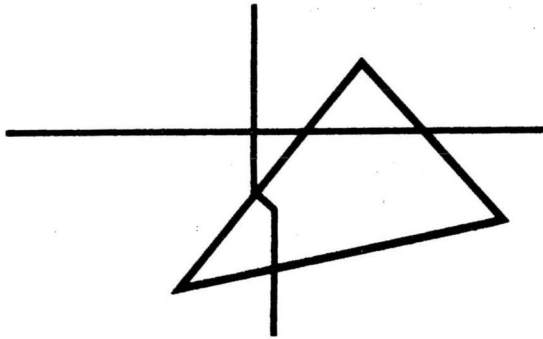


**TRADITIONAL LEADERSHIP  
IN THE CONSTITUTION  
OF THE MARSHALL ISLANDS**



**by C. J. LYNCH**

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Social Science Research Institute  
University of Hawaii at Manoa  
Honolulu, Hawaii**

Joe Lynch is a consultant on legislation and constitutional drafting whose long experience in the Pacific encompasses island areas in Micronesia, Melanesia, and Polynesia.

Robert C. Kiste, Director  
Pacific Islands Studies Program  
Center for Asian and Pacific Studies  
University of Hawaii at Manoa  
Honolulu, Hawaii 96822

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OF THE MARSHALL ISLANDS  
(With Comparative Notes)

C. J. Lynch

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## PREFACE

It hardly needs to be said that this paper is written by a lawyer and from a lawyer's point of view. This fact, however, necessarily means that it is selective, firstly in the aspects of its subject that are considered and secondly in the detail (especially on non-legal aspects) into which it goes.

The point is important. It is all too easy, and all too common (especially, perhaps among lawyers) for a student of one discipline to attack work in another on the ground that it does not produce answers that are required for his purposes, or does not deal with its subject in a way, or to a depth, relevant to those purposes. When I was working in Papua New Guinea, for example, one sometimes heard criticism of anthropological work in the fields of land tenure and marriage custom on the ground that it did not produce the propositions and categories which lawyers and administrators required, or that it dealt with details of no great importance to them. Apart from suggesting a degree of intellectual laziness and even arrogance, when such criticism goes beyond pointing out actual errors or misunderstandings it is, in my opinion, illegitimate. Indeed, some oversimplification of concepts and of facts in a "foreign" discipline may be essential if the ends of one's own discipline are to be served.

It is, therefore, only proper that I indicate some limitations that I have placed on this paper, and some approaches that I have adopted to aspects of it.

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I have confined myself, on the whole, to constitutional provisions, in the sense of formal constitutions and provisions of written laws of the kind that are commonly referred to as "constitutional." Constitutional law in this sense is a field of particular interest to me; also it is a fair assumption that the matters dealt with have such immediate political, ideological or legal importance as to warrant their being afforded the highest formal legal status. The point is nonetheless valid if on occasion quite crucial matters are omitted or left for future discussion because agreement on them is at the time impracticable: the constitution of Vanuatu is a good example of this.

The principal exception to the foregoing is my treatment in Part II of the Traditional Rights Court rules made by the High Court as required by the Constitution of the Marshalls. My justification for this is that those rules constitute a lawyer's extension of the principles set out in the Constitution in a special field of concern to more than just lawyers.

I have also attempted to avoid extra-legal value-judgments, except such as I base on the inferred purpose of the constitutional arrangements considered. The point is expanded upon a little below, and in Part III, but if apparently the intention was to involve traditional leaders, ex officio as it were, in the workings of a non-traditional governmental system, it is not really a fair criticism to point up their not being engaged solely in the performance of traditional functions in a traditional way. In context, such criticism misses the mark.

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Finally, my treatment of the traditional structure of Marshallese society, and my use of the term "traditional," need some preliminary comment, to which I now turn.

The necessarily brief description of traditional Marshallese society given on pp. 1, 2 is not intended as a guide to the anthropology or sociology of the Marshalls, nor does it pretend to analyze the complexities of, for example, the class structure. It is intended to provide only a background against which the constitutional provisions, themselves, may be understood.

As far as the concept of a traditional leadership is concerned, two matters are basic to my approach and, I believe, to that of the Constitution.

Firstly, the Constitution seems to accommodate traditional leaders, but, as suggested above, not necessarily in a traditional manner or solely with respect to their traditional functions. In fact, the whole idea of "modernized" government is non-traditional or possibly even anti-traditional, in a strict sense.

Secondly, as I use the expression, "traditional leadership" does not refer solely to a structure or functions that have existed for centuries or in the common law phrase, "from time immemorial." Rather, it includes the modifications made by such influences as foreign contact, economic change, centralization of power, and

"modernization,"\* generally. I therefore employ expressions related to tradition in a relative or popular way, as indigenous people themselves now use them, not in a strictly scientific sense.

Before turning to some particular cases relevant to my approach, I ought to outline a non-legal principle that I regard as vital to any consideration of social structures. In all societies, there are influences tending toward change, and the test of the viability of a social structure is how it adapts to (or occasionally successfully opposes) such influences. I am far from denigrating a static analysis of such structures as at a point in time, but a full, and constitutionally-relevant study must encompass, or at least recognize, their dynamic and evolutive aspects.

The simple fact that in the Marshalls, as elsewhere, contacts with dominant and culturally-alien administrations have involved limitation or prohibition of internal warfare as a method of acquiring or holding land, power or prestige obviously has had its effect on the position of the indigenous leadership. Similarly, the imported judicial requirement that leaders deal "fairly," in the sense of procedural fairness, substantially changed the incidents of leadership (see the reference in n. 64 below). Such developments do not necessarily alter the basic nature and derivation of such leadership, or deprive it of its indigenous or "traditional" characteristics.

Likiep Atoll furnishes an example of the development, practically within living memory, of a new leadership group. There, the "Owner" families, descended from two European adventurers of the late nineteenth century, emerged as local leaders. In spite of the facts that their leadership originated at the earliest in about 1887, and that it was not until about 1955 that the "Owners" were recognized as equivalent in legal terms to Iroijlaplap (see n. 51 below), there is little doubt that for practical and legal purposes the "Owners" are now regarded as leaders of a traditional kind. Indeed, they are recognized as such in the provisions of the Constitution dealing with the Council of Iroij, although, oddly enough, not specifically in those relating to the Traditional Rights Court. (It may be that this omission is due to only partial acceptance of "Owners" as traditional leaders, accommodating their inclusion in a political body such as the Council, but not their representation on the Court which is designed to adjudicate traditional rights.)

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\*See the references in Carl Heine's Micronesia at the Crossroads, n. 197 below.

Next, the rank or position of Iroijerik, which is recognized in a number of places in the Constitution, is an old one in much of the Marshalls, but its functions were largely re-organized and rationalized by the Japanese Administration. Nonetheless, it and its functions are today recognized as "traditional."

Lastly, there is the situation on the "Jebrik's side" of Majuro Atoll (see n. 54, 55 below). In those parts of Majuro, administrative decisions of the Japanese authorities, adopted by the U.S. Administration, vested the functions of the Iroijlaplap in a combination (variously and confusingly described by the courts) of the Iroijerik the "droulul" (a group or society of land-right holders) and the Government. Nonetheless one must regard this arrangement, too, as being in practical terms "traditional" rather than "non-traditional" in nature.

The purpose of the foregoing discussion is to suggest that the mere intrusion of foreign elements, even major ones, into an indigenous structure does not necessarily change the basic nature of that structure, at least from a legal point of view. The important thing, for present purposes, is that leaders arising in an indigenous structure, whether modified or not, are likely to have attitudes and values related to the society within which that structure evolved, which may be different in some ways from those of leaders arising by virtue of a system (specifically a Westernized political system) of a different nature. The importance of the Constitution of the Marshalls, and the point of this paper, lies in the attempts to accommodate both points of view, while giving formal pre-eminence (rightly or wrongly) to the latter. Whether the two leadership structures or the two points of view can co-exist is a question that only the future can answer. Here I am concerned to describe the constitutional arrangements under which the experiment in co-existence is set up.



## Introductory

In 1979 the Marshall Islands adopted a new, Westminster-type constitution.<sup>1</sup> In view of the importance of the traditional leadership in Marshallese custom, it is not surprising that the Marshall Islands Constitutional Convention gave considerable thought to the inclusion of that leadership, in some way, in the constitutional arrangements. The result was two institutions to provide for a traditional input: the Council of Iroij (chiefs) and the Traditional Rights Court.

The purpose of this paper is to examine the constitutional provisions relating to these institutions, of which the provisions relating to the Council are by far the fuller. It also includes notes on some analogous institutions and provisions in others of the smaller countries of the Pacific. However, I have not dealt with, for example, Tonga, Nauru, Fiji and American Samoa, or Hawaii and the French territories, mainly because of a lack of knowledge and research on which to base a useful comparison. Additionally, the monarchy in Tonga is very much an exceptional case (though it may illustrate how an imported institution can become "traditional").

Although, as noted in the Preface, I have generally avoided making value judgments, I have included in Part III some comments on the desirability and effectiveness of the involvement of tradition and traditional leaders in a "modern" form of government. However, in the first instance this is intended as a study of a constitution as it is, and not as an outsider might wish it to be—even though the latter approach might raise some fundamental questions otherwise unaddressed.

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As a preliminary it is necessary to have a general understanding of the traditional social structure of the Marshalls. As emphasized in the Preface, this is not an anthropological or sociological introduction to the Marshalls, but merely a minimal sketch placing the constitutional provisions in the context of present-day social arrangements.

The traditional element in Marshallese society is sometimes described as feudalistic.<sup>2</sup> There are two social classes into which one is born, the Iroij (those of royal blood) and the kajur (commoners), each with its own subdivisions. The Constitution itself refers specifically only to Irojlaplap<sup>3</sup> ("paramount chiefs" or "kings") and Irojjerik<sup>4</sup> (lesser chiefs) among the Iroij, and to Alab<sup>5</sup> (persons who lead Kajur lineages and are in administrative charge of particular pieces of land)

and Dri Jerbal<sup>6</sup> (persons who actively work or use the land, among the Kajur. Land rights, and traditional authority, are inherited with ownership rights in an Iroj lineage and user rights in, Kajur lineage, but it should be noted that land ownership on the United States or English model is not a part of the traditional land tenure pattern.<sup>7</sup>

Almost every Kajur can hope to become the Alab of his lineage if he lives long enough. Succession to Iroj office, say, as Irojlaplap, depends not only on heredity but also on other factors. It is claimed that the Irojlaplap traditionally operated politically with the advice of, or after consultation with his Alabs, who were also expected to implement the decisions of the Iroj.<sup>8</sup> As in the ideal feudal society, relationships tended to be reciprocal, and nowadays the traditional reciprocity of rights and obligations is enforced by the courts, which require fair and reasonable dealing with "inferiors."

Although there are of course rules as to status and succession, they are by no means inflexible, and are not infrequently bent if not broken. As will be seen, this flexibility is recognized in the constitutional provisions relating to the Council of Iroj.

Thus, while succession to the office of Irojlaplap is in general through the maternal ancestor, in some parts male descent has achieved at least de facto acceptance. Finally, "Iroj" sometimes seems to refer to the Iroj class, sometimes only to the Irojlaplap. It is not always easy for the layman to determine which and I have not always ventured to draw a distinction where it does not seem necessary to do so.

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Two points relating to the Constitution might also be referred to in this Introduction:

The provisions relating to the Council of Iroj and the Traditional Rights Court are specially entrenched,<sup>9</sup> so that unlike minor provisions they may be amended in any significant way only through the protracted process of a Constitutional Convention, followed by amendments passed by the legislature (the Nitijela) and approved in a referendum.<sup>10</sup> It is only fair to add that the same applies in relation to other institutions established by the Constitution.

Secondly, unhappily the proceedings of the Marshall Islands Constitutional Convention that adopted the Constitution are not anywhere available at this time. This, of course, creates problems of interpretation for the student of the Constitution.

## PART I. THE COUNCIL OF IROIJ

### 1. The Precursors

Iroj involvement in the legislative process is not a new thing. In 1949 the U.S. Administration of the Trust Territory of the Pacific Islands (of which the Marshalls is an "entity," along with what are now the Commonwealth of the Northern Marianas, the Republic of Palau, and the Federated States of Micronesia) established an advisory Congress of the Marshall Islands, consisting of a House of Iroj (all the "Paramount Chiefs") and a House of Assembly (elected representatives of local governments).<sup>11</sup> Nine years later the Congress was reorganized into an elected uni-cameral legislature, with seats reserved for Irojlaplap.<sup>12</sup> In its final pre-Constitution form, the legislature was re-designated the Marshall Islands Nitijela,<sup>13</sup> and was composed of 24 legislators of whom two Irojlaplap and four Kajur were elected in each of four electoral districts.

When the 1979 Constitution established the Nitijela of the Marshall Islands as the legislature, no separate provision was made for direct Iroj representation, and instead the Iroj were specifically involved in the legislative process only by means of the consultative and advisory Council of Iroj. The reason for this decision was explained to me as follows:

1. The presence of Iroj in the Nitijela will not allow members to discuss matters freely affecting their relations with the Iroj.
2. The title of Iroj is hereditary and cannot be inherited by someone who is not of an Iroj blood. To ask an Iroj to stand election to qualify for a seat in the Nitijela can be most embarrassing if he loses an election. Furthermore, not only is the Iroj's prestige at stake if he loses in a race, but his traditional role as a spokesman of his people can be seriously questioned.<sup>14</sup>

In fact, there are Iroj in the present Nitijela (including the President)<sup>15</sup> and in my own observations of the Nitijela in action<sup>16</sup> I see little inhibition caused by their status.

