources as the Fisheries Regulations Act 1923 contained archaic provisions and did not reflect the current trends in fisheries management.

Under the Act, fish is defined to mean:

" ...any aquatic animal whether piscine or not and includes any mollusc, crustaceans, coral (living or dead), sponge, holothurian (beche de mer) or other echinoderm, turtle, their young and eggs. "

Management Measures

Section 3(1) of Tonga's Fisheries Act requires the Director to prepare and keep under review, plans for the management and development of fisheries. Any fisheries plan must indicate the current state of fishery exploitation, the management objectives to be achieved and the licensing and development measures to be applied. In the preparation of the fishery plan the Director is required to consult with any local government authority and any local fishermen who are likely to be affected by the plan (s.3(3)). Under section 22(1) of the Act, the Minister responsible may by order declare any area of fisheries waters to be reserved for subsistence fishing and additionally may specify the types of vessels to be used for fishing in that area and the fishing methods to be used.

The Minister is empowered under section 59(2) to make regulations:

- for the licensing, regulation and management of any particular fishery;
- prescribe management and conservation measures including mesh size, closed seasons, closed areas, prohibited methods of fishing, gear to be used and schemes for limiting the entry into all or any specified fisheries;
- for the taking of corals and shells; and
- the setting up of fish fences.

The Act gives the Registrar of Fisheries power, under the direction of the Minister to establish local committees from among professional fishermen to provide advice on a range of matters including the allocation of fisheries licences (s.7). The involvement of these committees is to facilitate a process for shared information between Government and the local community and to assist in the resolution of problems likely to arise over the resources. The Minister also has the power to declare any area of the fisheries waters to be a reserved area for subsistence fishing, the types of vessels allowed to fish in that area and the fishing methods to be used (s.22(1)).

Tuvalu

The Fisheries Ordinance 1978 promotes the development of fishing, regulates fishing industries and gives the Minister responsible the power to take measures to promote the development of fishing and fisheries and to ensure that the fisheries resources are exploited to the full for the benefit of Tuvalu (s.3(1)). No express mention is made in the Ordinance concerning customary fishing rights or the preservation of customary practices.

Fish is defined in this Ordinance to mean:

" ... any aquatic animal, whether piscine or not, and includes shell fish, crustaceans, sponges, holothurians (beche de mer), sea urchins, turtles and their eggs. " (s.2)

Management Measures

Under section 22 of the Act, the Minister may make regulations for the conservation and protection of all species of fish by establishing closed seasons for any area or for any species of fish;

- limiting the amount, size or weight of fish or any species to be caught or traded;

- = designating prohibited fishing areas for all fish or certain species;
- = regulating methods of fishing;
- = prohibiting certain types of fishing gear to be used;
- = specifying minimum mesh sizes for fishing nets (s.22(d)(iv));
- = prohibiting the use of methods, practices, equipment, apparatus, materials or substances likely to be injurious to the maintenance and the development of fish stocks in Tuvalu waters (s.22(n)).

The Marine Zones (Declaration) Act 1983 gives the Minister responsible the power to make regulations for the EEZ. Under section 12(d) of the Act, the Minister may prescribe measures to protect and preserve the marine environment of the EEZ. Although Tuvalu has sovereign rights to exploit the resources in the EEZ, the Act prescribes that conservation must be included in any EEZ management strategies. Section 2 of this Act interprets conservation and management to include all rules, regulations, methods and measures that are required to build, restore or maintain any fishery resource (including fish species and habitats) and to avoid practices that will cause irreversible or long term ill effects on fishery resources.

Protection of Specific Species

The Fisheries (Trochus) Regulations 1989 (L.N. 2/90) designate the area of Tuvalu as a prohibited fishing area for the newly introduced shell fish species *Trochus niloticus* (r.2). Anyone who fishes for this particular species is liable on conviction to a fine of \$1000 or 6 months imprisonment (r.3).

