Creating legal space for community-based fisheries and customary marine tenure in the Pacific: issues and opportunities

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Rome, 2004

FOREWORD

This document reviews legal aspects of community-based fisheries management (CBFM) and the role of legislation in enhancing CBFM and customary marine tenure in the Pacific. It was prepared on the basis of a literature and legislative review and site visits to the Cook Islands, Fiji, Palau, Papua New Guinea, Solomon Islands and Vanuatu in 2003, undertaken by Blaise Kuemlangan (FAO Development Law Service). The visits were made immediately before and following the Secretariat of the Pacific Community Regional Policy Meeting on Coastal Fisheries Management, which was held 17-21 March 2003 in Nadi, Fiji. Legal technical assistance in support of the meeting and preparation of this study was provided through the FAO FishCode Programme under component project GCP/INT/823/JPN, "Responsible Fisheries for Small Island Developing States."

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Acknowledgements

This study would not have been possible without the valuable assistance of many people in the countries visited by the author and at FAO Headquarters. Special thanks go to the following individuals and groups who facilitated the field visits to undertake research and collect material for the study and for their helpful insights on the subject of CBFM and CMT.

In the Cook Islands: Barbara Munro and Nooroa Roi (Ministry of Marine Resources).

In Fiji: Maciu Langibalavu (then Director, Department of Fisheries, Ministry of Fisheries and Forestry); Peniasi Kunatuba; participants of the SPC Regional Policy Meeting on Coastal Fisheries Management (Nadi, Fiji,17–21 March 2003, and particularly Semisi Fakahau (Commonwealth Secretariat), Kenneth Mackay (Canada-South Pacific Ocean Development Program), Michael King, Ueta Fa'asili and Aliti Vunisea (SPC), and those who gave overviews at the Nadi Meeting on CBFM in their countries – namely, Terry Keju (Marshall Islands), Alifereti Bogiva (FLMMA, Fiji), Sione Leolahi (Niue), Nooroa Roi (Cook Islands), Fatima Sauafea (American Samoa), Etuati Ropeti (Samoa), Kenneth Bulehite (Solomon Islands), Tevita Latu (Tonga), and Graham Nihomo (Vanuatu).

In Papua New Guinea: Molean Chapau (Executive Director), Lamiller Pawut (Manager, Monitoring and Enforcement), Augustine Mobiha (Management Advisor), Leban Gisawa (Inshore Manager) and Phillip Polon (Sedentary Manager) of the National Fisheries Authority; Masio Nidung (Senior Legal Officer, Department of Justice and Attorney General); Matthew Wela (Secretary), Anton Benjamin and Twain Pambuai of the Department of Agriculture and Livestock; and Gai Kula (Country Director, Conservation International of Papua New Guinea).

In Solomon Islands: Albert Wata (then Permanent Secretary) and Sylvester Diake of the Department of Fisheries and Marine Resources; Gabriel Suri (Lawyer and Chairman of Environment Conservation Action Network, Solomon Islands); and Feleti Teo (Director) and Joel Opnai (Fisheries Management Advisor) of the Forum Fisheries Agency.

In Vanuatu: Dorosday Kenneth (Director of Department of Agriculture); Ernest Bani (Head of Environment Unit) and Naviti William (Senior Fisheries Resource Manager) of the Department of Fisheries; Francis Hickey (Vanuatu Cultural Center), and Wan Smolbag.

The author is also grateful to: Masanami Izumi (FAO Subregional Office for the Pacific Islands) for facilitating field visits); Eric Reynolds (Programme Coordinator, FishCode) for his consistent effort and encouragement in finalizing the study; Henning Teigene (FAO Development Law Service) for his technical contribution; and to Alacoque Martin for editing the final manuscript. Any errors in this document, however, are solely those of the author.

Kuemlangan, B.

Creating legal space for community-based fisheries and customary marine tenure in the Pacific: issues and opportunities.
FishCode Review. No. 7*(En)*. Rome, FAO. 2004. 65p.

ABSTRACT

The legal environment within which community-based fisheries management (CBFM) will function should be examined to determine whether it supports or will need necessary enhancement to support the implementation of CBFM. The question as to whether CBFM is legally sustainable must be asked with regard to the whole legal framework of the State – from fundamental laws, such as the constitution, to subsidiary legislation. Amendments to existing legislation or new legislation may be necessary to implement CBFM. There is no blueprint for a CBFM legal framework what number of rights with respect to fish resources should be accorded and what should be the level of participation by the local community. It is important, however, to ensure that the constitutionality of all these aspects is ascertained, and to ensure that enabling legislation for CBFM consider the following issues: security, exclusivity and permanence of rights vested; flexibility of its provisions so as to allow states to exercise choices that reflect their unique needs, conditions and aspirations for CBFM; and the way CBFM harmonizes with the overall fisheries management legal framework. Attaining the right balance in the CBFM legal framework, however, is difficult and depends largely on local circumstances.

There is much interest in using customary marine tenure (CMT) as a basis for CBFM in the Pacific Island Countries (PICs). The laws of PICs lend general support to the use of CMT or tradition in fisheries management. Still, only modest efforts in the use of CMT-based community fisheries management in the PICs are observed. Further legislative action can enhance CMT use in community fisheries management. Broad lessons can be drawn from the experiences of some PICs in legislating on CMT or certain of its aspects to enhance CMT use. Government commitment to CBFM generally, and for the role of CMT in the CBFM context with support from interested entities and stakeholders including communities, will complement efforts for promoting sustainable utilization of fisheries resources and improved livelihoods in the PICs.

Keywords: community-based fisheries management, customary marine tenure, fisheries legislation, legal frameworks, Pacific Island Countries

CONTENTS

Abbreviations and Acronyms

CBFM	Community-based Fisheries Management
CBNRM	Community-based Natural Resources Management
CCA	Community Conservation Area
CMT	Customary Marine Tenure
FAO	Food and Agriculture Organization of the United Nations
FCP	Fiji Country Programme
FLMMA	Fiji Locally Managed Marine Areas Network
FSM	Federated States of Micronesia
FSP	Foundations of the Peoples of the South Pacific
IAS-USP	Institute of Applied Science Programme of the University of South Pacific
IMA	International Marine Alliance
ITQ	Individual transferable quotas
LMMA	Locally Managed Marine Areas
MCS	Monitoring, Control and Surveillance
PIC	Pacific Island Countries
MMR	Ministry of Marine Resources
MPA	Marine Protected Area
MRAG	Marine Resources Assessment Group (MRAG Ltd)
NGO	Non-governmental Organization
PNG	Papua New Guinea
SIDS	Small Island Developing States
SMA	Special Management Areas
SPC	Secretariat of the Pacific Community
SPREP	South Pacific Regional Environment Programme
WWF	World Wide Fund for Nature

INTRODUCTION

There is increased interest in innovative approaches to fisheries management including the use of limited access regimes and increased stakeholder participation in fisheries management. Limited access regimes include property or rights-based regimes (FAO 2002). The collective property regime may involve the communal management of resources whereby a community collectively enjoys the rights to access and extraction of the resources. Creation and assignment of rights to communities create economic concerns which in turn stimulate an interest in sustaining and protecting these rights with the view to achieving, *inter alia*, sustainable resource use. The institutionalization of a collective property rights regime or increased stakeholder participation, such as in community-based fisheries management (CBFM see Box 1) in any jurisdiction, raises legal issues that should be addressed (Kuemlangan and Teigene 2003).

There has been much discussion of community- or village-based management of fisheries in the Pacific Island Countries (PICs)[1] for comparatively the same amount of time, if not more, as there has been discussion on CBFM world-wide. Of particular significance in the Pacific context is the documented existence of customary marine tenure (CMT) or traditional management of the resources in the marine areas, in most if not all PICs. Indeed, the existing body of literature trumpets the potential role of customary marine tenure in PICs, or generally recommend that traditional practices form the basis of management approaches in the Pacific, particularly in coastal fisheries. Yet other reports herald the success of use of CMT in a number of these countries. Generally, it can be said that CMT or traditional management practices as found in the PICs would be relevant and should play a pivotal role in fisheries management. The push for use of CMT in contemporary fisheries management in the Pacific is consistent with global trends in CBFM.

This is a brief study that primarily looks at the legal aspects of CBFM and the role of legislation in enhancing CBFM and CMT. It was prepared on the basis of a literature and legislative review and site visits to the Cook Islands, Fiji, Palau, Papua New Guinea, Solomon Islands and Vanuatu in 2003. The visits were made immediately before and following the SPC Regional Policy Meeting on Coastal Fisheries Management, which was held 17-21 March 2003 in Nadi, Fiji. Legal technical assistance in support of the meeting and preparation of this study was provided through the FAO FishCode Programme under component project GCP/INT/823/JPN, "Responsible Fisheries for Small Island Developing States."

The study is presented in three main parts, together with an Introduction and Conclusion. Part A discusses the broader subject of CBFM and the significance of considering associated legal aspects. It is a synopsis of the findings by Kuemlangan and Teigene (2003), ho elaborate the argument that it is important to ensure that CBFM is legally grounded or will otherwise need legislative support in implementation.[2] At this general level of discussion, legal aspects of resource governance in PICs are drawn on, where appropriate, to demonstrate how consideration of these issues could be dealt with at the country level.

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[1] PICs here refers to the developing countries members of the Forum Fisheries Agency viz the Cook Islands, Federated States of Micronesia, Fiji, Marshall Islands, Kiribati, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.

[2] The first section of this study, from the introduction to the discussion of the legal aspects of CBFM, is an adapted version of the paper entitled, "An overview of legal issues and broad legislative considerations for community based fisheries management" by Kuemlangan and Teigene (2003) presented at the Second Large River Symposium (LARS2).

Part B briefly reviews the status and progress in pursuing CMT-based community fisheries management in selected PICs. The review is carried out in the context of brief legislative history and the current fisheries management framework. It provides a synopsis of the policy, legal and physical environments within which CMT regimes are established and operate and analyses how the recognition and application of CMTs are adapted to the unique situations of each country.

Part C of the study identifies possible strategies for enhancing the use of CMTs. Proposals are also submitted in respect of the role of legislation in facilitating the desired progress in enhancing use of CMT in contemporary fisheries management.

Box 1. Community-based fisheries management

For the purposes of this study, community-based fisheries management is used to refer to the co-management arrangement whereby villages or other communal groupings are the primary partners and principal initiators of management action for the inshore fisheries in a specified locality. Co-management is a generic term covering a variety of management arrangements that involve resource users or owners in the management process. Such arrangements will have varying degrees of intervention by the government. These arrangements may include: the control of decision-making at the local level by government; management authority is delegated or transferred to resources users; resource owners exercise management authority with technical advice or assistance of government. The form of partnership depends on the desired long-term objectives. Benefits normally associated with participatory approaches to management include: (a) greater reliability and accuracy of data and information; (b) more suitable and effective regulations; (c) enhanced acceptability of and compliance with management measures; (d) reduction in enforcement costs; (e) reduction in conflicts; and (f) strengthened commitment to and participation by stakeholders (FAO 1997).[3]

[3] Section 3.3 of *FAO Fisheries Technical Guidelines for Responsible Fisheries on Fisheries Management, No. 4*, Rome, 1997. See also definition of co-management by Abdullah, Kuperan and Pomeroy, Transaction Costs and Fisheries Co-Management, Fisheries Co-Management - A Worldwide Collaborative Research Project: http://www.co-management.org/ and Fikret Berkes, Robin Mahon, Patrick McConney, Richard Pollnac, and Robert Pomeroy, Managing Small-Scale Fisheries – Alternative Directions and Methods.

PART A.

OVERVIEW OF LEGAL ISSUES AND LEGISLATIVE CONSIDERATIONS FOR CBFM

A1. THE SIGNIFICANCE OF CONSIDERING LEGAL ASPECTS OF CBFM

The implementation of any community-based natural resource management (CBNRM), including CBFM, requires that the legal environment within which CBNRM functions be examined to determine whether such legal environment supports or will need enhancement to support the implementation of CBNRM. It is best that such examination take place before or when CBNRM is being considered for utilization or trial (Lindsay 2001, Kuemlangan and Teigene 2003).[4] The need to have prior examination of legal issues is supported by findings indicating the following.

- Effective implementation of CBFM systems depends on supporting legislative framework (Berkes 1994, Ruddle 1994);
- CBFM systems are successful in jurisdictions like The Philippines and Japan where a favourable legal environment exists (Alcala and Vande Vusse 1994, Ruddle 1994). In respect of traditional community-based marine resource management systems, the functional systems recorded exist in jurisdictions that accord them legal recognition and are protected by government (Karlsen 2001, Pomeroy et al 2001, Ruddle 1998).
- Prior examination can pre-empt and avoid legal challenges that could have adverse consequences.[5]

A1.1 Constitutional Basis for CBFM

A principal consideration in implementing CBFM is to ascertain whether there is legal basis for CBFM in the fundamental laws of the land, (e.g. the Constitution or organic law). If the fundamental laws stipulate that CBFM in general, or certain prerequisites of CBFM are not possible, then CBFM in its fullest sense cannot be established legally. The question of constitutionality particularly relates to certain aspects of CBFM such as, for example, what number of rights, access or powers and responsibilities with respect to management of the fish resources (i.e. level of participation) should be accorded to the local community.

One of the principal considerations of such review is whether the fundamental laws allow for the allocation of property and use rights. The answer is often found in national Constitutions, either addressed directly or indirectly. Where a Constitution neither states explicitly the validity of allocating property or use rights nor prohibits such allocation, it can be safely deduced that property and use rights may be allocated under subsidiary legislation for as long as these legislation are gauged in terms that are not inconsistent with the Constitution.

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[4] See also The World Bank. 1999. Report from the International CBNRM Workshop, Washington D.C., 10-14 May 1998. URL: http://www.worldbank.org/wbi/conatrem, which discusses considerations for establishing community-based natural resource management (CBNRM). The report underscores the legalising of institutions as a basic requirement for establishing CBNRM.

[5] For example, in Iceland the ITQ-based fisheries management system introduced by the 1984 Fisheries Act was found to be unconstitutional. This may be an extreme example and one that relates more to the issue of individual transferable quotas. However, it holds a valuable lesson for policy- and decision-makers that innovative approaches to management, including rights-based management, are reviewed from all perspectives and that they are found to be legally functional in the national context before they are comprehensively applied.

On the other hand, it would naturally be problematic to allocate property rights or other use rights owing to constitutional constraints.

Where the Constitution or fundamental laws stand in the way of the allocation of such rights the political will to amend these laws must be mustered. The task would be less onerous if it were to be already decided as government policy that CBFM be established.

The question of whether Pacific Island Constitutions support CBFM, or the broader issue of whether wider public participation is encouraged by Pacific Constitutions, will generally receive a positive answer. As will be demonstrated later, a majority of Pacific Constitutions expressly allow some form of CBFM, or otherwise do not expressly prohibit CBFM systems to be established.

A1.2 The Fundamental Legal Basis and Decentralization

CBFM could be implemented through a decentralization framework. Decentralization is normally sanctioned by fundamental laws such as the Constitution. Where such laws exist, it should be ascertained as to how CBFM is facilitated through the decentralization structures in place.

In the Pacific Islands region, countries like Papua New Guinea (PNG), Solomon Islands and Vanuatu that have a decentralized form of government would need to consider how their Constitution and laws relating to decentralization distribute powers for resource management, and how CBFM could fit into these legal structures. The same can be said of countries with federal government systems, such as the Federated Stated of Micronesia (FSM), Marshall Islands and Palau, particularly where the state governments rather than the central (federal) government have jurisdiction over coastal fisheries areas where CBFM is most likely to be utilized.

A1.3 The Need for Enabling National Legislation: Principal Considerations

Enabling legislation or enhancement of existing legislative framework is vital to implementation of CBFM if there are no provisions that clearly provide for the operational implementation of CBFM. As is noted above, such legislation or enhanced legislative framework should be consistent with fundamental laws and should elaborate basic constitutional principles relating to CBFM. The legislation must ensure security and enforceability of a right and provide for site-specific delegation of some management responsibility, either on an indefinite basis or for a finite period.[6]

The CBFM legislative framework should set out the rules by which local institutions can interact with an outsider. CBFM must naturally exist inside its larger legal environment and be linked with sovereign authority, which is the State, and thus needs a legal status with which outsiders can recognize and interact. CBFM legislation should provide protection for local institutions from trespass and the criminal behaviour of outsiders. The CBFM gives legal recognition to community-based rules, and commands conformity by the public to those rules.

[6] A balance is normally sought through this mechanism for ensuring that the State-level concerns for efficiency in fisheries management and the local-level concerns for self-governance, self-regulation and active participation are realised while defining the extent of their mandates.

Community rules, which are hierarchically lower, can not define the limits of State power. Such a role will have to be performed by national CBFM legislation. The extent to which the State will respect local autonomy, and where and under what conditions it will retain the power to intervene, should be spelled out in CBFM legislation.[7] CBFM law must also provide protection for individuals against the abuse of local power. It should provide basic guidelines for protection of wider social interests, such as environmental protection. Where a broad spectrum of rights are allocated to the local community, this question surfaces strongly.

In a nutshell, specific legislative issues relating to CBFM include the need to ensure that the legal framework clearly states: (a) security and enforceability of a right; (b) the creation of ability and opportunity for rights-holders to seek redress for violation of security and interests in the rights allocated; (c) the nature and extent of recognition of locally promulgated rules; (d) rules for interaction with other stakeholders; (e) rules for interaction with the State which includes the limits and conditions for State intervention; (f) protection of individuals against abuse of "local" power; and (g) protection of wider interests, e.g. environment. These issues need to be addressed to ensure that the required features of a legal framework for a rights-based management regime, namely security, exclusivity and permanence of rights, are incorporated (Box 2).

Box 2. Main features of CBFM legislation

Security, exclusivity and permanence features of CBFM legislation are briefly described as follows.

- ***Security*** is the ability for the holder of rights to withstand challenges to such rights. It involves: the nature of rights allocated, which cannot be alienated or changed unilaterally and unfairly; the enforceability of rights against the State, including local government institutions; the boundaries of the resources to which the rights apply; who is entitled to claim membership in a CBFM group; and recognition of the holder of the rights.
- ***Exclusivity*** is the ability to hold and manage the right without unlawful interference, which can also occur through regulations, license conditions, gear, area and time restrictions etc;
- ***Permanence*** is the time span of rights allocated. The term for holding the rights allocated could be perpetual but if the right is not held in perpetuity, the duration of rights should be clearly spelled out and is sufficient for the benefits of participation to be fully realized.

An optimal legislative framework for CBFM should be flexible. Legislations must enable community-based managers to exercise choice that reflects their unique needs, conditions and aspirations. Regulators must be able to decide and review management objectives in CBFM and the rules used to achieve those objectives, the manner in handling recognition of local groups, the definition of CBFM units and areas of jurisdiction. Ultimately, a flexible CBFM legislative framework must allow for the reflection of change in policy and is preferably a framework law which allows ease of amendment or detailed mechanisms to be set out in regulations.

