UNIVERSITY OF HAWAII LAW REVIEW

VOLUME 10

1988

University of Hawaii Law Review

Volume 10 / Number 1 / Summer 1988

ARTICLES

Papua New Guinea's Indigenous Jurisprudence And The Legacy Of Colonialism

by David Weisbrot*

I. INTRODUCTION

Papua New Guinea is by far the geographically largest,[1] most populous,[2] and resource-rich of the Pacific Island states.[3] It was seventh among Pacific Island states to achieve independence, in September 1975,[4] but its decolonization represented a watershed in legal and political development in the region. Papua New Guinea's independence created pressure, felt most keenly by Great Britain, for further decolonization in the region. Between 1978 and 1980, Tuvalu, the Solomon Islands, Kiribati and Vanuatu emerged as independent states.[5]

The colonial regimes in pre-independence Papua New Guinea were relatively

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* Associate Professor of Law, University of New South Wales, Sydney, Australia; formerly Dean of the Faculty of Law, University of Papua New Guinea.

[1] At 462,000 square kilometres, Papua New Guinea has more than seven times the land mass of the rest of the independent Pacific combined and is more than sixteen times larger than the second largest state, the Solomon Islands.

[2] With a 1987 population of 3.5 million, Papua New Guinea has nearly three times the total of the other ten independent states combined, and is nearly six times more populous than Fiji, the next most populous state. Taking into account all of the South Pacific region, including territories and dependencies of metropolitan states, Papua New Guinea comprises over 60 per cent of the total population of the 22 South Pacific entities.

[3] Papua New Guinea is a major exporter of gold, copper, coffee, copra and cocoa. Although phosphate-rich, population-tiny Nauru has a higher per capita income, Papua New Guinea is alone among Pacific Island states with real prospects for sustained economic growth. *See* Connell, *Development and Dependency: Divergent Approaches to the Political Economy of Papua New Guinea*, in MELANESIA: BEYOND DIVERSITY 501 (R.J. May & H. Nelson eds. 1982).

[4] Western Samoa was the first Pacific Island state to gain independence in 1962. It was followed by the Cook Islands in 1965, Nauru in 1968, Tonga and Fiji in 1970, and Niue in 1974. The Cook Islands and Niue remain in free association with New Zealand.

[5] Independence was achieved in Tuvalu and the Solomon Islands in 1978, in Kiribati in 1979 and in Vanuatu in 1980. Papua New Guinea, Vanuatu and the Solomon Islands now form the so-called "Melanesian Spearhead" caucus within the South Pacific Forum, which strongly supports independence for the French territory of New Caledonia.

typical of their era. The formal system of courts and laws represented a strand of Western common law that was modified for the exigencies of frontier rule but not for the radical dissimilarities of culture, custom and social organization. The reach of the colonial administrations was limited. Western law and institutions barely penetrated the daily lives of the majority of the population who lived their lives in traditional ways. The authoritarian and patronizing nature of the colonial legal system gradually gave way in the 1960's to a form of liberal legalism which sought to involve indigenous people, but not indigenous ideas or institutions, in the legal process. As far as the formal system was concerned, Western law was still central and supreme, with pockets of custom allowed to exist at the margins.

In the push towards independence in the early 1970's, Papua New Guinean political leaders perceived law to be the "cutting edge of colonial rule,"[6] and much of the decolonization rhetoric involved expression of the urgent need for law reform and development.[7] This reform and development was not intended to result in a mere imitation of Australian, English or American legal systems. Rather, it was to involve the fashioning of a new, culturally sensitive, Melanesian jurisprudence which blended customary law and institutions with modern Western law and institutions in an appropriate mix.[8]

In the immediate pre-independence period, an indigenous Constitutional Planning Committee was established. A system of custom-based Village Courts and Land Courts was also devised to run parallel to the existing, formal common law courts. A Law Reform Commission was foreshadowed and a number of other measures were taken in an effort to customize the legal system.

Unfortunately, much of this momentum has dissipated in the twelve years since independence. Despite the clear dissatisfaction with the inherited legal system and the popular belief that customary law should play a central role in the development of new laws and legal institutions, the anticipated legal transformation has not eventuated.

The failure to bring about the needed legal changes may be attributed to five broad factors. First, there is the well-known phenomenon that once independence is finally achieved, the vigor of the anti-colonial debate makes way for new political struggles and realities.

Second, the post-colonial period in Papua New Guinea is generally characterized by a de-emphasis on law reform contrasted with great concern for economic development.[9] This is quite apparent from the failure by Parliament

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[6] P. FITZPATRICK, LAW AND STATE IN PAPUA NEW GUINEA 57 (1980).

[7] Paliwala & Weisbrot, *Changing Society Through Law: An Introduction*, in LAW AND SOCIAL CHANGE IN PAPUA NEW GUINEA 4-5 (D. Weisbrot, A. Paliwala & A. Sawyerr eds. 1982) [hereinafter LAW AND SOCIAL CHANGE.

[8] *Id.*

[9] Weisbrot, *Integration of Laws in Papua New Guinea: Custom and the Criminal Law in Con-*

even to consider major Law Reform Commission reports, from general parliamentary debates, and from the limited legislative programs of successive governments. Although "law and order" is an important issue,[10] law reform is not.

Third, there are elements of conflict, confusion and technical failure in the provisions of the Constitution relating to legal development and the "underlying law." These conflicts make it difficult for significant change to come about.

Fourth, and most critically, the institutions charged by the Constitution with the development of Papua New Guinea's indigenous jurisprudence are failing to earnestly approach the task. The National Parliament is not reviewing the bulk of inherited colonial legislation. It is not debating or acting on important Law Reform Commission proposals. Nor is it formulating its own law reform initiatives aimed at "customising" the legal system. Provincial Governments and Local Government Councils are also not particularly active in this area. Furthermore, the superior courts appear ambivalent about the clear constitutional invitation to be innovative and activist in fashioning an indigenous jurisprudence. They are too often content to act as successors to the colonial courts in perpetuating the dominance of Western law.

Finally, the legal profession, for its part, has played virtually no role in the search for a Melanesian jurisprudence. As a collective agency, the profession is not lobbying for legislative change to the substance or processes of the legal system, nor is it leading public debate on the shape or future of the Papua New Guinea legal system.

This article begins with a political history and background of Papua New Guinea. It then examines impediments to the development of a uniquely Melanesian jurisprudence. Focus is on the failure of the judiciary, legislature and legal profession to exert their powers to effect constitutionally mandated change. Finally, the article examines the continued survival of indigenous custom and explores the possibility of making up for a lost decade.

II. HISTORY AND BACKGROUND

Western contact with what is now Papua New Guinea began in the mid-sixteenth century. It was not until 1884, however, that the area came under European dominion with German proclamation of a Protectorate over the northeast quadrant of the main island of New Guinea and the associated offshore islands.[11] Under pressure from its Australian colonies who were fearful of

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flict, in LAW AND SOCIAL CHANGE, *supra* note 7, at 96.

[10] Weisbrot, *The Papua New Guinea Minimum Penalties Legislation*, 18 AUSTRALIA NEW ZEALAND J. OF CRIMINOLOGY 164 (1985).

[11] The German territory was known as Kaiser Wilhelm's Land. *See generally*, S. FIRTH, THE GERMANS IN NEW GUINEA (1983). The Dutch had earlier claimed the western half of New

German expansionism in the region, Britain quickly declared a Protectorate over the southeast quadrant on November 6, 1884.[12] Britain was also motivated by its desire to preserve the Torres Strait as a strategic British waterway between the Pacific and Indian Oceans.

The Protectorate of British New Guinea became the Australian Territory of Papua after a transference of responsibility in 1906, five years after Australia's own federation and independence.[13] German New Guinea also came under Australian control, first through military conquest in 1914 during World War I, and subsequently in 1921 as a Class "C" Mandate of the League of Nations, after Germany was divested of its overseas colonies by the Treaty of Versailles.[14]

The colonial regimes in Papua New Guinea "received" Western law through a variety of legislative and doctrinal means.[15] Colonial administrations treated the received, Western law as the only official, formal law. It combined this, however, with "a limited *de facto* recognition of 'custom' which was permitted to continue to govern the lives of the indigenous population unless the colonial state and its legal system decided to intervene."[16] The areas in which indige-

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Guinea in 1828, which is now the Indonesian territory of Irian Jaya. For a discussion of law in German New Guinea, see S.S. MACKENZIE, THE OFFICIAL HISTORY OF AUSTRALIA IN THE WAR OF 1914-1918: VOLUME X - THE AUSTRALIANS AT RABAUL 254-68. *See also* Chalmers, *A History of the Role of Traditional Dispute Settlement Procedures in the Courts of Papua New Guinea*, in LAW AND SOCIAL CHANGE, *supra* note 7, at 173.