There is a number of by-laws passed to regulate fishing in some of the islands such as Niutao, Nui and Nukulaelae. These include:

- Nui Island Council (Control of Fishing) By-laws 1985; and amendment 1990;
- Niutao Island Council (Control of Fishing) By-laws 1987 (proposed);
- Nukulaelae Council (Control of Faapuka and Kaumu) By-laws 1984.

There are provisions regulating local fishing practices in a number of by-laws eg. prohibiting fishing in certain areas at certain times such as the fishing for faapuka between June and August using a spear or net in various areas, particularly in parts of the lagoon (Nukulaelae Council (Control of Faapuka and Kaumu) By-laws 1984). Some of the provisions in by-laws may have direct conservation significance although the primary objective may be to protect those who are still using traditional practices from commercial operations and an increasing resort to new technologies, such as outboard motors (Farrier:1992).

Vanuatu

The purpose of the Fisheries Act 1982 is to provide for the control, development and management of fisheries and related matters.

Fish is defined in the Act to mean:

" ... any aquatic animal, whether piscine or not and includes any mollusc, crustacean, coral, sponge, holothurian (beche de mer) and reptile and their young and eggs and includes coconut crabs." (s.2)

Management Measures

The Fisheries Act 1982 gives the Director of Fisheries the responsibility to prepare and keep under review, plans for the management and development of fisheries in Vanuatu waters. Each plan must:

- identify and assess the present state of fishery exploitation;
- specify the management objectives to be achieved;
- specify the management and development measures to be taken; and in particular;
- specify the licensing programme to be followed for each fishery, and the limitations to be applied to local and foreign fishing vessels.

In the preparation of the plan, the Director is required to consult with local fishermen, local authorities, Government Ministries, departments and anyone who will be affected by the proposed plan. Where necessary, consultations must be carried out with fisheries management authorities of other states in the region especially those sharing the same or interrelated stocks in order to harmonise fisheries management and development plans (s.2). Any fishing access agreement entered into by Vanuatu must not exceed the total resources or the amount of fishing permitted to foreign fishing vessels under the applicable management and development plans (s.3).

Protection of Specific Species

The Fisheries Act prohibits the fishing of any marine mammal in Vanuatu waters. Any marine mammal accidentally caught must be returned to the waters immediately with the least injury (s.18).

The Minister may make regulations prescribing:

- minimum mesh size, species sizes, closed seasons and closed areas and schemes for limiting entry into all or any specified fisheries;
- measures to prevent or minimise the accidental catching of marine mammals (s.18(i));
- regulations for the taking of coral; the setting up of fish fences; the taking of aquarium fish; and the development of aquaculture (s.18 (m)).

Part IV of the Fisheries Regulations sets out conservation measures for specific species. No person must take, harm, possess, sell or purchase:

- rock lobsters carrying eggs or less than 22 cm in length from the rostral horns to the rear edge of the telson or whose carapace is less than 7.5 cm;
- slipper lobsters less than 15 cm in length;
- coconut crab less than 9 cm in length;
- green snail less than 15 cm in length when measured in its longest dimension;
- *Trochus niloticus* less than 9 cm in diameter when measured across the base;
- trumpet shell less than 20 cm in length measured along the out side of the shell from one end to the other;
- turtles and eggs, or interfere with turtle nests; purchase or export turtle shell particularly of the species known as the hawksbill turtle.
- crustaceans, beche de mer, and aquarium fish.

Written approval from the Minister is required for export purposes.

Prohibited Methods

Section 19 of the Fisheries Act prohibits the use of explosives and poisons for the purposes of taking fish. Anyone committing an offence under this section is liable to a maximum fine of VT 1,000,000.

Marine Reserves

The Fisheries Act authorises the establishment of marine reserves. The Minister may, after consultation with owners of adjoining land and the appropriate Local Government Council, declare any area in Vanuatu water, including the seabed, as a marine reserve. Anyone who takes fish, takes or destroys any coral, takes sand or gravel, wrecks, or destroys or disturbs the natural habitat without the written permission of the Minister is liable to a fine (s.20).