## 2. Functions of the Council.

### (a) General.

The first point to be noted is that the Council of Iroij is advisory and consultative and has no formal authority over either the Cabinet or the Nitijela. However, the reverse is almost as true: the Cabinet has no authority over the Council and the Nitijela is not in a much stronger position. The Nitijela has three main functions in relation to the Council: it may appoint a member if the proper appointors do not; it determines, by Act, the compensation of members of the Council;<sup>17</sup> and it may confer additional functions on the Council. Otherwise, the Council is an independent institution.

Nevertheless, it must be remembered that the power to make laws rests very firmly with the Nitijela.

The primary constitutional functions of the Council can be divided into four—

- (A) To "consider any matter of concern to the Marshall Islands, and ... to ... express thereon to the Cabinet."<sup>18</sup>
- (B) Functions conferred "by or pursuant to Act."<sup>19</sup>
- (C) Power to fill certain vacancies on the Council,<sup>20</sup> and to appoint deputies in certain cases.<sup>21</sup>
- (D) Certain non-final powers in relation to Bills.<sup>22</sup>

We are immediately concerned only with functions A and B. Function D is the subject matter of subdivision (b) of this Section, and the following Section 3 of this paper deals with function C.

Although it has not yet been formally used, function A is, at least potentially, an important and an influential one. In effect, it establishes the Council as a general advisory body to the Cabinet on matters of national importance (which are not limited to matters of custom or traditional practice, although such matters would obviously be the Council's strong point). The Constitution does not require or even suggest that the Cabinet act on or do anything in particular about a Council opinion. However, one would think that in a proper case (especially if it dealt with a customary or traditional matter) the Cabinet would give such an opinion considerable weight.

Two other aspects of function A might be mentioned.

Firstly, the Council is fully competent to initiate advice, but there is nothing to prevent the Cabinet from requesting the opinion of the Council where, for example, it desired the views or support of the traditional leadership. Oddly, perhaps, no provision is made for advice to the Nitijela, although this could be provided for by Act under function B, if desired.

Secondly, legally there seems to be nothing to prevent the Council from making its opinion public, or to require it to do so. Whether it would always be wise to do so is another matter.

Function B, relating to the Council's pursuant powers granted it by legislation, has not yet been implemented. This is a matter for the Nitijela itself. However, one can see a case for seeking, either directly or through a Committee, the opinion of the Council on a Bill under consideration without having to wait until after third reading for a formal request for reconsideration (see treatment of this in subdivision (b) of this Section, following). I have already encountered cases where the Council's views would be useful, but were not requested. On one occasion the Nitijela did, by resolution,<sup>23</sup> request the Council "to adopt and publish standards for the uniform spelling of Marshallese words . . . ." No significant action resulted in the Council.

An interesting omission, which I assume was deliberate, is that there is no specific provision for Council participation in any Convention<sup>24</sup> to amend the Constitution. A Constitutional Convention—

shall be composed of members fairly representing all the people of the Marshall Islands; shall be specially elected by qualified voters; shall number at least 10 more than the total membership of the Nitijela . . .<sup>25</sup>

There might, however, be a good case for at least Iroijlaplap representation on a Convention, and even perhaps for an Iroij electorate—in the social circumstances of the Marshalls I doubt if this would offend against the equal protection and freedom from discrimination provision, or the access to electoral processes provision, of the Bill of Rights.<sup>26</sup> It will be noted from the passage quoted immediately above that the expression used is "qualified voters," not "all qualified voters."

Any Bill amending the Constitution,<sup>27</sup> or proposing amendments to a Constitutional Convention or to a referendum,<sup>28</sup> would come under function D of the Council next to be referred to in subdivision (b) of this Section.

(b) Relations with the Nitijela.

It has already been pointed out that the Nitijela has little or no control over the Council. Here, I concentrate on the converse, the two major areas of the relationship between the Council and the Nitijela that are specifically provided for by the Constitution which give the Council power over the Nitijela: the power of the Council to require reconsideration of Bills, and the Council's functions in relation to Bills to declare the customary law.

The power of the Council to require the Nitijela to reconsider Bills is not a power to decide, or even to delay to any significant extent, the disposition of a Bill.<sup>29</sup> It does not apply to Appropriation Bills, Supplementary Appropriation Bills or Bills that the Nitijela has already reconsidered at the request of the Council,<sup>30</sup> nor, seemingly, to Bills referred to in n. 29, so that nothing said here applies to them.

The Council has formal access to Bills because the Clerk of the Nitijela must send to the Council a copy of each Bill passed on third reading.<sup>31</sup> The Council then has one week within which to decide whether or not to do anything,<sup>32</sup> and until the end of that week, or until the Council sooner decides to take no action, the Speaker must delay certification of the Bill.<sup>33</sup> If during that week the Council decides that a Bill "affects the customary law or a traditional practice, or land tenure, or a related matter" and that the Nitijela should reconsider it, the Council may adopt a resolution expressing its opinion and "requesting" the Nitijela to reconsider it. On the other hand, it may decide not to adopt such a resolution, or it may simply do nothing.<sup>34</sup> If it does request reconsideration, it may at the same time make "observations" on the Bill, which could well include suggested amendments.<sup>35</sup> It should be noted that the Council can act on any Bill that does affect the customary law, etc., and that this may not necessarily be a main purpose of the Bill or the intention of the Nitijela. There could easily be a case where the possibility that the customary law, etc., might be affected simply did not occur to the Nitijela, and in such a situation a request that the Bill be reconsidered and a simple amendment made to put this beyond doubt would probably satisfy all concerned.

The Clerk of the Council transmits the resolution and any "observations" to the Clerk of the Nitijela for reference to the Speaker.<sup>36</sup> This is the end of the Council's direct involvement, and ultimately under the Rules of Procedure of the

Nitijela it will be informed of the result of its request for the reconsideration. Under the Constitution<sup>37</sup> the Nitijela may<sup>38</sup> reconsider the Bill, and may decide:

- (a) not to proceed with the Bill; or
- (b) to amend the Bill "in any manner that it thinks fit"<sup>39</sup> or
- (c) to re-affirm its support for the Bill without amendment.

Such a decision by the Nitijela is not subject to further challenge, and unless the Nitijela decides not to proceed with the Bill, the Speaker then certifies the Bill into law.<sup>40</sup>

In the course of Nitijela reconsideration the Speaker may,

... in consultation with the Chairman of the Council of Iroij, arrange for a joint conference of members of the Council and members of the Nitijela, for the purpose of endeavoring to reach agreement about the content of the Bill.<sup>41</sup>

This conference is not necessarily a conference of all members of the Council with all members of the Nitijela, and in fact the Rules of Procedure<sup>42</sup> state that the Nitijela members will normally be "the members of the appropriate Standing Committee or such members of the Nitijela as the Speaker appoints." The Council has as yet no rule on the matter, so presumably this is one of the points to be arranged between the Chairman and the Speaker.

While the conference may be held "for the purpose of endeavoring to reach agreement," such understanding will not be constitutionally or legally binding, for an Act may be made and a Bill amended by the Nitijela and by no other body, not even a joint conference. Nevertheless, such an agreement would be extremely influential, especially if it were unanimous or reached by consensus. In fact, given the consensual style of government in the Marshalls and the possible reluctance of commoners to discuss their relations with Iroij, joint conferences and joint committees (see immediately below) might give the Council its best opportunity to exert influence.

Even when the Nitijela adopts a Bill, the Constitution gives the Council of Iroij an opportunity to influence its contents. The Constitution provides:

The Nitijela shall not proceed further than the first reading of any Bill or amendment to a Bill<sup>43</sup> which, in the opinion of the Speaker, makes provision for any declaration ... [ of the customary law ] ... unless a joint committee of the Council of Iroij and the Nitijela has been

afforded a reasonable opportunity to make a report on the matters dealt with in that Bill or amendment, and any such report has been published.<sup>44</sup>

A joint committee is "a committee of members of the Council of Iroij and of the Nitijela, acting jointly."<sup>45</sup>

It should be noted that the right to express an opinion on a Bill to declare the customary law is limited: only a "reasonable opportunity" must be given. The Constitution does not define what is a "reasonable opportunity," but if the joint committee meets promptly, and continues its work without unnecessary delays, it should probably be allowed to work until it completes its report, or decides that it cannot agree on a report.

This constitutional provision for a joint committee including members of the Council is additional to the provision, discussed above, allowing the Council to request the Nitijela to reconsider a Bill. Since a Bill to declare the "customary" law (as defined in Article XIV, S.1 of the Constitution) would certainly be a Bill that "affects the customary law or a traditional practice, or land tenure, or a related matter" (see above, on Council requests for reconsideration) this potentially affords to the Council a second opportunity to press its opinion on such a Bill.

It would be foolish for the Council to neglect the joint committee procedure, and rely only on the second opportunity. In addition, if the Nitijela reconsiders a Bill at the Council's request, it would be a strong argument in favor of not changing it that the Council had failed to use a joint committee to express its opinion. It should also be noted that an opinion of a joint committee may not necessarily be the opinion either of the Council or of the Nitijela; and that a Bill as ultimately passed by the Nitijela may not be in the same form as when it was considered by the joint committee.

The Rules of Procedure of the Nitijela provide that the Nitijela members of a joint committee are chosen in the same way as those of a joint conference, and again there are no rules of the Council to provide for this matter.

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A significant gap in the express constitutional powers of the Council is that the Constitution is silent on whether it has any function with relation to "Resolutions" of the Nitijela. In the Nitijela, a "Resolution" is not merely the decision on a motion, but rather the expression is a term of art:



A resolution is a document expressed to be a resolution, formally expressing the decision of the People of the Marshall Islands through their Nitijela on some matter of public importance or interest.<sup>46</sup>

A Resolution is drafted and disposed of with something approaching the same degree of ceremony as a Bill. For example, it usually contains a number of recitals setting out the facts on which it is based and a summary of the arguments in favor of it; unless the Nitijela orders otherwise it is referred to a Standing Committee for report, and if the Committee thinks it necessary, a public hearing; and, like a Bill, it is formally certified by the Speaker, countersigned by the Clerk of the Nitijela, and sealed with the official seal of the Nitijela. A Resolution is thus an important type of measure, and many Resolutions deal with quite fundamental matters. The Council of Iroij might well, therefore, have a valuable contribution to make in relation to Resolutions—perhaps the more valuable because a Resolution is not legally binding. Also, because it is not an interference with the law-making process the recognition of the right of the Council to originate Resolutions in the Nitijela could in some ways be to the advantage of both, and of the government of the country.

(c) The Council in action

Up to early 1983, the time this paper was written, the public involvement of the Council of Iroij in the governance of the Marshalls has been minimal, in spite of the fact that there have been Bills (for example, the comprehensive Local Government Bill 1980<sup>47</sup> and the Property and Traditional Law (Repeal) Act 1981<sup>48</sup>) which had obvious implications for customary law and traditional practices. On one occasion, the Nitijela by Resolution requested the Council to standardize Marshallese orthography, but the Council took no action.

It is, of course, possible that the explanation for this inactivity lies in the Council's seeing no reason to act, or (on the more discouraging view) that the members have not been particularly concerned to have the Council operate in the manner that the 1979 Constitution envisaged. It could, moreover, be due to all or any of four practical matters:

Firstly, there is a lack of interest, of legislative time, or both, on the part of the political leadership in the Nitijela in relation to the encouragement of the Council to perform its constitutional role. That this lack exists certainly seems to be true, but what importance one attaches to it depends on the extent to which one expects the traditional element to stand on its own feet from the beginning under the new constitutional arrangements.

Allied to this first matter is the lack of provision for administrative and legal and other advisory staff for the Council—again, really a matter for the political executive to determine, though one in relation to which a strong or concerned Council could be expected to take positive initiatives, which it does not appear to have done. (In fact, the constitutionality-required office of Clerk of the Council is the only senior advisory post of the Council, and not only has it been regarded as of no great administrative importance but also changes of occupancy have made it almost a part-time office, or at least one in which the interest of the occupant is accepted as being primarily part-time.)

The third is a probable lack of appreciation on the part of the members of the Council of its constitutional role and the potential importance of the Council.

Fourthly, the Council adopted as its rules of procedure the Westernized and formalized rules of procedure of the Nitijela with only minor and formal amendments, even though this was neither required by nor resulted from the Constitution. I cannot but feel that this was due to inexpert advice, but in any event the requirement to follow such procedures could well have led to confusing the members of the Council and to their failure to exercise their functions as contemplated by the Constitution.

These points are by no means unrelated. A concerned political executive would not only provide adequate staff and support, but would attempt to encourage an understanding of the constitutional provisions:<sup>49</sup> In turn, adequate staff would draw relevant matters to the attention of the members of the Council and would devise suitable procedures for their consideration. If these points are truly relevant ones, the lesson suggests that it is not enough to place traditional leaders in unfamiliar waters, but some instructions or advice on how to survive in them is also necessary.

### 3. Composition of the Council.

The Council consists primarily of representatives of the Iroi jlaplap. It is made up of five "eligible persons" from the districts of the Ralik Chain and seven "eligible persons" from the districts of the Ratak Chain.<sup>50</sup> Basically an "eligible person" is an Iroi jlaplap (or Leroi jlaplap), except in respect of Likiep Atoll where the equivalent expression "Owner" is used.<sup>51</sup> However, a person who is not a qualified voter in Nitijela elections, or who is a member of the Nitijela, is disqualified.<sup>52</sup>

The situation in Majuro and Arno, each of which is allotted one Iroijlaplap member of the Council, is complicated.