[12] H. NELSON, PAPUA NEW GUINEA: BLACK UNITY OR BLACK CHAOS 36 (1974).

[13] Australia assumed control pursuant to the Papua Act (1905)(Cth).

[14] The two territories were separately administered until the middle of World War II, when the martial Australian New Guinea Administrative Unit (ANGAU) replaced the civil administration in the face of the Japanese invasion. In 1945, the Territory of Papua and the new United Nations Trusteeship Territory of New Guinea were amalgamated under a single Australian civil administration, the charter for government eventually being the Papua and New Guinea Act (1949)(Cth).

[15] The English common law was said to have been received by virtue of colonial legislation. The Courts and Laws Adopting Ordinance § 4 (1889) brought the common law to Papua "so far as the same are applicable to the circumstances of the Territory and are not repugnant to or inconsistent with [any written law]." The Laws Repeal and Adopting Ordinances § 16 and sched. 2 (1921) and (1924) achieved the same effect in New Guinea. *See* R. O'REGAN, THE COMMON LAW IN PAPUA AND NEW GUINEA 297 (1971); *see also* Mattes, *Sources of Law in Papua and New Guinea*, 37 AUSTL. L. J. 148 (1963). It was a matter of controversy in the courts what effect English statutory modification had on the received law in Papua New Guinea. *See* Booth v. Booth, 53 Commonwealth Law Reports [C.L.R.] 1 (1935) and In Re Johns, [1971-72] Papua New Guinea Law Reports [P.N.G.L.R.] 110 which both support the view that statutory modification in England did concurrently alter the law in Papua New Guinea. *See also* Murray v. Brown River Timber Co. [1964] P.N.G.L.R. 167 which strongly opposed that view.

[16] P. Sack, "Law" and "Custom" in Papua New Guinea: Separation, Unification or Co-operation? 3 (Aug. 16, 1986) (unpublished paper presented at the Commission on Folk Law and Legal Pluralism Conference in Sydney, Australia). The reception legislation contained some limited references to customary law. In New Guinea, the Laws Repeal and Adopting Ordinance § 10

nous custom was permitted to operate effectively included such crucial matters as land use and ownership, succession, family law, and compensation for traditional wrongs. This pragmatic "two spheres approach" was thought to be an interim solution to the practical and logistical problems of colonial administration. It was envisaged that Western law would gradually, but steadily and ultimately completely replace custom as the local population "advanced."[17]

In 1960, the Australian administration commissioned Professor David Derham of Melbourne University to review and report on the system of administration of justice in Papua New Guinea. Derham was very critical of the autocratic nature of the colonial administration and courts, and the failure to involve the indigenous population in the justice system other than as non-commissioned police or as criminally accused. Among other recommendations, Derham suggested that a system of Local Government Councils be established.[18] He recommended that the racially separate Native Administration Courts be replaced by magisterial courts of summary jurisdiction. As a policy goal, Derham suggested that responsibility for these institutions be assumed by Papua New Guineans.[19]

Derham also recommended that legislation be prepared which would provide for the curial recognition, application and enforcement of native custom in certain specified circumstances.[20] This recommendation resulted in promulgation of the Native Customs (Recognition) Act (1963). Derham emphatically rejected, however, suggestions[21] that a system of "native courts" be established which, like their African counterparts and contemporary Village Courts in Papua New Guinea, would rely on customary law as the source of most substantive and procedural rules. As Derham wrote:

(1921) provided, in keeping with the terms of the League of Nations Mandate Agreement, that:

> The tribal institutions, customs and usages of the aboriginal natives of the Territory shall not be affected by this Ordinance and shall, subject to the provisions of the Ordinances of the Territory from time to time in force, be permitted to continue in existence in so far as the same are not repugnant to the general principles of humanity.

The Native Administration Regulations of New Guinea, Nos. 57, 65 & 70, also expressly provided that the courts could take judicial notice of custom, unless contrary to written law or general principles of humanity. Administration field officers were directed to acquaint themselves with local customs and to record them. No legislative enactment generally recognised customary law in Papua, although Papua's Native Regulation No. 115 provided for the recognition of custom in determining matters of succession. However, as a practical matter there was little difference in the recognition and application of custom as between Papua and New Guinea. *See* Chalmers, *supra* note 11, at 172-77.

[17] Sack, *supra* note 16, at 5.

[18] D. Derham, Report on the System for the Administration of Justice in the Territory of Papua and New Guinea 62-66 (Melbourne, Dec. 21, 1960).

[19] *Id.* at 44-48.

[20] *Id.* at 36-37.

[21] These recommendations were from progressive elements within the colonial administration and elsewhere. *See, e.g.*, D. FENBURY, PRACTICE WITHOUT POLICY 92-144 (2d ed. 1980).

> The proposals [to establish "Native Courts"] rested on a basic assumption that the native communities ought to conduct their own judicial functions of government according to their own customs. This assumption rests on two further assumptions: (i) That the customs are able to meet the needs of the native communities not only as they are now but as they will be; and (ii) That customary rules exist and can be known and applied. The first of those assumptions is false, and the second is true only to a very limited extent.[22]

In sum, the Derham Report recommendations, which were largely followed, called for replication of Anglo-Australian legal institutions in Papua New Guinea, ultimately to be staffed by nationals. As has been noted:

> In so doing, the Derham Report expressly asserted the superiority of the processes of western justice over traditional perceptions of justice. The assertion was rooted in an attempt to remove the worst aspects of racial duality from the courts and legal system as well as a fundamental assumption of the superior efficacy of common-law justice.[23]

Consequently, it is unsurprising that the Derham-recommended courts and institutions never really took root in Papua New Guinea, and that the "two spheres approach" continued.[24]

In 1965, the Australian section of the International Commission of Jurists, a lawyers' human rights organization, sponsored a conference in Port Moresby. This conference was attended by leading Australian judges, lawyers and academics, Papua New Guinean politicians and public servants, and a number of distinguished overseas visitors including some from Third World countries. The theme of the conference was "The Rule of Law in an Emerging Society," and the conferees expressed:

> faith that the ideals of the Rule of Law, designed to uphold the dignity of the individual and his freedom under just laws and to secure for men social, economic, educational and cultural progress, are applicable and relevant to the people of this country as to the people of every other country.[25]

The members of the conference then went on to make specific proposals and recommendations including: (1) a written constitution following the general pattern of the "Westminster model," with the three basic branches of Western

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[22] Derham, *supra* note 18, at 34.

[23] Chalmers, *supra* note 11, at 177.

[24] *See* M. STRATHERN, OFFICIAL AND UNOFFICIAL COURTS (New Guinea Research Bulletin No. 47, 1972).

[25] INTERNATIONAL COMMISSION OF JURISTS, THE RULE OF LAW IN AN EMERGING SOCIETY 112 (1970).

democratic government; (2) evolution towards a single system of common law-type courts, with an independent and steadily localized bench; (3) judicial recognition, "for the present," of native custom which is "not repugnant to statute law, the general principles of humanity or the rules of natural justice"; and (4) an increase in the size of the legal profession, with training of local lawyers to be achieved through establishment of a Law Faculty at the University of Papua New Guinea, and with the "highest practicable standards of admission . . . insisted upon."[26] Apparently echoing domestic Australian concerns, the conferees also concluded that a scheme should be introduced for the participation of private practitioners, and not merely public solicitors, in legal aid services. In view of the shortage of qualified lawyers, it was also recommended that the local legal profession remain merged rather than divided into separate branches for solicitors and barristers.[27]

In the early 1970's, as Papua New Guinean nationalist sentiment grew and the pressure for self-government and independence intensified, there were frequent and powerful expressions of discontent from leading political figures about the imposed legal system.[28] In 1973, for example, the then Chief Minister, later Prime Minister, Mr. Michael Somare, expressed the following unequivocal view of the urgent need for law reform and development:

> We are facing, at this very moment, the need to devise a system of laws appropriate to a self-governing, independent nation. The legal system that we are in the process of creating must ensure the orderly and progressive development of our nation. But, in addition, it must respond to our own needs and values. We do not want to create an imitation of the Australian, English or American legal systems. We want to build a framework of laws and procedures that the people of Papua New Guinea can recognize as their own—not something imposed on them by outsiders.[29]

The indigenous Constitutional Planning Committee (C.P.C.), charged with devising an autochthonous constitution for independence, set itself the goal of re-establishing the primacy of Melanesian ways. In a florid passage in its Final Report, the C.P.C. likened colonialism to a huge tidal wave "submerging the natural life of our people."[30] In the aftermath, the task of the people (upon independence) was to sift through the debris and the detritus and to rebuild

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[26] *Id.* at 113-17.

[27] *Id.*

[28] Bayne, *Legal Policy-Making*, in POLICY-MAKING IN A NEW STATE: PAPUA NEW GUINEA 1972-1977 139 (J. Ballard ed. 1981).