Western Samoa

The purpose of the Fisheries Act 1988 is to promote conservation, management and development of fisheries; promote exploration of living resources, scientific research and to promote the protection and preservation of the marine environment (s.3).

Fish is defined in this Act to mean:

" ... any aquatic animal, whether piscine or not, and includes any mollusc, crustacean, coral, sponge, holothurian (beche de mer) or other echinoderm, turtle and marine mammal and includes their eggs, spawn, spat and juvenile stages."
(s.2)

Management Measures

The Director of Fisheries is given a number of functions under the Act which include the requirement for consultation with fishermen, industry and village representatives concerning conservation and development measures for fisheries. The Director is also required to prepare and promulgate by-laws on conservation and management of fisheries (s.3(3)(d)). Any by-law affecting the conservation and management of fisheries in lagoon waters must be issued to the Pulenu'u (village Mayor) of adjacent villages at least 7 clear days before it comes into force (s.3(4)(e)).

The Head of State acting on the advice of Cabinet may make regulations prescribing measures for the conservation and management of fisheries. The measures could include:

- the designation of closed seasons and closed areas;
- specifications of gear to be used including net mesh size;
- particular fishing methods to be prohibited;
- limiting the size of fish to be caught (S.25(1)(b));
- establishing the terms and conditions to be included in licences(s.25(g)); and
- plans to prevent marine pollution (s.25(t)).

The Fisheries Act prohibits the use of explosives, poison or noxious substances to kill, stun, disable or catch fish (s.4).

Comments

It would not be correct to assume that the range of marine resource management measures in statutes, regulations and by-laws have no correlation in customary law. The management

techniques in both systems (statutory and customary) have a number of similarities and these include:

- open and closed seasons for fishing. During the closed seasons, fishing for particular species named or all species are prohibited for the purpose of propagation or restocking of a fishery. Under customary law in some societies, closed seasons are also used for the purpose of restocking fisheries for feasts in honour of a visit by a high chief or other important persons;
- the technique of using prohibited areas to restock fisheries.

The details of conservation and management measures are generally promulgated by way of regulations and by-laws and in some jurisdictions customary practices are taken into account. Where this is done, the custom is no longer custom but law. The powers to make regulations and by-laws are generally wide enough in some jurisdictions to permit traditions and customs to be part of the range of marine resource management strategies but the inclusion of customary practices is at the discretion of persons authorised by law.

Management Measures Under Customary Law

A major contribution to understanding customary management of marine resources has been made by a number of writers such as Johannes, Ruddle, Baines, Teiwaki, Dahl, Hviding, Morauta, Permetta and others and there is no need here to duplicate their review of customs, techniques and traditional knowledge relating to the management of marine resources. Some useful material is listed in the references to this Review but the list is by no means exhaustive. Whilst the research produced to date forms an invaluable collection, a number of these writers have at the same time promoted the view that ways would need to be found to integrate customary management into the overall strategies for marine resource management.

The urgency to do so is obvious as in some localities the weakening of traditional resource management is symptomatic of great social changes. Many of the finer points of traditional management systems are becoming less clear and not well understood today largely because of extensive changes made by statutes; the movement of the people (particularly those with traditional knowledge) from rural communities to urban areas with many absent for many years from their local communities; changes in lifestyle; the weakening of kinship ties; and the fact that traditional leaders and heads of families in some communities have lost much of their former authority. The social and economic changes have relaxed the rules and social controls that sustained customary law and practices and enabled it to function effectively. It is difficult under these circumstances to maintain unimpaired customary management of resources.