In Arno, the Japanese Administration attempted to settle a dispute as to succession to the office of Iroijlaplap on the eastern side in 1932, but the attempt failed and there is still no Iroijlaplap.<sup>53</sup> On "Jebrik's side"<sup>54</sup> of Majuro atoll there has not been an Iroijlaplap since 1919; his functions have in fact been carried out by the Iroiherik on that "side" and the group ("droulul") consisting of those holding property rights there, and in law are shared by the U.S. Administration as successor to the Japanese Administration.<sup>55</sup> On the termination of the Trusteeship Agreement, if the matter has not been settled in some other way, the Government of the Marshall Islands will presumably succeed to the functions of the U.S. Administration, which has consistently refused to exercise those powers or to supervise their execution.<sup>56</sup>

The Constitution also deals with three special instances of membership.

(a) where in a district there are more eligible persons available for membership than there are seats.<sup>57</sup>

(b) where there is no eligible person available.

(c) where a new person or group of persons becomes recognized as possessing Iroijlaplap functions.

In the first class of cases a selection must obviously be made between the eligible persons available. In that event--

(a) the term of office is one calendar year; and

(b) before the expiration of each calendar year the eligible persons in the district concerned are to endeavour to reach agreement<sup>58</sup> as to which of them is or are to be the member or members.<sup>59</sup>

If agreement cannot be reached by the date of the first meeting of the Council in any calendar year, the Nitijela proceeds to make the necessary appointment from among the "eligible persons" available.<sup>60</sup> In point of fact, the Iroijlaplap member for the Mejit Island district for 1980 was appointed by the Nitijela.<sup>61</sup>

In the selection of a member (whether by eligible persons or by the Nitijela) the principle to be observed is that of a "reasonable rotation among the eligible persons" in each district, but this is not mandatory.<sup>62</sup>

In the second class of cases, where for any reason there is no eligible person for a district, the Council itself appoints --

... a person who, in the opinion of the Council, having regard to the customary law and any traditional practice, is qualified by reason of his family ties to a person who, but for that reason, would have been eligible to be a member of the Council from that district.<sup>63</sup>

This will obviously take care of a case where the selection of a new Iroiylaplap on the death of the former one is delayed,<sup>64</sup> but might also take care of the unlikely occurrence of a new "Jebrik's side" situation on an atoll. It would also apply where the only otherwise-eligible persons are disqualified.

The third class of case is where there is the emergence of a new person or group of persons having Iroiylaplap functions --

If, in any district, a person or group of persons becomes recognized, pursuant to the customary law or to any traditional practice, as having rights and obligations<sup>65</sup> analogous to those of Iroiylaplap, that person, or a member of that group nominated by the group, shall be deemed to be eligible to be a member of the Council of Iroiij as though he were an Iroiylaplap.<sup>66</sup>

This would obviously fit the anomalous cases of Likiep and Majuro if there were a change back to a more normal pattern, while the recognition of "groups" would take care of the situation of the Iroiierik or the droulul on Majuro should either, or both, be recognized in law as having in their sole right the Iroiylaplap functions which they already have in practice.

The seat of a member of the Council becomes vacant if he dies, resigns or becomes qualified, and in the case of a member selected under the first special class of case discussed above when his 12-month appointment runs out. Vacancies are filled by applying, as nearly as may be, the regular provisions.<sup>67</sup>

There is a Chairman and a Vice-Chairman of the Council who are appointed by an ordinary majority, in a secret ballot, from among the members.<sup>68</sup> Each ceases to hold office on resignation; on the entry into office of a successor; on ceasing to be a member of the Council; or on removal from office by a resolution of the Council carried by 2/3 of the members present and voting.<sup>69</sup>

Further provisions, which have no parallel for the Nitijela, provide for the appointment, in two sets of circumstances and by different procedures, of deputy members of the Council.

Firstly, a member who is prevented from attending a meeting of the Council or a committee of the Council, or of a joint committee or joint conference, may:

... appoint a person who is qualified by reason of his family ties to that member<sup>70</sup> to be his deputy at that meeting.<sup>71</sup>

This would allow for a system of standing deputies.

Secondly, if a member is absent from a meeting of the Council, etc., and is not represented by a deputy appointed by him, or if the seat of a member is vacant

--  
... the Council of Iroij may, by resolution, appoint a person who, in the opinion of the Council, having regard to the customary law and any traditional practice, is qualified by reason of his family ties to that member to be his deputy at that meeting.<sup>72</sup>

Except in the case of the deputy of the Chairman, a deputy of a member "may perform the functions and shall have the powers, duties and responsibilities of that member." The deputy of the Chairman performs the functions of the Chairman only if there is no other member available to perform those functions.<sup>73</sup>

Finally, as is the case with the Nitijela, any question that arises concerning the right of any person to be a member (or a deputy of a member) is to be determined by the Court.<sup>74</sup>

#### 4. Procedures of the Council.

The Council is empowered to determine its own procedures.<sup>75</sup> The rules of procedure that it has adopted simply follow the Rules of the former (pre-Constitution) Marshall Islands Nitijela and are inappropriate to such an extent that they are ignored here.

The Council meets in regular session during any period when the Nitijela meets in regular session, and in special session during any period when the Nitijela meets in special session, and remains in session after the Nitijela rises for such time as it is necessary for it to deal with any Bills passed by the Nitijela.<sup>76</sup> There is no specific provision for a recess, but since the requirement is only that the Council meet "during"<sup>77</sup> Nitijela sessions there is probably no need for one. However it is at least arguable that it should not recess unnecessarily during the hold-over period after Nitijela sessions: the obvious intention is that it should then consider all remaining Bills passed by the Nitijela (except those excluded from its consideration).

The Council may also meet in special session when called by the Chairman, or by the Clerk of the Council at the request of nine members. It remains in such a session until such date as it determines.<sup>78</sup>

The quorum, oddly enough, is fixed at six, precisely half of the membership,<sup>79</sup> which at least in theory leaves open the possibility that two competing halves of the Council might sit simultaneously! In fact, should there be a considerable amount of work to be completed within a limited period, this could be a useful provision, though I, for one, would be wary of using it.

The Chairman presides at any meeting at which he is present, and if he is absent the Vice-Chairman presides. If neither is present, the oldest available member presides—"oldest" obviously means oldest in years of life, not in office as Irojlaplap or as a member of the Council, and "available" means, I think, not only present, but also able and willing to act.<sup>80</sup>

There is no provision relating to the number of votes necessary for any question to pass the Council except that the member presiding has a vote<sup>81</sup> and a 2/3rd majority of the members present and voting is needed to remove from office a Chairman or Vice-Chairman.<sup>82</sup> Combined with the effect of the quorum provision noted above, this means that a dissident group of four could perhaps unseat a Chairman. There is no constitutional provision, as there is in relation to the Nitijela,<sup>83</sup> dealing with tied votes.

A quite unusual provision declares that the Council is not disqualified from the transaction of business by reason of there being a vacancy in its membership, a deputy of a member not having been appointed, or an unqualified person acting as a member or a deputy.<sup>84</sup> A quorum of members or deputies, however, would still be necessary. A similar provision applies in respect of the Nitijela, but is limited solely to the existence of a vacancy.<sup>85</sup>

##### 5. Miscellaneous matters.

The Constitution also contains three other significant provisions relating to the Council of Iroj.

Firstly, it requires the compensation of members of the Council to be specifically prescribed by Act.<sup>86</sup> This constitutes the only real power that the Nitijela has over the Council, and such an Act must be made by the Nitijela by a

a special constitutional process involving a report to the Nitijela by a committee of the Nitijela or by some statutory body, the terms of reference of which are laid down in the Act. An appropriation by the Nitijela of the necessary funds is also required.<sup>87</sup>

Secondly, it provides that,

Neither the Council of Iroj nor any member of the Council shall be subject to any proceeding outside that body, or subjected to any liability, civil or criminal, in relation to the casting of any vote, the making of any statement, the publication of any document or the taking of any other action as part of the official business of the Council of Iroj.<sup>88</sup>

The protection would extend to joint committees and joint conferences, as well.

This provision is practically identical with the equivalent provision for the Nitijela,<sup>89</sup> but in two ways the protection given to the Council does not extend as far as that afforded the Nitijela. Members of the Nitijela are also privileged from arrest (except for felony) during sessions and in going to or returning from sessions<sup>90</sup> - it seems on the face of it that this extends to recesses, and during 1980-1982 would have given almost year-round protection! In addition,

Neither the Speaker nor any officer of the Nitijela in whom powers are vested for the regulation of procedure or the conduct of business or the maintenance of order shall, in relation to the exercise of any of these powers, be subject to the jurisdiction of any court ...,

except as to habeas corpus and the determination of the qualifications of members.<sup>91</sup> The first of the omitted provisions probably is of little moment, but there is much to be said for extending the second to the Council.

Concluding the provisions on the Council there is the office of the Clerk of the Council of Iroj who, like the Clerk of the Nitijela, is a Public Servant. As has already been noted, the Clerk receives Bills from the Nitijela and transmits requests for reconsideration to it, and calls a special session of the Council at the request of not less than nine members. He is also responsible for arranging the business of the Council, keeping a record of its proceedings, and for the provision of secretarial services, and may be given other functions by Act or by resolution of the Council.<sup>92</sup>

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It will be seen from this Section and the preceding Section of this paper that the constitutional provisions relating to the Council have largely been modelled, as far as it was reasonable to do so, on those relating to the Nitijela. It is possible that this was merely fortuitous, or simply a matter of drafting style, but, at least to me, it seems to emphasize the fact that the Council was envisaged as an integral part of the total legislative machinery, and not merely a peripheral one.

## 6. Comparisons

While I cannot attribute a specific source or precedent for the Council of Iroj, I think that there is merit in referring briefly to some comparable institutions in the Pacific, and to some methods in the area bringing traditional influences to bear on the governmental process. The value lies not simply in a comparison of institutions and specific provisions (which is always useful as a source of ideas), but in pointing out some other cases where developments and activities may have relevance to the future and the operations of the Council, and which ought therefore to be of interest.

### (a) Palau<sup>93</sup>

The Constitution of the Republic of Palau provides that:

A Council of Chiefs composed of a traditional chief from each of the states shall advise the President on matters concerning traditional laws, customs and their relationship to this Constitution and the laws of Palau. No person shall be a member of the Council of Chiefs unless he has been appointed and accepted as a chief in a traditional manner, and is recognized as such by the traditional council of chiefs of his state. No chief shall serve in the Council of Chiefs while serving as a member of the Olbilil Era Kelulau<sup>94</sup> or the Cabinet.<sup>95</sup>

Since the President is the chief executive<sup>96</sup> and has a veto power over Bills which can be overridden by a 2/3rd majority of each House,<sup>97</sup> this gives the Council of Chiefs a power that is analogous to (but, since the Council must first convince the President to exercise his veto power, more indirect than) the power of the Council of Iroj to require reconsideration of a Bill.

As an advisory body to an executive President who is sympathetic to its function, the Council of Chiefs might well be in practice a more powerful body than the Council of Iroj. As will be seen, the "traditional" councils in Yap State of the F.S.M. have on occasion effectively exercised such an indirect power.



The Constitution of Palau contains two other provisions<sup>98</sup> which, although they have no analogues in the Marshalls, have a bearing on the present discussion:

Section 1. The government shall take no action to prohibit or revoke the role or function of a traditional leader as recognized by custom and tradition which is not inconsistent with this Constitution, nor shall it prevent a traditional leader from being recognized, honored, or given formal or functional roles at any level of government.

Section 2. 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.

The first protects the traditional organization, except in cases of inconsistency with the Constitution, and specifically permits (though it does not require) inputs from it into government, and illustrates the importance attached to that structure by the Constitution. The second imposes in effect a fetter on the legislative power, the legal significance of which cannot be known until the courts have dealt with the matter thoroughly.

(b) The Federated States of Micronesia

The Constitution of the F.S.M. contains provisions analogous to those in Palau, though their significance is potential rather than actual:

ARTICLE V. Traditional Rights

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, honored, 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,<sup>99</sup> protection of Micronesian tradition shall be considered a compelling social purpose<sup>100</sup> 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.

Section 1, it should be noted, does not seem to protect traditional leaders from legislative interference as does the equivalent provision in Palau. It was supplemented by a resolution<sup>101</sup> of the constitutional convention which is itself equivocal, affirming that--

It is not the intention ... to affect adversely any of the relationships which prevail between traditional leaders and the people of Micronesia, nor to diminish in any way the full honor and respect to which they are entitled.

There is therefore no specific constitutional guarantee to the traditional leaders nor of their involvement in government, though there is nothing to prevent national or state legislative action on such matters.

Section 2, also, is much weaker than its Palau counterpart, and establishes no dominant position for custom and tradition.

At the national level, at best Section 3 allows the establishment of something similar to the Council of Iroij or the Palau Council of Chiefs. An authoritative source in the F.S.M. informs me that the provision has not been implemented and neither the elected nor the traditional leadership show any great interest in establishing the Chamber:<sup>102</sup>

There is another potentially relevant provision. Under the F.S.M. Constitution each state has in the unicameral Congress one member elected at large and others elected on a population basis, and may provide that one seat of the latter group be "set aside for a traditional leader who shall be chosen as provided by statute."<sup>103</sup> Representation of the traditional leadership in this way can, however, hardly be regarded as more than nominal.<sup>104</sup> In any event, to date it has not been implemented.