Finally, the legislative framework must integrate CBFM in the general fisheries management legal framework. This sets out, *inter alia*, the clear status, relationship and role of CBFM in the overarching policy framework and decision-making process, management planning, the decision rules for total fishing effort (e.g. national and local total allowable catch), regulatory powers and structure of the management authority, and local monitoring, control and surveillance (MCS) powers in the context of national MCS programmes.

[7] From a property rights regime perspective, this touches upon the fundamental question of who owns the natural resources. Most fishing nations that implement a rights-based regime retain the power to allocate, and withdraw rights and change the regulations governing their administration. If the rules governing a rights-based regime are explicit in the form of legislation, it is less problematic in administering them and deflecting legal challenges.

A1.4 Summary of Legal Issues and Implications of CBFM

The prevailing lesson here is that it is best that all implications of CBFM, including policy, technical, institutional and legal aspects are reviewed before CBFM is implemented.

Plans, trials and the results of the trials in the application of CBFM are site-specific. Given this, any law that is enacted for establishing CBFM should preferably be a "framework" law. The framework law must primarily enable the use of CBFM through its provisions that ensure security, exclusivity and permanence for any rights that may be allocated. However, the legal framework should also, as a minimum, ensure that powers are vested or entities are designated to invoke CBFM when the need arises. The provisions of the framework law that provide for these must allow:

- the designation of communities that will be involved in CBFM and that such communities may be allocated rights and responsibilities in fishing and fisheries management;
- choices in the manner in which designation of communities will be effected;
- choice in demarcation of areas for CBFM; and
- choices in the institutional or organizational framework for CBFM.

Above all, the legal framework for CBFM must be practical and flexible in effect to respond to changing needs and priorities. Ultimately, it is a question of balance. Attaining that required balance however is difficult and depends largely on local circumstances (also see Box 3).

It is advisable that the implementation of CBFM is undertaken through a multidisciplinary approach. Such approach implies that projects for the introduction of CBFM should entail, *inter alia*, sound planning, trials and reviews of the results of the trials, plans and objectives which will need a generous time period for project implementation. The CBFM initiative will also require the commitment of adequate financial and other resources for its activities.

Box 3. The process and result of legislating CBFM: The Tonga case (Kuemlangan 2000)

The review of the Tonga fisheries legislation in 2000 incorporated a framework for CBFM. The legislative review and drafting process took into account, *inter alia*, the following facts and considerations:

- The Constitution was silent on the issue of CBFM but it did not expressly prohibit the establishment or implementation of CBFM.
- Lack or absence of authoritative literature or documentation on customary marine tenure (CMT). These was a study done on traditional shell collection practices which was of limited relevance only to guide the potential use of CMT in fisheries management.
- Lack of comprehensive programmes or strategies for implementation of CBFM.
- One trial project only on CBFM had been carried out in a region of Tonga implemented by the government authorities responsible for environment.
- Strong support for CBFM was noted but there were no clear instructions on the institutional or operational aspects of for implementing CBFM. There was also no clear understanding of what the CBFM concept was in the Tongan context.
- No capacity and resources to initiate and manage CBFM within the Ministry of Fisheries.
- Existing local-level governments in the form of Town and District Officers (who were an extension of central authority) governed by the Town Officers Act and the District Officers Act, respectively. Town and District Officers had powers to make by-laws at town and district level. The issue was whether to formulate a new institutional arrangement or use/involve the existing local-level institutions.

The legislative provisions in the principal Act (the Fisheries Management Act 2002) merely vest powers to establish CBFM and facilitate future detailed regulation. The provisions concerning CBFM are as follows:

Section 4 (l) - Principle of practicable, broad and accountable participation (conducive to CBFM) to be taken into account in the exercise of management powers under the Fisheries Management Act.

Section 7 - Consultation with "coastal communities" in preparation and review of fisheries management plans.

Section 13 – Creation of Special Management Areas (SMA). An SMA or part thereof can be allocated to be under the management responsibility of coastal communities.

Section 14 - Designation of coastal communities ("coastal community" is not defined so as to allow use of existing community organizations, inclusion of non-coastal communities or a change to a prevailing definition of "coastal community"). Consultation is also required in the designation of coastal communities.

Section 15 - Regulations can be made for management of a specific SMA or part thereof which is allocated and which is designated to a coastal community.

Section 16 – Any authorization (e.g. licence) for fishing in a SMA which has been designated to a coastal community is issued only after prior consultation with the coastal community concerned.

Section 101 (b) - Regulations for administering CBFM (i.e. that relates to the general administration of coastal communities etc.) can be promulgated in the future.

PART B.

CUSTOMARY MARINE TENURE AS THE BASIS FOR CBFM IN THE PACIFIC

Many prominent scientists and writers have testified on the prevailing existence of customary marine tenure (CMT – see Box 4) in the PICs. They have noted its co-existence with formal fisheries management regimes and its relative success in areas where formal fisheries management regimes often fail, owing to shortcomings of these conventional top-down management approaches.

Box 4. Customary marine tenure

In the context of this study, "customary marine tenure" has the meaning given to it by Ruddle, K. Hviding, E. & Johannes, R.E. (1992), where: "customary" refers to a system that emerges from firmly traditional roots and has continuous and meaningful links with the past as it adapts to handling contemporary issues; "marine" refers to the system as dealing with coral reefs, lagoon, coast and open sea and including islands and islets contained in this overall sea space; and "tenure" refers to a social process of interacting activities concerning control over territory and access to resources."

It is now widely agreed that CMT, as found in the PICs, holds valuable lessons for tropical fisheries management elsewhere. It is also argued that CMT should play a pivotal role in contemporary fisheries management in the Pacific.[8]

The basic formal recognition of CMTs provided by the legal frameworks of many of the PICs, as partly summarised the Annex to this document, adds impetus to the argument that they can play a valuable role in contemporary fisheries management across the region. Such recognition provides the primary basis for use of CMT in the respective jurisdictions. It is reasonable to expect that CBFM, as may be implemented in PICs, would be founded on or influenced by CMTs in these countries.

Pulea (1993) also provides a fair overview of the legal provisions of the Pacific relating to CMT and management systems. That overview remains relevant. However, the question of how use of CMT can be enhanced in contemporary fisheries management in the Pacific and further facilitated by legislation remains largely unanswered. This study also presents elements and options for advancing the case of CMT-use through legislation in the Pacific, and hopefully elsewhere, through desk case studies of the legal framework of the selected jurisdictions supplemented by the findings made in short site visits.

The choice of particular PICs' experiences with CMTs for review in this study is deliberate and is based on the fact that few of the PICs have implemented new legislation[9] or use CBFM. For example, Palau has potent provisions in its legal framework dealing with recognition of customary laws and the role of traditional governance systems. This presents an adequate basis for going to the next level of implementing fisheries management through communities using a mix of scientific information to influence management decisions and actual fisheries management or conservation measures that are issued and enforced through the traditional governance structures. Despite this optimal legal setting in Palau, the importance of CBFM based on traditional governance systems was not seriously considered

[8] See for example Johannes 1981, Hviding and Ruddle, 1991, Johannes and MacFarlane 1991, Doulman 1992, Ruddle, Hviding and Johannes 1992, Fong 1994 and Ruddle 1998 who argue that CMT should be an integral part of fisheries management in the PICs.

[9] Papua New Guinea, Solomon Islands, Federated States of Micronesia, Nauru, Marshall Islands and Tonga enacted new fisheries legislation in the late 1990s and early 2003.

until recently, when attempts were made to involve communities in establishing marine protected areas. This study encourages a closer look at what legal frameworks provide for use of CMTs, such as in the case of Palau, and provides some suggestions as to how this basic foundation can be harnessed for actual utilization of CMT in contemporary fisheries management in PICs.

B1. OVERVIEW OF SELECTED CASES OF RECOGNITION OR UTILIZATION OF CMT IN THE PACIFIC

B1.1 The Cook Islands

B1.1.1 Legal recognition of CMT and significant traditional management practices in the Cook Islands

The Cook Islands Constitution, the supreme national law, makes no mention of custom or traditional laws and their role although the *Cook Islands Act 1915* refers to the recognition of "the ancient customs and usage of the Natives of the Cook Islands" in determining native title and rights in land[10] as well as land succession rights.[11] The Act does not recognize that Cook Islanders can own land below the line of high water mark. This is a significant derogation of the role of custom and the concept of land ownership in custom which, in the Cook Islands, includes ownership over land, water, sea areas, reefs and shelves (Munro 1996, Crocombe 1961). Despite the substantial lack of formal recognition in fundamental law, island custom or traditional norms are part of the social fabric of society and influences every day life mannerisms of Cook Islanders, particularly in the outer islands.

Formal but indirect recognition of the value of traditional forms of governance and laws is accorded through legislation in relative terms. Such recognition is provided *inter alia* by the Constitution, in establishing the house of Arikis,[12] the enactment of the *Rarotonga Local Government Act* and the *Outer Islands Local Government Act*. Of more relevance to fisheries management is the Marine Resources Act which accords powers to Island Councils to pass by-laws for the management of fisheries. While the institutional structures for governance as established by the *Rarotonga Local Government Act*, the *Outer Islands Local Government Act and the Marine Resources Act* are introduced institutions, many individuals that are elected to hold offices within these structures are often traditional Chiefs and other titled persons, although this practice is diminishing.[13]

The noticeable re-emergence and use of customary forms of fisheries management, particularly *Ra'ui* (Cook Islands traditional seasonal closure)[14] have occurred only recently in Rarotonga although it has been practiced along with other forms of traditional-based management measures in the outer islands for years, both prior to and since first contact.[15]

[10] Cook Islands Act, section 422.

[11] Ibid, section 446

[12] Constitution, Article 9.

[13] Munro B, 2003, Personal communication.

[14] "Ra'ui" is a Rarotongan word for a seasonal closure or ban. In the context of this study, it is effectively a marine protected area or reserve.

[15] Crocombe notes in 1961 that Raui is used occasionally in Rarotonga and quite frequently in the outer islands. See Crocombe 1961 page 118-119.

B1.1.2 The *Ra'ui*

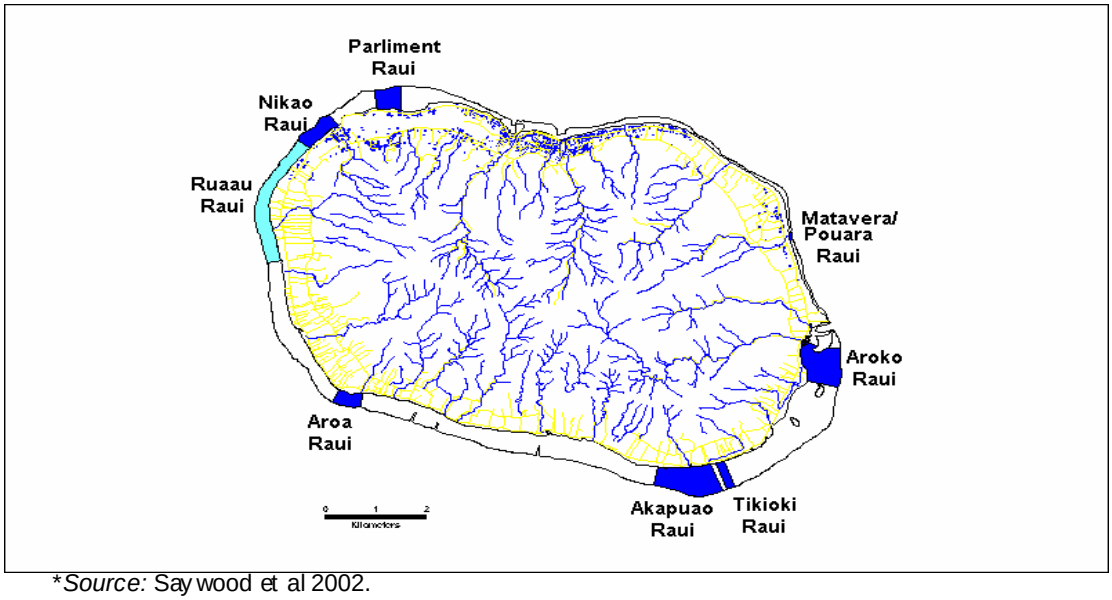
The *Ra'ui* today is described as a traditional form of community-based resource management that has similarities to marine reserves whereby the harvesting of marine species in an area is prohibited for a designated period. *Ra'ui* was often used as a customary prohibition on the taking of certain products from all lands of the tribe and the taking of lagoon fish in order to preserve and accumulate supplies for a coming festivity (Crocombe 1961).

Ra'ui is put in place by the traditional Leadership Council, the *Te Koutu Nui* in response to low stocks of fish and invertebrates so as to allow these stocks to rejuvenate (Raumea 1999, Saywood et al 2000).

When a *Ra'ui* is declared, there is a traditional ceremony, where signs are unveiled. The signs declare an area to be *Ra'ui* and are placed on the road side at the boundaries of the *Ra'ui* and also in the water.[16] Compliance with *Ra'ui* is achieved through basic awareness and pressure on people to fish in other areas which are easy to establish owing to the fact that the community lives on a small island and word of mouth is an effective medium of communication. Today, a wider public awareness of the *Ra'ui* is accomplished through the media.

The use of the *Ra'ui* in Rarotonga[17] in 1998 was at the initiative of Island Councils. The last recorded *Ra'ui* in Rarotonga prior to 1998 was in the 1950's. In February 1998 five *Ra'ui* were put in place around the island of Rarotonga most of which lasted for two years. The 1998 *Ra'ui* were opened briefly to allow some harvesting and then re-closed. The Rarotongan *Ra'ui* areas increased to eight in 2002 and some previously established ones expended in size. There has also been similar use and expansion of the *Ra'ui* to outer islands. Aitutaki established their Ra'ui in 2000 which covers 12 percent of the lagoon. There are recordings of earlier use of *Ra'ui* in other outer islands. Pukapuka for example, is noted to have used *Ra'ui* in post contact years in the 1980s (Allen 1980, Andrews 1987) and in 1996 (Munro 1996).

Map of Rarotonga, Cook Islands showing declared *Ra'ui* in 2002*



**Source:* Saywood et al 2002.

[16] The use of signs follows custom but current practice and materials are modern versions of the old practice of using a coconut leaf tied to a tree on the path leading to the prohibited area. See Crocombe 1961, p. 118.

[17] Rarotonga is the largest island of the Cook Islands group and is also the capital of the Cook Islands.

The *Ra'ui* is an effective marine resources conservation and management mechanism. The resource assessments that were done on the Rarotonga reef areas in 1998, 1999, and 2002 covering also the *Ra'ui* areas showed a significant increase in reef fish and commercial fish resources (e.g. Trochus) in the *Ra'ui* areas compared with control sites (non-*Ra'ui* areas).[18]

At the moment Ra'ui is not enforced through the formal law enforcement system. Compliance is achieved through community pressure and respect for customs which are perpetuated by legal recognition and continued role of traditional governance institutions. In Pukapuka, the village laws or village-imposed *Ra'ui* are endorsed by the legally established Island Council. The same laws and *Ra'ui*, if breached, are similarly enforced, particularly if they affect the whole island as opposed to affecting only one village. The sanctions used are traditional sanctions.[19] Opportunity exists to impose fines and other penalties under Island Council by-laws or national laws but it appears that it is often unnecessary to resort to this option due to a high incidence of compliance or effectiveness of traditional sanctions (Munro 1996).

B1.1.3 Current fisheries management framework and the role of CMT in the Cook Islands

The *Marine Resources Act 1989* is the cornerstone of the Cook Islands' management framework for the exploitation and management of the fisheries resources. The Act governs the management of fishing primarily through the mechanisms of designated fisheries and management plans, and the control of fishing by both domestic and foreign fishing vessels through licensing. The Act also provides for conservation through prohibition of fishing for certain species or using certain fishing methods, leasing of land for aquaculture, scientific research and test fishing operations and broad regulation making powers to give effect to the Act. The Ministry of Marine Resources administers the Act.

The most interesting and significant features of the *Marine Resources Act* are the provisions relating to designated fisheries, local fisheries committees and the establishment and functions of the Island Councils. These features are briefly explained as follows.

- **Designated Fisheries.** The Minister may authorize a fishery as a "designated fishery" where it is determined that such fishery: (a) is important to the national interest; and (b) requires management and development measures for effective conservation and optimum utilization. For each designated fishery a fisheries plan for management and development must be prepared and kept under review.
- **Local Fisheries Committees.** The Secretary may appoint a Local Fisheries Committee in any island to advise on the management and development of fisheries in relation to that island. The functions of a Local Fisheries Committee shall be to: (a) advise the Secretary on issues related to the management and development of fisheries in relation to the island; and (b) make recommendations to the local Island Council with respect to the adoption or amendment of by-laws regulating the conduct of fishing operations and the issuing of fishing licences for any designated fishery of the island.
- **Power of Island Councils to recommend the promulgation of by-laws.** Each Island Council may recommend the promulgation of by-laws in respect of any designated fishery of the island in accordance with the procedures set out in Section

[18] See: Ponia, Raumea, Roi, Makikiriti and Turua 1998; Raumea 1999; and, Saywood, Turua and Makikiriti 2002.

[19] Munro (1996) reports that the harshest traditional sanction that may be used is *akatamariki*, which is to reduce a person's adult status to that of a child. The features of the child's status are: the offender's share of food, money, etc are under the control of the adult man or women (mother/father); the offender is not allowed to participate in village activities; the offender is not allowed to attend village meetings; the offender is not allowed to speak or contribute ideas; the offender cannot hold any island/village title; and the offender cannot participate in elections of a leader or representative.

15 of the *Outer Islands Local Government Act 1987*. Every by-law recommended for promulgation under this section must be consistent with the relevant provisions of the fisheries plan and the *Marine Resources Act 1989* and any regulations made under the Act. The by-law recommended for promulgation under this section must be officially approved by the Minister.

There is opportunity within the management framework established under the *Marine Resources Act* to formalize all fisheries management arrangements which will in turn establish management measures (including *Ra'ui*) through delegated authority in Island Councils, or through the national fisheries administration by way of local fisheries committees. No reference in the Act is made to the use of CMT, or traditional knowledge generally, as a basis for the management measures or regulations adopted by Island Councils through by-laws or the Local Committees. However, ample opportunity exists through these formal mechanisms for decisions or by-laws to be influenced by such traditional practices, or for the incorporation of CMT concepts such as *Ra'ui* into by-laws. For example, village laws based on CMT that affect the whole island and which were established by traditional governance institutions are also recognized and enforced by the Island Council in Pukapuka (Munro 1996).

The prevailing practice of the Ministry of Marine Resources (MMR) is to focus national fisheries management effort on offshore fisheries, particularly tuna. Coastal fisheries fall under the aegis of Island Councils. It is left largely to the Island Councils to take initiatives in fisheries management although, as pointed out above, it is possible in theory for MMR to intervene on the basis of the Marine Resources Act. Indeed, the involvement of the MMR in coastal fisheries management to date was on the initiative of the representatives of the Island Councils and traditional leaders who make the first approaches to MMR for technical assistance. The Island Councils have often relied on MMR for such advice.[20]

The MMR's role in the context of the *Ra'ui*, has been to perform coordinating and support services to traditional conservation. The most important contribution is providing technical and scientific data through research and surveys on resources in areas under *Ra'ui*. It should be noted that the *Ra'ui* system in the age of contemporary fisheries management in the Cook Islands has been successful because it also received considerable support from MMR. Allowing the practice of traditional fisheries management systems that work without having to exert control or influence appears to be the principle upon which the MMR operates in dealing with fisheries management issues in coastal areas.