The Legislature in some countries permits or directs that laws touching on customary rights and practices be viewed and commented upon by traditional leaders giving them the opportunity to influence Parliamentary deliberations on the inclusion of customary law and resource conservation practices. Island councils and local committees whose views are also sought in connection with marine resource management and conservation can play a vital role in developing the range of customary law support that could be included in management strategies. Although the law permits such opportunities, at the same time the Legislature directs that those customary laws that are in conflict with statute law, the principles of public policy, and in some countries the received common law, should be rejected.

The weakening of customary law and practices can also be influenced by the Legislature Ministers, Heads of Departments and the Courts who shape the development of law often without a thorough knowledge of customary law and resource management practices and a knowledge of traditions and sometimes even of the local language. Statutory law also emphasises the gap:

between juristic concepts and customary law concepts and thus to provide uniformity and certainty in a changing society there is preference for statutory law rather than for the flexible and amorphous pattern of customary law.

To infer that all Pacific Islanders are environmentalists and that all custom relating to natural resources have a sound environmental basis would not be accurate. Pacific Islanders are developers as well as exploiters of natural resources and in this sense they are similar to 'Western' communities. The way societies value natural resources underpins the ways in which they cope with the infringements of laws that regulate the balances within the natural environment. The spiritual lore of indigenous societies plays a significant role in maintaining the relationship between human beings and the natural environment and dealing with infringements.

With increasing knowledge of the degradation of the environment and its resources, there is now an even greater emphasis by Western societies to uphold certain environmental values and to impose constraints to development. Higher standards of environmental care and the maintenance of the natural environment within the bounds of sustainability is now the norm. The spiritual, cultural and physical values placed on natural resources by indigenous societies and the environmental values for sustainable development and a higher standard of environmental care in Western societies are closer to each other than one might at first think, as they are both intended to achieve the same results.

SECTION VI

COMMENTARY

The colonisation of Pacific Island countries has left a legacy of mixed legal heritage. Imported legal rules, procedures and institutions which are now firm parts of the Pacific legal systems have not totally obliterated customary law and practices despite all the changes brought about by the laws in areas of social life and economic development. Customary law, practices and rituals still play an important part in the life of islanders.

At independence in the Pacific Islands, customs and customary law achieved prominence as there was a general wish for the constitution to be related to the values, social and economic conditions of the country. Independence also brought about a renaissance of pride in the past and the contemporary culture of the people as is evident in almost all Preambles to the constitutions (Ghai:1988). Certain customary concepts and institutions have re-surfaced and legally recognised parts of customary law especially those relating to land (eg. Vanuatu) and chiefly institutions (eg. Fiji) have been given new protection. But customary concepts, rights and practices relating to the marine environment have had less recognition.

Legal reforms granting recognition to customary law and practices are beginning to correspond, in some respects, to those concepts and institutions stemming from customary law. Where such nexus exists, it forms part of a new legal basis to the country's statutory programme to remedy deficiencies and gaps by integrating essential customary features into the existing legal system.

The laws on natural resources (eg. fisheries, forestry) reflect economic development goals to ensure sources of revenue for the country but economic choices are now influenced by environmental legal controls which encompass sustainable development.

The preservation of customary law and management practices is not only dependent on its recognition and preservation in the constitution and statute law but it also relates closely to the preservation of the system of traditional leaders who play a critical role in shaping custom and practices and forms a unique forum to influence laws that embrace customs and traditions. The incorporation of traditional authority is well developed in some Pacific constitutions, for example, the House of Arikis (Cook Islands) (s.8); the Chamber of Chiefs (Federated States of Micronesia) (Art.V(3)); the Boselevu Vakaturaga (Fiji) (s.3); the Council of Iroij (Marshall Islands) (Art.III); Council of Chiefs (Palau) (Art.VIII s.6); National Council of Chiefs (Vanuatu) (Art. 27); Matai System (Western Samoa) (Art.100). From the perspective of customary resource management, they have exclusive functions in promoting and developing customary law and practices. The Palau Constitution provides recognition as follows:

" ... the government shall take no action to prohibit or revoke the role or function of a traditional leader as recognised by custom and tradition which is not inconsistent with this constitution, nor shall it prevent a traditional leader from being recognised, honoured, or given formal or functional roles at any level of government." (Art.V(1)).