[29] Somare, *Law and the Needs of Papua New Guinea's People*, in LO BILONG OL MANMERI 14 (J. Zorn & P. Bayne eds. 1974).

[30] CONSTITUTIONAL PLANNING COMMITTEE, FINAL REPORT - PART I 2/13-2/15 (1974) [hereinafter C.P.C. REPORT].

society, "not on the scattered good soil the tide wave of colonisation has deposited but on the solid foundations of our ancestral land."[31] Reliance was to be placed upon traditional ways, social obligations and customary laws rather than Western techniques.[32]

The C.P.C. clearly intended the Constitution to be a fundamental decolonizing agent. In *Tabo Sipo v. Mukara Meli*,[33] Mr. Justice Narokobi, formerly legal adviser to the C.P.C. and first chairman of the Law Reform Commission, stated well this viewpoint:

> The Constitution did intend a new start in life. Its goals and directive principles make it quite clear that a new vision for the nation was intended. If Independence meant nothing more than maintaining unequal laws, it would not have been worth attaining. If the Constitution did not set out the highest ideals and standards for the Legislature, the Executive and the Judiciary, the whole process of creating a home-grown Constitution would have been worthless.[34]

III. The Independence Constitution

The constitution that finally emerged on Independence Day, 16 September 1975, contained some of the C.P.C.'s design for a Melanesian renaissance.[35] Even more, it was a product of liberal legalism and followed the pattern foreshadowed by the International Commission of Jurists a decade before. Ironically, the Papua New Guinea Constitution incorporated many progressive features regarding civil liberties and human rights, affirmative action, government and public service accountability, and judicial creativity, that were discussed but not implemented in many of the metropolitan legal systems intended to serve as models.

Somewhat at odds with the bulk of the Western-style Constitution are statements of philosophy and programmatic provisions which call upon the courts, now accorded the central role they hitherto lacked, with the assistance of other institutions, to transform the inherited colonial legal order. It has been suggested that this *cri de coeur* appears to acknowledge that the framers of the Constitution felt unable to conceptualize or articulate how the new legal order should be structured, but hoped to provide the spur and the means to achieve a

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[31] *Id.*

[32] *Id.*

[33] Unreported National Court Judgment N240 (1980).

[34] *Id.* at 1.

[35] Narokobi, *History and Movement in Law Reform in Papua New Guinea*, in LAW AND SOCIAL CHANGE, *supra* note 7, at 14-16.

transformation of the legal order in the years after independence.[36]

The "transitional" provisions of schedule 2 of the Constitution discuss the development of an underlying law for Papua New Guinea based on custom,[37] common law and equity,[38] and judicial creativity in formulating rules by analogy.[39] Section 21 explains that the purpose of schedule 2 "is to assist in the development of our indigenous jurisprudence, adapted to the changing circumstances of Papua New Guinea."[40]

There are four matters, each central to the development of the national legal system, which are largely responsible for the failure of customary law to become a significant, much less pre-eminent, source of law in Papua New Guinea. These are: (1) the relegation of the National Goals and Directive Principles to the Preamble of the Constitution, and their non-justiciable nature; (2) the failure to require a review of the colonial legislation, which was adopted *in toto*; (3) the sources of law provisions, especially section 9 and schedule 2, which allow the written law to pre-empt the fostering of a Melanesian jurisprudence; and (4) relying on the courts as the principal mechanism for developing a national "underlying Law."

A. The National Goals and Directive Principles

The National Goals and Directive Principles (National Goals) formulated by the C.P.C. expanded upon the pre-independence "Eight Point Plan for National Improvement," more commonly known as the "Eight Aims." The National Goals were intended by the Committee to provide "a clear definition of Papua New Guinea's most fundamental national goals . . . a yardstick against which government performance can be judged."[41]

The Goals themselves refer mainly to broad social, political and economic concerns, but many could also bear on questions of legal development. For example, the National Goals call for "development to take place primarily through the use of Papua New Guinean forms of social and political organisation;"[42] for P.N.G. "to be politically and economically independent;"[43] for the "wise assessment of foreign ideas and values so that these will be subordinate to the goal of national sovereignty and self-reliance;"[44] and for a "fundamental re-

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[36] Sack, *supra* note 16, at 17.

[37] P.N.G. CONST. sched. 2.1.

[38] *Id.* at sched. 2.2.

[39] *Id.* at sched. 2.3.

[40] *Id.* at § 21.

[41] C.P.C. REPORT, *supra* note 30, at 2/1.

[42] Nat. Goal No. 1(6).

[43] Nat. Goal No. 3.

[44] Nat. Goal No. 3(5).

orientation of our attitudes and the institutions of government, commerce, education and religion towards Papua New Guinean forms of participation, consultation, and consensus, and a continuous renewal of the responsiveness of these institutions to the needs of and attitudes of the People."[45]

The C.P.C. recommended that "[a]ll courts and other adjudicatory tribunals shall be guided in the exercise of their functions" by the National Goals. However, it also recommended that the National Goals "not be directly justiciable," although they "should not be regarded by any court, other adjudicatory tribunal or institution of government as being of less weight than other directly justiciable provisions." The C.P.C. recommendations also provided that the Government should make specific reference to the National Goals in formulating and explaining national policies and programs.[46]

The Government of the day supported these C.P.C. proposals in a response paper, but pointed out that "[c]ourts are not however to apply the goals as law but must administer the law as it stands . . . . The Government supports the rule of law, which requires the courts must apply the law as it exists."[47]

In the end, section 25 of the Constitution specified that the National Goals are non-justiciable, i.e., they may not be the subject of direct litigation in a court or tribunal, but nevertheless imposed a duty on all governmental bodies "to apply and give effect to them as far as lies within their respective powers."[48] Subsection (3) provides that:

> Where any law, or any power conferred by any law (whether the power be of a legislative, judicial, executive, administrative or other kind), or reasonably be understood, applied, exercised or enforced, without failing to give effect to the intention of the Parliament or to this Constitution, in such a way as to give effect to the National Goals and Directive Principles, or at least not to derogate them, it is to be understood, applied or exercised, and shall be enforced, in that way.[49]

The National Goals are also said to be particularly relevant in the considerations of the Ombudsman Commission, especially in Leadership Code matters. Furthermore, schedule 2.3 of the Constitution directs the courts to have regard to the National Goals where no existing rule of law applies and the courts are called upon to formulate a new rule of underlying law; and section 22 directs that the National Goals be regarded in judicial determinations of the nature of constitutional rights, powers and duties.

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[45] Nat. Goal No. 5(1).

[46] C.P.C. REPORT, *supra* note 30, at 2/25.

[47] GOVERNMENT PAPER, PROPOSALS ON CONSTITUTIONAL PRINCIPLES AND EXPLANATORY NOTES 4 (1974).

[48] P.N.G. CONST. § 25.

[49] *Id.* at § 25(3).

Treating the National Goals in the manner in which the Constitution provides entails a substantially different judicial technique than the traditional common law method of interpretation and decision-making, and requires that counsel bring to the proceedings a different range of materials and submissions with which the court may work. Constitutional law authorities have expressed doubts whether the Supreme Court judges, trained in the narrow Anglo-Australian tradition which does not regard the preamble to a piece of legislation as an aid to interpretation, would be willing to be guided by the National Goals.[50] These doubts have been justified in view of the actual practice of the post-independence court.

In the last ten years, the National Goals have rarely been referred to by the judges, even though there were many occasions on which public policy was being determined. In *Public Curator of Papua New Guinea v. Public Trustee of New Zealand*,[51] Deputy Chief Justice Prentice referred to the National Goals in giving a liberal interpretation to the words of section 43 of the Wills, Probate and Administration Act (1966) so as to accept the validity of a will with several formal defects.

In *Supreme Court Reference No. 4 of 1980* (the "*Vanuatu Case*"),[52] the Court was consciously engaged in policy-making when it formulated a rule of underlying law with respect to *locus standi* to constitutionally challenge an act of Parliament. Nevertheless, the only significant reference to the National Goals is by Justice Kapi in the following terms: "I find that there is nothing in the National Goals and Directive Principles which is relevant to the formulation of the law in this case."[53]

In *Supreme Court Reference No. 2 of 1982* the ("*Electoral Deposits Case*"),[54] Justice Kapi was again the only member of the Court to consider the National Goals in determining whether the K1000 electoral deposit imposed by an Act of Parliament (amending the Organic Law on National Elections) was "reasonably justifiable for the purpose in a democratic society that has a proper regard for the rights and dignity of mankind" under section 50 of the Constitution. Among his reasons for finding that the Act transgressed section 50, Justice Kapi specified that the nomination fee required "was contradictory to the principles stated in the National Goals and Directive Principles. (See *Equality and Participation*)."[55]

The National Government has also rarely thought it necessary to justify or

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[50] J. GOLDRING, THE CONSTITUTION OF PAPUA NEW GUINEA: A STUDY IN LEGAL NATIONALISM 37-38 (1978).