Observations

Despite the limited or indirect reference to CMT or aspects thereof in Cook Islands law, there appears to be *de facto* acceptance of application of certain aspects of custom in contemporary fisheries resources conservation and management.

Current fisheries legislation provides the opportunity for modern fisheries management to be influenced by CMT through the recognition of established local governance institutions in the form of the Island Council which is most likely to comprise traditional leaders. This is evidently the case as can be seen from the establishment of *Ra'ui* by certain Island Councils and by-laws that have been adopted by these Island Councils (Munro 1996).

The current fisheries legislative and management situation imply a comfortable co-existence and application of modern formal laws and customary norms in the Cook Islands. There is acceptance of a formal contemporary fisheries management framework that is prescriptive, and the re-emergence and application of CMT or aspects of CMT at the initiative of Island Councils or communities.

[20] Official Ministry of Marine Resources Pamphlet 2000, Barbara Munro and Nooroa Roi 2003, Personal communication.

In practice, MMR has provided, and will continue providing, technical assistance to the Island Councils in fisheries management and encouraging use of the *Ra'ui* but only on the invitation of the Island Councils. There appears to be no desire at the moment to change the status quo although it is expected that in the future, by-laws promulgated by Island Councils will formalize some aspects or principles of CMT but that the flexibility to resort to pure forms of CMT which is not formalized is possible.

The ready reception of legal incorporation of customary decision-making institutions, such as the house of Ariki, and existing local government institutions, such as the Island Councils that can be constituted by traditional title holders, may be evidence of continued respect for and relevance of these institutions among modern Cook Islands. These legal incorporations also ensure a certain degree of relevance and future use of CMT in the Cook Islands. The success seen in the use of *Ra'ui* in inshore fisheries management further strengthens the chances for continuation of CMT use. This does not mean that the survival of traditional management systems in Cook Islands will not be tested (Munro 1996). External pressures and influences including adopted lifestyles could erode respect for traditional leadership and communal organization, leading to a disregard for traditional management measures. More effort is needed to enhance the profile and relevance of traditional management systems, in particular in the national policies for coastal fisheries management, which could eventually become legislated policy.

B1.2 Fiji

B1.2.1 Background to the recognition of CMT in Fiji

Fiji, compared with many PICs, has had a longer history of dealing with and implementing CMT. The recognition of CMT rights in law dates back to the mid-1800s.[21]

The point of departure for this review is the time of cession of Fiji to Britain in 1874. It is said that at the time of cession, the Chiefs were assured that "the Queen as their sovereign and Highest Chief would return to them all or whatever part of their gift she may think right" and that "[t]hey must also trust her to govern them righteously and in accordance with native usage and customs" (Hornell, 1940). The Deed of Cession, signed in October 1874, gave possession of and full sovereignty and dominion over the whole of the group of Fiji islands together with the possession of the waters adjacent thereto, as well as over all ports and harbours, rivers, estuaries and other waters and all reefs and foreshores within or adjacent thereto. Further, the Deed of Cession promises that the rights and interests of the ceding parties, the High Chiefs, shall be recognized, in so far as they are consistent with British Sovereignty and the colonial form of government.[22]

The right interpretation of the relevant articles of the Deed of Cession and whether ownership over islands' waters, reefs and foreshores has been accorded to the Chiefs, or whether they can merely exercise use rights in those domains, remains a matter of contention. Certain laws passed after cession, such as the 1880 Rivers and Streams Ordinance, affirmed the then official view along the lines that "all waters in Fiji which the natives have been accustomed to traverse ... shall, with the soil under the same, belong to the Crown and be perpetually open to the public for the enjoyment of all rights...".

[21] See Fong (1984) for a comprehensive description of and discussion on the traditional Fijian Management system and the history of legislative development concerning CMTs. The review on the Fiji legislative history on CMTs herein is based largely on Fong (1998) unless indicated otherwise.

[22] Deed of Cession of 10 October 1874.

The *Birds, Game and Fish Protection* Ordinance further confirmed the position that the Chiefs, and in particular their sub-clan or lineage groups (*mataqali*), will enjoy user rights only in their traditional fishing areas. Section 16 of the *Bird, Games and Fish Protection Ordinance* states, *inter alia*:

> "Notwithstanding anything contained in the Rivers and Streams Ordinances 1880 it shall be unlawful for any person to fish on any reef or on any kai (cockle) or other shellfish bed in any water forming part of the ancient customary fishing ground of any matanqali unless he shall be a member of such matanqali or shall first have obtained a licence so to do under the hand of the Colonial Secretary."

The same Ordinance in Section 17 sowed the seeds of a mechanism for determination of the boundaries of traditional fishing right areas (*qoliqoli*) and a dispute settlement mechanism with respect to claims over such areas. The *Fisheries Ordinance of 1942* superseded the *Bird Games and Fish Protection Ordinance* and contained equivalent provisions. The Fisheries Ordinance is now referred to as the *Fisheries Act 1992*, which is the principle fisheries legislation. The *Fisheries Act* retains the same provisions in Sections 13 to 20. In particular, Section 13 restates, in almost identical fashion, Section 16 of the *Bird Games and Fish Protection Ordinance* as follows:

> "**13**. (1) Notwithstanding anything contained in the Rivers and Streams Act, it shall be an offence for any person to take fish on any reef or on any kai (cockle) or other shellfish bed in any area in respect of which the rights of any mataqali or other division or subdivision of the Fijian people have been registered by the Native Fisheries Commission in the Register of Native Customary Fishing Rights unless he shall be a member of such mataqali, division or subdivision of the Fijian people who does not require a licence under section 5 to take such fish or shall first have obtained a permit to do so from the Commissioner of the Division in which such area is situated:
>
> Provided that
>
> (a) such permits shall not be necessary in the case of persons taking fish (other than by way of trade or business or as the employee of a person carrying on the trade or business of a fisherman) with hook and line or with a spear or portable fish trap which can be handled by one person; and
>
> (b) any such permit may exclude fishing for particular species of fish, or may exclude fishing in any particular areas, or may exclude fishing by any particular methods, or may contain any combination of such exclusions.
>
> (2) The grant of a permit shall be in the discretion of such Commissioner who shall consult the Fisheries Officer and the subdivision of the Fijian people whose fishing rights may be affected thereby, prior to granting the same.
>
> (3) A permit may be granted for any period not exceeding three years, but every such permit shall expire on the 31st day of December in any one of such years."

The result of the legal situation described above is that Fiji's coastal waters and foreshore areas and use rights are shared under a dual ownership system. The ownership of the foreshore, including all land below the high-water mark (the sea bed) and extending to its territorial limits and continental shelf rests with the State. The State exercises sovereign rights in the area beyond its territorial limits in the exclusive economic zone. The rights of Fijians are confined to exclusive fishing rights in the recognized customary fishing grounds, including those fringing reefs on the coastal waters and around isolated islands. The fact that the *Fisheries Act* is interpreted to mean that the right of the *vanua* to fish in the traditional fishing area is exclusive (Fong 1994) and which is confirmed by current practice, are indeed a significant developments. These developments should not be under-valued because

exclusivity, as a characteristic of rights-based regimes,[23] if implemented, guarded and enforced vigorously, allows the benefactor of the right to enjoy benefits that may be as good as those derived from ownership.

Sections 14 to 20 of the *Fisheries Act 1992* establish the Native Fisheries Commission (also referred to as the Native Lands and Fisheries Commission) and the rights and procedures relating to determination of traditional fishing area boundaries. The Commission has now determined and registered all traditional fishing areas (*qoliqoli*) totalling 410 parcels.[24] These determinations and registrations were based on the inquiries held during 1890 to 1996.

B1.2.2 Overview of traditional fisheries management practices in Fiji

Customary fishing areas and the right to regulate use and exploitation in that area belong to different, but closely related social groups, namely the *vanua*[25], and the *yavusa*[26]. The *vanua* is said to be embodied in the Chief which is one of the principal aspects of the Fijian way of life.[27] The *yavusa* comprises the people of the same village divided into *mataqali* and *tokatoka*. People within these groups are expected to use their own customary fishing area location. Those from outside the group who wish to use the customary fishing area of another group must obtain permission of the owners. Owners of customary fishing areas may from time to time, establish closed areas to preserve the resources for an intended purpose.

Decisions of a group are conveyed through social channels of communication, which ensures that all interested parties are made aware of such decisions. Enforcement of decisions and traditional management measures is done by traditional authority and through strict adherence to protocols. Compliance with the management measures is normally assured through the combined effect of respect for the Fijian traditional authority system (the Chiefly system), respect for tradition, including observance of *Vakaturanga* (in the Chiefly manner)[28] and other people, and reverence for sacred grounds or the supernatural which require adherence to certain rules or practices. Contraventions of established management measures attract harsh punishments, which included executions or banishment in ancient times (Veitayaki 1998).[29]

[23] See supra page 3 and footnote 7.

[24] The registration of traditional fishing areas is made in the Register of Native Customary Fishing Rights of the Native Lands and Fisheries Commission.

[25] The *vanua* is the largest grouping of kinsmen structured in a number of social units and is "the human manifestation of the physical environment which the members have since claimed to belong to them and to which they also belong." (Ravuvu 1983).

[26] The *yavusa* is the next social unit down the scale and consists of groups of people who are divided into various social groups according to blood and other kinship ties.

[27] The traditional leadership system, the Chiefly system, is central to Fijian way of life (Fong 1994). "A Fijian chief is, most importantly, a member of a lineage in which he occupies a position of authority primarily through his relative seniority in terms of decent... In the Fijian culture, every member of the Vanua is not only identified with the chief, but is also the embodiment of the vanua" (Ravuvu 1983).

[28] The concept of *Vakaturanga* is another important aspect of the Fijian way of life. *Vakaturanga* "embodies respect and deference, compliance and humility, loyalty and honesty." (Ravuvu 1983).

[29] The overview of the traditional management practices is based on the synopsis of the Fijian traditional management practice by Veitayaki (1998). For a detailed description of the Fijian social groupings and way of life in the context of CMT, see Fong (1994). A comprehensive description of the Fijian traditional way of life is provided by Ravuvu (1983).

B1.2.3 Current Fisheries management framework and CMT as a basis for CBFM in Fiji

The *Fisheries Act* is the principal fisheries legal framework for the management of marine resources in Fiji.[30] The main features of the Act important to this study are:

- the recognition of traditional use rights in traditional fishing areas and their exclusive use to members of the *mataqali*;
- the provisions which establish a Native Fisheries Commission charged with the duty of ascertaining the customary fishing rights in each province of Fiji;
- prohibitions for the taking of fish in Fiji fisheries waters by way of trade or business without a licence;
- the requirement that every licence granted under the Act terminates on 31 December of the same year as the day of issue, licenses are personal to the holder, and licenses are not transferable;
- the power of the Minister to empower any licensing officer, police officer, customs officer, honorary fish warden and any other officer to enforce the Act;
- the powers of the Minister to make regulations: (a) prohibiting any practices or methods, or use of equipment or devices or materials which are likely to be injurious to the maintenance and development of a stock of fish; (b) prescribing areas and seasons when fishing is prohibited or restricted, either entirely or with reference to a named species; (c) prescribing limits to the size and weight of fish of named species which may be taken; (d) prescribing limits to the size of nets or the mesh of nets which may be used for fishing; (e) regulating procedures for issue and cancellation of licences and the registration of fishing boats; (f) prescribing the fees to be charged upon the issue of licences and the registration of fishing vessels; and (g) regulating any other matter relating to the conservation, protection and maintenance of a stock of fish which may be deemed requisite.

Several fisheries regulations have been made under the *Fisheries Act* which are consolidated into the *Fisheries Regulations 1992* except for the *Fiji Vessel Monitoring System Regulations 2002*. The regulations cover licenses, registration, prohibited fishing methods, mesh limitations, size limits, and exemptions.

The *Fisheries Act* and its subsidiary legislation vest the primary responsibility of the management of living marine resources in Fiji in the Fisheries Department of the Ministry of Fisheries and Forests. Entry into fisheries is regulated primarily by the fishing license system. All fishing licences to fish in Fijian waters are granted by the designated licensing officers. Recently and with respect to tuna fishing, the licensing system operates together with the Tuna Management Plan.

Pursuant to the legal situation established under the provisions of the *Birds, Game and Fish Protection* Ordinance as contained in the Fisheries Act, fishing in traditional fishing areas (the *qoliqolis*) is exclusive to the members of the *vanua* and *yavasu*. Any fishing that is to take place in the *qoliqolis* by non members of the *vanua* and *yavusa* is possible only under permit

[30] *Fisheries Act 1992*, Chapter 158 of the Laws of Fiji. The *Marine Spaces Act* (Cap. 158A) establishes the archipelagic waters of Fiji and a twelve nautical mile territorial sea. The *Marine Spaces Act* also establishes a 200 nautical mile exclusive economic zone over which Fiji has sovereign rights for the purposes of exploring and exploiting, conserving and managing the natural resources of the seabed, subsoil and superjacent waters. Formal declaration of the archipelagic waters and the exclusive economic zone is contained in the Marine Spaces (Archipelagic Baselines and Exclusive Economic Zone) Order.

granted by the District Commissioner, based on the approval of the Chief responsible for the *qoliqoli*. To obtain a permit, the person approaches the Chief, who will consider the request. Upon approval, the Chief grants a letter of consent which is taken to the District Commissioner, who then grants the permit upon verification of ownership.

Fishers seeking fishing licences within *qoliqolis* pay goodwill money in addition to the nominal licence fee that is paid to the Government (Veitayaki 1998, MRAG 1999). Veitiyaki (1998) claims that this system is open to abuse as anybody could be allowed to fish for as long as they can pay particularly large sums.

Although commercial fishing has increased in Fiji, an increasing number of customary fishing owners are now restricting the number of licences issued for fishing in their *qoliqoli* due to growing awareness of the need to consider the interests of all members in the use of the *qoliqoli*. As a result of such concern, CBFM – which utilizes the communities' ownership over fishing rights – has begun to take root in Fiji. The movement has expanded through the initiatives of NGOs, institutions and other conservation agencies.

Community-based management developed by NGOs and other institutions was established in five communities, most of which are now collectively known as Fiji Locally Managed Marine Areas (LMMA). The LMMA is now the leading programme for facilitating the revival of traditional resource use practices in Fiji in order to improve management, ensure the sustainability of fisheries resources, and maximize benefits to local communities (Veitayaki et al 2003). The recently established Fiji LMMA network (FLMMA), a collaborative effort among Government authorities, NGOs, learning institutions, conservation practitioners and communities has added impetus to the community-based fisheries movement in Fiji.[31] The network was established with the aim of developing partnerships in order to strengthen relations among NGO's and the government for better management of local marine areas and, as a consequence, for improved local community livelihoods.

Members of the FLMMA Network have project sites within the country where they have work with local communities to help establish Marine Protected Areas (MPAs). Each member, once selecting a site, works with the site community to develop a community-based marine resource management plan and to reach consensus on declaring and enforcing a no-take zone within community fishing grounds. Each member then monitors its site to ascertain the extent to which management efforts have been successful. One of the highlights is the sharing of human resources and information. Through the FLMMA, members can discuss site-specific problems, solutions and achievements. This not only helps to improve management strategies, but also to ensure that goals are clearer and members' resolve for success is strengthened.

The network operates on the basis of a social contract[32] and through a common vision that conservation and local community livelihoods can be improved by developing and implementing effective means of resource management. The FLMMA also works with government to obtain endorsement and recognition of the community-based approach to fisheries management. Recently, the Fisheries Department has pursued its objective of implementing LMMA's management plans at the national level to enable the community-based management initiatives to have a wider influence and impact. This initiative was

[31] The network was established in March 2001. Currently the six main organizations that make up the FLMMA network are the World Wide Fund for Nature (WWF) Fiji Country Programme (FCP), Institute of Applied Science Programme of the University of South Pacific (IAS - USP), Foundations of the Peoples of the South Pacific (FSP), International Marine Alliance (IMA) and Ministry of Fisheries and Forests.

[32] Under the Social Contract the FLLMA network partners agree to collaborate to improve conservation both for the people involved and the marine environment. The Social Contract is not legally binding but demands that the members observe common values that emphasize good social relations. These values include commitment, teamwork, transparency, empowerment, respect and the belief that practitioners can make a difference.

incorporated into strategies and policies of the Department of Fisheries for the 2002-2006 period.

A new and encouraging development is that the Government has decided that it will grant ownership of the foreshore areas to indigenous Fijians through legislation.[33] If this undertaking is implemented, it will remove the controversy over the ownership of the *qoliqoli* and should give further impetus to the CBFM movement in Fiji.

Observations

In terms of the date and time frame within which ownership over traditional fishing areas or the rights to their use were dealt with, and in terms of the institutions and actions put into determining and recording of traditional fishing right areas, the Fiji case represents the most systematic legal recognition and record of the traditional fishing rights and areas in the Pacific – if not the world.

It was not made clear in days of cession in the *Birds, Game and Fish Protection Ordinance* and in current law whether recognition of claims over marine areas is a claim of ownership (title) or merely ownership over user rights. For the moment, the Native Fisheries Commission, which has the mandate to consider, demarcate and register claims, considers *mataqalis* hold user rights and not title over registered areas. Naturally, the *mataqali*'s claim the opposite to be true – that is, that *mataqalis* have ownership over the registered marines areas.[34]

The conflicting claims arising out of different interpretations of the law will no longer remain a moot point if the Government of Fiji stays true to its commitment to give ownership over the foreshore to indigenous Fijians through legislation. However, even if this does not happen and the *mataqali*'s do not have title but mere ownership or exclusivity over fishing rights, that right recognized by-law is not an insignificant one. There is ample opportunity to build on the current legal situation to establish an effective fisheries management regime, including the drafting of regulations that will make this right operational. This opportunity has been seized in practice by local communities and conservation practitioners. On the basis of the limited provisions of Sections 13 to 20 of the *Fisheries Act*, the people and their conservation partners were able to push for effective protection of their marine resources as evidenced by the LMMA initiative.

Studies of access to marine areas for fishing also show that traditional conservation and management practices of fish resources are largely maintained. They are however increasingly being challenged owing to pressures of population growth and the related need to harvest more to feed household members, as well as pressures to earn money in an ever expanding cash economy. Despite these challenges, the fisheries management authority and its partners remain hopeful that renewed interest in fisheries management through CMT will promote better utilization of age old conservation and practices, and that respect for rights of control exercised by *mataqalis* over marine areas will lead to innovative solutions for sustainable use of fisheries resources while addressing community needs. The recently completed registration of all claims over marine areas by *mataqali* and the LMMA system driven by the FLMMA strengthens the movement for community fisheries management based on CMT in Fiji. Recent international recognition of the FLMMA efforts at conservation can only add to this effort.[35]

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[33] See Veitiyaki *et al*. 2003, PACNEWS April 1999 and ABC Radio Australia News internet site: http://www.goasiapacific.com/news/GoAsiaPacificBNP_1019518.htm

[34] Langibalavu 2003, Personal communication.