(c) Yap<sup>105</sup>

The Constitution of the State of Yap in the F.S.M. was initially the Charter of the Yap District of the Trust Territory of the Pacific Islands, granted by the former Congress of Micronesia (referred to here as "the initial (Yap) constitution").<sup>106</sup> It was revised by a State Constitutional Convention ("the revised

(Yap) constitution"),<sup>107</sup> Although I have been unable to obtain a copy of the proceedings of the Convention or other sources explaining the reasoning behind the changes made, it is convenient to deal here with both versions of the constitution.

Both the initial charter and the revised constitution provided for two councils of traditional leaders with important functions with regard to legislation, though there are significant differences between the formulas by which the functions were conferred. As a preliminary, each gave a general statement of function which it followed by a specific statement in regard to legislation.

The initial constitution stated that—

There shall be a council of Pilung and council of Tamol which shall exercise legislative, judicial and executive functions which concern tradition and custom as prescribed by this charter or by statute.<sup>108</sup>

The formulation in the revised constitution is in terms that are rather more vague and general, avoiding the reference to "legislative, judicial and executive" functions—

There shall be a Council of Pilung and Council of Tamol which shall perform functions which concern tradition and custom.<sup>109</sup>

The revised formulation seems to leave the allocation of precise functions much more in the discretion of the legislature than does the earlier formulation, but whether it will have this effect in practice remains to be seen.

As a matter of interest, these councils were set up in 1978 as successors to the former Yap Islands council and Outer Islands Chiefs council.<sup>110</sup>

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The powers of the councils with regard to legislation have been both extensive and explicit. They were stated in the initial constitution as follows, and to all intents and purposes the same formulation was used in the revised constitution:

A certified copy of every bill which shall have passed the legislature shall be presented to the council of Pilung and the council of Tamol for consideration. The councils shall have the power to disapprove a bill which concerns tradition and custom or the role or function of a traditional leader as

recognized by tradition and custom. The councils shall be the sole judge of the concernment of such bill....

The council of Pilung and the council of Tamol may disapprove a bill by returning the certified copies of the bill with their objections within thirty days after it is received from the legislature.

A disapproved bill may be amended to meet the councils' objections and, if so amended and passed, only one reading being required for such passage, it shall be presented again to the councils ...<sup>111</sup>

It is evidence of the constitutional standing of the councils that no power to override their disapproval was (or is) given, in contrast, with the position of the Governor's veto which could (and can) be over-ridden by the legislature.<sup>112</sup> It seems that both councils must disapprove for the negation to have effect.<sup>113</sup>

The councils jointly disapproved one Bill to establish a constitutional convention (on the ground that it was too soon), and the council of Pilung alone three more (with, I think dubious validity, though as the council of Tamol did not concur the point is academic). The indirect influence of the traditional leadership is, however, made apparent by the fact that the Governor vetoed two out of these three Bills, taking into account the views of the council of Pilung.<sup>114</sup>

No attempt seems to have been made in the revised constitution to deal with a possible excess of power exercised by the councils in this regard, and indeed it is noteworthy that both the initial constitution and the revised constitution make each council the judge of the concernment of a bill for the exercise of its power of disapproval.<sup>115</sup>

One important power of the councils vanished in 1982. Under both the initial constitution and the revised constitution, if the Governor elected is a resident of Yap Islands Proper the Lieutenant Governor must be a resident of the Outer Islands, and vice versa: to ensure this the initial constitution provided for the Lieutenant Governor to be appointed by the Governor with the advice and consent of the appropriate council.<sup>116</sup> Under the revised constitution, the Governor and the Lieutenant Governor are elected by the State electorate on a single ticket, voting being for the office of Governor and the successful candidate carrying with him his running mate.<sup>117</sup>

The initial constitution provided for the membership of the respective councils of "traditional leaders of the respective municipalities of" Yap Island Proper or Outer Islands, and for the manner of their appointment.<sup>118</sup> The revised constitution contains no similar provisions and these matters are presumably left to the State legislature.

The initial Yap constitution also had a provision relating to traditional leadership<sup>119</sup> that was to all intents and purposes identical with the F.S.M. provision quoted above<sup>120</sup> and needs no further comment. However, this provision was not re-enacted in the revised constitution.

There seems little doubt that, both in law and in practice Yap went, and continues to go, far beyond other countries—which may perhaps be attributed to "its exceptional conservatism" and the strength of its traditions.<sup>121</sup> Whether the Nitijela would, for example, be prepared to tolerate the Council of Iroij's going beyond its constitutional functions as the council of Pilung apparently attempted to do is doubtful. In the Marshalls the final word would rest with the Nitijela, while in Yap such matters could go to the courts, although it does not follow that they would be so tested.

(d) Vanuatu

The Constitution of Vanuatu establishes a National Council of Chiefs "composed of custom chiefs elected by their peers sitting in District Councils of Chiefs".<sup>122</sup> The Council--

... has a general competence to discuss all matters relating to custom and tradition and make recommendations for the preservation and promotion of Ni-Vanuatu culture and languages,<sup>123</sup>

and

may be consulted on any question, particularly any question relating to tradition and custom, in connection with any bill before Parliament.<sup>124</sup>

The function of consultation on Bills generally is one that might certainly be useful in the Council of Iroij, and could be provided for by Act.

Constitutionally the National Council is in a weaker position than either the Council of Iroij or the Palau Council of Chiefs, in that it has really no direct link with any organ of government. But, as nearly always in such cases, it will be the practice rather than the constitutional situation that will determine its authority. The National Council has, however, one express function of considerable importance.

The Constitution declares that " The rules of custom shall form the basis of ownership and use of land in the Republic",<sup>125</sup> and requires Parliament to provide for a national land law. Before so doing, Parliament must consult with the National Council.<sup>126</sup> Although Vanuatu requires a land law based on custom while the Marshalls only allows the Nitijela to declare customary law (including land law), the respective functions of the National Council and the Council of Iroj in the matter are similar.

All in all, there are very close parallels between the Vanuatu and the Marshalls institutions, and if and when they become fully operational their workings should be a matter of mutual interest.

(e) Western Samoa

In this discussion, I leave out of account the original joint Heads of State (O le Ao o le Malo) and the Council of Deputies, institutions designed to accommodate the four highest traditional titles of Western Samoa.

The Western Samoan approach to the problem of traditional input into the legislature was simple, quite different from others already discussed (although there may be parallels in the seats for the nobility in Tonga<sup>127</sup> and in the members nominated to the Fijian Senate by the Great Council of Chiefs<sup>128</sup>), and to a complete outsider regressive by suffrage standards of other countries.

The approach adopted was simply to provide that almost all the seats in the Legislative Assembly were to be filled on the basis of a matai franchise, not a universal, adult, citizen franchise.<sup>129</sup> However, seats were not expressly reserved in the constitution for the matai.

There is little basis for direct comparison with other institutions and provisions discussed here, and Western Samoa is referred to only to illustrate the range of options available, though it is unlikely that this particular approach (which has been under legal attack<sup>130</sup>) would either be particularly welcome (except perhaps in Yap?) or effective elsewhere.

(f) The Cook Islands

The Cook Islands has a House of Ariki(s) consisting of Arkiki representing the various islands in the group.<sup>131</sup>

The main details of the House are left to be prescribed by Act. Crocombe describes the House of Arikis as:

a body of high chiefs having ceremonial functions as well as an advisory role to the government in matters of traditional custom and land. It may also discuss any matter referred to it by the House of Assembly.<sup>132</sup>

He finishes by way of illustration the submission to the House of Assembly by the House of Arikis in 1967 of "proposals to require the approval of landowners before subleasing or selling land, and the sharing of profits by landowners," which were not adopted.<sup>133</sup> Powles<sup>134</sup> also states that the House of Arikis --

has been active in the clarification of customary law in relation to tribes, clans and chiefs, but perhaps over-concerned to re-assert chiefly authority.

However, the primary function of the House of Arikis under the Cook Islands Constitution is similar to what I referred to in Section 2(a) of this paper as function A of the Council of Iroij --

It shall consider such matters relative to the welfare of the people of the Cook Islands as may be submitted to it by the Parliament for its consideration, and it shall express its opinion and make recommendations thereon to the Parliament ...<sup>135</sup>

The Marshalls provision for function A is hardly more than a paraphrase of that provision, with the significant difference that in the Marshalls the Council is in this respect linked to the executive, while in the Cook Islands the House is linked to the legislature. In the Cook Islands the linkage is made closer by provisions for the Prime Minister to attend and address the House, for a Minister or a person nominated by the Minister to appear when any matter for which the Minister is responsible is under consideration, and for a member of the legislature to attend invitation. A Minister, person or member so appearing is entitled to take full part in proceedings, but not to vote.<sup>136</sup> The provision for the appearance of the Prime Minister is, I imagine, a formal and political matter, but provision for the appearance of responsible Ministers and other members of the legislature is a valuable procedural one that might well be imitated elsewhere.

Like the Council of Iroij, the House of Arikis may be given other functions by Act. However, it has no other constitutional functions.

(g) Comments

It will have been noted that in the examples referred to here, three methods of associating the traditional leadership with government have been employed: (i) by membership of the legislature, as in the case of the seats that may be reserved for traditional leaders in the F.S.M.; (ii) by a special franchise, as in Western Samoa; (iii) by the creation of a separate institution, as in all other cases. The Marshalls is with the majority in adopting the third method. In the Marshalls, and probably elsewhere, the third approach has the advantage of freeing legislators from constraints that might be imposed by the presence of traditional leaders in their capacities as such. The comments which follow are limited to this third approach.

In all cases except Palau there is a direct link with the legislature, although the power of veto possessed by the councils of Tamol and Pilung in Yap is more akin to an executive veto than to participation in the legislative process.<sup>137</sup> The linkage is most direct in the Cook Islands, where the legislature may submit matters to the House of Arikis. In a way, the Marshalls has the broadest linkage, since the Council of Iroij is a sort of consultative House of review but, as in all cases except Yap, the ultimate authority of the legislature remains. The comparisons do, however, suggest that the Council of Iroij could be strengthened and made more useful if it were effectively accorded a more general consultative role, like that of the House of Arikis (though by all accounts the latter has been made ineffective in practice). Indeed, closer formal and informal contacts with the legislature is desirable if the "traditional" input is to be effective—in my view, Palau and Yap probably go too far in distancing the "traditional" assembly from the popular one.

Some linkage with the executive is also common, though in the Cook Islands it is limited to provision for the appearance before the House of Arikis of members of the Cabinet and in Vanuatu the matter is left at large. In Yap it was formally limited to the selection of the Vice-President. As the Yapese examples suggest, however, informal influence on the executive by traditional leaders, acting through a constitutional institution, can be great. If what is sought is an institutional means of associating the traditional leadership with government, then it seems to me that the Marshalls (and in other ways, Palau) has adopted the correct approach in specifically giving to the traditional leadership a function of advice to the executive.



A further point to be noted is that nowhere has a specific right been conferred on traditional-leadership institutions to formally initiate legislative proposals (although undoubtedly such proposals could take the form of "advice" or "recommendations," and in the Marshalls the Council of Iroij can propose amendments to relevant Bills). For a society however much tradition-oriented that is trying to "modernize" itself, such failure to confer expressly a right of initiative just like the lack of final power of disposition is probably a positive factor as it tends to lessen the danger of confrontation and the possibility of a back-lash in the popular assembly. Such danger might prove to be a real one for a place such as Yap.

An obvious question to be answered in framing provisions for an institution representing traditional leadership is whether its competence is to be limited to matters relating to custom and tradition. This is the case in relation to the reconsideration of Bills (though not in relation to advice to the Cabinet) in the Marshalls, and to the veto power of the Yapese councils. In Vanuatu the competence extends to the preservation of Vanuatuan culture and languages. I think that the Marshalls' position is the soundest one in principle (especially if the right to advise were extended to include advice to the legislature), as it avoids the formal subjection of the legislative authority of the people to the authority of the traditional leadership while at the same time it allows the experience of the latter to be utilized. As a practical matter, it is hard to see a true dichotomy between the traditional and the non-traditional, since tradition and custom govern a large part of social life and relationships in the Pacific Islands (to a degree varying from country to country). Again, as the Yap examples suggest, merely legal restrictions may be ineffective to limit de facto influence.

My last point of comparison concerns the manner of selection of the members of the bodies representing the traditional leadership. Palau, the F.S.M. and the Cook Islands avoid the issue and leave it to ordinary law—although if the Palau Council of Chiefs is to be elective the position may be complicated by the constitutional guarantee of equality under the law,<sup>138</sup> unless the courts are prepared to hold that election by peers is a reasonable and proper basis of distinction. The same may be true of the specifically elective element of the F.S.M. Chamber of Chiefs. The Marshalls, Yap and Vanuatu specifically provide for election of members by their peers, though the Marshalls is noteworthy in allowing for an evolving leadership structure.<sup>139</sup>

Interesting omissions from the list of countries referred to in this Section are Papua New Guinea, Solomon Islands, Tuvalu and Kiribati—the last three being constitutionally related in that their constituent documents obviously derive from a common Whitehall model, although the three differ from each other in important respects. While I do not have sufficient information to form a concluded opinion as to why there is no traditional representation at the national level, the following considerations appear relevant:

Papua New Guinea is notorious for the many hundreds of traditional groupings that it includes and for its fragmentation, and it could well be thought impossible, or unnecessary, to provide for national representation of traditional leadership—even if in the absence of any formalized chiefly system such a leadership could be identified otherwise than by conventional elections in some form. The same applies, perhaps to a lesser extent, in Solomon Islands, although in that case there was a positive decision that "(the) appropriate role for chiefs and other traditional leaders is at the provisional and area government levels,"<sup>140</sup> which is more-or-less what was provided for in the constitution.<sup>141</sup>

In Tuvalu and Kiribati the position was rather different, as there were reasonably well-defined and operating bodies that could be drawn on (although in both cases the expense of government was a cause for concern). In fact, in Kiribati among the list of questions circulated for public discussion before the constitutional proposals were finalized was the following:

25. Is there any formal institutional way in which island maneabas could be associated with law-making?<sup>142</sup>

In Tuvalu, no such question was included in a similar list, but the island maneabas were consulted before the constitutional proposals were settled.<sup>143</sup> The upshot was that both countries opted for a procedure under which non-urgent Bills are circulated to island councils between first and second readings: this provision is specific in Tuvalu,<sup>144</sup> while no reason is given in Kiribati for the required delay between readings.<sup>145</sup> These procedures are quite informal and not institutionalized,<sup>146</sup> and the island councils have no direct voice but only the opportunity to express their views to, and to put pressure on, their representatives in the legislature. They provide an interesting contrast to the Marshallese and other similar provisions in that they seem to place a higher rating on the status of the elected representative as leader of his people and at the same time to reflect a more egalitarian approach. On the other hand, operating as they do before the

legislature has had a chance to make a concluded decision they might be more effective in getting grass-roots opinion to the legislature, even if in a rather unorganized way. Of course, grass-roots opinion and specifically leadership opinion are two slightly different things.