[51] [1976] P.N.G.L.R. 427 (National Court).

[52] [1981] P.N.G.L.R. 265 (Supreme Court).

[53] *Id.* at 293.

[54] [1982] P.N.G.L.R. 214 (Supreme Court).

[55] *Id.* at 239.

explain policy decisions in terms of the National Goals. Indeed, some politicians and bureaucrats have been openly scornful of them. A Government report in 1983 recommended that, in the future, "N.E.C. [National Excecutive Council] submissions should be certified by the Principal Adviser to the N.E.C. as to compliance with the *Constitution* and in particular, with the *National Goals and Directive Principles.*"[56] This recommendation has not yet been followed. Thus, the C.P.C.'s vision of the National Goals as a "guiding lamp"[57] in national and legal development has certainly not eventuated.

B. Failure to Review Colonial Legislation

The C.P.C. recommended in very strong terms that the Constitution be an autochthonous (homegrown) one that would serve as a focus or symbol of the "breaking [of the] legal link with the law of Australia . . . [a] definite break with the past."[58] This stands in sharp contrast with the decolonization of most of the former British territories in Africa, where a constitutional recipe was uniformly dished out at Lancaster House and imposed upon the newly independent state.[59]

In keeping with this break from the past and the need to construct a new and appropriate legal system, the C.P.C. also recommended a thorough review of the existing law:

> Ideally, only those existing laws which are in conformity with the new Constitution should be adopted by it. However, we recognize the necessity to make provision for a reasonable time to elapse before the Constitution becomes fully effective in respect of the body of presently existing law, to enable all of our present laws to be carefully reviewed, and inconsistent laws repealed or amended as is appropriate. We suggest that a period of two years should provide sufficient time for this work to be done.[60]

And again:

> We believe that many of the laws that will be in force at independence are more

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[56] DEPARTMENT OF PROVINCIAL AFFAIRS, REPORT OF THE COMMITTEE TO REVIEW POLICY AND ADMINISTRATION ON CRIME, LAW AND ORDER 335 (1983) (Also known as the Morgan Report, after the Chairperson of the Committee) [hereinafter D.P.A. REPORT].

[57] C.P.C. REPORT, *supra* note 30, at 2/15-2/16.

[58] *Id.* at 15/1.

[59] For example, in the Pacific, the Solomon Islands Constitution, although the product of substantial local input, is established by a British Act of Parliament, the Solomon Islands Independence Order (1978). *See* Goldring, *Legalism Rampant: The Heritage of Imposed Law and the Constitution of Papua New Guinea*, 12 VERFASSUNG UND RECHT IN UBERSEE 223, 227-29 (1979).

[60] C.P.C. REPORT, *supra* note 30, at 15/2.

> appropriate to the circumstances of colonial rule than to a society seeking to achieve the National Goals and Directive Principles . . . . The need for a thorough-going review of our legal system is apparent to all of us.[61]

The C.P.C. suggested that such a review be undertaken either by a proposed Law Reform Commission or by a "special alternative body," a Permanent Committee of Parliament,[62] delegated to review existing laws. This reviewing body would be created "for the purpose of making recommendations for the repeal or amendment of those laws which are not in conformity with either the National Goals and Directive Principles or the Fundamental Human Rights and Obligations"[63] portions of the Constitution.

In its final form, the Constitution makes no reference to such a legislative review. Section 9 provides that the laws of P.N.G. consist of, *inter alia*, laws "adopted by or under this Constitution." Schedule 2.6 effectively adopts *all* pre-independence colonial laws, as well as a number of English and Australian (Commonwealth) laws.[64] The Law Reform Commission is charged by schedule 2.14 with the "special responsibility" of overseeing the development of the "underlying law," or P.N.G. common law. No directions, however, are provided about reviewing existing legislation. Even where ad hoc reviews were undertaken, as in the case of the Criminal Code, they were not always very successful.[65]

In enumerating the sources of law and the components of the underlying law, the Constitution makes customary law subordinate to all written law.[66] Further, many key areas of the law, such as criminal law, are covered by comprehensive statutory codes.

Thus, the failure to include in the Constitution a mandatory review of adopted colonial legislation, or to give courts the power to modify or override the legislation where it is inappropriate to the circumstances of an independent Papua New Guinea, serves to entrench the colonial laws and makes adaptation and localization of the law difficult.[67] The role of the underlying law, whether based on local custom or otherwise, is limited to an interstitial one, filling in

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[61] *Id.* at 8/9.

[62] *Id.* at 5/1/20.

[63] *Id.* at 15/2.

[64] *See* P.N.G. CONST. sched. 5.

[65] *See* Weisbrot, LAW AND SOCIAL CHANGE, *supra* note 9, at 62.

[66] P.N.G. CONST. § 9 and sched. 2.

[67] *Cf.* THE REPUBLIC OF VANUATU CONST. § 93 (Section 93 provides that pre-Independence Joint Regulations and subsidiary legislation shall continue in operation, but "shall be construed with such adaptions as may be necessary to bring them into conformity with the constitution." Furthermore, English and French laws applicable in the once jointly administered condominium also remain in force unless expressly revoked or unless "incompatible with the independent status of Vanuatu, and whenever possible taking due account of custom.").

gaps in legislative schemes or operating in those increasingly few areas not largely covered by statutory law. One of the most enduring ironies of the Papua New Guinea Constitution is that while local custom is enforceable only in very limited situations and subject to a number of strict qualifications, colonial era statutes are conclusively presumed to be applicable, appropriate, dominant, and subject only to non-substantive adaptations of nomenclature[68] and judicial review.

The C.P.C. did recommend,[69] and the Constitution does provide,[70] that the courts have the power to review legislation and to render invalid those statutes or parts of statutes offensive to the Constitution. This is true since the Constitution is the "Supreme Law of Papua New Guinea"[71] and the Supreme Court has original and exclusive jurisdiction as to the interpretation and application of constitutional law.[72]

A system of judicial review of legislation on a case-by-case basis, however, is slow and painstaking, and cannot be comprehensive. The Supreme Court has, in fact, declared a number of legislative provisions and executive actions invalid. This has not amounted, nor could it, to the sort of thorough review of colonial laws that the C.P.C. recommended and that is a precondition to genuine decolonization and legal development.

Similarly, the Law Reform Commission may review particular legislation upon reference from the Minister for Justice, and report and make recommendations to Parliament. One of the Commission's earliest reports, in fact, recommended repeal of the bulk of repressive and discriminatory colonial era Native Regulations. This recommendation was acted upon by Parliament.[73] However, the Commission does not have a general or on-going authority to review the inherited body of statutory law, nor has it been given sufficient resources in recent years to carry out such a major task.

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[68] P.N.G. CONST. sched. 2.7.

[69] C.P.C. REPORT, *supra* note 30, at 8/15-8/16.

[70] P.N.G. CONST. § 162.

[71] *Id.* at § 11.

[72] *Id.* at § 18(1). *See* Rakatani Peter v. South Pacific Brewery Ltd., [1976] P.N.G.L.R. 537, 541 (Chief Justice Frost); Supreme Court Reference No. 4 of 1980, [1981] P.N.G.L.R. 265, 298 (Justice Miles).

[73] LAW REFORM COMMISSION OF PAPUA NEW GUINEA, ABOLITION OF NATIVE REGULATIONS 4 (Report No. 2, 1975). The provisions penalizing adultery were not repealed despite the Commission's initial inclination because of strong public opinion in support of retention. *Id.* at 1-3. *See also* D. CHALMERS, D. WEISBROT & W. ANDREW, CRIMINAL LAW AND PRACTICE IN PAPUA NEW GUINEA 716-20 (2d ed. 1985).

C. The Constitutional Sources of Law

Section 9 of the Papua New Guinea Constitution provides that:

> The laws of Papua New Guinea consist of -
> (a) this Constitution; and
> (b) the Organic laws; and
> (c) the Acts of the Parliament; and
> (e) laws made under or adopted by or under this Constitution or any of those laws, including subordinate legislative enactments made under this Constitution or any of those laws; and
> (f) the underlying law, and none other.

Section 37(2) provides that no one "may be convicted of an offence that is not defined by, and the penalty for which is not prescribed by, a written law."[74] Therefore, *purely* customary offenses may not give rise to criminal liability in the courts, even the village courts. The village courts may, however, punish a breach of a lawful order made with regard to a customary law, insofar as this involves an element of contempt of court.