[35] Veitayaki *et al.* 2003 and *South Pacific Currents*, a quarterly newsletter for WWF South Pacific Programme staff and friends (No. 17, September 2002).

The strength of the Fijian legislative framework relating to the use of CMT for fisheries management, like the Cook Islands, is derived from the legal incorporation of traditional decision-making institutions, and better still, the actual recognition of traditional fishing rights in legislation. It is this continued relevance of and respect for culture and tradition in Fiji that has largely contributed to the success of CBFM initiatives, based on CMT.

The approach in establishing and locally managing MPAs, not only to achieve conservation but also to increase yields, is worthy of note. It lends support to the notion that fisheries management action through CBFM should not only dwell on resource conservation but should also be economically sustainable for the community. As CBFM becomes entrenched as a vital part of fisheries management in any jurisdiction, costs of fisheries management are shifted from the fisheries management authority to the communities. These costs should be offset by incentives such as improved livelihoods and benefits or privileges to communities who invest time and effort in CBFM.[36] In other words, communities involved in CBFM should be the net benefactors of the alternative management approach so that there can be reinvestment of resources, including community time and effort, into the CBFM approach.

Present moves to grant ownership over foreshore areas to indigenous Fijians, through legislation, would further assure the continuation of traditional forms of fisheries management, through CBFM. They would also add impetus to the efforts of the institutions who are promoting CBFM in Fiji. Legislation that introduces recognition of ownership over traditional fishing areas to indigenous Fijians (members of the *vanua, yavusa, mataqali* and other sub lineage groups) should be clearly drafted in the context of a thorough review of the current fisheries management environment in Fiji. In particular, the drafting of legislation should, *inter alia*, consider the developments so far in establishing and operating community-based fisheries and other resource management efforts based on traditional management practices, partnerships established to promote such management practices, lessons learned in operating these management initiatives and existing mechanisms such as the Native Lands and Fisheries Commission[37] that have determined and kept records of traditional fishing areas.

Clear and full ownership over land and the resources therein by any group and the powers that come with it may have undesirable consequences. If the powers through ownership over foreshore areas promised by the Fijian Government are misused by traditional leaders or communities so that personal gain and profit prevail over sustainable utilization of fisheries resources and the collective good, the demise of community fisheries based on CMT and waste of gallant efforts and substantial resources invested in CBFM, would be real prospects. Efforts to ensure that such results do not ensue would be a worthy investment in sustainable fisheries resource management in Fiji.

[36] For more reading on transaction costs, see Abdullah, Kuperan and Pomeroy supra note 3. See also David G. McGrath, Alcilene Cardoso and Elias Pinto Sá, Community Fisheries and Co-Management in the Lower Amazon Floodplain of Brazil, Paper presented at the International Symposium on the Management of Large Rivers: Sustaining Livelihoods and Biodiversity in the New Millennium, Phnom Penh, Kingdom of Cambodia, 12 - 15 February 2002.

[37] It should be noted also that the Native Lands and Fisheries Commission is established under the Ministry responsible for Fijian Affairs. The linkages between Native Lands and Fisheries Commission and their constituting legislation and administration should be reflected or accommodated in the fisheries legislative framework if the Native Lands and Fisheries Commission is to continue to be relevant to fisheries management in Fiji.

B1.3 Samoa

B1.3.1 Background to the legal recognition of CMT and traditional governance systems influencing fisheries management in Samoa

The Samoan Constitution as the supreme law of Samoa 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.

Section 2 of the *Land and Titles Act 1981* adds only a little more to the definition of the term "custom and usage" in the following manner:

> "Custom and usage" or "Samoan custom and usage" means the customs and usages of Western Samoa accepted as being in force at the relevant time and includes:
>
> (a) The principles of custom usage accepted by the people of Western Samoa in general; and
>
> (b) The customs and usages accepted as being in force in respect of a particular place or matter.

Other than the above references, no elaborate statement of custom as law exists. This however cannot disguise the fact that in Samoa, many important decisions are made according to, or are influenced by, what is referred to as the Samoan way (Fa'a Samoa). Fa'a Samoa, founded on custom, is perpetuated by the continued relevance of the traditional forms of social groupings and decision-making institutions, particularly the Matai (Chiefly) system and the Village Fono (Council).

The legal recognition of the traditional governance system whether directly or indirectly also facilitates an easier adoption of contemporary fisheries management systems based on CMT or the community-based approach. The deeply ingrained natures of traditional forms of governance and norms that perpetuate the Fa'a Samoa are manifested in the following ways.

- The National Government institutions described in the Constitution, despite its western origins, closely resemble the traditional governance system. The Parliament is a national Fono and the members are elected from the village Matai in the 11 districts. Until 1990, only registered Matai could vote for Parliament. The 1990 referendum approved universal suffrage but only Matai can run for the 47 Samoan seats. Constitution Section 100 recognizes Matai titles which shall be determined according to Samoan custom and usage.
- The head of state is chosen from one of four royal families, and, like the village High Chief, does not play an active role in government, acting only on the advice of the Prime Minister and cabinet. The head of state is The Paramount Chief of Samoa, His Highness Malietoa Tanumafili II. He appoints as Prime Minister the member of the legislative authority who has the majority of support of the 47 members. The Prime Minister then selects an 8-member cabinet from the parliament.
- Samoan villages are traditional and are therefore sensitive to outside interference in their affairs. Each village has a number of clans and there is a titular High Chief (Ali'i) and an orator or Talking Chief (Tulafale). The orators can be real sources of authority in the village and conduct debates and speeches on all subjects. But in the end, everyone must agree on the decision or no decision is made (Peteru 1993).

- Resource use and development decisions are also addressed by the Samoan socio-political network. This network begins with the Matai System on the local level and is reflected in the structure of most political and social organizations (Peteru 1993). The Matai and Fono system have great influence on day to day community life.
- The Village Fono decides on all matters pertaining to the village and its land and sea resources. Decisions are reached by consensus following a great deal of discussion by concerned parties. The *Village Fono Act 1990* formally recognized the Village Fono by validating and empowering the exercise of power and authority by Village Fono in accordance with the custom and usage of their villages, and to confirm or grant certain powers.
- Fono decisions are based more on a sense of social justice, custom and usage than written laws and regulations. Enforcement of laws is also undertaken by Village Fono. Village Fono penalties imposed on lawbreakers can be more severe than those provided by national law and range from fines to ostracism from the village in extreme cases.

B1.3.2 Current fisheries management framework and CBFM in Samoa.

Article 104 of the Constitution vests all land lying below the line of high water in the State. This has important implications for fisheries as it means that legally all Samoans have open and equal access to sea resources. This right is regulated by the *Fisheries Act 1988* which is the principal legislative framework relating to fisheries in Samoa and provides a system for distributing access rights to fishers guaranteed by the Constitution.

The *Fisheries Act* governs the management of fishing primarily through the control of entry into fishing by both domestic and foreign fishing vessels. The other stated purposes of the Act include the conservation, management and development of marine resources, the promotion of marine scientific research and the protection and preservation of the marine environment. The responsibility for managing fisheries and marine resource is vested in the Fisheries Division of the Department of Agriculture, Forests, Fisheries and Meteorology.

The *Fisheries (Fishing Licence) Regulations 2001* made under the Act provides the requirements and process for applying for fishing licenses including the upper limits of fishing licenses that can be issued, special considerations for local and foreign license applications, transferability of licenses, offences and penalties.

An important provision of the *Fisheries Act 1988* is that the Director responsible for fisheries "may, in consultation with fishermen, industry and village representatives, prepare and promulgate by-laws not inconsistent with this Act for the conservation and management of fisheries". The ingenious use of this provision, in connection with the *Village Fono Act* and the underlying relevance of indigenous socio-political and decision-making institutions has allowed community-based fisheries management or co-management to become well established in Samoa. Many villages now have by-laws to assist in managing village fishing grounds. As will be demonstrated below, this CBFM system for fisheries is now an important integral feature of the predominantly successful inshore or reef fisheries management in Samoa.

B1.3.3 The use of village by-laws in CBFM in Samoa

In the mid-1980s, it was noted that over-exploitation, use of destructive fishing methods and environmental disturbance caused serious declines in catches in the inshore fisheries. The situation was of grave concern not only to the Government, but also to a large number of the village communities. Village communities through their Village Fono took initiatives to make village rules and publicise these rules through media to prevent further decline of their fishery resources. Notices announced bans on the use of explosives, chemicals and other

destructive fishing techniques and prohibited nearby villages to fish in their respective lagoon areas. The notices also indicated penalties to be paid to the Fono for any breach of their village rules by their own residents, and threats of legal action for breach of by-laws by outsiders (Fa'asili and Kelekolio 1999).

The powers of Fono to make rules are based on the *Village Fono Act*. Section 3 (2)–(4) relating to the continuation of the powers of the Village Fono states as follows:

> "(2) Every Village Fono in the exercise of any power or authority shall exercise the same in accordance with the custom and usage of that village.
>
> (3) The past and future exercise of power and authority by every Village Fono with respect to the affairs of its village in accordance with the custom and usage of that village is hereby validated and empowered.
>
> (4) In addition to the power and authority granted under this Act, every Village Fono shall have other powers, authorities and functions as may be provided in any other Act."

The scope of jurisdiction of the Village Fono is established under section 9 of the Act. Section 9 reads:

> "The jurisdiction of any Village Fono shall not extend to include-
>
> (a) Any person who does not ordinarily reside in its village; or
>
> (b) Any person who not being a Matai of its village ordinarily resides in its village on Government, freehold or leasehold land and is not liable in accordance with the custom and usage of that village to render tautau to a Matai of that village."

While the enforcement of village rules within individual communities was relatively easy, problems were experienced with enforcement on outside communities. This comes as no surprise as the jurisdiction of the Village Fono, according to Section 9, is to make laws that apply only to persons who ordinarily reside in the village and not to a person who lives outside the village and is not liable to render *tautau* to a Matai of that village, in accordance with custom and usage.

Problems of enforcement also arose owing to the inconsistency of some village rules to manage and conserve fishery resources with existing Government laws. This resulted in several Fono not being able to pursue court action against breaches by neighbouring villages. (King and Fa'asili 1999)

Despite initial problems, the Fisheries Division recognised that the initiative taken by the village communities provided an excellent avenue to introduce effective management regimes for the inshore fisheries. An important first step in the view of the Fisheries Division was to give the Village Fono assistance by enhancing the legal recognition of village rules for conservation and management of fisheries resources. To this end, the *Fisheries Act* introduced provisions that provided the process whereby village by-laws are promulgated and enforced as national laws. Section 3 (1), of the Act sets out the powers for making by-laws, as follows:

> "The Director shall have such powers, rights and authorities as may reasonably be necessary or expedient to carry out the Director's functions, and in particular may – ...
>
> [d] in consultation with fishermen, industry and village representatives, prepare and promulgate by-laws not inconsistent with this Act for the conservation and management of fisheries; ..."

Section 3 (4) of the Act relates to the procedure for publication upon promulgation, alteration or revocation of by-laws:

> "With respect to by-laws under this section, the following provisions shall apply -
>
> [a] by-laws shall be signed by the Director;
>
> [b] they shall be published in the Gazette and in a newspaper circulating in Samoa;
>
> [c] they shall come into force on a day fixed in the by-law, which day shall not be earlier than 7 clear days after the date of publication in the Gazette;
>
> [d] any by-law may in like manner be altered or revoked;
>
> [e] any by-law affecting or applying to the conservation and management of fisheries in lagoon waters shall be issued to the Pulenu'u of adjacent villages at least 7 clear days before it shall come into force;
>
> [f] a by-law may leave any matter to be determined, applied, dispensed with, prohibited, or regulated by the Director, from time to time, either generally or for any classes of cases, or in any particular case;
>
> [g] no by-laws made by the Director shall bind the Government; and
>
> [h] by-laws must be reasonable or consistent with this Act."

Section 3 (5) sets out penalties for breach of any by-law:

> "[5] Every person who commits a breach of any by-law made under this section is liable to a fine not exceeding 100 tala and, where the breach is a continuing one, to a further fine not exceeding 20 tala for every day on which the breach continued."

It is said that "the Fisheries Act was specifically designed to include provisions dealing with procedures whereby a village fono could declare its own rules as by-laws." (King and Fa'asili 1999). In reality, as can be seen from the provisions restated above, the power to make by-laws under the *Fisheries Act 1988* is vested in the Director for Fisheries and not the village Fono. However the impression conveyed even now, which is that it is the Village Fono that makes the by-laws, is vital for ownership and legitimacy of the by-laws. This in turn contributes to ensuring respect of and compliance with such laws.

Ownership and legitimacy is assured in part by the by-law making process (see Box 5). The main requirement is set out under Section 3 (1) (d) of the *Fisheries Act* which states that the Director shall promulgate by-laws in consultation with fishermen, industry and village representatives. The mechanism for introducing village by-laws under the *Fisheries Act* also ensures that the village rules apply equally to village residents and outsiders and no Samoans can be differentially excluded as was the case under the *Village Fono Act*.

The advantage of village rules in the form of by-laws under the *Fisheries Act* is that it can now be enforced in a court of competent jurisdiction like any other national law of Samoa.

Current village by-laws are broad and cover any measure that assists the management and conservation of the fishery resources. These may include the restriction of the sizes of fish and shellfish (but not lower than the minimum limits in the *Fisheries Regulations 1996*), bans on certain types of fishing gear and methods, allocation of fish quotas, restriction of mesh sizes for nets and fish traps (but not lower than the minimum limits in the *Fisheries Regulations 1996*) and closure of fishing seasons or areas to allow fish to reproduce. Importantly, the by-laws apply to all citizens equally (Faásili and Kelekolio 1999).

Box 5. The Samoa by-law Process[38]

Step 1: By-law formulation

Members of the Fono (Council of Chiefs), which is the highest village authority (that determines village rules, sets village policies and imposes traditional punishments on village residents for contraventions of rules), consult among themselves first on the rules to be introduced as village by-laws, bearing in mind that the rules must be related to the conservation and management of the fishery resources.

Step 2: Consultation process

Upon agreement by the Chiefs on the proposed rules, representatives of the Chiefs are sent to the Fisheries Division for consultation to ensure appropriateness of the proposed rules to avoid in particular inconsistency of the proposed rules with existing Government legislation. The Fisheries Division may suggest improvements, alterations, and in extreme cases, recommend complete deletion of the proposed by-law. The Fisheries Division may also redraft the by-laws to better reflect the wish of the Fono.

Step 3: Final checking and clearance by the Office of the Attorney General

The agreement reached in Step 2 is then submitted to the Office of the Attorney General for final checking and clearance and to ensure that the by-laws are written into their legal and proper forms.

Step 4: Signing

The cleared by-laws are returned to the Fisheries Division for the signature of the Director of the Ministry of Agriculture, Forests, Fisheries and Meteorology.

Step 5: Gazetting, publishing and distribution process

The signed by-laws are then passed to the Legislative Assembly to be gazetted. At the same time they are published by the Fisheries Division in the local newspaper and copies are distributed to Pulenu (nominated Government representatives) of neighbouring villages. The by-laws come into force on a day fixed in the by-laws which should be 14 clear days after the date of publication in the Government Gazette.

Monitoring and enforcement of the by-laws are largely done by village communities. The communities normally put signboards along roadsides and beaches to inform the public of the areas only where their respective by-laws apply. Communities variously build watch houses, patrol canoes and routinely use watchers to monitor illegal activities in their coastal zones and marine protected areas. Breaches by individuals from the village sponsoring the by- laws are dealt with by the Village Fono. Traditional fines such as provision of pigs, taro and others may be imposed by the Fono. Breaches by an outsider are handled through the formal court system. Fines imposed by the formal court system shall not exceed $100, and not more than $20 for each day the breach continues.[39] If the offence involves an existing Government law or fisheries legislation, applicable fines under those laws, which may be higher, will apply.

Observations

The main advantage of the village by-laws in Samoa reflect the justifications put forward for use of the CBFM approach. The involvement of communities ensure that by-laws concerning fisheries management are monitored more effectively than the monitoring and enforcement of regular national laws, which are severely compromised by limited resources and personnel of the Government. By-laws are initiated by villages and people with real interest in the management and conservation of the fishery resources in question. These stakeholders are

[38] This is a synopsis of the Samoa by-law process by Fa'asili and Kelekolio, 1999.

[39] Section 3 (5) of the *Fisheries Act*.

more likely to respect and abide by the rules initiated by them compared with the rules set by a government authority.

Village by-laws are now an important feature of village Fisheries Management Plans created under the community-based Fisheries Extension Programme operated in Samoa (King & Fa'asili 1999). To the Fisheries Division, village by-laws represent an effective fisheries management tool, which has great potential for solving many problems involving the conservation of the inshore marine environment (Fa'asili and Kelekolio 1999).

In Samoa, as is the case in Cook Islands and Fiji, existing legislation does not directly refer to the use of CMT or specific traditional or indigenous custom. However, it seems unnecessary in the three jurisdictions that customary law or traditional practice is preserved by direct reference to them in the Constitution and legislation. Preservation or contemporary use of custom and practice can also occur through legal recognition or contemporary use of traditional forms of social organization, leadership, governance or, as in the case in Fiji, fishing rights. This augers well for the community-based natural resource management based on custom and usage.

B1.4 Vanuatu

B1.4.1 Background to the legal recognition of CMT in Vanuatu

The current community-based fisheries management in Vanuatu influenced by CMT can be legally supported by several provisions in the Constitution of Vanuatu and other legislation and governance institutions. The first legal provision relating to custom as a source of law is found in Article 95(3) of the Constitution which states:

> "Customary law shall continue to have effect as a part of the law of the Republic."

The second Constitutional provision concerning the determination of a matter in court in the absence of applicable law is Article 47 (1) of the Constitution. The provision reads:

> "...If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom."

An institution that directly perpetuates the use of custom is the Island Courts established by the *Island Court Act* Chapter 127. Section 10 relating to the power of an Island Court to apply custom states:

> "10. Subject to the provisions of this Act an island court shall administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order."

The other Constitutional provision and perhaps the most important in securing the ability of the indigenous peoples of Vanuatu to determine resource management approaches in a certain area is Article 73. This article states:

> "all land in the Republic belongs to the indigenous custom owners and their descendents".

Complementing Article 73 of the Constitution is Section 2 of the Land Reform Act Chapter 123, which defines land as including "... land extending to the seaside of any foreshore reef but no further".

The combined effect of the recognition of custom as a source of law and the ownership of all lands extending to the seaside of any foreshore reef enables any land-owning individual or group in Vanuatu to undertake management of resources in these areas in the manner deemed appropriate. For those lands beyond the seaside of the foreshore reefs, it is conceivable to apply management approaches based on custom, provided that there is no

applicable law or that the measures or regulations made are not inconsistent with applicable law.

The Constitution also establishes the Vanuatu National Council of Chiefs, also known as *Malvatumauri*.[40] The *Malvatumauri* is an important advisory body to the Government in all matters. It is composed of Chiefs elected by their peers sitting in the district Councils of Chiefs. The Council advises on custom and tradition as well as on the preservation and promotion of the country's culture and indigenous languages.