The functional roles given by the Constitution to traditional leaders at any level of government gives them unlimited opportunities to influence the harmonisation of customary forms of marine resource management with those enshrined in statute law - bringing together both statutory and customary forms of management.

In Vanuatu, the National Council of Chiefs has a general competence to discuss all matters relating to custom and tradition and could make recommendations for the promotion of Ni-Vanuatu culture

and languages. The Council may also be consulted on any question relating to tradition and custom in connection with any Bill before Parliament (Art.28).

It is clear from the above provisions that one of the reasons for the preservation of traditional leadership is to advise government on customs and traditions, and in some cases as in Vanuatu where the Council of Chiefs may be consulted on any question particularly those relating to custom and tradition. Consultative rights provide a unique opportunity for traditional leaders to secure the protection of customary law and customary conservation and management practices to be included in the country's programme of resource management measures.

Integration of customary principles in the legal system

The integration or application of customary principles however are not without its difficulties. According to Bayne (1988):

" The general question of the role of custom in the legal systems of the Pacific Island States has not yet received a very clear answer in any of them. Some of the constitutions do provide that custom should be recognised as an integral component of the body of the laws. For example, Article XI, section 11 of the Constitution of the Federated States of Micronesia declares that 'Court decisions shall be consistent with this Constitution, Micronesian customs and traditions and the social and geographical configuration of Micronesia'. It may be said however that such provisions do no more than state the duty of any court in the Pacific islands. There remains nevertheless the question of how custom is to be reconciled with other laws, and, in particular, how it is to be reconciled with the Constitution."

Ghai (1988) states that the incorporation of customary values and practices and the accommodation of traditional authority in the constitutions have been a most difficult and complex intellectual and technical problem. He identifies some of the difficulties which are noted below:

- because constitutional processes required wide consultation and traditional authorities were often members of committees and conventions, the role of custom and chiefs became much more of an issue;
- most countries did not have homogeneous cultures (PNG being a classic example) some had significant immigrant communities with different traditions (Fiji). In such instances the incorporation of specific customary rules would have been divisive.
- countries with homogeneous traditions (Tonga, Western Samoa, Nauru, Kiribati, Tuvalu) found it easier to incorporate custom;
- the reconciliation of custom with modern values and western type of political institutions that the colonial authorities had begun to promote in the preparation for independence.

On the other hand, attempts to prevent the erosion of custom have been made in Papua New Guinea (s.21 and Sch.2), Solomon Islands (s.76 and Sch.3) and Vanuatu, (ss.45(1), 72 and 93(2)) by requiring custom to be made the basis of national law but subordinate to fundamental rights. Papua New Guinea, in acknowledging that some custom was bad and best abandoned, concerned itself with the more interesting questions of reconciling modern and traditional values and of establishing national goals and policies and ensuring their implementation;

Bolder efforts were made in the Palau constitution where statutes and traditional law are made equally authoritative and in case of conflict, the statute shall prevail only to the extent that it is not in conflict with the underlying principles of traditional law (Art.V) - a concept bristling with jurisprudential difficulties and conundrums (Ghai:1988).

FSM goes further - nothing in the constitution is to take away a role or function of a traditional leader as recognised by custom and tradition (Art.V(1)) (does custom prevail over the constitution?). The constitution also says that the traditions of the people of the FSM may be protected by statute and if such statute is challenged as violative of fundamental rights, then the protection of Micronesian tradition is to be considered "a compelling social purpose warranting such governmental action", (Art.V,s.2.). Ghai (1988) states that statute and custom, the modern and the ancient, co-exist uneasily, helped by deliberate ambiguities. The constitutions have deferred the issue, but have stacked the cards on the side of the statute. Ghai (1988) asserts that there are many ways in which a constitution may threaten custom; conferring power of legitimacy on new state institutions, competence for the enactment of nationwide laws (statutes); continuation of received laws, specialisation of judicial functions and institutions etc. A threat also inhere in a part of the constitution which has been seldom seriously debated or questioned - fundamental rights, which are based on western philosophy and values and in many cases can seriously undermine the bases of traditional authority (the right to exercise jurisdiction, impose sanctions, to exile, to restrict mobility, etc.).