Section 20 of the Constitution provides that an act of Parliament shall declare, and provide for the development of, the underlying law of Papua New Guinea. As no such act has yet been promulgated, or even debated, the "transitional" provisions of schedule 2 of the Constitution still apply twelve years later.

Schedule 2.1 provides that "custom is adopted, and shall be applied and enforced, as part of the underlying law" except "in respect of any custom that is, and to the extent that it is, inconsistent with a Constitutional Law or a statute, or repugnant to the general principles of humanity."[75] The provision is similar in terms to the old Native Customs (Recognition) Act (1963),[76] which imposed two additional qualifications: (1) that the custom not be against the public interest, and (2) that it not adversely affect the welfare of a child.

Schedule 2.1(3) also provides that an act of Parliament may: (a) provide for the proof and pleading of any custom; (b) regulate the manner in which, or the purpose of which, custom may be recognized, applied or enforced; and (c) provide for the resolution of conflicts of custom. As the Parliament has not yet acted, those matters are all still governed by the provisions of the colonial era Customs Recognition Act.

Schedule 2.2 adopts the principles and rules of the common law and equity of England in existence at the time of independence, notwithstanding statutory

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[74] P.N.G. CONST. § 37(2).

[75] *Id.* at sched. 2.1.

[76] § 6, now § 3, of the REVISED LAWS OF PAPUA NEW GUINEA, ch. 19, Customs Recognition Act.

revision, as the other main source of the underlying law. However, such laws are not adopted if, and to the extent that:

> (a) they are inconsistent with a Constitutional Law or a Statute;
> (b) they are inapplicable or inappropriate to the circumstances of the country from time to time; or
> (c) in their application to any particular matter they are inconsistent with custom as adopted by [schedule 2.1].[77]

Note that while the common law is made subject to a judicial determination of circumstantial applicability and appropriateness, it is assumed that, unlike customary law, there can be no clash with "the general principles of humanity."[78]

An affirmative duty is placed on the national judicial system, particularly on the Supreme and National Courts,[79] to formulate an appropriate rule as part of the underlying law where neither custom nor the common law are applicable. In formulating such a rule of underlying law, schedule 2.3 requires the court to refer:

> (a) [I]n particular, to the National Goals and Directive Principles and the Basic Social Obligations; and
> (b) to Division III.3 (Basic Rights); and to
> (c) analogies to be drawn from relevant statues and custom; and
> (d) to the legislation of, and to relevant decisions of the courts of, any country that in the opinion of the court has a legal system similar to that in P.N.G.; and
> (e) to relevant decisions of courts exercising jurisdictions in or in respect of all or any part of the country at any time; and to the circumstances of the country from time to time.

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[77] P.N.G. CONST. § 2.2.

[78] *Id.* at sched. 2.1.

[79] *Id.* at sched. 2.3. The National Judicial System is created by the P.N.G. Constitution Part VI, Division 5. The Supreme Court is established by section 160(1), and is at the top of the judicial hierarchy. (Before Independence, appeals could be made to the High Court of Australia and the Privy Council in England). The Supreme Court comprised at least three judges (normally five in constitutional or other important cases) and presided over by the Chief Justice or the next most senior judge sitting. It is the final court of appeal, but also has original and exclusive jurisdiction regarding constitutional interpretation and application, under section 18 of the P.N.G. Constitution. Lower courts are obliged to refer all such matters to the Supreme Court (§ 18(2)), and special references may also be made from the Parliament, Head of State, Public Prosecutor, Public Solicitor, the Principal Legal Adviser to the National Excecutive (the Cabinet), the Law Reform Commission and the Ombudsman (§ 19).

The National Court is established by § 163(1) of the P.N.G. Constitution, and is a court of general and unlimited jurisdiction. The National Court is presided over by a single judge and is the main superior trial court. It also hears appeals from the magistrates' courts and some administrative tribunals. All judges are judges of both the National and Supreme Courts except for acting or assistant judges who may sit only on the National Court.

The Law Reform Commission is also given a "special responsibility" under the Constitution to report to the Parliament and the National Executive Council from time to time on the development of the underlying law.[80]

At first glance, the constitutional scheme regarding sources of law appears to have honored the C.P.C.'s wish that customary law form the basis of the new legal system and that a uniquely Melanesian jurisprudence be developed. In the Constitution, custom is listed as the initial source of the underlying law, adoption of the common law is made subject to consistency with adopted custom, a wide range of subsidiary sources is available in formulating a new rule of underlying law, and an affirmative duty is placed on the judiciary to develop the underlying law. In practice, however, actual conformance to C.P.C. goals has not occurred.

In essence, the constitutional scheme failed to propel customary law to the fore because it did not fully take into account the pre-independence experience of the relative lack of impact on the formal legal system of the Native Customs (Recognition) Act (1963). That Act, which provides for the recognition of custom subject to certain qualifications, and the application and enforcement of custom in designated matters of civil and criminal law, has been referred to by the superior courts only on rare occasions in the past two decades.

Consideration of that experience would have pointed up several problem areas in the constitutional scheme. First, the written law, particularly in areas such as criminal law, is so extensive that there is often little room to maneuver in incorporating custom.

Second, there are enormous difficulties inherent in ascertaining customary law on a case-by-case basis in Western-style courts, even where the courts and counsel act in the best of faith. As well as overcoming problems of proof and conflicts between different customary regimes, there is the fundamental problem that customary "rules of law" really are inseparable from customary processes and social organization.[81] The lack of time, specialized training, and resources also operate to make it difficult for counsel to adduce evidence of local custom which properly may be used by the court. Courts are generally unfamiliar with ascertainment procedures and tend to prefer the relative certainty and ease of discovery of common law rules.

Because of the problems of ad hoc ascertainment of custom, thought must be given to providing institutional assistance to the courts and to throwing out

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[80] *Id.* at § 21 and sched. 2.13-2.14.

[81] *See* Diamond, *The Rule of Law Versus the Order of Custom*, 38 SOCIAL RESEARCH 42, 42-72; S. F. MOORE, LAW AS PROCESS - AN ANTHROPOLOGICAL APPROACH 13-31 (1978); and Weisbrot, *supra* note 9, at 89-95.

ascertainment questions to the wider community. For example, recognition of chiefly authority may be appropriate in certain instances; use may be made of assessors or special juries or referees; and national, provincial or local governmental adoption of general principles of customary law may be acknowledged.

Finally, given all the obstacles described above, it is almost inevitable that where custom "may" be a source of law, it will not be. If it is national policy to formulate a distinctively Papua New Guinean legal system, there must be an affirmative and inescapable duty placed on the courts and counsel to do the necessary hard work.

IV. THE JUDICIARY AND THE UNDERLYING LAW

A. The Constitutional Role of the Judiciary

The Papua New Guinea Constitution places upon the judiciary the responsibility for the development of the underlying law:[82]

> In all cases, it is the duty of the National Judicial System, and especially of the Supreme Court and the National Court, to ensure that, with due regard to the need for consistency, the underlying law develops as a coherent system in a manner that is appropriate to the circumstances of the country from time to time, except insofar as it would not be proper to do so by judicial act.[83]

The judges are given very broad powers to assist them in enforcing the human rights provisions and in developing an indigenous jurisprudence.[84] Section 155(4), for example, provides that the superior courts have an inherent power to make *any* order "necessary to do justice in the circumstances of a particular case."[85]

The C.P.C. envisioned that the Bench would regularly look to the National Goals and to the particular customs and conditions of Papua New Guinea in making inevitable policy choices: "In carrying out their judicial role, judges and magistrates must take full account of the goals of the society in which they live; they must be attuned to the wishes of that society and to that extent must be politically conscious (although not party politically conscious)."[86] The C.P.C. did recognize that there were disadvantages in giving the main responsibility for legal development to the judiciary. In particular, the C.P.C. recognized that "courts tend to be formalistic and legalistic"; that the judiciary was (at that

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[82] P.N.G. CONST. sched. 2.

[83] *Id.* at sched. 2.4.

[84] *Id.* at §§ 57-60, 109(4), & 155.

[85] *Id.* at § 155(4).

[86] C.P.C. REPORT, *supra* note 30, at 8/15-8/16.

time) predominately expatriate; that the courts, as final arbiters of the Constitution, could overshadow "the powers of other institutions which express more directly and clearly the wishes of the people"; that the courts have a limited capacity to conciliate and effect compromises;[87] and that a built-in tension exists between the courts' role as protector of individual rights and liberties and their role as determiners of public policy and facilitators of the programmatic National Goals.[88]

Since independence, surprisingly few cases involving judicial development of a custom-based underlying law have emerged. It is true that the judiciary has had to face considerable institutional and resource obstacles satisfactorily to fulfill its constitutional mandate. However, there have also been some very notable missed opportunities, and self-created problems of attitude and performance.