The *Decentralisation and Local Government Regions Act 1994* (the Decentralisation Act) and its subsidiary legislation compound the legal situation concerning mandates for resource management powers in the marine areas up to the seaside of the foreshore reefs. The Decentralisation Act vests powers in regional governments to make laws within the provincial boundaries which may apply to areas that extend to and beyond the foreshore reef. The recently enacted *Environmental Management and Conservation Act 2002* empowers the Director of the department responsible for environment to negotiate with custom land-owners to protect and register community conservation areas. The Fisheries Act empowers the Minister for Fisheries to establish marine reserves. These create a situation where the national government (and between authorities within the national government), provincial governments and land owning groups have shared powers in respect of natural resources conservation and management. In this situation, questions arise as to which laws apply and prevail over the others. It is important that these issues are considered and solutions identified to address them in the establishment and implementation of CBFM, as submitted in Part A of this study.

It suffices to summarise here that the laws of Vanuatu facilitate the application of custom and the role of custom landowners in marine resources management at least in the marine areas up to the seaside of the foreshore reef. This opportunity has been put to good use, as has been demonstrated in part by the effectiveness of the CBFM movement in Vanuatu.

B1.4.2 Current fisheries management framework and CBFM in Vanuatu

The main legislation dealing with the management of fisheries in Vanuatu is the *Fisheries Act 1982,* as amended in 1989. The Act sets out a comparatively adequate management framework with provisions relating to:

- development and management of fisheries through establishing conditions for encouraging foreign investment in fisheries, fisheries management and development plans, fishery access arrangements, foreign fishing and local fishing vessel licenses for regulating fishing access and encouraging scientific research operations;
- monitoring control and surveillance through the Minister's powers to enter into agreements or arrangements on harmonization of licensing and enforcement, authorized officers to carry out observer and enforcement duties and recognition of a regional register of foreign fishing vessels;
- conservation, such as the prohibition of fishing for marine mammals in Vanuatu waters, the use of explosives and poisons for fishing and the protection of fish habitat through the Minister's powers to establish marine reserves; and
- requirements for fish export processing establishments to ensure fish and fish product safety.

[40] Constitution, Chapter 5.

The *Fisheries Act* vests the responsibility for the development and management of Vanuatu's fisheries in the Fisheries Department of the Ministry of Agriculture, Livestock, Forestry and Fisheries.

An interesting aspect of the *Fisheries Act* is that the Minister is empowered under Section 20 to establish marine reserves in consultation with owners of adjoining land and the appropriate local government Council. As regards what areas can be established as a reserve, a possible interpretation is that the area would be marine areas or lands that do not belong to custom owners (land on the seaward side of the foreshore reef). Section 20 makes it an offence to undertake certain activities in the established marine reserves without the permission of the Minister. These activities are: fishing; the taking or destroying of coral; dredging or the taking of any sand or gravel; the destruction of natural habitat; and the taking or destruction of a wreck or part of a wreck.

The other notable legislation relating to fisheries management include the *Decentralization and Local Government Regions Act 1994*, the *Environmental Management and Conservation Act 2002,* the *Maritime Zones Act 1981,* and various land laws.

As noted above, the *Environmental Management and Conservation Act* 2002 empowers the Director for the department responsible for environment to negotiate with custom landowners to protect and register Community Conservation Areas (CCA). Division 2 of Part 4 of the Act provides a mechanism for conservation of community areas that have national biodiversity significance. Once a CAA is registered, the landowners or Management Committee will be responsible for developing and implementing a conservation protection or management plan. It is an offence for a person to contravene a term or condition of a management plan for a registered CCA.

Clearly, the CAA approach under the *Environmental Management and Conservation Act 2002* is conservation-oriented and can be separated from the general fisheries management framework under the *Fisheries Act*. The potential for conflict however is real where the area for the CAA is a marine area, and if the conservation and management plan for the CAA also sets out fisheries management measures. On the other hand, the marine reserve concept under the *Fisheries Act* appears to be conservation orientated so there could be overlap in conservation mandates under the *Fisheries Act* and the *Environment Management and Conservation* Act in marine conservation areas. Both options are open to the appropriate government authorities to pursue. It is however desirable to avoid duplication of effort by allowing the authority best suited in terms of capacity to undertake conservation action. Thus, conservation should be undertaken by the Department responsible for environment. Fisheries management action on the other hand should be undertaken by the Fisheries Department although there will be need for good communication, planning and coordination to ensure that there is cohesiveness in management action whether it is conservation or management driven.

B1.4.3 Village-based marine resource management

The Vanuatu village-based marine resource management began in 1990 when it was announced that the Department of Fisheries would provide technical advice on trochus management to fishing rights owners who requested it. The enthusiastic response to the announcement led to trochus surveys carried out by the Department of Fisheries along with the provision of advice on desirable minimum size limits for harvests and optimum closed seasons to rebuild stocks. No requirement for rigid management plans were forced on villages based exclusively on biological considerations.

The success stories of the trochus management led to a further study on the strengths and weaknesses of the cooperative management approach and its potential for wider application, although Johannes (1998) had already made the claim then that the modest village-based trochus management programme of the Department of Fisheries "*offered a basic general*

approach to cooperative management that could be applied both over a wide range of species as well as elsewhere in Oceania." This proved to be a sound prediction as the author actually witnessed the same village-based management units and their meetings being utilized by other conservation and management organizations and entities to promote turtle conservation and as an entry point for dissemination of other socio-economic issues that impact on village lives.

The study provoked by the trochus management programme of the Fisheries Division confirmed the existence of CMT and indeed specific village claims of exclusive rights to harvest marine resources from the adjacent shallow waters, through its Chief or its constituent clans or families under a CMT system. These rights in coastal waters are contiguous to traditional land holdings.

The study also established that promulgations of village-based conservation taboos including closures for various species, restrictions on fishing methods, an awareness of the relationship between excessive fishing pressure and declining stocks, the benefits of recent regulations on fishing, and the rights to exclude outsiders from fishing.

CMT is not only the foundation for all village-based marine resources management measures in Vanuatu; it also contributes to the equitable distribution of the harvest and spreads fishing effort (Hickey and Johannes 2002).

Enforcement of marine resources taboos imposed by the villages ranged from simple admonition to fines in the form of money, food and kava or a combination of the three. Where reverence of traditional authority is still high, compliance with taboos was achieved for fear of shame and embarrassment at being caught and fined in a village court.

In a 2001 resurvey of the marine resource activities in 21 villages, Hickey and Johannes (2002) observed that village-based marine management measures more than doubled between 1993 and 2001. In addition to the continuation of the exemplary extension work of the Fisheries Department in the villages which ensured the increase in the marine resources management activities, the increase in awareness for better conservation and management of fisheries resources was also attributed to the spread of awareness by a travelling theatre group called Wan Smolbag.[41] Wan Smolbag spread the conservation message for sea turtles which led to introduction of regulations relating to banning or restriction on harvesting of turtles.

While CMT, perpetuated by legal recognition of custom owners' title over certain marine areas, is the foundation for the success of marine resources management activities in villages, it is not the only reason for the continued success and exists in isolation of other factors that contribute to this success. Cultural norms including respect for others and their areas and respect for rural community organization, leadership and collective behaviour allows for non- intrusion into taboo areas. In addition, most of the taboo areas are small and located close to villages which facilitate surveillance. Alternative food sources extracted from traditional land, the export of cash crops and the establishment of other income activities with outside assistance also contribute to the compliance with established regulations. Recently, support in enforcement of traditional Chiefs' rulings were provided by the police in cases where the Chief had exhausted other possibilities within the village to bring an individual into compliance. Outside assistance in providing, inter alia, technical information in conservation and management, focussed conservation effort on one species to ensure success so that conservation effort could be replicated for other species and education, not only for villages

[41] Wan Smolbag brought to villages a play about the plight of sea turtles which resulted in the banning or restricted harvesting of turtles by villages. Wan Smolbag also encouraged many villages to select turtle monitors to tag turtles and to help oversee the conservation of turtles and eggs in their villages. The author had the opportunity to witness Wan Smolbag in action in further education of turtle monitors with the support of SPREP as well boosting awareness on other issues such as AIDS.

but also for national governments, can also enhance community-based fisheries conservation and management effort (Hickey and Johannes 2002).[42]

Observations

Community-based management of fisheries in Vanuatu, unlike those in Cook Islands, Fiji and Samoa, began as an initiative of one individual, that of Moses Amos. This is an anecdote worthy of attention as it shows that individual intervention and commitment can also contribute much to the introduction of a different and effective approach to fisheries management.

Although there was already in 1985 legal recognition of ownership by Ni-Vanuatu of land (including marine areas) which is an important aspect of CMT, real activity to promote fisheries management based on traditional marine tenure in Vanuatu occurred only in the 1990s on the basis of the individual initiative noted above. That initiative has progressed with various other factors, contributing to the success of CBFM as evidenced by increased village-based marine resource management regulations today.

The Constitution read in conjunction with the *Land Reform Act* recognizes ownership over significant tracts of marine areas which provide a solid legal basis on which indigenous communities can take fisheries management and conservation action. The late establishment of CMT-based management in Vanuatu shows that legal recognition of ownership of marine areas by indigenous communities is a valuable asset but it is not enough to enhance CMT use. There is a need for further legislative framework for the conservation and management of resources that not only gives cognisance to ownership rights but also establishes mechanisms that operationalize communities' rights.

There is already *de facto* acceptance of community-based fisheries management in Vanuatu. Indeed, customary marine tenure in Vanuatu is now going through a period where exercising the right to exclude outsiders and to regulate one's own group activity on the fishing grounds is intensifying. Any revision of the principal fisheries legislative framework can only add to this development by giving formal recognition through its provisions and to facilitate CBFM implementation in the context of the whole fisheries management framework. Indeed Johannes (1998) made a worthy recommendation that Vanuatu should work towards ensuring that national law supports local authorities in their regulation of fishing by means of village-based prohibitions and enforcement mechanisms, but that such laws should not define procedures too narrowly.[43]

The developments from the recent review of the decentralized government system in Vanuatu[44] should be closely observed for potential impact on fisheries management in general and village-based fisheries management in the coastal areas. Future fisheries management policies should set out strategies for ensuring harmonized implementation with clear roles for villages, the provincial or regional government system and the national government authorities.

B1.5 Summary of Observations and Important Lessons

Main observations and some broad important lessons can be highlighted immediately from the review of the legal framework and implementation of CMT in community-based fisheries management in the four jurisdictions. These are as follows.

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[42] See Hickey and Johannes 2002 at page 19.

[43] See Johannes 1998, p. 184.

[44] See Decentralization Review Commission – Government of Vanuatu, Constitutional Review Commission Reports (2001).

- **The importance of legal recognition of custom or aspects of CMT, including ownership and customary fishing rights**. The vesting or recognition of ownership over marine areas or fishing rights through legislation (as in the case of Vanuatu and Fiji, respectively) are obviously more substantial than mere recognition of custom (as in Cook Islands and Samoa) but this does not mean that there should be limited scope in the application of custom in fisheries management. As can be observed in all cases, but more prominently in the case of the Cook Islands and Samoa, the minimum reference to custom could be translated into support for the use of effective traditional practices for the conservation and management of marine resources. It would be helpful if fisheries legislation elaborate practical means by which these rights are applied. For example, in Fiji, customary fishing rights are primarily exclusive to the *mataqali* but the manner in which these rights are utilized is also built into the fishing access mechanisms (i.e. the licensing regime). Additional support to these rights is provided by a formal registration mechanism. Legislation can further facilitate CMT in fisheries management by providing a regime where there is a role in the context of the wider fisheries management framework for communities to directly or indirectly influence management decisions or initiate local regulations.

- **Legal recognition of custom, CMT or aspects thereof does not necessarily mean codification of specific custom or traditional practice.** Indeed, as cautioned by many, the codification of specific practices may be restrictive and may have the undesirable effect of freezing aspects of CMT. It is observed that CMT in PICs is dynamic. This valuable characteristic should be maintained. In order to avoid freezing custom, a general recognition that custom can be applied in fisheries management or recognition or ownership over marine areas or fishing rights may be the entire necessary legal basis required. "Codification" or legislative incorporation of traditionally-based governance structures and their role in community decision-making in the context of the wider government framework is a factor that can perpetuate custom, as shown in the Samoan context. If direct recognition of traditional governance institutions is not possible, adoption of introduced institutions that can be influenced by traditional institutions, or leadership can be used effectively such as in the case of the Cook Islands.

- **National legislation should incorporate CBFM and complement community initiated regulations**. A noted concern about the four jurisdictions' legal regimes is the lack of legislation that expressly provided for broad participation in fisheries management including through CBFM. Many legislated fisheries policies in the world have incorporated the principle of broad participation in fisheries management.[45] Such broad participation may include CBFM. If this approach is adopted by many PICs, it will provide a minimum legal basis to implement CBFM, including those that incorporate or are influenced by CMT. The Samoa case demonstrates how legislation, in the form of the provisions of the Fisheries Act on village by-laws, complement village-made rules based largely on traditional wisdom, practice and leadership. The Fisheries Act gives universality and enforceability to rules that originate from villages in conventional law enforcement institutions, such as the courts.

- **For marine fisheries, CMT-influenced community fisheries management or CBFM in general is most suited for inshore coastal areas**. This finding is not a novelty as it is consistent with the proven CBFM systems globally. In the PICs, inshore coastal areas is where monitoring control and surveillance activities are easier to execute and the legal situation with respect to rights in or ownership over these marine areas is relatively clearer. This does not mean that the ownership issues over coastal areas is settled or that the current legal situation regarding these issues is satisfactory

[45] FAO 2002.

to indigenous communities, as is evident in the case of Cook Islands, Fiji and Vanuatu, where there are sentiments about limited areas of recognized land ownership rights.

- **Long term effort to promote CBFM is vital.** Any external programme for assistance should be for a longer term duration than normal technical assistance or development projects. CBFM projects should envisage the eventual transfer of the ownership of the programme and its outcomes to the community and the country or government. It is obvious that CBFM activists should work in partnership with local communities to assure ownership and respect for and compliance with regulations. Long term effort in promoting CBFM will be sustainable also if CBFM activists work closely with government to ensure that such a vital aspect of community governance institution is not sidelined. The sustainability of the CBFM is also assured if government is educated on the value of CBFM, recognizes successful outcomes and integrates into its national fisheries policy and strategies. Eventual legislation to support these policies and strategies would add security to the sustainability of CBFM initiatives.

- **Economic sustainability of CBFM is important.** The issue of improving livelihoods, in addition to improving fisheries resources conservation or management, should be an integral part of CBFM. This is illustrated by all the four jurisdictions studied – a finding consistent with global trends that ensure that fisheries management action through CBFM does not emphasize resource conservation or management alone but should be economically viable. As CBFM becomes entrenched as a vital part of fisheries management in the jurisdiction, costs of fisheries management are shifted from the fisheries management authority to the communities. These costs will need to be offset by incentives such as improved livelihoods and benefits or privileges to communities who invest time and effort in CBFM.

- **Individual initiative is as important as collective effort in promoting CBFM**. This is demonstrated clearly in the Vanuatu case but collective effort is vital to build on and sustain CBFM initiatives of individuals. Networking activities that promote coordination, cohesiveness and effective delivery, review, assessment and highlighting of outcomes are also vital, as is demonstrated clearly in the Fiji case.

- **Programme tailored to each country's peculiarities**. Above all, the CBFM initiative or programme should be tailored in design and delivery to the individual country circumstances. Some flexibility should be maintained so that it responds to emerging issues or to use options that are effective, such as the use of the Wan Smolbeg travelling theatre group in the case of Vanuatu, for awareness campaigns. All the jurisdictions however demonstrate that, while objectives and outcomes are similar if not identical, the ways in which the objectives or outcomes are achieved are rich in their variations.

Certain aspects of the broad lessons highlighted above, particularly the legislative aspects, are further elaborated in the next part of this study.

PART C.

SOME SUGGESTIONS FOR ENHANCING CMT USE IN THE PACIFIC

It is apparent that despite the consensus that CMTs should be utilized in contemporary fisheries management and the substantial legal recognition of CMTs in the Pacific, only a few PICs (Fiji, Cook Islands, Samoa, Vanuatu) have made notable progress in enhancing such use. Reasons for this rather unimpressive performance of CMT utilization in PICs cannot be fully accounted for through a desk study and short site visits. However, various contributing factors may be suggested, aspects of which have been highlighted by the case studies.

- There is a lack of clarity on how to operationalize CMT-based fisheries management, owing to insufficient information and advice and appreciation of the need for trials in order to glean lessons for wider application nationally.
- There are difficulties associated with standardization, which are compounded by the complexities of CMT within a context of ethnic and cultural diversity, as is the case in the Melanesian countries of Papua New Guinea, Solomon Islands and Vanuatu. These create practical application problems, including the high levels of costs and technical capacity required to implement CMT systems.[46]
- CMT systems and community-based regimes in jurisdictions with decentralized governance will need to deal with the complexities of decentralization and decentralization laws. Questions abound as to the extent of conservation management legislative powers and functions to be exercised by provincial and local level governments,[47] and whether these government entities have the capacity and resources to implement such functions. This is compounded by a lack of trust in national and local governments, whether well founded or not, due to their alleged preoccupation with revenue generation to the exclusion of the values and practices needed for sound conservation and management.
- Legislative support for elaboration of the role of traditional management systems or traditional leadership, organization and governance can be weak, due to apprehensions about rigidifying custom through legislation.
- There may be fear of eroding custom by creating reliance on formal institutions.
- Uncertainty may exist as to how and at what level to legislate (i.e. whether legislation should codify a specific customary management measure or practice or whether it should merely provide a framework to facilitate recognition of such practice and allow for changes to occur).
- Conflict between current laws and mandates may create uncertainty as to who should take initiatives or implement CMTs or CBFM;[48]

[46] See Simon Foale and Bruno Manele, Privatising Fish? Barriers to the use of Marine Protected Areas for Conservation and Fishery Management in Melanesia, Resource Management in Asia-Pacific, Working Paper No. 47, Research School for Asia Pacific Studies, The Australian National University, 2003.

[47] For example in Papua New Guinea, Organic Law on Provincial and Local Level Governments, the Fisheries Management Act and in Vanuatu the Decentralization and Local Government Regions Act 1994.

[48] For example, in Vanuatu the Environmental Management and Conservation Act 2002 empowers the Director of the department responsible for environment to negotiate with custom landowners to protect and register Community Conservation Areas while the Fisheries Act empowers the Minister for fisheries to establish fishing reserves.

- CMT-based CBFM projects are sometimes mounted on an *ad hoc* basis without sufficient attention to high implementation and maintenance costs, especially for larger countries.

The underlying lesson that can be drawn from the variety of difficulties identified above is that the situation in each jurisdiction is reviewed thoroughly to identify the problems and to address them through identification of appropriate solutions.

The same difficulty is confronted in presenting options for enhancing use of CMT in this brief study. However, some factors will be identified by presenting below what experts in CMTs in the Pacific have identified and what this study demonstrates as the necessary prerequisites for utilizing CMT in contemporary fisheries management in the Pacific. The overview of the few functioning CMT systems in Part B and information collected from site visits also highlight possible opportunities for enhancing the use of CMTs in CBFM. The role of legislation is provided in this context.