## PART II. THE TRADITIONAL RIGHTS COURT

### 7. The Traditional Rights Court and the judicial system

The general judicial system under the Constitution of the Marshalls is quite orthodox: it consists of a Supreme Court, which is basically an appellate court; a High Court, which is both a court of general jurisdiction and an appellate court from subordinate courts; and such District Courts, Community Courts and other subordinate courts as are provided by law. While the Traditional Rights Court is, like the Supreme Court and the High Court, established by the Constitution and its jurisdiction is laid down in the Constitution, it is in most ways an appendage to the system rather than an integral part of it.

The Traditional Rights Court consists of --

panels of 3 or more judges selected so as to include a fair representation of all classes of land rights, including, where applicable, the Iroijlaplap, Iroijedrik, Alap and Dri Jerbal; and shall sit at such times and places and be chosen on such a geographical basis, as to ensure fair and knowledgeable exercise of the jurisdiction conferred by this Section.<sup>147</sup>

Its size, membership and procedures are determined by the High Court unless and until the Nitijela makes provision for those matters by Act.<sup>148</sup> Rules have been made by the High Court.<sup>149</sup>

The jurisdiction of the Traditional Rights Court is treated in the Constitution under two heads: a general jurisdiction, and a particular jurisdiction in relation to the compulsory acquisition of land rights. In each case, the jurisdiction is ancillary to proceedings in the regular courts, and (with a puzzling exception which is discussed in the Addendum to this Section) is advisory only, though the "determination" or "opinion" of the Court must be given "substantial weight."

The general jurisdiction is limited to

the determination of questions relating to titles or to land rights or to other legal interests depending wholly or partly on customary law and traditional practice in the Marshall Islands.<sup>150</sup>

There is a problem with the word "titles" in this passage, which is also discussed in the Addendum to this Section. The jurisdiction may be invoked as of right by a party to a judicial proceeding pending in a regular court, but only on a certificate by that court that a "substantial question" within the jurisdiction of the Traditional Rights Court has arisen.<sup>151</sup> The T.R.C. Rules provide for the party who first applied for the referral of a question to this Court to prepare the order of certification and referral, and in the event of unresolved objection from another party the order is settled at a contested hearing.

The resolution of the referred question by the Traditional Rights Court,

shall be given substantial weight in the certifying court's disposition of the legal controversy before it; but shall not be deemed binding unless the certifying court concludes that justice so requires.<sup>153</sup> (emphasis added)

The words emphasized constitute the "puzzling exception" referred to above.

The particular jurisdiction of the Court relates to the assessment of compensation by the High Court in cases of the exercise of the right of eminent domain over land rights. The Constitution<sup>154</sup> states that before any private property is taken compulsorily the High Court must determine that the taking is lawful<sup>155</sup> and make an order for "prompt and just" compensation. It continues -

In determining whether compensation for land rights is just, the High Court shall refer the matter to the Traditional Rights Court and shall give substantial weight to the opinion of the latter.<sup>156</sup>

It should be noted that there is no reference to a binding effect.

The result is that, subject to the exception to which I have referred, the Traditional Rights Court is an advisory tribunal of a representative kind—representative not of the parties, but of the classes of right-holders. The position under the Traditional Rights Court Rules is discussed below.

Before turning to problems of interpretation, I might mention four other points which, although not constitutional matters, have a bearing on functions of the Traditional Rights Court.

Firstly, the Trust Territory Code<sup>157</sup> empowers what is now the High Court to select assessors to advise it in regard to local law and custom (but not to participate in the determination). In regard to matters within the jurisdiction of the Traditional Rights Court this provision will presumably be superseded, though it could well still apply in other cases involving custom.

Secondly, Rule 1 of the Special Rules of Civil Procedure (Rights in Land, Marshall Island (sic) District) of the High Court of the T.T.P.I.<sup>158</sup> requires a plaintiff in effect to set out in his pleadings what action he has taken to settle the matter by customary means and to state any relevant custom, and further provides that if the proceedings are an attempt to upset or disregard an Iroijlaplap's determination, the Iroijlaplap is entitled to notice and to be joined as an additional defendant (whether or not he has any other interest in the matter).<sup>159</sup> If utilized, these and other provisions of Rule 1 will certainly help clarify the conflict of views, as between the parties, on applicable custom. However, the joinder of the Iroijlaplap as a party, rather than his appearing as a witness, may make it unnecessarily difficult to obtain a completely disinterested panel in the Traditional Rights Courts; further, doubts have been expressed to me as to whether the Rule is, in practice, fully and properly utilized.

The third point concerns the applicability of the law of evidence. This is, naturally enough, not referred to in the Constitution, but the Traditional Rights Court Rules propose, at least as an interim step, that the rules of evidence applicable in the High Court will apply.<sup>160</sup> Experience in Papua New Guinea and elsewhere strongly suggests that this is not enough. For example, in a society with an oral tradition of record keeping, the exclusion of hearsay removes from the competence of the court some of the better, if not the best, sources of information. I suggest that the Traditional Rights Court (and indeed any court dealing with matters of custom and traditional practice) should be able to use any information or source of information available to it, including hearsay and opinion, and relevant authoritative books and other publications.

Finally, while the details of the organization of the Traditional Rights Court are not laid down in the Constitution they are provided for in the Traditional Rights Court Rules.<sup>161</sup> There are to be 12 judges: four Iroij,<sup>162</sup> four Alab, and four Dri Jerbal. Five judges are to be from the Ralik Chain and seven from the Ratak Chain. (These figures are, perhaps coincidentally, the same as the respective figures for membership in the Council of Iroij, and are also roughly proportional to

the respective total populations—neither of which necessarily provides the correct criterion.)

Appointments are for five years,<sup>163</sup> and are made by the High Court, which also has the power of dismissal for any cause for which a judge of the Supreme Court or of the High Court may be dismissed.<sup>164</sup> Legal qualifications are not required, but judges must be adult citizens of not less than 30 years of age who are "knowledgeable in the customs and traditions of the Marshall Islands concerning titles, land rights, and related matters."<sup>165</sup> There is a chief Judge, elected by the judges of the Court from among themselves.<sup>166</sup>

For any particular case, there is a panel of three judges (an Iroij, an Alab and a Dri Jerbal), the panels being appointed by the Chief Judge, subject to challenge for cause. A challenge is decided by the certifying court unless the grounds for it are not ascertained until after the actual referral to the Traditional Rights Court, in which case it is decided by the other members of the panel.<sup>167</sup> There is also provision for joint hearings by the Traditional Rights Court and the certifying court where it would be "in the best interests of justice, and economy in terms of time and cost," though in such a case the deliberations and decision of the Traditional Rights Court are made separately from and independent of the certifying court.<sup>168</sup>

Finally, there is provision for the Traditional Rights Court to sit en banc:<sup>169</sup>

(1) to secure and maintain uniformity of the decisions of the Traditional Rights Court, or (2) where the case involves a question of exceptional importance.<sup>170</sup>

A number of points stand out in connection with the Traditional Rights Court Rules.

Firstly, traditional selection processes, or peer selection, are not used, except insofar as they may be involved in the election of a Chief Judge. Rather, selection is through appointment by what will probably be for some time an expatriate High Court. However, the senior<sup>171</sup> Iroij member of a panel is the presiding judge of the panel,<sup>172</sup> and in the case of en banc proceedings in the absence of the Chief Judge the senior<sup>173</sup> Iroijlap<sup>174</sup> member of the Court presides.<sup>175</sup> These procedural provisions seem to draw on traditional, rather than Western, precedents.

Secondly, there is no separate representation of Iroijlaplap as distinct from Iroijerik, in spite of the fact that there may be conflicts of interests between members of these classes and that the Constitution requires representation of each (where applicable).<sup>176</sup>

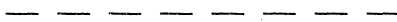
Thirdly, the total numbers of members is small, especially in the Ralik Chain, and in view of possible disqualifications for interest there may be a problem in forming intra-Chain panels.

Fourthly, within each Chain there is necessarily an imbalance between the classes of right-holders (although in the Ralik Chain there is no rank of Iroiherik) and this may make for problems in obtaining a "fair" representation of all classes of land rights" on any particular panel, as required by the Constitution.

Finally, there seems to be an implicit attitude that the Traditional Rights Court is in some way judicially inferior to the "regular" courts, even the technically subordinate Courts. This is a matter that might well lower the standing of the Traditional Rights Court, and of course its effectiveness.

ADDENDUM: Two problems of interpretation.

I referred above to two problems of statutory interpretation: the first, the statement that a determination of the Traditional Rights Court is not binding "Unless the certifying court concludes that justice so requires," the second, the question of the Court's jurisdiction as to "titles." To facilitate their consideration, these problems are considered in reverse order.



The second problem can be stated thus: does the word "titles" refer to titles to land, or to traditional titles or to traditional titles of rank and dignity (compare the Western Samoa provision quoted on page 34 below giving the Samoan Land and Titles Court jurisdiction over "matai titles and customary land")?

On a matter of the construction of language, it seems to me that the relevant provision refers to three subjects of jurisdiction: (a) titles; (b) land rights; (c) other legal interests depending on customary law and traditional practice. The question of titles to land would thus fall under (b), so that (a) would cover such controversies as the long-standing disputes over the positions of Iroiherik on Majuro and Arno Atolls.<sup>177</sup>

It is, of course, true that both (a) and (b) could be subsumed under (c), but both traditional titles of rank and land rights are sufficiently important to warrant special mention.

It is also relevant that the word "title" does not seem to be used in the Constitution in the context of a right to land, whereas "land rights" is defined as -

any right in any land in the Marshall Islands under the customary law or any traditional practice.<sup>178</sup>

In addition, "land rights" is clearly used in the eminent domain provisions of the Bill of Rights<sup>179</sup> to include all rights, titles and interests in land. Further, Article X deals under the heading "Traditional Rights" both specifically with land tenure and related matters, and generally with the customary law.

The point is an important one, both to individuals and to government. For example, membership of the Council of Iroij and of the Traditional Rights Court itself, and the right to take part in the election of members of the Council, depend on the possession of traditional titles, and under certain local government constitutions, some seats in local government councils are reserved for the holders of traditional ranks or titles.

The Traditional Rights Court Rules have adopted the view expressed above distinguishing "title" from "land rights."<sup>180</sup>

The first problem referred to at the beginning of this Addendum is more difficult. The relevant provision in full reads:

When a question has been certified to the Traditional Rights Court for its determination under paragraph (4), its resolution of the question shall be given substantial weight in the certifying court's disposition of the legal controversy before it; but shall not be deemed binding unless the certifying court concludes that justice so requires.

The legal difficulty here is that since a determination of the Traditional Rights Court can be made enforceable (i.e., "binding," in one sense) simply by being adopted and applied in the ultimate decision of the certifying court in much the same way that the opinion of an advisory assessor might be, what is the intended additional effect of the provision that such a determination becomes "binding" only if "the certifying court concludes that justice so requires"?

It is arguable that, when the certifying court comes to the appropriate conclusion, the determination becomes binding either on all persons, whether involved in the proceedings or not (i.e., as a decision in rem), or on the Traditional Rights Court itself, on other courts, or on both, in future cases (i.e., as a binding precedent). However, if any of these alternatives were intended it would have been very easy to so state. (From the lawyer's point of view, any such interpretation



raises peculiar conceptual difficulties that need not be detailed here.) It might be noted in passing that the provisions of the Traditional Rights Court Rules, referred to above, concerning proceedings en banc, seem to assume that a determination of the Traditional Rights Court sitting otherwise than en banc will not constitute a precedent binding on the Court as a whole.<sup>181</sup>

It has been suggested to me that the provision may be based on the concept that the doctrine of stare decisis (that is, of precedent) has no application in customary law, and that disputes are settled ad hoc. On that basis, the Traditional Rights Court would consider de novo any question referred to it unless a regular court has already concluded that an earlier determination of the Traditional Rights Courts should be accorded binding authority because, for instance, justice requires finality. Quite apart, however, from the fact that this does not settle the question of what the Constitution means by "binding," it also raises the question of whether the original certifying court should in effect say: "We approve this determination handed down by the Traditional Rights Court and declare it binding," or whether it should adopt ab initio the approach that in the instant case justice requires finality and that (unless the certifying court rejects the determination) the determination of the Traditional Rights Court should be binding for the future. I now turn to this question.