B. Practical Impediments to Legal Development

The Court has also experienced significant and regular changes in personnel since independence, although its composition has somewhat stabilized in recent years. Clearly, it requires a settled and capable bench plus time in order to develop an indigenous jurisprudence. In the first half of the decade since independence, the Bench was entirely expatriate. In the wake of the 1979 "Rooney Affair,"[89] the judiciary has been steadily localized, led by the appointments of Sir Buri Kidu and Mari Kapi as the Chief Justice and Deputy Chief Justice, respectively.

In the early years of independence, a number of the expatriate judges informally expressed the view that, notwithstanding the constitutional mandate, it would be inappropriate for them as "outsiders" to effect significant changes in legal rules, procedures or institutions. At least the new, mainly national judiciary need not feel constrained in that regard. Other constraints have emerged,

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[87] *Id.* at 8/15.

[88] *Id.* at 8/1.

[89] Mrs. Nahau Rooney, M.P. was Minister for Justice in 1979. She was strongly critical of the Supreme Court on a number of occasions. In particular, she was critical of the Court's staying a ministerial order of deportation against a foreign academic alleged to be interfering in local politics. She was also generally critical of the Court being composed of highly paid expatriates who were out of touch with the local population. Rooney was charged and convicted of contempt for breaching *sub judice* rules regarding the deportation hearing and for "scandalizing the court." She was sentenced to nine months imprisonment. When she was released on license by the Prime Minister after only one day in prison, the majority of Supreme Court judges resigned in protest. For reports of the Supreme Court decisions in this case, see Public Prosecutor v. Nahau Rooney (No.1) [1979] P.N.G.L.R. 403, and Public Prosecutor v. Nahau Rooney (No.2) [1979] P.N.G.L.R. 448. For commentaries on the Rooney Affair, see Bayne, *Judicial Method and the Interpretation of Papua New Guinea's Constitution*, 11 FED. L. REV. 121, 150 (1980), and Weisbrot, *Papua New Guinea: Judges and Politicians*, 4 LEGAL SERVICE BULL. 240 (1979).

however.

All of the judges are based in Port Moresby, and are faced with regular, costly, and tiring circuits to other regions throughout the year. Their absences from the capital are significant enough to hinder a collegial approach to legal development, while the presence in each of the regional centers is too brief for a judge to gain any real knowledge or understanding of local customs and usages. Certainly some thought should be given to basing judges in the main provincial or regional centers, to resolve logistical problems, assist judges to understand local conditions, and to provide a symbol of the accessability of the legal system to people outside of Port Moresby.[90]

Both on circuit and at home, the judges are faced with massive caseloads to process. Unlike many English language jurisdictions, though similar to most Pacific Island states, the judges of the Supreme Court are also judges of the trial level National Court with heavy trial commitments. This naturally cuts into the time available for pondering and formulating policy decisions on major issues which arise at trial, or on appeal or by special reference to the Supreme Court.

Amendments to the Criminal Code and the District Courts Act (1963) in 1980 substantially increased the jurisdiction of senior magistrates of the District Courts. The amendments allowed the magistrates to deal summarily with a range of offenses that were previously indictable. This was done expressly to relieve the overcrowded National Court calendar and to reduce the period of custody for those accused who are refused bail.[91] These changes, however, have not significantly reduced the workload of the National Court.[92]

The Court is also extremely under-resourced for the important work it has to carry out. The judges operate without court reporters and must themselves take down detailed notes of the proceedings, including verbatim transcripts of witness testimony where appropriate.[93] Interpreter services are insufficient and sometimes unreliable,[94] and there is no trial coordinator to efficiently manage the calendar.[95] Library resources are often inadequate, particularly with respect to journals, comparative materials, texts, and other materials that venture beyond Anglo-Australian cases and statutes. All of these problems are, of course, magnified on circuit.

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[90] Recommendations to this effect have been made in two official reports, but not implemented. *See* D.P.A. REPORT, *supra* note 56, at 296; LAW REFORM COMMISSION OF PAPUA NEW GUINEA, THE JUDICIARY (Working Paper No. 7, 1978).

[91] LAW REFORM COMMISSION OF PAPUA NEW GUINEA, INDICTABLE OFFENCES TRIABLE SUMMARILY 7 (Report No. 8, 1978).

[92] W. CLIFFORD, L. MORAUTA & B. STUART, LAW AND ORDER IN PAPUA NEW GUINEA 145 (1984).

[93] D.P.A. REPORT, *supra* note 56, at 281-82.

[94] SUPREME COURT OF PAPUA NEW GUINEA, ANNUAL REPORT OF THE JUDGES 4 (1982).

[95] CLIFFORD *et al.*, *supra* note 92, at 155-56.

The judiciary would benefit from an upgrading of the Judge's Associate position. An extremely prestigious prize for law graduates in North America, the position in Papua New Guinea has mainly been filled by non-graduates who are assigned routine clerical tasks, but who are rarely entrusted to do serious research. In Papua New Guinea, where the Constitution requires the courts to do more than mechanically work with cases and statutes, it would be useful if the judges had qualified associates to assist with research and the drafting of judgments.[96] Increasing the number of trial judges would certainly help relieve the excessive workload. Alternatively, or additionally, appointments to assistant judgeships could be made from among the profession, the senior magistracy, or elsewhere.[97]

The judges have complained that cases before them are often poorly prepared or poorly argued, with submissions inadequate to assist the Court in ascertaining custom or formulating a rule of underlying law. Former Deputy Chief Justice Raine wrote that "[i]n some quarters it is fashionable to suggest that the Supreme Court is shirking this duty [under schedule 2.3 of the *Constitution*, to develop the underlying law]. It is not so. We are not given the tools with which to work."[98]

Similarly, in *St. v. Paul Pokolou*,[99] the Court commented that:

> There are basically two reasons why custom is not recognised by the courts and the underlying law has not been developed. First, in almost every case before the courts lawyers have not made any attempts either to produce evidence or material necessary for the judges to use to recognise custom or to develop the underlying law. Judges have not the time and the resources to undertake their own research in most cases . . . . Secondly, the Parliament of Papua New Guinea has failed to perform its duties as given to it by the *Constitution* [to enact law, under section 20]. Until that time . . . Sch. 2 does not permit the court to ignore the statutory law and the decisions of the Supreme Court and pronounce a new law based on custom.[100]

In another decision, Deputy Chief Justice Kapi remarked in similar terms:

> Whether or not custom has any influence in the formulation of principle depends

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[96] D.P.A. REPORT, *supra* note 56, at 283.

[97] *See* LAW REFORM COMMISSION OF PAPUA NEW GUINEA, THE SYSTEM OF SELECTING JUDGES OF THE NATIONAL AND SUPREME COURTS: A PROPOSAL 7-9 (Occasional Paper No. 7, 1978); *see also* C.P.C. REPORT, *supra* note 30, at 8/4. The P.N.G. Constitution, section 167, provides for the creation of Assistant Judgeships; however, no enabling legislation has been enacted and no appointments of this kind have been made.

[98] Constitutional Reference No. 1 of 1977, [1978] P.N.G.L.R. 295, 299 (Supreme Court).

[99] Unreported National Court Judgment N404 (1983).

[100] *Id.* at 3.

> on the evidence that is produced before the court. The court may, in appropriate cases, decline to formulate a law if it considers that not much assistance has been given on these considerations. Formulation of new law depends to a large extent on the evidence of these considerations. It is foreseeable that in appropriate cases the formulation of a new law may change from time to time on the subject depending on the evidence that is brought before the court. It is not satisfactory. For these reasons counsel appearing in these cases ought to give these matters the fullest research. This does not mean that the judges should not give the fullest research outside counsels' research. But it must be borne in mind that the judges of the Supreme Court are trial judges in the National Court and have very little time for full research. We do not have the benefit of law clerks as in the Supreme Court of the U.S.A. This undoubtedly puts a heavy burden on counsel who appear in these cases.[101]

These complaints have a certain cogency, and the shortcomings of the legal profession are discussed below. However, the judiciary has contributed to this situation by its own actions and omissions. Schedule 2.5 of the Constitution provides that in their annual report to Parliament under section 187, the judges shall, "if in their opinion it is desirable to do so . . . comment on the state, suitability and development of the underlying law, with any recommendations as to improvement that they think is proper to make."[102] In the first few years of independence the Judges' Annual Report did briefly discuss the development of the underlying law, but this central issue has received little attention in recent years. Despite the remarks of the court in *Pokolou* quoted above, the judges have not seen fit to prod Parliament to enact the necessary legislation facilitating the declaration and development of the underlying law called for in section 20 of the Constitution.