The concept of a Bill of Rights is not altogether unknown in the Pacific. Both the Constitution of Hawaii 1839 and Tonga 1875 established a bill of rights in the constitution and these rights have been an accepted part of the Constitution in the Pacific even though metropolitan powers such as the United Kingdom and New Zealand did not themselves have any. Decolonisation in the Pacific had also occurred in some countries under the watchful eye of the United Nations which adopted its own Universal Declaration of Human Rights in 1950. Except for Cook Islands and Niue, all Pacific Constitutions had bills of rights, though Cook Islands adopted a Bill in 1982.

Ghai (1988) states that in general there was no dissent from bills of rights but there was an underlying anxiety as to what these rights might do to the traditional society, as their values appeared to be often at variance with customary rules and communal ethos and obligations. The bills of rights in the Pacific derive from metropolitan models. For the Commonwealth Islands and Marshall Islands, the most important influence was the European Convention on Human Rights, while fundamental rights in the FSM and Palau owe much to the USA. Both these models emphasise individual and property rights with only limited recognition of the rights of the community. The scope of the bill in effect cuts down the scope of the application of custom and the scope of traditional authority.

In recent constitutions the fear of subordination of custom to the bill of rights has been met in various ways in different countries by promulgating rules on conflict of laws (Palau, FSM), injunctions to base the law on custom (Papua New Guinea, Solomon Islands, Vanuatu, Palau), incorporating traditional authorities in the constitution, (Cook Islands, Marshall Islands, Fiji, Vanuatu, Palau, Western Samoa) establishing separate legal regimes for land (Solomon Islands, Vanuatu, W.Samoa etc.) and restricting the franchise to the Matai (W.Samoa) although this is now no longer the case. One of the specific rights in the bill which caused anxiety was on the protection of property as indigenous owned land could easily pass to government on the rules of eminent domain (ie. compulsory acquisition for a public purpose).

The constitution subordinates all other jurisdictions (eg. customary law) to new state institutions, thus consolidating the state apparatus, declares itself the basis of all sources of lawful power and authority and the validity of custom is determined by its provisions (Ghai:1988).

What impact do these conclusions have on customary tenure and management practices in relation to marine resources?

As the recognition and promotion of customary law and management practices is dependent on their recognition in constitutions and statutes, the degree of nexus between the means and the end will

depend upon a number of factors and not least the commitment of traditional leaders who have the opportunity to make comments and give advice on customary matters and the sensitivity of governments to implement some of the directives in the constitution and statutes towards customary law.

The question also remains whether the restrictive measures and limitations made upon customary law and practices in some constitutions affect the strong community cultural practices and customary rights. It would appear that this would depend on the degree of resistance by communities against any interference in what has been a traditional practice. The importance of traditional management practices should not only be measured by its present use but also by the possibility of its use in the future. The preservation of customary practices and traditional marine resource management cannot be dismissed without striking at the very heart of the local communities' cultural identity.

Some constitutions are clear in their reliance on customary law and institutions which provides room for making investments in customary practices that promotes both conservation and sustainable development. But whether a country will take advantage of this situation remains to be seen. The principles of customary management are in some respects similar to those provisions of conservation and management provisions in fisheries and marine spaces legislation. Customary marine management tools need to be further investigated as the safeguarding of the resources will become more and more important as years go by. Conservation and management provisions in statute law by themselves are not enough. The body of unwritten customary conservation and management laws within communities could play an important role in the action needed to effectively protect the marine environment.

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