C1. A BETTER UNDERSTANDING OF CMT SYSTEMS AND THEIR POTENTIAL ROLE IN FISHERIES MANAGEMENT

Hviding and Ruddle (1991) underscore the need for the better understanding of the social, economic and legal dynamics of CMT systems to raise awareness, recognition and application of CMT in the Pacific.[49] The need to evaluate benefits of CMTs as viable fisheries management tools which must involve social scientists are also advocated by Johaness, Ruddle and Hviding (1991). It is noted in this regard that there is already a high level of appreciation for the potential role for CMT systems in contemporary fisheries management in the global and regional contexts. The understanding and evaluations advocated should not only be accomplished for individual CMT systems but results should also be shared and awareness should be achieved at the national level.

Increasing the awareness for the potential role of CMT in fisheries at the government policy and management level is vital. As stated by Hickey and Johannes (2002), education is not just for villages but also for government, particularly in promoting awareness of the value of subsistence fisheries and the importance of CMT-based community fisheries management to such fisheries.

It is also noted that at the national level, fisheries management officers have demonstrated an inherent and acute appreciation of the potential role that CMT systems can play in fisheries management due to having been brought up in fishing communities as well retaining strong links with their rural roots (Hviding and Ruddle 1991).[50] In this context, minimal effort is required to educate government officials in the value of CMT in the framework of contemporary fisheries management and therefore leading to an enhanced use of CMT in community fisheries management.

[49] See also Ruddle 1998 at page 122. See also page 123: "before any action is taken, it is imperative that the nature of existing fishing rights systems be documented, particularly those that have been or are being exercised". MRAG has attempted to follow this recommendation in studies of CMT systems in Fiji and Vanuatu. See MRAG 1999a, p. 17.

[50] See also Hviding and Larsen 1995, p. 15.

C2. COMMITMENT, GUIDANCE AND RESOURCES FOR ENHANCING CMT USE IN FISHERIES MANAGEMENT

The general impression gained during brief site visits to certain PICs, along with documented experiences from the known cases of CBFM in the Cook Islands, Fiji, Samoa and Vanuatu and trials of CBFM in Marshall Islands, point to inadequate commitment, guidance and allocation of resources as basic underlying causes for the slow progress in enhancing CMT use in fisheries management. Efforts should now be directed also at mainstreaming CMT systems at the national level to ensure that policies directly relating to CMT systems use in fisheries management are established with strategies and guidelines to implement them. Strategies would include renewed effort to remind stakeholders in each jurisdiction of the value of CMT systems and deliberate and phased programmes, beginning with trials and continuing through to programme adaptation and replication on a wider scale.

The Fiji case demonstrates the effectiveness of mainstreaming CMT. Mainstreaming of community fisheries based on CMT was achieved through the FLMMA. The main components of the approach were: (a) to involve local communities through a method which instils goodwill, trust and commitment; (b) training to use the agreed method and to ensure continuity; (c) field work to set the CBFM work in context; and (d) follow-up to ensure that not only conservation is achieved but that there is also an increased resource yield. Further down the process, but not least of all, is the goal of eventually influencing the government's development policy. There is no better way to convince government to adopt a management approach than to showcase a true success story. This is illustrated by the following excerpt concerning the FLMMA in Fiji.

> The accomplishments of the FLMMA partners were presented to the policy makers in Government in a workshop in 2001. The Ucunivanua dam monitoring had shown a 300% per annum increase in the no-take area and 100% per annum increase in the surrounding areas, as well as increased household income and greater catch per unit effort. After the policy makers got over their surprise at being given scientific findings by community members, they informed FLMMA of their desire to adopt the use of traditional Fijian customs to manage marine resources. As a direct result of FLMMA's work, the Government recently developed a full time program focusing on the use of locally managed marine reserves within coastal waters.[51]

The importance of ensuring increased yields from resources and household incomes cannot be understated. Economic viability of the CBFM initiative is vital to the acceptance and survival of CFBM in any jurisdiction whether it be Fiji or Brazil.[52] The programme for CMT-based community fisheries systems should therefore include components that ensure economic sustainability of the CMT-based fisheries management by addressing improved livelihoods of communities. Alternative activities to fishing, like aquaculture in Samoan villages, assist with conservation by taking fishing pressure off resource areas such as reefs. Where alternative economic activities can be encouraged, the future of CMT-based community fisheries initiatives becomes more secure.

Johannes (1998) provides some helpful suggestions for the strategies necessary for successful fisheries management based on community-level approaches, which would in turn employ CMT systems (Box No.6). Optimally, community-level approaches to fisheries management initiatives should be supported by government.

[51] Veitayaki *et al.* 2003, p.5.

[52] See McGrath, Cardoso and Pinto Sá 2002. See also Abdullah, Kuperan and Pomeroy, supra note 3.

Box 6. A strategy checklist for CBFM implementation (Johannes 1998)

- Announce government's willingness to collaborate with villages on management issues, and invite requests for assistance from interested villages.
- Start small, and not with a comprehensive plan to address many types of fisheries or many villages.
- Concentrate initially on villages where local marine tenure, local authority and community cohesion are strong.
- Concentrate initially on villages where fishing ground geography facilitates effective village surveillance.
- Focus initially on a singular type or limited number of fisheries (e.g. beech de mar).
- Ensure that national law supports local authorities in regulating of fishing by means of village-based prohibitions and enforcement mechanisms, but does not define these procedures too narrowly.
- Provide formal legal assistance in disputes only where local dispute resolution or enforcement has clearly failed.
- Train fisheries extension personnel in the skills necessary to help the community effectively combine local customs and knowledge with scientific knowledge for the purpose of marine resource management by:

  - studying local management procedures and relevant local knowledge concerning marine resources; and obtaining relevant literature; and

  - providing research-based management information and disseminating it in forms that can be readily understood by the community.

- Leave final management decisions and enforcement to village authorities.

Certain useful sources of information can also be cited for mainstreaming and implementing CMT-influenced CBFM or general CBFM in PICs. Among these sources are a set of useful guidelines on the broad issues that should be addressed in directing policy, strategy and programme for CBFM in a co-management context, as presented in "Guidelines towards Effective Co-Management of Coral Reef Fisheries in the Pacific Region" (MRAG 1999b). Another valuable source of information is a manual for actual implementation of CBFM in a co-management context, although it also contains useful general information on subsistence fisheries and fisheries management in the PICs. This is entitled, "Fisheries Management by Communities – A manual on promoting the management of subsistence fisheries by Pacific Island Communities" (King and Lambeth 2000).

C3. ENHANCING CMT-BASED COMMUNITY FISHERIES THROUGH LEGISLATION: "CODIFICATION" OF CUSTOM?

Much debate has ensued on whether or not customary marine tenure should be legislated. Recently, within the context of Vanuatu, the need to further examine the desirability to formally incorporate customary marine tenure in legislation was questioned again. (Govan 2002).

Those who caution against codification often regard the subject of legislating on customary laws or rights as codifying traditional practice or measures so that these are rigidified and cannot be changed later. This is a genuine concern but it depends on what it is that one wants to codify and the sense given to the term "codification". It is submitted that the act of legislating and legislation can have the attribute of rigidity only in circumstances where:

- emphasis is placed on translating specific customary principles and practice explicitly into "thou shall" or "thou shall not" statute forms, with little regard for the need to maintain the flexibility of custom or CMTs; and,
- one chooses the form and nature of statute that can only be promulgated or changed by the recognized highest law-making body (the National Parliament or Assembly), instead of choosing forms of laws, such as regulations, rules or by-laws that can be easily initiated or amended by traditionally-based local communities more closely linked to the site or issue that needs regulation.

Law or rule making is not an exclusive domain of the national legislature. Decentralization (through provincial or district level government or through delegation of the rule-making authority to the Minister or other administrative or local authority) allows site specific rules to be promulgated). Whereas bills for laws to be enacted as Acts of Parliament (the legislature) are put through onerous screening and debate procedures and require a substantial majority vote to pass bills into law, the power to make regulations or by-laws are normally delegated to a Minister (the executive), statutory authority, or a legally recognized local authority where rule-making processes are less stringent and are easily influenced by those familiar with the subject matter to be regulated. These qualities are essential to retain the flexibility of traditional laws and practices and to ensure that regulations and by-laws can change and evolve to reflect shifts in objectives, priorities and concerns. As can be noted from the cases of the Cook Islands and Samoa, by-laws are passed by the Minister or Island Council respectively. In Samoa, even if in the end it is the Minister that promulgates regulations, administrative arrangements are established to allow villages to initiate by-laws so that the significant end result is that laws are seen to have been established and "owned" by the villagers.

In the light of sluggish advances in preserving or promoting use of CMTs in the Pacific, Graham (1994) forcefully argues that where traditional tenure systems are collapsing owing to the inability of traditional authorities to effectively allocate, arbitrate and enforce use-rights, codification can enhance traditional law by replacing or re-enforcing the power of traditional authorities. Codification can range from mere recognition of custom,[53] as can be seen in many Constitutions and principal fisheries legislation of the PICs, to explicitly defined rights for access to or use of marine space.

Codification therefore, is not necessarily bad or tantamount to rigidity. Fong (1994) stresses that codification should not be given the "connotation that that piece of legislation contains the whole on the subject" but rather that it

> "recognizes an existing system of customary tenure" and "enables the customary marine tenure system to be not just congruent with, but also integrated, into the formal legal system, ... provide for basic rules and principles at the national level whilst retaining the flexibility which allows for a variety of specific local level management measures, and does receive explicit support from the wider legal –political system".

Moreover, the legislation should allow for a system of consultation between government and resource authorities which is necessary in contemporary fisheries management.

Based on the scenario of the prevalence of minimum levels of codification of custom (i.e. the simple recognition of custom) in the PICs and the need to enhance use of CMTs in contemporary fisheries management, the important issue should no longer be the choice between codification or not. Rather, it should be the determination of the appropriate degree of elaboration through codification referred to by Graham (1994) as a "continuum of options"[54] These may include choosing the type of authoritative structure necessary to give

[53] The simple recognition of custom is codification according to Graham 1994.

[54] Graham 1994 also gives some examples of the matters that can be codified and how.

right holders the degree of security necessary to meet their purposes without losing the necessary flexibility to adapt to changing circumstances, objectives and priorities.

C3.1 Degrees of CMT Codification

The options highlighted below on legislating custom, CMT or aspects thereof for fisheries management purposes do not by any means constitute an exhaustive list of choices. No model law or provisions are provided, given the multiplicity of PIC jurisdictions and cultures involved (despite their relatively homogenous legal history and systems). Nor is there any attempt to present options through a comprehensive assessment of legislation for CMT or through a discussion on the minutiae of CMT implementation. The aim is rather to provide a selection of examples and commentary on how PIC jurisdictions have dealt with codification of CMT or certain of its aspects. These may be useful as guidelines to managers and drafters familiar with individual countries and their laws and drafting practices, who can tailor-make laws for such specific cases.

C3.1.1 Legislative prescription of the recognition of custom, customary rights or the application of custom

A short legal statement on the recognition of custom, customary rights or the applicability of custom as law or as a basis for certain decisions ensures further application and elaboration of the same in many PICs. In certain jurisdictions, it may be all the legal basis required and from which a whole range of implementation action or options will ensue. Such legal statements are often found in national Constitutions and principal legislation. Indeed, as highlighted earlier, many PIC jurisdictions already recognize the application of custom generally, or as a basis for decision-making, customary rights or the applicability of custom as law, without elaborating on what is custom or customary law. It is left up to other laws, a lower law-making institution or judicial institution, such as courts, to prescribe the circumstances for application of custom and the ways to determine or apply custom. These types of legal statements, as found in the Constitutions of the Cook Islands, Samoa, Fiji and Vanuatu, have been described in the earlier part of this study as examples.

Article 73 of the Vanuatu Constitution, in addition to other provisions relating to the recognition of customary law, is of course an example of a clear and strong statement of customary rights in land held by the indigenous peoples of Vanuatu, the custom landowners. This basically allows the custom landowners to deal with natural resources on their land subject only to the confines outlined in the Constitution. The rights over land extending to the seaside of the foreshore reef allows for custom landowners to utilize CMT in managing fisheries resources within their lands, and is now the foundation for community-based fisheries in Vanuatu.

Clear legal basis for rights-based in custom are also provided for in the Fiji Constitution through the tracing of Fiji's legal history and foundation for such recognition to the Deed of Cession.[55] The Constitution also restates the rights of Fijians to land as well as the ability to make laws that favour Fijians where such laws concern land or fishing rights. As regards fishing rights, Section 13 of the *Fisheries Act* restates the legal situation in the Deed of Cession and which was earlier restated in the *Birds, Game and Fish Protection Ordinance*.

Section 2 of Article X of the Marshall Island's Constitution is explicit in designating the Nitijela (the Legislature) to declare by an Act what the customary law shall be, as follows:

> "(1) In the exercise of its legislative functions, it shall be the responsibility of the Nitijela, whenever and to the extent considered appropriate, to declare, by Act, the customary law in the Marshall Islands or in any part thereof. The customary law so declared may include any provisions which, in the opinion of the Nitijela, are necessary or desirable to

[55] The Fiji Constitution 1987 as amended, Preamble.

supplement the established rules of customary law or to take account of any traditional practice."

It is noted that Section 2 of Article X also uniquely states that the Legislature can add provisions that are necessary or desirable to supplement the established rules of custom. A bill for an Act made for declaring customary law or amendments thereto shall not be deal with by the Legislature without the consideration of a report of a joint committee of the Legislature and the Council of Iroij.[56]

Section 1 of Article X of the Marshall Islands Constitution specifically provides for rights in respect of land in a different manner, as follows:

> "(1) Nothing in Article II shall be construed to invalidate the customary law or any traditional practice concerning land tenure or any related matter in any part of the Marshall Islands, including where applicable, the rights and obligations of the Iroijlaplap, Iroijedrik, Alap and Dri Jerbal."

Many of the PICs' Constitutions however follow the approach that matters of custom, customary rights and application of customary laws will be elaborated by other legislation. The differences between the jurisdictions are noted only in the degree of cognisance of custom or aspect of custom and extent to which the individual PIC has pursued legislative prescription. For example, the preamble of the Kiribati Constitution provides for the recognition of custom in the following manner.

> "In implementing this Constitution, we declare that-
>
> 1. the will of the people shall ultimately be paramount in the conduct of the government of Kiribati;
>
> 2. the principles of equality and justice shall be upheld;
>
> 3. the natural resources of Kiribati are vested in the people and their Government;
>
> 4. we shall continue to cherish and uphold the customs and traditions of Kiribati."

Unlike the Vanuatu case, the Kiribati Constitution does not recognize specific customary rights but it created an opportunity seized by legislature to state in clear terms through the Laws of Kiribati Act 1989 that custom shall regulate certain matters. These include:

> "(a) the ownership by custom of or of rights in, over or in connection with native land (within the meaning assigned by the Native Lands Ordinance); or -
>
> (i) any thing in or on native land; or
>
> (ii) the produce of native land, or the determination of, or rights in relation to, the boundaries to native land or rights in connection with the transfer of title to native land; or
>
> (b) rights in respect of the possession or utilisation of native land, including rights of hunting or gathering on, or taking minerals from, native land; or
>
> (c) 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;
>
> (d) the ownership by custom of water, or of rights in, over or to water."[57]

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[56] The Marshall Islands Constitution, Section 2 of Article X.

[57] The Laws of Kiribati Act, Schedule 1 section 4. The matters set out in section 4 of Schedule I are civil matters. In accordance with section 2 of the Laws of Kiribati Act, customary law is part of the law of Kiribati and can also be used for: the determination of boundaries of, and titles to, customary land under section 58 of Magistrates Ordinance 1978; for the determination of civil and criminal proceedings in Magistrates' Courts, 1979 – 1989; provided the custom was not repugnant to natural justice, equity and conscience or inconsistent with any

The Constitution and other laws of Tuvalu provide for recognition and application of Tuvaluan custom and tradition in a manner similar to the one adopted by Kiribati. The preamble of the Constitution of Tuvalu has the only provision that refers to the wish of the Tuvaluan people to "constitute themselves as an independent state based on Christian principles, the Rule of Law, and Tuvaluan custom and tradition". Parliament has built on this limited reference to custom by enacting the *Laws of Tuvalu Act 1987* which designates "customary law" as having effect as part of the laws of Tuvalu, describes "customary law" as comprising "the customs and usages, existing from time to time, of the natives of Tuvalu"[58] and provides for a number of matters to be regulated by custom rather than the imported common law. These matters include:

> "(b) the ownership by custom 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; ...
>
> (c) ownership by custom of water or of rights in over or to water.[59]

The Papua New Guinea Constitution provides for custom to be applied and enforced as part of the underlying law so long as it does not conflict with the Constitution or is repugnant to the general principles of humanity. An Act of Parliament may provide for the proof and pleading of custom, regulate the manner and the purposes for which custom is recognized and provide for the resolution of conflicts of custom.[60] In implementing the Constitution, the *Custom Recognition Act* Chapter 19 restates that custom can be pleaded in court except where its recognition or enforcement would result in injustice or would not be in the public interest or, in a case affecting the rights of a minor, its recognition or enforcement would not be in the interest of that child.[61] Relevant to fisheries and CMT is the following provision:

> "Subject to this Act and to any other law, custom may be taken into account in a case other than a criminal case only in relation to –
>
> (a) the ownership by custom of or of rights in, over or in connexion with customary land or –
>
> (i) any thing in or on customary land; or
>
> (ii) the produce of, customary land, including rights of hunting or gathering; or
>
> (b) the ownership by custom of rights in, over or in connexion with the sea or a reef, or in or on the bed of the sea or of a river or lake, including rights of fishing; or
>
> (c) the ownership by custom of water, or of rights in, over or to water;"[62]

Papua New Guinea recently added to its effort on developing the underlying law by enacting the *Underlying Law Act 2000*. In relation to customary law as underlying law, the Act defines "customary law" as "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".[63] The *Underlying Law Act 2000* however adds little else to the principles

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Ordinance or other law for the time being in force in the country (s.42(2) Magistrate's Courts Ordinance 1978); and for all civil or criminal proceedings in all courts except to the extent that it is inconsistent with the Constitution, or legislation or subsidiary legislation in force in Kiribati (s.5 Laws of Kiribati Act 1989).

[58] Laws of Tuvalu Act 1987, Section 5 and Schedule 1.1.2

[59] Ibid, Schedule 1.4 (b) and (c). See also Schedule 1.3 for the application of customary law in criminal cases.

[60] The Constitution of the Independent State of Papua New Guinea, Schedule 2.1 (1) and (2).

[61] Customs Recognition Act Chapter 19, Section 3.

[62] Ibid Section 5.