The judiciary has also failed to provide clear guidelines on how evidence of custom should be formally adduced by counsel in court. Recently the Rules of Court promulgated by the judiciary were revised.[103] Despite the urgent need for a provision on the pleading of custom, and at least one submission strongly calling for the same, no such provision was included. This failure occurred notwithstanding the constitutional scheme[104] which lists custom as a principal source of the underlying law, and despite experience overseas which indicates that special rules of procedure dealing with custom are essential for satisfactory use in the courts.[105] In view of this omission, counsel could certainly be for-

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[101] Supreme Court Reference No. 4 of 1980, [1981] P.N.G.L.R. 265, 292-93 (Supreme Court).

[102] P.N.G. CONST. sched. 2.5.

[103] The Supreme Court is empowered to promulgate Rules of Court under section 184 of the P.N.G. Constitution.

[104] P.N.G. CONST. sched. 2.1.

[105] Weisbrot, *supra* note 9, at 90.

given for believing that the courts are not especially interested in receiving submissions on custom.

Ex tempore and written opinions from the judges do not assist to clarify the situation. For example, in *Siwi Kurondo v. Lindsay Dabiri*[106] and in *Supreme Court Reference No. 4 of 1980*,[107] Justice Miles expressed the view that assistance from the bar table on matters of custom, while not strictly "evidence," was welcome especially when counsel are Melanesians. Statements from the bar table would have little probative value, of course, where counsel are in disagreement.

In *Michael Mandaku v. Patrick Wau*,[108] then Chief Justice Minogue stated that what is now section 2 of the Customs Recognition Act, on proof of custom, enables the court to inform itself in a quite informal matter, although as a matter of practice the court should also carefully record the source of all advice upon which it places reliance. Section 2 provides, in relevant part, that with regard to proof of custom, a court:

> (a) is not bound to observe strict legal procedure or apply technical rules of evidence; and
> (b) shall -
> (i) admit and consider such relevant evidence as is available (including hearsay evidence and expressions of opinion); and
> (ii) otherwise inform itself as it thinks proper.[109]

However, in *Acting Public Prosecutor v. Nitak Mangilonde Taganis of Tampitanis*,[110] both Chief Justice Kidu and Deputy Chief Justice Kapi wrote that statements from the bar table by counsel could not be considered as proper or sufficient submissions on custom.[111]

The fears of the Chief Justice and Deputy Chief Justice about the impropriety and unreliability of statements from the bar table are probably well grounded. More guidance, however, is required for counsel to understand exactly how they *are* to best inform the court on matters of customary law.

C. Doctrinal Impediments to Legal Development

Apart from the procedural problems, one line of cases would appear to place such stringent requirements on a litigant seeking to rely on custom that it may

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[106] Unreported National Court Judgment N258 (Sept. 26, 1980).
[107] [1981] P.N.G.L.R. 265, 304 (Supreme Court).
[108] [1973] P.N.G.L.R. 124, 134 (Supreme Court).
[109] Custom Recognition Act § 2.
[110] [1982] P.N.G.L.R. 299 (Supreme Court).
[111] *Id.* at 302.

well operate as a major disincentive to counsel considering raising customary law or underlying law matters.

In *Poisi Tatut v. Chris Cassimus*,[112] the Supreme Court considered the question of whether an action for enticement was available in Papua New Guinea. The Court found that the English common law on enticement was vacated by legislation in 1970 and could not then be adopted under schedule 2.2 of the Constitution. Chief Justice Prentice then interpreted schedule 2.4, which places a duty on the courts to "ensure that, with due regard to the need for consistency, the underlying law develops as a coherent system in a manner appropriate to the circumstances of the country from time to time," as requiring that any custom adopted as part of the underlying law under schedule 2.1 must obtain *throughout the country*: "[B]efore undertaking the duty of formulating an appropriate rule as part of the underlying law, in regard to a matter close-knit into the fabric of traditional village life, the Court would I think, need to have evidenced before it an appropriate almost country-wide custom."[113]

Justice Saldanha came to the same conclusion, resulting in a classic Catch-22 situation. Since there was no evidence of a *national* custom, custom could not be adopted, under schedule 2.1, as the underlying law. But, "as long as there is a doubt that there may be a remedy at customary law . . . it would not be proper . . . to formulate a rule of [underlying] law on this subject [under schedule 2.3]."[114] Justice Saldanha recommended that the matter be taken up by Parliament.

In a later case, the Supreme Court considered whether the then leader of the opposition, the Rt. Hon. Michael Somare, had standing to challenge the constitutional validity of an Act of Parliament.[115] Among the submissions made to the Supreme Court on behalf of the petitioner was that, "in Papua New Guinea 'big men' can speak in any forum. Mr. Somare should be allowed to speak in this forum because he is such a man."[116] Evidence tendered in support of this submission included anthropological works and witness testimony on local custom from an East Sepik traditional and political leader.

The submission failed, however, because the Court determined that the evidence of custom related only to the Arapesh peoples of the East Sepik Province and did not sufficiently demonstrate nationwide application. Chief Justice Kidu wrote, "in a case such as this, for a custom to be held to be applicable in Papua

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[112] [1978] P.N.G.L.R. 295 (Supreme Court).

[113] *Id.* at 298.

[114] *Id.* at 300.

[115] The Defence Force (Presence Abroad) Act (1980). It was under the authority of that Act that the Papua New Guinea Defence Force troops were dispatched to Vanuatu at the invitation of the new government of Vanuatu, and at the behest of the South Pacific Forum, to help put down anti-independence rebellions on the islands of Tanna and Espiritu Santo.

[116] Supreme Court Reference No. 4 of 1980, [1981] P.N.G.L.R. at 271.

New Guinea, evidence that *at least the majority of the nineteen Provinces* have this custom would be required . . . ."[117]

The opinion of Deputy Chief Justice Kapi provided the clearest and most detailed consideration of this issue. Noting that the definition of "custom" contained in schedule 1.2 of the Constitution refers to customs and usages "existing in relation to the matter in question at the time when and the place in relation to which the matter arises, regardless of whether or not the custom or usage has existed from time immemorial," Deputy C.J. Kapi rejected the view that a custom necessarily had to have national or near-national acceptance before it could be applied in a given case:

> In my view before a custom is adopted and enforced as part of the underlying law under Schedule 2.1 of the Constitution it must be established that there is a community of indigenous inhabitants of this country which recognises a certain customary rule. In a case which involves a dispute between two individuals regarding their private rights, it must be established that a custom which the court proposes to adopt as law is recognised and extends to both parties. In a case which involves an issue which has a general application to the whole country . . . as in this case, it must be established that there is a custom which is common to all societies throughout the country.[118]

Thus, Deputy C.J. Kapi accepted the approach that where a dispute could be localized, proof of local custom would be sufficient for recognition and application by the courts under schedule 2.1 of the Constitution. Unfortunately, the controversy over the scope of judicially-recognized custom was not put to rest, and the issue resurfaced in the 1983 Final Report of the General Constitutional Commission.[119] Although the Report contains no supporting discussion, the Commission nevertheless recommended that " 'custom' under Schedule 2.1 be clarified. Any custom which is proposed to be adopted under this schedule must be a custom that is recognised *throughout Papua New Guinea as a matter of fact and should not include local custom* or custom that applies only to some or certain parts of the country."[120]

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[117] *Id.* at 272 (emphasis added).

[118] *Id.* at 288.

[119] GENERAL CONSTITUTIONAL COMMISSION, FINAL REPORT (1983) [hereinafter G.C.C. Report]. Part XII of the P.N.G. Constitution (sections 260-62) mandated that a General Constitutional Commission be established after three years to inquire into the workings of the Constitution and the Organic Laws, and to report to Parliament any recommendations for changes to the Constitution, Organic Laws, other laws or administrative procedures. The Commission, composed entirely of Papua New Guinea nationals (with some expatriate advisers), actually commenced its work in 1980 and reported in 1983. None of the recommendations of the Commission have been implemented.

[120] *Id.* at 297 (emphasis added).