Another possible interpretation is that the conclusions of the certifying court as to the requirements of justice is intended to relate to the process of determination, irrespective of the result of that process in the particular case. To use lawyers' language, the matter is res adjudicata, and cannot again be raised. Here, too, there are conceptual problems, as well as linguistic ones.

There may be other possibilities, but perhaps the provision is not meant to be subject to linguistic or legalistic analysis in detail. The general thrust may be simply that the certifying court may reopen a question referred to the Traditional Rights Court or may elect not to do so, depending on its view of the "justice" of the case.

The problem is clearly one that requires authoritative settlement as soon as possible, for it concerns not merely a verbal or theoretical matter. For one thing, it raises the whole question of stare decisis in relation to determinations of the Traditional Rights Court. For another, it could well affect the technical availability of lines of appeal provided for by the Constitution.

## 8. Comparisons and comments.

Somewhat surprisingly, there is comparatively little in other Pacific islands constitutions that I have studied providing a place for the traditional leadership in the judicial process.

In Papua New Guinea, in spite of a declaration of the primacy of "Papua New Guinean ways,"<sup>182</sup> the only substantive provision is one allowing the establishment of "village courts," that is,

courts intended to deal with matters primarily by reference to custom or in accordance with customary procedures, or both.<sup>183</sup>

Vanuatu went a little further: the National Council of Chiefs could formally nominate one judge of the Supreme Court;<sup>184</sup> there is provision for "persons knowledgeable in custom" to sit with the Supreme Court and the Court of Appeal, and to take part in their proceedings;<sup>185</sup> Parliament is to provide for "village or island courts with jurisdiction over customary and other matters and ... the role of chiefs in such courts";<sup>186</sup> and the Government is to "arrange for the appropriate customary institutions or procedures to resolve disputes concerning the ownership of custom land."<sup>187</sup>

The only close analogy to the concept of the Traditional Rights Court is a skeletal enabling provision in Western Samoa:-

There shall be a Land and Titles Court with such composition and with such jurisdiction in relation to matai titles and customary land as may be provided by Act.<sup>188</sup>

The Cook Islands, however, has a not-unrelated provision<sup>189</sup> under which the Land Division of the High Court (formerly the Land Court) exercises in relation to land on the Islands of Mangaia, Mitiaro and Pukapuka only the jurisdiction formerly exercised by the Land Court "according to local custom," and may exercise a wider jurisdiction only at the request of the respective Aronga Mana (traditional assemblies, now generally equated to island councils). This is, of course, only an indirect conferring of judicial power, but it is unusual in that it appears to allow a traditional authority, and customary law, to bar the jurisdiction of a superior court, even on a case-by-case basis.

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The Traditional Rights Court in the Marshalls thus appears to be sui generis among the institutions that I have examined for the purposes of this paper. My only other comment at this stage (apart from the desirability of clarifying the matters referred to in the Addendum to Section 7 ) is that it is perhaps a pity that the Marshalls did not go a little further and provide for the Traditional Rights Court to supersede the assessor system completely: for example, in the fields of criminal law and family law, which under the Trust Territory Code are at least in part governed by custom,<sup>190</sup> as well as in the general application of custom by that Code.<sup>191</sup> The Constitution seems, however, to have prevented such jurisdiction being conferred by Act or rules of court.

### PART III—CONCLUSION

#### 9. General comments.

Before I go on to more general, and perhaps more basic, matters, it seems desirable to point out a major gap (deliberate or accidental) in the provisions relating to the Council of Iroij and the Traditional Rights Court—that is, the lack of a direct organizational link between the two.

I would have expected, for example, that the Traditional Rights Court would have had a direct responsibility for questions relating to eligibility to sit in the Council, but this responsibility (like the equivalent responsibility in relation to the Nitijela) is vested in the High Court. Of course, if my interpretation of the jurisdiction of the Traditional Rights Court over "titles" is correct,<sup>192</sup> the Traditional Rights Court may, if required, have a consultative function.

It might also not have been unreasonable to have found a role for the Council in relation to the membership of the Court, comparable with the former right of the National Council of Chiefs in Vanuatu to nominate a judge of the Supreme Court,<sup>193</sup> but this is not the case, either in the Marshalls Constitution or under the Traditional Rights Court Rules.

Leaving the matter aside, there are two aspects of the constitutional provisions for participation by the traditional leadership in the government of the Marshalls which impress me. On the one hand, there is the relative comprehensiveness of relationships, in that in one way or another the traditional leadership is

associated with all three branches of government—with the executive and the legislature through the Council of Iroij, with the judiciary through the Traditional Rights Court. The closest comparison is perhaps the Council of Chiefs in the original constitution of Vanuatu. On the other hand, there is a decided feeling of tentativeness in the approach of the Constitution to the incorporation of the traditional leadership. Also, their participation is peripheral (or perhaps even subordinate) in the sense that they have no final or conclusive functions but only advisory or consultative ones (if one leaves out of account the possible binding force of determinations of the Traditional Rights Court which is referred to in the Addendum to Section 7 of this paper). Moreover, their constitutional power of initiative is fairly slight. Whether this second aspect of the functioning of the traditional leadership is good or bad is debatable.

If one believes (as, for example, the framers of the Tonga and Western Samoa constitutions appear to have done) that the traditional leadership should retain, in the context of a specifically "Western" form of government, something approaching or analogous to its traditional place, then it is presumably a bad thing. If on the other hand, the intent is to combine elements of two systems, I for one think that in some ways it is not a bad thing at all. As I have suggested above, politically there are advantages for the Council of Iroij in the fact of being to some extent distanced from the legislature (although, as already noted, there is room for a widening of its functions), and there are similar advantages for it in not being given executive functions within a non-traditional executive structure.

As far as the Traditional Rights Court is concerned, I think it would be undesirable for it to be permitted to make decisions as to the Constitution or non-customary law, but at least in respect to constitutional issues it seems that its special constitutional position might be recognized by allowing it to state a case to the High Court. Outside this area, however, I feel that there is considerable scope for strengthening the jurisdiction of the Court, at the very least by making its determinations binding for the purpose of the proceedings to which they relate (perhaps unless "justice" requires otherwise), and by allowing for an appeal direct to the High Court from it. Especially if customary law and traditional practices are considered to be evolutive, it seems also that some express provision should be made for the precedential effect of its determinations. However, as in the case of the Council of Iroij, there is much to be said for avoiding a direct clash between the traditional and the "modernizing" legal institutions, and particularly for avoiding the deadening effect of a backward-looking judicial institution. To the

extent that the traditional structure, personified in the Council of Iroij, is expected to adjust—in a Marshallese and not a foreign-oriented way—to changing circumstances, this constitutes another reason for some link between the Council and the Court.

10. Is a traditional input desirable?

Throughout the preceding discussion I have assumed that, at least for some Pacific countries, provision for a traditional input into government is desirable and perhaps politically necessary, and that this might well be provided for in the constitution itself. It remains to look a little more closely at these assumptions, which have been questioned, as for example, by Guy Powles.<sup>194</sup> However, pursuing this discussion should be some considerations that I believe to be fundamental.

Firstly, the question whether or not a role for the traditional leadership should be provided, or allowed for, is emphatically one for each people (or for their representatives) to decide in the light of their perceptions of their needs and circumstances, perceptions that the outside consultant or adviser, no matter how sympathetic, can only partially share. The outsider can best limit himself to estimates, based on comparative and historical knowledge, of how such a role might function and how effective it might be, and of the possible results. Even the assessment "good" or "bad" should primarily depend on and relate to indigenous perceptions, not the perceptions and values of the outsider.

Secondly, it is of course possible that the outsider may be in a better position to appreciate the possibility of incompatibility between an imported constitution or political institution and an ongoing or proposed modification of a traditional institution. However, here again the resolution of such a conflict ought to depend on the perception of the people involved. It is all too easy for the outsider to proceed as if the resolution can only be unidirectional, that is, adverse to the "traditional" institution. As seen by those within the culture, the choice may well be real and difficult.

Thirdly, it is possible that accommodation of the traditional element may represent only a stage in development, and thus may be only transitory. But it is again too easy for the outsider to take this for granted. After all, it is only a few years since "everyone" knew that the advantages of individualized over traditional land tenure systems were so self-evident that if the people were given the opportunity to make an informed choice, the traditional systems would wither

away. Moreover, the fact that an institution is apparently transitory is not of itself decisive on the question, whether it is at any given time sufficiently important to be specifically provided for, by constitution or otherwise.

Finally, at the time of the framing of a constitution there may well be a real political need—if only a temporary one—to accommodate the traditional leadership in order to "get the constitution off the ground," even at the risk of some institutional incompatibility.

On the other hand, it cannot be denied that there may be a tendency to romanticize and idealize traditional elements. This is especially true of outsiders to a culture. Traditional elements undoubtedly have both positive and negative aspects and all must be weighed.

The issues raised by the assumptions that provision should be made for traditional leadership can be rephrased as two questions: should there be an institutional link between the traditional leadership and the "new" political and legal structure? And, are the two fundamentally incompatible? The answer to neither question is within the province of a "Western" legal consultant, or to a large extent within the true competence of lawyers as such. It is therefore with diffidence that I venture an opinion.

The first question involves a political matter and depends on the realities of the situation at the time and in the place. It is, for example, idle to have a given subject governed in theory by an imported system of law while in practice it is regulated by custom and tradition; it follows that if there is a living and adaptive system of customary law it ought to apply in its proper field,<sup>195</sup> and ought to be administered at least in the first instance by people used to it and to its ideological background. Here, it cannot be too much emphasized that a particular ethnic background does not imply a particular ideological understanding. For example, it used to be a common, and I think often a true, statement that African and Indian lawyers trained in the English common law were "more English than the English."

In the political and administrative fields the position is much the same. If the fact of the matter is, and will continue to be, that the traditional leadership structure plays a large part in the regulation of society, then it seems that there are three immediate possibilities: to oust it, as by revolution; to ignore it, and thereby to accept the fact that its operations will continue sub rosa or clandestinely; or to accommodate it in some way.

Whether the answer is that an institutional link between the traditional leadership and the new structure is desirable, or that it is not, is primarily a matter of local political judgment. If there is to be such a link, whether it should be established in the constitution, allowed for by the constitution, or simply not prevented by the constitution, is to some extent a matter on which the lawyer, as such may well offer advice.

As to the question of whether the traditional leadership and the new structure are incompatible, my answer is twofold. On the one hand, if the imported structure, or a particular part of it, is specifically intended to operate in the same way as its foreign counterpart and to produce the same results, then there may be incompatibility. On the other hand, if, for example as I am told was the case in the Marshalls, a foreign structure is chosen because of its resemblance to the traditional one,<sup>196</sup> and if that means that the imported structure is not expected to operate in precisely the same way, or to produce precisely the same results, as the foreign model, then the incompatibility may be more superficial than real. But to the extent that real incompatibility does exist, it is the importation that should be changed. Also, as is rather well brought out by Senator Carl Heine of the Nitijela,<sup>197</sup> the compatibility in question is more an ideological one than an operationally institutional one or even one of constitutional law, and ideologies differ from person to person, time to time, and place to place. Particularly in relation to ideological distinctions, outsider value-judgments are likely to be less than useful.

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The question of whether any institutional link with tradition and the traditional leadership should be provided for in the constitution is partly political and partly a matter of legal ideology concerning the form and contents of constitutions. Here there seems to be no uniformity of approach: for example, the constitution of Kiribati is silent; F.S.M. allows a role to be given to the traditional leadership; Solomon Islands requires one to be given, but structured below the national level; the Marshall Islands prescribes considerable structural and functional detail; Palau prescribes certain aspects and preserves others.

I described the question as partly a political matter for two reasons: in general, the decision as to what goes into a constitution at a particular time and in a particular place is in the first instance one to be arrived at by the politicians; and the specific decisions as to the desirable role (if any) for the traditional leadership and of tradition, and as to their importance as of the time and place, are of a

political nature, at times, even caught up in the confrontation of organized political parties.

Legal ideology is involved because a drafting approach is inherently incorporated into every constitution, as is well exemplified in Papua New Guinea: an ideology partially underlying that constitution is that anything of real importance in government should be dealt with in the constitution. My own view is that it is better (especially in a situation of development and change) for a constitution to be limited in extent to the essentials, this without prejudging what are the essentials in any given case. For example, while it is well within the "English" constitutional tradition, much of the details of procedures and so on that are included in the Marshalls constitution concerning the Council of Iroij could, it seems to me, well have been left either to Act or to the Council itself, without taking away from the importance or the functions of the Council. I might add that one gets a strong impression that the legal ideology involved is frequently that of the consultants, advisers and draftsmen rather than that of the politicians and the people affected (though I am not sure how far that was in fact the case in Papua New Guinea).

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Powles, in a paper that surveys all the constitutions discussed here (except Yap) as well as some other Pacific constitutions, obviously disapproves of, or at least is pessimistic about the results of, the formal involvement of the traditional leadership in government, except at the local level and then in such matters as dispute-settlement. His conclusion is --

In the light of what is seen as the inevitable sweep of egalitarian thinking, the perpetuation by statute of a leadership system based upon elements of inherited status or "class distinction" would appear short-sighted and anachronistic. To supplement chiefly with statutory power seems contrary to the interests of both systems—and of greater public participation in the decision-making which affects daily lives. As an institution competing freely with government and commerce, however, independent chiefship contributes to a wider and more interactive field for the exercise of power, the expression of opinion and mobility in the achievement of aspirations.<sup>198</sup>

Powles sees "conceptual conflicts and erosion of values implicit in any fusion of chiefly and Western systems."<sup>199</sup> His main problems apparently lie in the



difference between the natures of chiefly and "Westernized" power; the dependent or reciprocal nature of the relationship between a chief and his group; and the fact that dependence by a chief on an outside source of authority might undermine that relationship. At best, Powles sees only a temporary role for chiefship.