[63] The Underlying Law Act 2000 Section 1.

and rules of application of customary law as has been developed through case law concerning Schedule 2.1 of the Constitution and the Customs Recognition Act even though it seeks to replace Schedule 2.1 of the Constitution.[64] It certainly offers little operational help on the issue of "the ownership by custom of rights in, over or in connexion with the sea or a reef, or in or on the bed of the sea or a river or lake, including rights of fishing". Evidently, there is room for legislature to make specific laws concerning the matters listed in Sections 4 and 5 where custom may be considered, although the principles and manner in which custom will be pleaded are now set out in the *Underlying Law Act 2000*. Nevertheless, custom has generally been important to determination of title over customary land in the land disputes dealt with by the Land Courts and in criminal and civil disputes arising in villages through Village Courts. Another way in which custom can be used to determine the manner in which resources are used or managed is through the formation and operations of a customary land group incorporated under the *Land Groups Incorporation Act*.[65] There is little or no information however on how these groups have been involved in CMT and general fisheries management in the country.

The principal legislation relating to fisheries in Papua New Guinea, the *Fisheries Management Act 1998*, also adds little to the use of CMT. While customary fishing rights was an important issue at the time of development of the *Fisheries Management Act 1998*, the Act only declares that customary rights shall be recognized and respected in the area where the right operates[66] and to exempt customary fishing from the application of the Act unless expressly stated otherwise.[67] In subsequent sections, the Act only states that terms and conditions of access agreements and fishing licences shall be subject to and observance of customary fishing rights. Opportunity exists under the provincial and local-level government system for provincial governments to make laws on fisheries and to employ CMT in fisheries management.[68] However, the *Fisheries Management Act 1998*, being a national Act of Parliament prevails in respect of regulating how fisheries are managed. The limited use of custom as is prescribed under the Fisheries Management Act therefore prevails. It can be stated as general observation that while the legal system and laws of Papua New Guinea allow for wide use of custom and customary law, the prevailing use of custom is generally in the area of dispute settlement.

The peoples of Solomon Islands, through the preamble of the Constitution, pledge that they shall "cherish and promote the different cultural traditions". Section 75 of the Constitution provides for Parliament to make provisions for the application of laws including customary law, as follows:

> "Subject to this paragraph, customary law shall have the effect as part of the law of Solomon Islands."

Until such act of Parliament is passed, Schedule 3 of the Constitution shall apply in relation to application of laws. Schedule 3 provides that customary law shall have effect as part of the law of Solomon Islands for as long as it is not inconsistent with the Constitution or an Act of Parliament. Section 3 of Schedule 3 provides as follows:

> "(3) An Act of Parliament may:
>
> (a) provide for the proof and pleading of customary law for any purpose;

[64] Ibid Section 24 (2).

[65] J.S. Fingleton, Legal Recognition of Indigenous Groups, FAO Legal Papers on Line, 1998. See the internet site: http://www.fao.org/Legal/prs-ol/lpo1.pdf

[66] Fisheries Management Act Section 26.

[67] Ibid Section 3.

[68] See Organic Law on Provincial Governments and Local Level Governments, Section 42.

(b) regulate the manner in which or the purposes for which customary law may be recognized; and

(c) provide for the resolution of conflicts of customary law."

It was only in 2000 that Solomon Islands enacted the *Customs Recognition Act* to apply custom. In relation to the consideration of custom in relation to fisheries resources, Section 8 provides as follows:

"Subject to provisions of this Act, the High Court (Civil Procedure) Rules, 1964, and to any other law, custom may be taken into account in a case other than a criminal case only in relation to-

(a) the ownership by custom of rights in, over or in connection with customary land of-

(i) anything in or on customary land; or

(ii) the produce of customary land, including rights of hunting or gathering;

(b) the ownership by custom of rights in, over or in connection with the sea or a reef, or in or on the bed of the sea or of a river or lake, including rights of fishing;

(c) the ownership by custom of water, or of rights in, or over water;"

Although the *Customs Recognition Act 2000* is recent, the Solomon Island's legislature was already active in the area of fisheries management and in prescribing certain roles for customary fishing rights. In this connection, Section 10 (3) of the *Fisheries Act 1998* on the law-making responsibilities of Provincial Governments and provincial ordinances states as follows:

"Ordinances made under this section may provide for any or all of the following -

(a) measures for the development of fisheries in provincial waters and the approval of fisheries development projects;

(b) the registration or recording of customary fishing rights, their boundaries and the persons or groups of persons entitled under those rights;

(c) open or closed seasons for fishing for all or any species of fish or other aquatic organisms in all or any areas of provincial waters based on scientific advice;

(d) the closure of areas in which fishing for all or any species of fish or other aquatic organisms may be prohibited;"

Section 12 of the *Fisheries Act 1998* gives further support to customary fishing rights by making commercial fishing subject to customary fishing rights, requires compensation to be paid for breach of customary fishing rights and makes it an offence for failing to comply with an order for compensation for breach of customary fishing rights. In the Solomon Islands therefore, the principal national legislation relating to fisheries has, wisely or otherwise, left the matter of further elaboration of the recognition and application of fishing rights to the Provincial Governments. No provincial ordinance to this effect is noted.

Also in Palau, the responsibilities for areas where traditional fishing rights are normally exercised and therefore the power to elaborate laws relating to traditional fishing rights are granted to decentralized levels of government. Article 1(2) of the Constitution of Palau provides that "Each state shall 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." Article V of Palau's Constitution further provides that:

"Statutes and traditional law shall be equally authoritative. In case 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 is therefore possible in Palau that custom, traditional fishing rights and the traditional mechanisms through which they operate shall function without impediment. In practice, the application of these bold constitutional provisions has been fraught with difficulties and some undesirable consequences. The Court in interpreting and applying the law "has not only affected custom but has also become part of it", redefined customary processes and rules, made customary practices less flexible by codifying custom and "distorted what it was mandated to preserve." (Graham and Idechong 1998). This is hardly the effect that numerous observers have cautioned – i.e., that codification and formalization of custom through statute will fossilize them and dilute their ability to adapt to changing circumstances. It is worth considering the merits of recommendations by Graham and Idechong (1998) that in Palau, further national legislative action is required, not only to sort out the ambiguities and conflicts in the Constitution to avoid the courts from giving narrow interpretation to Constitutional provisions requiring custom, but also to preserve and recognize the usefulness of traditional authority particularly in implementing and enforcing rules, and to support states in clarifying and expanding the states' jurisdiction and enforcement powers concerning marine resources.

Observations

It is noted from the cited examples above that the legislative option of simple recognition of custom in fundamental laws, such as the Constitution, and allowing legislature to elaborate the application of custom through other legislation, is well established in the PICs. Many legislatures in PICs have legislated on how custom shall be considered in a uniform fashion by enacting principal legislation for recognition of custom in almost identical style and substance, whether it is the *Laws of Kiribati Act*, the *Laws of Tuvalu Act*, the Custom Recognition Act of Papua New Guinea or the Customs Recognition Act of Solomon Islands.

The marked difference is in how much further legislature and other law-making bodies in each country have taken recognition of custom beyond the basic "recognition of custom" legislation. Fiji and Solomon Islands are the only jurisdictions that have further legislated on the recognition of customary fishing rights although Fiji has a more prescriptive operational approach to recognition of custom than Solomon Islands. In addition, Fiji established a functional institutional structure to determine and record customary fishing right areas in the form of the "Native Lands and Fisheries Commission".

In some countries, recognition and application of custom for purposes other than fisheries management is well advanced, such as in dealing with land disputes or in general maintenance of peace and order through village or community courts, which make decisions on certain criminal and civil matters on the basis of custom. The application of custom within dispute settlement mechanisms is to apply custom in a reactive rather then a proactive dispute prevention setting. Using custom in dispute settlement only seems a rather limited application of custom and is not desirable in natural resource management where communities are encouraged to be proactive by initiating rules that will promote ownership of regulations and therefore ensure compliance with management measures. Unfortunately in countries like Papua New Guinea and Vanuatu, not much effort is made to operationalizing customary fishing rights and to establishing the place for such right in the overall fisheries management legal framework, despite the opportunity to do so and established precedents in other areas of law which apply custom. Lack of further legislative imitative however is generally prevalent in all PICs.

One notable commonality of all PICs' legislation relating to recognition and application of custom or fishing rights is that no particular principle or aspect of custom is described and recognized by the national legislation. Even the dispute settlement mechanisms established in Papua New Guinea and Vanuatu do not specify the customary rules that shall apply. Decisions in dispute settlement fora in these jurisdictions are no doubt influenced by custom but no formal record or a finding of customary law is made. Where conservation rules are formally promulgated, such as in the case of Samoa, they are not specified to be customary

rules although there is opportunity for custom and usage to influence the establishment of specific measures. This preserves the dynamic nature of custom or CMT and should be the approach to pursue rather than attempting to describe customary rules in detail which reduces their dynamism and flexibility through detailed prescription. Any further prescription by reducing to writing customary practices such as has been done by the Courts in Palau so that custom becomes universal and inflexible is not recommended.

Another encouraging feature in PIC's legislations relating to custom is the designation of lower levels of authority to make or apply laws. This approach provides the opportunity for decisions and rules to be made by institutions and persons with more concern with the subject matter in issue, and greater familiarity with the environment within which the decisions or rules are implemented. The chances for making more relevant decisions and rules are better at these levels of authority and promote better compliance. There is still room for national legislation to provide guidance for preservation and incorporating traditional authority, particularly in implementing and enforcing customary rules in the wider fisheries management framework, and to support lower levels of authority in clarifying and expanding their mandates and enforcement powers concerning marine resources.

C3.1.2 Establishing socio-political institutions that are constituted by traditional leaders or influenced by indigenous governance structures and custom through legislation

It is not necessary for customary law or traditional practice to be preserved only by direct reference to them in Constitution and other legislation. Preservation or contemporary use of custom and practice can also occur through legal recognition or contemporary use of traditional forms of social organization, authorities and governance. This is certainly the approach taken in Samoa (Matai System and village Fono), the Cook Islands (House of Arikis), and Federated States of Micronesia (the Chamber of Chiefs), Fiji (Boselevu Vakaturanga), the Marshall Islands (Council of Iroij), Palau (Counsel of Chiefs) and Vanuatu (National Council of Chiefs or Malvatumauri). These institutions have the opportunity to influence the recognition of custom, including customary forms of marine resource management (Pulea 1993).

Many of the traditional organizations in the jurisdictions mentioned above are recognized by the country's Constitution and normally have an advisory role on matters relating to custom, although some of them have other roles such as the ability of the Council of Iroij of the Marshall Islands to screen and request reconsideration of bills relating to customary law and traditional practice,[69] and the role of Fiji's Bose Levu Vaka Turanga to advise on the appointment of a certain number of senate members, and appointment and removal of the President and the Vice President.[70] Vanuatu's *Malvatumauri*, formed prior to independence and now accommodated in the Constitution, also plays a judicial role in addition to the advisory role that it has on custom matters relating to bills that come before Parliament. (Bolton Lissant 1999).

The Constitutions of the Federated States of Micronesia and Palau have interesting provisions relating specifically to the continuity of roles and functions of a traditional leader.

Article V of the Federated States of Micronesia Constitution provides, in addition to providing for the preservation of traditions through statute, the possibility for traditional leaders to be given formal roles in government, and preserves the ability to form a Chamber of Chiefs

[69] Indeed, the Constitution of the Marshall Islands relating to the Council of Iroij is one of the most detailed of Constitutional provisions on similar matters in the PICs. Article III on the Council of Iroij has ten sections that deal inter alia with the establishment of the Council of Iroij, its composition, offices, procedures and privileges.

[70] See Constitution sections 90 and 92 to 93.

similar to the collective Chiefly entities created in other jurisdictions. Article V provides as follows:

> "**Section 1**. Nothing in this Constitution takes away a role or function of a traditional leader as recognized by custom and tradition, or prevents a traditional leader from being recognized, honoured, and given formal or functional roles at any level of government as may be prescribed by this Constitution or by statute.
>
> **Section 2**. The traditions of the people of the Federated States of Micronesia may be protected by statute. If challenged as violative of Article IV, protection of Micronesian tradition shall be considered a compelling social purpose warranting such governmental action.
>
> **Section 3.** The Congress may establish, when needed, a Chamber of Chiefs consisting of traditional leaders from each state having such leaders, and of elected representatives from states having no traditional leaders. The constitution of a state having traditional leaders may provide for an active, functional role for them."

Article V of the Palau Constitution reads:

> "**Section 1.** The government shall take no action to prohibit or revoke the role and 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 recognized, honoured, or given formal or functional roles at any level of government."

The level of specificity in the FSM and Palau Constitutions in preserving roles and functions of traditional leaders appears to be possible only with territorially and demographically small jurisdictions, owing to the relative homogeneity of cultures despite the diversity in their minute features. Unfortunately, as observed in the case of Palau, such explicit and potent legal provisions that recognize the value of traditional leadership have not effectively translated into governance action, particularly the potential for its application to natural resources management (Graham and Idechong 1998).

In addition to the provisions for recognition of customary law, the Solomon Islands Constitution in section 114 (2) (b) of Chapter 12 provides Parliament to make law for the government of Honiara and provinces and "consider the role of traditional Chiefs in the village".

The other PIC constitutions create possibility for recognition of traditional leadership institutions in broad terms through references to upholding culture and tradition.[71] The Papua New Guinea and Tuvalu Constitutions refer broadly in the preambles to the maintenance of culture and traditional communities or social organizations. For example, the Papua New Guinea Constitution refers in the National Goals and Directive principles "to achieve development primarily through the use of Papua New Guinean forms of social, political and economic organization".[72]

Observations

Regardless of the style and substance of the Constitutional provisions for the incorporation or recognition of traditional governance institutions or establishment of formal institutions that are influenced by traditional leaders or custom, experiences show that effective use of such institutions in preserving and applying custom occur where PIC legislatures also supplement Constitutional provisions by enacting legislation to determine the functions and extent of the mandates for such institutions.[73] This is clearly seen in Samoa where authority of the Village Fono is recognized through the enactment and application of the *Village Fono Act*.

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[71] For example in the Niue and Kiribati Constitutions.

[72] Constitution of the Independent State of Papua New Guinea. National Goal and Directive Principle 5.

[73] Examples of similar approaches in legislation abound in areas other than fisheries management where custom is readily applied and enforced through clear but flexible mandate. The Village Courts of Papua New Guinea largely keep custom relevant

The main features of the *Village Fono Act* of Samoa are: [74]

- its stated purpose and objectives in the long title which is to "validate and empower the exercise of power and authority by Village Fono in accordance with the custom and usage of their villages and to confirm or grant certain powers, and to provide for incidental matters.";
- Clear determination of the jurisdictional scope of the Village Fono which does not apply to non-village members or persons who, not being a Matai of its village, resides on Government freehold or leasehold;
- Clear definition of a Village Fono which is, "in relation to a village means the assembly of the Alii ma Faipule of that village meeting in accordance with the custom and usage of such village and includes the plural";
- Clear statement of powers, including exercise of powers based on custom and usage, validation of past exercise of powers, sweeping powers with respect to the affairs of the village, the exercise of powers granted to it by any other Act , specific law-making powers in relation to maintenance of village hygiene and economic development;
- Clear statement of powers to enforce village rules or direction;
- Right of Appeal against decision of a Village Fono and related procedures;
- Grant of economic incentives, such as exemption from income tax;
- Ability to delegate Village Fono powers;
- The absence of description of a specific customary practice that should be applied by the Village Fono.

The powers accorded under the *Village Fono* Act are wide enough to enable the Village Fono to pass village rules relating to fisheries management. The Samoan legislature further buttressed sound tradition-influenced decisions by formalizing through the *Fisheries Act* a mechanism for village conservation and management rules by closing the gap in jurisdiction under the *Village Fono Act* to extend regulation over outsiders who are not bound by village rules or directions.

The ability of the Island Councils of the Cook Islands to make custom-influenced rules or recognize the traditional conservation system of *Ra'ui* for fisheries conservation and management can also be traced back to the legal authority in legislation in the form of the *Marine Resources Act*.

The Marshall Islands has legislated for decentralized fisheries management through Local Government Councils. Part IV of the *Marine Resources Act* provides for the powers of the Local Government Councils to manage and develop fisheries, designate local fisheries areas, establish local fisheries committees, prepare fisheries management plans and adopt ordinances. In the preparation of fisheries management plans, the Local Government Council "has a duty to consult with all those who may be directly affected including traditional leaders, fishers and holders of traditional rights". Part IV also provides for the right of appeal against the decisions of the Local Government Council. The legislative framework for decentralized fisheries management is observed to have facilitated a necessary process which is the development of a community-based fisheries management programme in the Marshall Islands (Faásili 2002).

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because village court legislation elaborates a dispute settlement mechanism where decisions are made based on custom of the community to which the Village Court belongs.

[74] See the Village Fono Act, sections 3 (2), 3(3), 3(4), 5, 6, 9, 10 and 11.

Traditional practices for management of the *qoliqoli* in Fiji is sustained to some extent by the *Fisheries Act* which restates traditional fishing rights vested in the *mataqali* and elaborates a system where authorization to use the *qoliqoli* by outsiders is given only on the agreement of the traditional leader. There is opportunity for and a need to enhance legislation for CMT-based community fisheries as it is observed that the current mechanism is not adequate for guiding effective community fisheries management in Fiji (Veitiyaki *et al. 2003*). The undertaking by government to enact legislation to accord ownership of the foreshore to the Vanua offers a good opportunity also to develop legislated guidelines on implementing Vanua-based marine resources management that could also draw from the *Village Fono Act* of Samoa.

C3.2 Possible Next Steps

For fisheries management the Samoan experience clearly can be replicated only in jurisdictions where similar characteristics exist. Such characteristics may include continued reverence for traditional leadership, cohesive traditional socio-economic and political groupings and, not least, the will of government to divest power and responsibilities. A guess is hazarded here that small jurisdictions, such as FSM, Palau and Vanuatu, could be able to use the Samoa model. It must be cautioned however that the models are simply guidelines and whatever legislative framework is developed to enhance CMT, use in each PIC must reflect national circumstances and address the concerns and needs peculiar to that jurisdiction. The numerous experiences and lessons learned from trials, collective effort and partnerships built to promote community fisheries in other PICs, can only be part of the body of guidelines to develop better elaboration of roles of traditional leadership systems and custom for the better conservation and management of fisheries resources in individual countries.

The studies of the CBFM initiatives and experiences show that there are various ways to go about implementing CMT-based community fisheries. There are valuable practical lessons that should be learned from these experiences. It is clear, however, that prospects for recognition and application of CMT in contemporary fisheries management can be enhanced if national governments elaborate further the role of CMT and the traditional institutions that sustain it. In this context, efforts to promote participatory approaches to fisheries management, whether based on CMT or not, could, as a start, take the form of government policy statements. They would be strengthened were such statements to become legislated policy. To this end, it would be advantageous for governments directly to provide, through fisheries legislation, the ability or powers to utilize, when it is deemed appropriate, broad participation in fisheries management by creating an institutional framework and procedures to implement CBFM, and the ability to regulate it. This would be in line with the noted global trend in fisheries legal frameworks where fisheries legislation sets out principles or policies that are used to guide the implementation of statutory management powers and functions (FAO 2001).

An example of legislative initiative is demonstrated by the Tonga case. Despite the lack of reference to custom and usage in the Constitution of Tonga and years of moderate results from centralized fisheries management, there was a clear government will to create the opportunity in legislation for use of participatory forms of fisheries management that could benefit from traditional knowledge and practices. In 2002, the Assembly enacted the *Fisheries Management Act*, which incorporates a basic framework for community fisheries management. Section 14 and 15 of the *Fisheries Management Act* clearly states the ability of the Minister to designate communities for community-based fisheries management and to set out their rights and responsibilities. The provisions maintain flexibility for future agreement on the organizational structure of the designated community, but clearly they will be influenced by existing community organizations and established formal institutions such as the Town and District authorities constituted by legislation. Designated communities will have the opportunity to initiate management measures and community regulations. The Tonga

approach in CBFM is based on the Samoan system but maintains enough generality so that a workable CBFM system which responds to Tonga's peculiar circumstances and needs could be developed (Kuemlangan 2000). Tonga will however need, *inter alia*, a CBFM implementation strategy and enhanced institutional capacity to implement its CBFM policy.

In the **Cook Islands**, the **Marshall Islands** and **Samoa**, legislation provides a broad institutional framework to work with in establishing CMT-based community fisheries. While Samoa's CBFM system appears well entrenched, the first two countries may need strategies and programmes, with a corresponding commitment of adequate resources, to realize CBFM, including a CMT-based CBFM system. It is noted that Marshall Islands has developed a strategy to implement CBFM but, as is highlighted by Fa'asili (2003), the CBFM initiatives will require Marshall Islands to enhance its institutional capacity and other resources.

In the **Federated States of Micronesia**, **Palau** and **Solomon Islands**, where coastal or inshore fisheries management areas or mandate is clearly decentralized to the State or provincial governments, it appears essential for a nation-wide strategy and programme to guide and assist states in establishing CMT-based CBFM. In Palau and Solomon Islands, it appears possible for the national government also to establish a further legislative framework, separately or incorporated into fisheries legislation, which establish essential components for CMT-based CBFM to compliment existing legislation. The national government should work closely with states and provincial governments to establish and implement CBFM programmes and further legislation, particularly in designating the roles of traditional institutions in implementing CBFM.

Vanuatu decentralized governments will have to collaborate closely with the national government and custom landowners to build on the clear title over marine areas up to the seaside of the foreshore reef and formalize the village-based fisheries management system by establishing a national legislative framework with components similar to Samoa, Marshall Islands or Tonga, or draw from all these jurisdictions.

Fiji can build on the clear fishing rights of indigenous Fijians and the limited but valuable interaction between traditional leadership and fishing access (licensing) system and elaborate its CBFM policies into its fisheries legislative framework. The findings from the numerous CBFM projects, studies and the work of the FLMMA and indigenous communities should be drawn on in developing such legislative framework. Consultation with all current CBFM activists and stakeholders in developing the legislative framework is essential.

Papua New Guinea also has a decentralized government system but the national government has consistently designated fisheries management a matter of national interest through legislation, thus wresting fisheries management and related opportunities to establish a CBFM away from provincial and local-level governments. The government has also consistently exempted customary fishing from the ambit of the fisheries legislative framework. However, the national government, through the National Fisheries Authority, could now be well positioned to develop a nationwide decentralized fisheries management policy including CBFM which can later become legislated policy through its national fisheries legislative framework. The elaboration of such policy and associated implementation plans must be based on a well thought-out strategy that should include extracting results from executed and planned studies and projects in CBFM, wide consultation with all stakeholders including provincial and local-level governments and communities, and drawing valuable external experience and assistance from entities such as SPC.

Other autonomous PIC jurisdictions (**Kiribati, Nauru, Niue** and **Tuvalu**) should also develop their CMT-based CBFM policy and strategy, which would be eventually incorporated into their fisheries legislative framework. As suggested in the case of Papua New Guinea, the national governments of these jurisdictions should initiate the elaboration of such policy and associated implementation plans based on a carefully planned strategy that should include extracting results from studies and projects in CBFM. Wide consultation with all stakeholders

and external assistance from specialized entities, such as SPC, would be essential to the policy elaboration exercise. Clearly, the commitment of resources and enhanced institutional capacity is required in these jurisdictions to develop and implement their CMT-based CBFM policy.

CONCLUSION

Increased use of CBFM, including those based on CMT in the Pacific, will only materialize if there is concerted effort by government, non-governmental institutions, stakeholder groups and individuals to promote their use. A cursory examination of PIC Constitutions, fisheries legislation and general natural resource management practice indicate that the PICs have the necessary minimum legal basis for application of CMT, and are receptive to or already practise participatory approaches to fisheries management including those based on CMT. This does not mean however, that further enhancement of the use of CMT-based CBFM in PICs cannot be carried out.

Clearly, the effectiveness of a CBFM system does not depend solely on establishing a legal basis for such a system but also on how it is implemented. Effective implementation of CBFM will require the commitment of substantial resources by government, interested groups and stakeholders at the initial phase of implementation, an extensive national campaign to work with communities and government authorities to motivate them to make CBFM work, and a programme that ensures continuous engagement and involvement of coastal communities in management of the inshore fisheries resources.

There is accumulated literature that directly or indirectly discusses the subject of utilizing CMT in fisheries management in the Pacific. This stresses the need to develop the institutional framework to facilitate the use of CMTs. General developments in the efforts on promoting the use of CMTs in the Pacific can be grouped into three areas and timeframes, namely:

- focussing attention on CMTs from the late 1970s to 1980s;
- arguing CMT potential through evaluation of its role and the examination of its implications from the early to mid 1990s; and
- trialling, implementing and establishing guidelines on use of CMTs from mid 1990s to this decade.[75]

The trend in these developments and recent efforts to establish CBFM systems highlight the need for:

- a systematic approach to utilization of CMTs;
- country-focused programmes for implementation of CBFM and the utilization of CMTs in this context; and
- the need to keep the momentum towards appropriate utilization of CMT in contemporary fisheries management.

In this regard, the efforts of organizations, such the Secretariat of the Pacific Community, in enhancing sound community fisheries and the role CMT in that context is lauded and should be supported.[76]

[75] Notable exceptions in the actual utilization or implementation of CMTs outside these time frames, whether by design or chance, can be seen in the case of the Fiji (1873) and the Cook islands (1989).

[76] Noteworthy developments at the regional level in support of CBFM by SPC or with SPC involvement are: South Pacific Commission 23rd Regional Technical Meeting on Fisheries, Noumea, New Caledonia August 1991; Community Management and Common Property of Coastal Fisheries in Asia and the Pacific 1994 (Traditional Management Workshop); Rights-based Management Workshop; SPC Traditional, Marine Resource Management and Knowledge Information Bulletin; and establishment of Community Fisheries Section and implementation of CBFM projects under the Section.

REFERENCES

Abdullah, N. M .R,, Kuperan, K. and Pomeroy, R. S. 1998. *Transaction Costs and Fisheries Co-Management,* Marine Resource Economics 13: 103-114.pp.

Alcala, A. C. and Vande Vusse, **F.J**. 1994. *The role of government in coastal management. In* R. S. Pomeroy. (Ed.). Proceedings of the Workshop on Community Management and Common Property of Coastal Fisheries and Upland Resources in Asia and the Pacific: Concepts, Methods and Experiences. Manila: ICLARM, 12-19.pp.

Andrews, G.J. 1987. Marine Ecological Survey of Pukapuka Atoll. The Australian Institute of Marine Science. Townsville.

Berkes, F. 1994. *Property rights and coastal fisheries. In* R. S. Pomeroy. (Ed.). Proceedings of the Workshop on Community Management and Common Property of Coastal Fisheries and Upland Resources in Asia and the Pacific: Concepts, Methods and Experiences. Manila: ICLARM. pp. 51-62.

Berkes, F., Mahon, R., McConney, P., Pollnac, R. and Pomeroy, R. 2001. *Managing Small-Scale Fisheries: Alternative Directions and Methods.* International Development Research Center. 2001. 309p.

Bolton, L. 1999. Chief Willie Bongmatur Maldo and the incorporation of Chiefs into the Vanuatu state. Technical Report Discussion Paper 99/2, State, Society and Governance in Melanesia Project, RSPAS, ANU.

Crocombe, R.G. 1961. Land Tenure in the Cook Islands. A thesis submitted for the degree of Doctor of Philosophy in the Australian National University by Ronald Gordon Crocombe. Canberra. 1961.

Decentralization Review Commission - Government of Vanuatu. 2001. Decentralization Review Commission Report, Volumes 1 and 2: June 2001.

Doulman D.J. 1992. *Community-based Fishery Management: Towards the Restoration of Traditional Practices in the South Pacific*. A paper prepared for presentation at the FAO/Japan Expert Consultation on the Development of Community-based Coastal Fishery Management Systems for Asia and the Pacific, Kobe. Japan. 1992.

Fa'asili, U. and Kelekolio, I. 1999. *The use of Village By-laws in Marine Conservation and Fisheries Management.* Information Paper 17. Secretariat of the Pacific Community. 1st SPC Heads of Fisheries Meeting, Nomea, New Caledonia. 9 - 13 August 1999.

Fa'asili, U. 2002. Technical Assistance to the Republic of Marshall Islands on setting up a Community Fisheries Programme and Advice on a Small Scale Tuna Development Project. Field Report No. 9. Secretariat of the Pacific Community, Noumea, New Caledonia. 2002.

FAO. 1997. Fisheries Technical Guidelines for Responsible Fisheries, No.4: Fisheries Management. Rome. 1997.

FAO. 2002. Law and sustainable development since Rio – Legal issues and trends in agriculture and natural resources management. FAO Legislative Study 73. Rome

Fingleton, J.S. 1998, Legal Recognition of Indigenous Groups. FAO Legal Papers on Line. 1998: http://www.fao.org/Legal/prs-ol/lpo1.pdf

Foale, S and Manele, B. 2003. Privatising Fish? Barriers to the Use of Marine Protected Areas for Conservation and Fishery Management in Melanesia. Resource Management in Asia-Pacific. RMAP Working Papers. Working Paper No. 47.

Fong, G. M. 1994. Case Study of a Traditional Marine Management System: Sasa Village, Macauta Province, Fiji. South Pacific Forum Fisheries Agency and the Food and Agriculture Organization of the United Nations, Project RAS/92/TO5 Case Studies on Traditional Marine Management Systems in the South Pacific. Field Report 94/1. Rome.

Govan, H. 2003. Notes on village-based marine resource management in Efate, Vanuatu. (unpublished draft report).

Graham, T. 1994. Flexibility and the codification of traditional fisheries management systems, SPC Traditional Marine Resource Management and Knowledge Information Bulletin, No. 3, January 1994.

Graham, T. and Idechong, N. 1998. Reconciling customary and constitutional law: managing marine resources in Palau, Micronesia. Ocean and Coastal Management 40. pp. 143-164.

Hickey, F. R. and Johaness, R. E. 2002. Recent evolution of villagebased marine resource management in Vanuatu. Traditional Marine Resources Management and Knowledge Information Bulletin, Number 14. October 2002.

Hviding, E. and Jul-Larsen, E. 1995. Community-Based Resource Management in Tropical Fisheries, First Edition. University of Namibia, Windhoek.

Hviding, E. and Ruddle, K. 1991. A regional Assessment of the Potential Role of Customary Marine Tenure Systems (CMT) in Contemporary Fisheries Management in the South Pacific FFA Report 91/71.

Hornell, J. 1940. Report on the Fisheries of Fiji.

Johannes, R. E. 1998. Government-supported, village-based management of marine resources in Vanuatu. Ocean and Coastal Management 40. pp.165-186.

Johannes, R. E., Ruddle, K. & Hviding, E. 1991. *The Value today of Traditional Management and Knowledge of Coastal Marine Resources in Oceanea*. Paper presented at the South Pacific Commission's Twenty-third Regional Technical Meeting on Fisheries, Noumea, New Caledonia, 5-9 August 1991. SPC/Fisheries 23/WP.11. 4 August 1991.

Karlsen, G. R. 2001. Can formalisation help? The introduction of fisheries co-management in the inshore fisheries of Dingle, Co. Kerry, Ireland. *In* Marine Policy 25 (2001), pp. 83-89.

King, M. and Fa'asili, U. 1999. Community-based management of subsistence fisheries in Samoa Fisheries Management and Ecology 6, pp, 133-144.

King, M. and Lambeth, L. 2000. Fisheries Management by Communities – A manual on promoting the management of subsistence fisheries by Pacific Island Communities.- Community Fisheries Section, Secretariat of the Pacific Community, Noumea, New Caledonia..

Kuemlangan, B. 2000. Report On Assistance To Tonga. *In* Fisheries Legislation, Final Report of TCP/TON/8923: Assitance in Fisheries Legislation. FAO. Rome. 2000.

Kuemlangan, B. and Teigene, H. 2003. *An overview of legal issues and broad legislative considerations for community-based fisheries management*. Unpublished paper submitted and presented at the Second Large River Symposium (LARS2), 11-14 February 2003. Phnom Penh, Cambodia.

Kurien, J. 1999. Community Property Rights: Re-establishing them for a secure future for small-scale fisheries. *In* FAO Fisheries Technical Paper 404/1. Use of Property Rights in Fisheries Management. Rome.

Leria, C. and Van Houtte, A. 2000. Rights-based fisheries: A legal overview. *In* Current fisheries issues and the Food and Agriculture Organization of the Unites Nations, pp 263-300. A publication in association with the Center for Oceans Law and Policy, University of Virginia School of Law.

Lindsay, J. 1998. *Designing Legal Space: Law as an enabling tool in community-based management*. International Workshop on Community-based Natural Resource Management, Washington D.C. 10-14 May, 1998.

Munro, D. M. 1996. A Case Study of Traditional Marine Management Systems in Pukapuka Atoll, Cook Islands. Case Studies on Traditional Marine Management Systems in the South Pacific Field Report 96/2. South Pacific Forum Fisheries Agency and the Food and Agriculture Organization of the United Nations, Rome.

McGrath, D. G., Cardoso, A. and Pinto Sá, E. 2002 *Community Fisheries And Co-Management In the Lower Amazon Floodplain of Brazil*. Paper presented at the International Symposium On The Management Of Large Rivers For Fisheries: Sustaining Livelihoods And Biodiversity In The New Millennium, Phnom Penh, Kingdom of Cambodia, 12-15 February 2002.

MRAG. 1999a. The Performance of Customary Marine Tenure in the Management of Community Fishery Resources in Melanesia. Final Technical Report.

MRAG. 1999b. The Performance of Customary Marine Tenure in the Management of Community Fishery Resources in Melanesia, Volume 5. Guidelines towards Effective Co-Management of Coral Reef Fisheries in the Pacific Region.

Peteru, C. 1993. Environmental Legislation Review - Western Samoa. South Pacific Regional Environment Programme (Apia).

Pomeroy, R. S. Katon, B.M. and Harkes, I. 2001. Conditions affecting the success of fisheries co-management: lessons from Asia. *In* Marine Policy 25 pp.197-208.

Pulea, M. 1993. An Overview of Constitutional and Legal Provisions Relevant to Customary Marine Tenure and Management Systems in the South Pacific, Pacific Law Unit, University of South Pacific, Vanuatu. FFA Report 93/23, Honiara 1993.

Ponia, B. Raumea, K. Roi, N. Makikiriti, N. and Turua, T. 1998. Inshore Invertebrate Resources of Rarotonga Island. Ministry of Marine Resources, Cook Islands. 1998.

Raumea, K. 1999. 2nd Monitoring of the Raui at Nikao and Matavera, November 1999. Report for the Data Analysis and Report Writing Training Workshop, Cook Islands.1999.

Ruddle, K. 1994. Changing the focus of coastal fisheries management. *In* R. S. Pomeroy. (Ed.). Proceedings of the Workshop on Community Management and Common Property of Coastal Fisheries and Upland Resources in Asia and the Pacific: Concepts, Methods and Experiences. Manila: ICLARM, pp.63-86.

Ravuvu, A. 1983. Vaka I Taukei: The Fijian Way of Life. Institute of Pacific Studies, University of South Pacific, Suva, Fiji.

Ruddle, K. 1998. The context of policy design for existing community-based fisheries management systems in the Pacific Islands, pp. 105–126. *In* Ocean & Coastal Management Special Issues 40, Numbers 2-3, 1998, A modern role for traditional coastal marine resources management systems in the Pacific Islands.

Saywood, A. Turua, T. and Makikiriti, N. 2002. Ministry of Marine Resources. 3rd Monitoring Survey of the Rarotonga Raui, Government of Cook Islands.

Taua, A. 1999. *Community-based Fisheries Management in Samoa*. FishRights99 Conference, Fremantle, Australia. 1999.

The World Bank. 1999. Report from the International CBNRM Workshop, Washington D.C., 10-14 May 1998. URL: http://www.worldbank.org/wbi/conatrem/

Veitayaki, J. 1998. Traditional and Community-based Marine Resources Management System in Fiji: An evolving Integrated Process. Coastal Management, Vol. 26, 1 January- March 1998, pp. 47–60.

Veitiyaki, J. Aalbersberg, B. Tawake, A. Rupeni, E. & Tabunakawai, K. 2003. Mainstreaming Resource Conservation: The Fiji Locally Managed Marine Area Network and its Influence on National Policy. Resource Management in Asia-Pacific Working Paper No. 42 Resource Management in Asia-Pacific Program, Research Schools of Pacific and Asian Studies, The Australian National University.

Vunisea, A. 2002. Community-based Marine Resource Management in Fiji: The challenges. SPC Women in Fisheries Information Bulletin No. 11, November 2002.

ANNEX

SAMPLE OF PIC LAWS THAT DIRECTLY OR INDIRECTLY RECOGNIZE CMT SYSTEMS*

Cook Islands	• The Cook Islands Constitution • Cook Islands Act 1915	• Marine Resources Act • Outer Islands Local Government Act • Rarotonga Local Government Act
Federated States of Micronesia	• Constitution of the Federated States of Micronesia • Constitution of the State of Chuuk • Yap State Constitution • The Phonpei Constitution • The Kosrae Constitution	
Fiji	• The Constitution of the Republic of Fiji Islands 1997	• Deed of Cession of 10 October 1874 • Cession of Rotuma to Great Britain in November 1879 • Fisheries Act • Fijian Affairs Act • Native Lands Trust Act
Kiribati	• The Constitution of Kiribati	• Laws of Kiribati Act 1989
Marshall Islands	• Constitution of the Marshall Islands	• Customary Law Commission Act • Customary Law (Bikini Atoll) Act
Palau	• Constitution of the Republic of Palau	
Papua New Guinea	• The Constitution of the Independent State of Papua New Guinea	• Customs Recognition Act Ch. 19 • Underlying Law Act 2003 • Fisheries Management Act 1998 • Village Courts Act
Samoa	• The Constitution of the Independent State of Samoa	• Village Fono Act • The Fisheries Act
Solomon Islands	• The Constitution of Solomon Islands	• Customs Recognition Act 2000 • Fisheries Act 1998
Tokelau	• The Tokelau Act 1948 (as amended)	
Tonga		• The Fono Act
Tuvalu	• The Constitution of Tuvalu	• The Laws of Tuvalu Act 1987
Vanuatu	• Constitution of the Republic of Vanuatu	• Decentralisation and Local Government Regions Act • Fisheries Act • Environment Act • Land Reform Act Chapter 123 • Island Court Act Chapter 127

* Based on Pulea (1993), with updates by the author.