Leaving out of account the "inevitable sweep of egalitarian thinking"—I for one would be reluctant to assert that such a sweep would necessarily do away with chiefship, any more than it necessarily has with monarchies—it seems to me that Powles' argument may have some force if chiefs are called upon to exercise executive power granted by an outside source and to enforce non-traditional values, or enforce them in a non-traditional way. The same would apply to the exercise of judicial authority, if non-traditional rules are applied or non-traditional procedures used.

However, it seems to me that the argument as summarized above does not take account, sufficiently, of a number of factors. Conditions will vary from country to country, depending on the depth of the social (as distinct from the legal) entrenchment of chiefship. As suggested above, even if chiefship is a transitory institution there may well still be a place for it in a constitution during the transitional phase. Then, too, it seems to me that an advisory or consultative role as in, for example, the Marshalls or Vanuatu may not involve the same dangers or considerations as an executive role, as outlined above, nor may a judicial role of a traditional nature applying customary law.

Powles assumes that the imported institutions of government are expected to operate in the same way, and presumably in accordance with the same value-systems, as they do elsewhere. This may well not be true, or at least may well not continue to be true. On the other hand, it may well be that chiefship may develop and adjust, as have some of the successful monarchies. If so, the governmental system as a whole may develop into something quite different from that of the source of its imported institutions.

Finally, a very real danger to the chiefship lies in the possibility of an elected political leadership supplanting, totally or effectively, the traditional leadership. This is what the Marshalls and Vanuatu, for example, attempt to guard against.

I am, therefore, rather more optimistic than Powles in that I believe that in some countries, such as the Marshalls, an opportunity may be provided for the traditional leadership to contribute to government while itself developing—if in the

given case it is capable of doing so. If it cannot evolve in this way, it will become, at best, irrelevant.

But Powles and others have sounded other important practical warnings.

- \* It is futile for a constitution to attempt to freeze the traditional structure, and to introduce it directly into a "modern" governmental structure in the expectation that it will continue to function in the new environment exactly as it did in the old.
- \* A feed-back effect is to be expected—the functioning of traditional leadership in a non-traditional structure is likely to change the manner in which it operates in the traditional system.
- \* The imposition or acceptance of alien "modernized" procedures is likely to impose too much of a burden on traditional leaders, and to undermine both their understanding of and their effectiveness in their new roles.

These are dangers to be guarded against or (if possible) to be allowed for. The point of the experiment in the Marshalls is that it is an experiment, which could be as valuable to other countries in its failure as in its success. What is necessary is a study, in considerable depth, of the actual workings of this and analogous constitutional experiments elsewhere in the Pacific.

## APPENDIX

### Notes

#### GENERAL NOTES

1. Unless otherwise stated, a reference to an Article (Art.) or a Section (S) is a reference to an Article or a Section in the 1979 Constitution of the Marshall Islands.

2. A reference to the name of a country or state, possibly followed by a reference to an Article, Section, etc., is a reference to the constitution of that country or state, and, as the case may be, to the Article or Section therein.

"F.S.M.": The Federated States of Micronesia - Yap, Truk, Kosrae (Kusaie), Ponape.

"S.O.": Secretarial Order, made by the U.S. Secretary of the Interior and having legislative and constitutive effect.

"Rules of Procedure": The Rules of Procedure of the Nitijela, adopted 1 September 1981.

"T.R.C. Rules": The Traditional Rights Court Rules (see n. 149).

"T.T.P.I.": The Trust Territory of the Pacific Islands, administered by the United States.

"T.T.C.": Trust Territory Code.

"T.T.R.": Trust Territory Reports.

#### NOTES

1. For a general description of the 1979 Constitution, see my "The 1979 Constitution of the Marshall Islands: A Hybrid?" (The Parliamentarian, October 1982, Vol. LXI, No. 4, p. 230) and "From Washington to Westminster: The Constitution of the Marshall Islands" (Seminar Paper, Department of Law, Research School of Social Sciences, The Australian National University, December 1981). In a paper entitled "The Constitution of Niue and the Marshall Islands: Common Traits and Points of Difference" (P. Sack (Ed.), Pacific Constitutions , The Australian National University, Department of Law, Research School of Social Sciences, Canberra, 1982; p. 97) Alison Quentin-Baxter, who was primarily responsible for most of the drafting of the Marshall Islands Constitution, gives a valuable view of it as at the time when it was written, and of the reasons for many of its provisions.
2. See, for example, Jatios v Levi (ITTR 578 (1954), at p. 587.
3. The feminine form is Leroijlaplap, and the title carries the same status as Iroiylaplap. Incidentally "laplap" is sometimes spelled "lablab," and either form may appear as a separate word.
4. The Constitution uses the form "Iroi Jedrik."
5. The Constitution uses the form "Alap."
6. "Dri jermal" is usually translated "worker," meaning worker of the land," but the word does not seem to have the connotation "laborer," still less "peon," "serf," or even "peasant."
7. See, for example, Jatios v Levi, op. cit.
8. If this is how the constitution-makers saw the Iroi/Alap relationship, it is irrelevant for present purposes whether or not it is an accurate description except to the extent that any error of perception may, in practice, distort their intentions. And see Quentin-Baxter, note 1, above, pp. 103-4.
9. In constitutional usage, a provision is "entrenched" if it can be amended only in a special way (e.g., on the votes of a special majority, or with special notice of lengthened proceedings). A provision is said to be "specially

entrenched" if its amendment is made more difficult or more protracted than that of other provisions of the constitution. The "depth" of entrenchment provides some indication of the relative importance attached to the various provisions of a constitution at the time of its adoption.

10. Art. XII, S.2(1),(2).
11. See Norman Meller, The Congress of Micronesia (Honolulu, University of Hawaii Press, 1969), pp. 54, 155.
12. Norman Meller, The Congress of Micronesia, pp. 136-9
13. The term "Nitijela" was the traditional name of the group of Alab who met with their Iroij, referred to above.
14. Personal communication from a former Minister of the Marshall Islands. See, also, the paper by Alison Quentin-Baxter referred to in n.1, at p. 107 et seq.
15. The eligibility of Irojlaplap to sit in the Nitijela is implied by the disqualification of any such person from the Council of Iroij. Art. III, S.1(7).
16. As Legislative Counsel and Special Consultant to the Nitijela since 1980.
17. Art. III, S.4. Such power of the purse could constitute a major form of control over the Council, albeit a clumsy one.
18. Art. III, S.2(a).
19. Art. III, S.2(c).
20. Art. III, S.1(5).
21. Art. III, S.9(2).
22. Art. III, S.3; Art. X, S.2(3).
23. Nitijela Resolution No. 16/1979.
24. The original Constitutional Convention had special seats for 11 Iroij and one "Owner" (see, as to "Owner," n. 51 below)—District Law No. 23-32-2, S.2(b).
25. Art. XII, S.4(2).
26. Art. II, Ss, 12, 14, respectively.
27. Art. XII, S.3. This applies only to minor amendments (See Art. XII, S.2(2),(3)), and strictly speaking such amendments are not made "by" Bill, but "shall be considered and disposed of as if they had been proposed by Bill"; for present purposes the result is the same.
28. Art. XII, S.4(5),(6). Although the Constitution is not specific on the point, it seems that this would not be true of Bills for referenda on amendments submitted by a Constitutional Convention (Art. XII, S.4(4)), where the Nitijela is given no discretion.

29. In the present pattern of sittings of the Nitijela, however, with short sittings and long recesses, the practical effect of a request by the Council for reconsideration, given either after the Nitijela has recessed sine die or to the call of the Speaker, could be a delay of six months or more in the final disposition of a Bill.
30. Art, III, S.3(8).
31. Art III, S.3(1). It might be noted that a "Bill" does not become an "Act" when passed by the Nitijela, but only on certification by the Speaker that the Bill has been properly passed. (Art. IV, S.21(3)).
32. Art. III, S.3(2).
33. Art. III, S.3(4); Art. IV, S.21(1); Rules of Procedure, S.92(b).
34. Art. III, S.3(2). The word used is "requesting," but since the Nitijela must deal with the request, if it wants the Bill to go ahead the word means, in practice, "requiring."
35. Art. III, S.3(3).
36. Rules of Procedure, S.93(8).
37. Art. III, S.3(5), (7).
38. In this context, the word "may" must, for practical purposes, be given the force of "shall", unless the Nitijela has such little interest in its Bill that it does nothing at all, for the effect of Act III, S.3(4) is that if the Council requests reconsideration the Speaker cannot certify the Bill into law until the Nitijela has either amended the Bill or reaffirmed it. The Rules of Procedure set out detailed rules in this regard (see Part VIII, Division 4—Special Provisions Relating to Re-consideration of Bills Requested by the Council of Iroj—Ss.92-94), which for practical purposes guarantee that positive action will be taken.
39. This seems to suggest that an amendment could be made that had nothing to do with the Council's action, or even with custom or tradition. The Rules of Procedure, however, limit amendments to matters arising out of the Council's resolution and observations (Rules, S.93(2)).
40. Art. III, S.3(9); Art. IV, S.21(1); Rules of Procedure, S.90(1).
41. Art. III, S.3(6).
42. Rules of Procedure, S.51.
43. This reference to "readings" of an amendment seems odd—I am not aware of any such procedure.
44. Art. X, S.2(3).
45. Art. XIV, S.1.

46. Rules of Procedure, S.95(1).
47. P.L. 1981-2. The importance of custom was illustrated by the fact that the people of a number of local government areas insisted that their Alabs (and on occasion Iroi) should be ex officio members of their local government councils. The point was not raised on the Bill nor by the Council of Iroi, however, but in discussions as to the contents of the local government constitution.
48. P.L. 1981-18. Although I was away from the Marshalls at that time, my understanding is that the impetus for this Bill arose out of the confused situation on "Jebrill's side" of Majuro Atoll, and that its wider implications were missed both in the Nitijela and in the Council of Iroi.
49. As, for example, turning the present talk about paying Council members full-time salaries because members of the Nitijela are compensated on a full-time basis—pointing up how this fails to grasp the constitutional role of the Council.
50. The Ralik ("sunset" or western) and Ratak ("sunrise" or eastern) Chain are the two chains of atolls and islands that make up the Marshalls.
51. Likiep Atoll was acquired in "fee simple" (properly, under German law, by way of absolute ownership) in about 1887 by three Europeans, Ingalls, Capelle and deBrum, but Ingalls sold out to the others afterwards. The Capelle and deBrum families (who are now assimilated as Marshallese are known as "Owners", and since at least from about 1955 their land rights on Likiep have been legally recognized as being the same (with some minor variations) as those of Iroijlaplap, subject to agreements of those concerned and to action of the Government (see Monna v Capelle, M.I. District Civil Action No. 49 (1955).
52. Art. III, S. 1(7).
53. See Lainlij v Lajuon (1 TTR 113 (1954)) at pp. 114-5); Labina v Lainej (4 TTR 234 (1964)) at pp. 243-4.
54. That is, the land formerly under the authority of Iroijlaplap Jebrik (sometimes spelled "Jebik") Lukotworok, who died in 1919 and has not been replaced.
55. For discussion of the situation on "Jebrik's side", see in particular Levi v Kumtak (1 TTR 36 (1953)) and the same case on appeal under the name Jatios v Levi (1 TTR 578 (1954) at pp. 583-4).
56. See Joab J. v Labwoj (2 TTR 172 (1961) at pp. 174-175), and dispatch DTG 172540Z August 1960 from the High Commissioner, T.T.P.I., quoted there.
57. There is multiple representation of a district in the Ralik Chain (excluding Ujelang), where 4 Iroijlaplap represent the district.
58. No procedure is laid down, nor is it suggested that one should be laid down, and in particular there is no requirement of a formal ballot. It seems that the intention was that the selection would be agreed by consensus.

59. Art. III, S.1 (4)(a), (b).
60. Art. III, S.1(4)(c).
61. Nitijela Resolution 18/1979. There was no similar resolution for 1981 or 1982.
62. Art. III, S.1(4)(d).
63. Art. III, S.1(5).
64. As had happened in the case of Lainlij v Lajuon (1 TTR 113 (1954)). On the case of Arno Atoll, ". . . except for a very few years there has been no iroij lablab over the eastern Arno lands in question from 1932 until . . . (1971)" and later (Bina v Lajuon (5 TTR 336 (1971), at p. 372).
65. It cannot be too much emphasized that in traditional society Iroij not only have rights, but also have obligations which will be enforced by the Courts. In fact, as a matter of law the modern responsibilities of Irojlaplap may be more onerous than their original ones, and their prerogatives less. See for example, the discussion in Labina v Lainej (4 TTR 234 (1969)).
66. Art. III, S.1(3).
67. Art. III, S.8.
68. Art. III, S.5(1),(2). Appointments are made, before the dispatch of any other business, at the first meeting in each calendar year and, as required, at the first meeting after the occurrence of a casual vacancy.
69. Art. III, S.5(3).
70. Both this provision and Art.III, S.9(2) refer to qualification, without stating what the deputy must be qualified for, or to do, or alternatively what the qualifications are, although S.9(2) relates the question to "customary law and . . . traditional practice" which S.9(1) does not. For the lawyer this raises problems of interpretation that the Constitution itself does not resolve. For what it is worth, my conclusion is that the deputy must be a person who would be acceptable, in the traditional context, to stand in for general purposes, qualified by the proviso that the Council must pay greater heed to "customary law and . . . traditional practice" than must the member himself (who, after all, is making a personal choice).
71. Art. III, S.9(1).
72. Art. III, S.9(2).
73. Art. III, S.9(3).
74. Art. III, S.1(8).
75. Art. III, S.7(4).
76. Art. III, S.7(1).

77. I realize that "during" may mean either "throughout" or "at some point in", but in context the latter seems to me the more likely meaning.
78. Art. III, S.7(2).
79. Art. III, S.7(3). The quorum may include a deputy or deputies.
80. Art. III, S.6. I have already witnessed a case where, I think because of diffidence, the oldest member refused to make herself available.
81. Art. XIV, S.3.
82. Art. III, S.5(3)(c).
83. Art. IV, S.15(7).
84. Art. III, S.10(2),(3).
85. Art. IV, S.15(9).
86. Art. III, S.4.
87. Art. IV, S.19.
88. Art. III, S.10(1).
89. Art. IV, S.16(4).
90. Art. IV, S.16(2)
91. Art. IV, S.16(3).
92. Art. III, S.11.
93. I understand that "Palau" is the official name in English, "Belau" in Palauan.
94. That is, the bicameral legislature of Palau.
95. Palau, Art. VIII, S.6.
96. Palau, Art. VIII, S.1.
97. Palau, Art. IX, S.15.
98. Palau, Art. V.
99. The F.S.M. Bill of Rights.
100. The expression "compelling social purpose" is not used in Art. IV. Explanations provided to the 1975 Micronesian Constitutional Convention related this expression to the U.S. doctrine on constitutionally-guaranteed rights (see the forthcoming book by Norman Meller on the 1975 F.S.M. Constitution).



101. Resolution No. 32 of the Micronesian Constitutional Convention, adopted 24 October 1975, before the fragmentation of the T.T.P.I. The resolution is to be included with all copies of the Constitution "so that the intent of the Delegates may be evident to all who read the Constitution." See TTC, Vol. 2, p. 319 (1980 Edn.).
102. Personal communication, 20 November 1981.
103. F.S.M., Art. IX, S.11.
104. The original allocation of seats on the basis of population was: Kosrae (Kusaie)-1; Yap-1; Ponape-3; Truk-5 (Public Law 1 C1, S.7, 1978). This followed F.S.M. Art. XV, S.6.
105. I am grateful to Daniel R. Foley, Legislative Counsel and Peter P. Fagal Chugrad, Assistant Legislative Researcher, First Legislature of the State of Yap, for much of the information on which this material is based.
106. 3 TTC Ch. 4 (1980 Edn.).
107. Mimeographed, 1982.
108. 3 TTC S. 333(1980 Edn.)
109. Revised Yap Constitution, Art. III, S.1.
110. 3 TTC S.381 (1980 Edn.).
111. 3 TTC Ss. 309, 310 (1981 Edn.); revised Yap Constitution, Art. V, Ss. 16 17.
112. 3 TTC S.311 (1980 Edn.); revised Yap Constitution, Art V, S.19. There was (and is), however, provision for the legislature on a single reading, to amend a disapproved bill to meet the councils' objections, but the amended bill is subject to further disapproval (3 TTC S.310 (1980 Edn.); revised Yap Constitution, Art. V, S.17).
113. Powles (Legal Systems of the South Pacific, International Association of Law Libraries, 8th Course on Law Librarianship, Australia 1981, Paper No. 8, p. 5) is of the opinion that either council can veto. The Legislative Counsel to the Yap Legislature takes, with me, the other view, which is confirmed as to practice by the examples given in the text below. The point is not clarified in the revised constitution.
114. Personal communication.
115. 3 TTC S. 309 (1980 Edn.); revised Yap Constitution, Art. VI, S.16.
116. 3 TTC S.315 (1980 Edn.).
117. Revised Yap Constitution, Art. VI, S.2.
118. 3 TTC Ss. 334, 335 (1980 Edn.).
119. 3 TTC S. 360 (1980 Edn.).

120. F.S.M., Art. V, S.1—See pp. 17,18 above.
121. See S. A. de Smith, Microstates and Micronesia (New York: New York University Press, 1970), pp. 162-166, esp. at p. 163.
122. Vanuatu, Art. 2(1).
123. Vanuatu, Art. 28(1).
124. Vanuatu, Art. 28(2).
125. Vanuatu, Art. 72.
126. Vanuatu, Art. 74.
127. Tonga, Arts. 59, 60, 63.
128. Fiji, S.45(1)(a).
129. Western Samoa, Art 44(1), which was amended to reduce the proportion of "non-matai" seats. The matai vote was in fact provided for in the Electoral Act 1963, and see n. 130 below as to recent judicial decisions on the relevant provisions.
130. Pacific Islands Monthly, Vol. 53, No. 3, March 1982, p. 19.  
 On 8 March 1982 the Chief Justice of Western Samoa held invalid the provision of the Electoral Act 1963 that laid down the matai franchise on the ground that they contravened the equal protection and anti-discrimination provisions of the Constitution (Art. 15) (In the Matter of the Electoral Act 1963 and The Judicature Ordinance 1961: Saipa'ia Olumalu and Others v The Attorney-General and Others, mimeographed, 1982). This thoroughly Westernized decision was reversed on appeal by the Court of Appeal (The South Sea Digest, 24 September 1982, p. 3). From the point of view of the "English" lawyer the decision on appeal is particularly interesting because it was based largely on the proceedings surrounding the adoption of the constitution.
131. Cook Islands, Art. 8.
132. Ron Crocombe (Ed.), Land Tenure in the Pacific (Melbourne, O.U.P., 1971), p. 87, n.9.
133. Crocombe op. cit., p. 66.
134. Guy Powles, "Traditional Institutions in Pacific Constitutional Systems: Better Late or Never?" (P. Sack (Ed.), Pacific Constitutions, The Australian National University, Department of Law, Research School of Social Sciences, Canberra 1982, p. 345, at p. 357).
135. Cook Islands, Art. 9(a).
136. Cook Islands, Art. 11.
137. It has been suggested that my reference to the Yapese vetoes as being executive rather than legislative in nature is misleading, for such a veto is part

of the legislative process itself. Possibly because my legal background derives from England rather than the United States, I draw a distinction between three different kinds of "veto", of which the following are illustrations:

In Australia, legislative power is vested in "a Federal Parliament, which shall consist of a Queen, a Senate and a House of Representatives" (Australia, S.1) The "Royal Assent" is therefore part of the process of converting a Bill into an Act, although it is for practical purposes a formality and is given by the Governor General (on behalf of Her Majesty) as decided by the Federal political executive.

In Tuvalu, "Parliament may make laws for the peace, order and good government of Tuvalu" (Tuvalu, S.57), Parliament consisting only of elected representatives (Tuvalu, S.46) That legislative power "shall be exercisable by Bills passed by Parliament and assented to by the Governor-General on behalf of Her Majesty" (Tuvalu, S.58(1)), the Governor-General acting in this matter as directed by the Tuvaluan political executive. Similarly, in the Republic of Kiribati the legislative power "shall be exercised by Bills passed by ... [the Maneaba ni Maungatabu, i.e., the legislature by and out of which the president and the ministers are chosen and of which they remain members] and assented to by [the Beretitenti, i.e., the president]".

In all such cases, "assent" is clearly part of the process of making a law, even though the power (if any) to withhold assent is sometimes, erroneously, called a "veto" power.

The third category is quite different. It was common in British and Australian dependencies, for example, for the legislative power, exercisable by "Act", to be conferred on a local legislature, subject to "disallowance" by the Crown, a Governor/Administrator or sometimes a Metropolitan Minister. This is a true veto, in that the law is made and is nullified *ex post facto*. There is a similar situation in the Marshalls at the moment, as under U.S. law (but not under the Constitution of the Marshalls, which is subject in this regard to the relevant U.S. law) an Act of the Nitijela can be "suspended" (i.e., vetoed or nullified) by the U.S. High Commissioner for the T.T.P.I. In cases in this category the "veto", being exercised independently of the legislature, is as I see it, "executive" and not "legislative", in nature.

138. Palau, Art. IV, S.5.
139. See pp. 11-14 above,
140. Report of the Solomon Islands Constitutional Conference, London, September 1977 (Lond., H.M.S.O., Cmd. 6969), p. 12, pars. 55,56.
141. Solomon Islands, S.114(2).
142. Report of the Constitutional Convention 1977, App. C, p. 22. Island maneaba are traditional island assemblies.
143. Tuvalu House of Assembly: Report of a Committee to Ascertain the Views of Tuvaluans on the Constitutional Provisions Best Suited to an Independent Tuvalu (Funafuti, February 1977): the questionnaire is App. A, p. 15.

144. Tuvalu, S.60(2). The provision is made more effective by the Rules of Procedure, which require a report of the debate on the first reading of a non-urgent Bill to be sent to island councils for comment, and for their comments to be considered at a separate stage in proceedings (called a "reading", which is a rather confusing misnomer) (Rules, S.21).
145. Kiribati, S.68(3).
146. But as to Tuvalu, see n. 144 above.
147. Art. VI, S.4(1).
148. Art. VI, S.4(2).
149. "Rules Providing for the Size, Membership and Procedures of the Traditional Rights Court" (referred to here as the "T.R.C. Rules"), dated 9 September 1982, effective 10 September 1982.
150. Art. VI, S.4(3).
151. Art. VI, S.4(4).
152. T.R.C. Rules, Rule 8.
153. Art. VI, S.4(5).
154. Art. II, S.5(4).
155. Art. II, S.5 lays down certain criteria for lawfulness. It includes a prohibition on the taking of customary land rights: "if there exist alternative means, by land fill or otherwise, of achieving at non-prohibitive expense the purpose to be served by such taking" (Subs.(3)).
156. Art. II, S.5(7).
157. 5 TTC S.353 (1980 Edn.).
158. Until replaced by Act or rules of court made under the Constitution, the T.T.P.I. rules of procedure apply in the constitutional courts.
159. The lawyer will notice that Rule 1, while adjectival in form, is substantive in nature.
160. T.R.C. Rules, Rule 23.
161. T.R.C. Rules, Rules 1-4, 19.
162. The T.R.C. Rules specifically state "Iroij members", whereas the Constitution (Art. VI, S.4(4)) specifically, though not exclusively, refers to Irojlaplap and Irojdedrik.
163. T.R.C. Rules, Rule 3.
164. T.R.C. Rules, Rule 4.

165. T.R.C. Rules, Rule 2.
166. T.R.C. Rules, Rule 10.
167. T.R.C. Rules, Rule 11, 12(b)(A).
168. T.R.C. Rules, Rule 13.
169. En banc proceedings are "proceedings held before the entire membership, or a quorum of the entire membership of the Traditional Rights Court" (T.R.C. Rules, Rule 19(a))
170. T.R.C. Rules, Rule 19(b).
171. No criterion of seniority is prescribed. Compare Art. III, S. 6(3), where the choice of an acting chairman of the Council of Iroij is based on age.
172. T.R.C. Rules, Rule 12(b).
173. See n. 171 above.
174. Note that the T.R.C. Rules do not explicitly require any Iroijlaplap membership.
175. T.R.C. Rules, Rule 19(c).
176. Art. VI, S.4(1).
177. See, for example, as to Majuro Levi v. Kumtak (1 T.T.R. 36 (1953)) and Jatios v. Levi (1 T.T.R. 578 (1954)), and as to Arno Labina v. Lainej (4 T.T.R. 234 (1969)).
178. Art. XIV, S.1.
179. Art. II, S.5.
180. T.R.C. Rules, Rule 5.
181. Art. VI, S.4(5).
182. P.N.G. Preamble, National Goals and Directive Principles No. 5.
183. P.N.G. S.172(2), and S. Sch. 1.2(1).
184. Vanuatu, Art. 47 (4). This was the original provision, but by the Constitution First Amendment Act (1980) it was replaced by a provision for the appointment of members of the judiciary, other than the Chief Justice, to be made on the advice of a Judicial Service Commission.
185. Vanuatu, Art. 49.
186. Vanuatu, Art. 50.
187. Vanuatu, Art. 76. The analogy with Rule 1 of the Special Rules of Civil Procedure in the Marshalls (see p. 29 above) is obvious.

188. Western Samoa, Art. 103.
189. Cook Islands, Art. 48(3).
190. 1 TTC S.103 (1980 Edn.); 39 TTC Ss.4,55 (1980 Edn.).
191. 1 TTC S.102 (1980 Edn.).
192. See the Addendum to Section 7 of this paper.
193. Vanuatu, Art. 47(4). But see n. 184 above.
194. See n. 134 above.
195. I am not denying that it may be necessary, for legal or non-legal purposes, to abolish or alter customary rules, or that it is possible that a customary legal system may lose its vitality and usefulness: see, for example, John Goldring, The Constitution of Papua New Guinea (The Law Book Company Limited, Sydney, 1978) Ch. 11 passim and esp. his quotation from Jain on pp. 168-9. There is also an important distinction to be drawn between custom as law and custom as a source of law or of legal ideas (compare P.N.G., S.Sch.2.3(1) (c)).
196. See my "From Washington to Westminster ..." (n.1 above), Section 8.
197. Carl Heine, Micronesia at the Crossroads (The University Press of Hawaii, Honolulu, 1974) passim, esp. under index references to "modernization" and "tradition". Heine emphatically opts for "modernization" with its consequences, but does not necessarily equate "modernization" with the rejection or abandonment of a distinctively Marshallese identity.
198. See the reference in n. 134 above.
199. Ibid., p. 10.