There is some limited support within the Constitution for this approach, given the requirement in schedule 2.4 for the underlying law to develop in a consistent and coherent manner. However, given the approximately 1000 different social groups in Papua New Guinea, each with its own language, customs and usages,[121] the "national custom" approach would make it extraordinarily difficult, if not impossible, for even the most enthusiastic, conscientious and best-resourced counsel to convince the court that they have sufficiently canvassed the nation and found compelling evidence of a common custom. No such obstacles are placed in the path of counsel who ask the courts to utilize English common law or equity under schedule 2.2 of the Constitution, and it is inconceivable that the framers of the Constitution intended to place such extreme obstacles to the recognition of custom at the same time that they were urging the development of an indigenous jurisprudence based upon customs and traditions and the "Melanesian way." Indeed, in another part of its Final Report, the General Constitutional Commission laments the lack of progress made towards the development of a uniquely Papua New Guinean jurisprudence, and is critical of lawyers for placing so little evidence of custom before the courts and for not raising issues of custom whenever appropriate.[122]

The approach taken to the recognition of custom under schedule 2.1 will almost certainly spill over into other areas of judicial development of the law. For example, schedule 2.3 of the Constitution directs the courts to formulate new rules of underlying law where neither existing custom nor the common law are applicable or appropriate. In doing so, the courts are obliged to consider constitutional material, such as the National Goals, Basic Rights provision, analogies to be drawn from custom and from written law, and precedents from other countries with similar legal systems. In the *Vanuatu Case*,[123] Deputy Chief Justice Kapi considered the relationship between schedules 2.1 and 2.3 and concluded that:

> Under Sch. 2.3(1)(c) the court shall have regard to analogies to custom. This is different from custom as adopted and applied under Sch. 2.1. Under Sch. 2.1 custom must be proven with some precision whereas the degree of precision may

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[121] There are about 1000 distinct languages from the Papuan and Austronesian language groups, as well as numerous dialects. This makes Papua New Guinea the most linguistically diverse nation in the world. *See* Wurm, *Papuan Languages*, in MELANESIA: BEYOND DIVERSITY 226 (R. May & H. Nelson eds. 1982). The official language of the law is English, but the *lingua franche* of Melanesian Tok Pisin and Hiri Motu are in widespread use and are constitutionally recognised as national languages. (Preamble, National Goal 2(11)) essential for citizenship by naturalization (§§ 67-68)). Tok Pisin, or Pidgin, is widely used throughout Papua New Guinea, the Solomon Islands and Vanuatu. Hiri Motu is mainly used along the south coast from the Central Province to Milne Bay.

[122] G.C.C. REPORT, *supra* note 119, at 278-79.

[123] Supreme Court Reference No. 4 of 1980, [1981] P.N.G.L.R. 262, 295 (National Court).

> not be the same under Sch. 2.3(1)(c). However, in practice custom must be decisively established under Sch. 2.3(1)(c), if it is to play any part in the formulating of a new rule of law.[124]

In fairness, although the Supreme Court in this case was unsympathetic to the submission on custom, it did by a majority of 3-2 decide not simply to adopt the restrictive common law rules of standing. Instead, the majority formulated a new rule of underlying law based on the progressive principle that under the Constitution, the people, the depository of all power, have standing to question whether legislative power is being exercised constitutionally.[125] Subject to judicial discretion in each case, the standing rules thus appear to be considerably more liberal than in most common law countries. This is a refreshing change from a long run of cases in which the courts demonstrated a marked predisposition towards finding the English common law "applicable and appropriate" and adopted it as the underlying law under schedule 2.2 without any significant, or often even any cursory, prior examination of the suitability of custom under schedule 2.1.[126]

Some brief examples of cases where the courts have grappled with the development of the underlying law further illustrate the difficult problems involved, and the characteristic lack of innovation. In *Sangumu Wauta v. St.*,[127] the Supreme Court considered whether an accused could be convicted of incest under what is now section 223 of the Criminal Code for having carnal knowledge of a girl alleged to be his adopted daughter under custom.[128] After finding that section 223 did not apply as between adoptive parent and child, Chief Justice Prentice also pointed to: (1) the constitutional injunction against convicting a person for an offense not defined by a written law;[129] (2) the fact that under both section 6 (now section 3) of the Customs Recognition Act, and schedule 2.1 of the Constitution, custom is subordinate to the written law; and (3) the limited purposes for which custom is available in criminal cases under section 7 (now section 4) of the Customs Recognition Act. Chief Justice Prentice wrote:

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[124] *Id.* at 292.

[125] *Id.* at 273 per Kidu, C.J., and at 296 per Kapi, J.

[126] *See, e.g.*, Buka v. Lenny, [1978] P.N.G.L.R. 510 (National Court) (construction of statutory reference to "nearest relative"); St. v. Alan Woila, [1978] P.N.G.L.R. 99 (National Court) (voluntariness of confessions); St. v. Kewa Kai, [1976] P.N.G.L.R. 481 (National Court) (corroboration in rape cases); Government of Papua New Guinea v. McCleary, [1976] P.N.G.L.R. 321 (National Court) (damages in tort for non-economic loss); W. A. Flick & Co. v. Thompson, [1976] P.N.G.L.R. 112 (National Court) (restraint of trade); and Johns v. Thomason, [1976] P.N.G.L.R. 15 (National Court) (doctrine of ratification in the principal-agent area of law).

[127] [1978] P.N.G.L.R. 326 (Supreme Court).

[128] In accordance with the Adoption of Children (Customary Adoption) Act § 5(1) (1969).

[129] P.N.G. CONST. § 37(2).

> Is [sic] the Criminal Code's provisions as to incest to take effect in the different societies and villages differentially according to what may be proved as the particular adoption process and its particular local effect in each particular case? Such a possibility would render the operation of the Statutory Criminal Law and its administration quite uncertain. Findings of guilt in each case, would depend not upon the terms of the Statute, but upon the evidence as to the particular "law" in each case. Availabiltiy of witnesses as to such "law," and the variable enthusiasm of prosecuting counsel and of police, in procuring their attendance, would surely prove an unsatisfactory basis for finding the law. Such a process would possibly militate strongly against the development of "a coherent system" of underlying law (Sch. 2.4 of the Constitution).[130]

In *St. v. Uname Aumane & Ors.*,[131] five accused, including a son of the deceased, were charged with the wilful murder of an old woman, an alleged sorceress responsible for a large number of deaths in the community. Four of the accused pleaded guilty (the other was acquitted at a subsequent trial) and each was sentenced by the trial judge to three months imprisonment with hard labour and ordered to pay compensation of five mature pigs to the deceased's other son. In arriving at this seemingly lenient sentence, the trial judge, Acting Justice Narokobi, expressly relied on local custom, the National Goals and Directive Principles, and the underlying law provisons of the Constitution. He concluded that it was appropriate in Papua New Guinea to make compensation a form of liability for crime, possibly in preference to a severe custodial sentence, depending upon the circumstances of the particular case. The Public Prosecutor appealed to the Supreme Court, challenging the nature and alleged inadequacy of this sentence.

The case was widely reported in the Western press as a "landmark in justice in Papua New Guinea, one which encompasses the important questions of the suitability of Western-style justice in a non-Western country and the related question of 'justice' versus 'legality.' "[132]

The five judges of the Supreme Court unanimously reversed on appeal, quashing the order for compensation and imposing a six year sentence on the four accused, less seven months time already served in custody. About half of the lengthy decision is devoted to discussion of a procedural point regarding time limitations on the institution of an appeal by the Public Prosecutor, but the Supreme Court also considered questions regarding judicial development of the underlying law.

On the question of the sentences, all judges expressly agreed with the Chief

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[130] [1978] P.N.G.L.R. 326, 332.

[131] [1980] P.N.G.L.R. 510 (Supreme Court).

[132] *See, e.g.*, Byrne, *Five Pigs for Murder? No, Say PNG's Top Judges*, Sydney Morning Herald, May 8, 1981 at 6.

Justice that the penalty imposed by the trial court was "grossly inadequate for the crime of wilful murder."[133] Chief Justice Kidu wrote that while it was quite proper to consider cultural factors in sentencing, they:

> should not override the clear dictates of the Parliament that those who commit the crime of wilful murder attract to themselves the possible penalty of imprisonment with hard labour for life. If Parliament represents the people of P.N.G. and the laws it makes reflect the attiturde of the people, then Courts must take heed.[134]

The opinion which most closely considered the relevance of customary law is that of Justice Kapi. While recognizing the wide discretion and powers of the sentencing judge to impose an appropriate penalty in a particular case, Justice Kapi found that of necessity this discretion may be exercised only within the bounds laid down by the relevant legislation. In this case, the Court's power to punish was controlled by section 19 of the Criminal Code which specifies the types of punishments which may be applied, and by what is now section 299 which specifies the punishment for wilful murder. Justice Kapi also referred to section 37(2) of the Constitution which ties criminal punishment to written law, and found that the underlying law as determined under schedule 2 did not amount to "a written law" for the purposes of section 37(2).

Justice Kapi disagreed with the trial court's use of what is now section 4(e) of the Customs Recognition Act, finding that this provision entitles a court to look at custom and take it into account as a mitigating factor in sentencing. It does not, however, enlarge the power of the court to formulate qualitatively different punishments outside the controlling statutes. In conclusion, Justice Kapi found that, "there is no room for developing the underlying law in this case. The development of the underlying law under schedule 2.3 arises only when there appears to be no rule of law that is applicable. In this case the *Criminal Code Act* is applicable."[135]

D. Summary

These cases illustrate most of the major problems discussed above:

(1) The pre-emptive nature of the existing written law;
(2) the failure to review the adopted colonial legislation for suitability;
(3) the difficulties involved in developing underlying law on a case-by-case basis;

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[133] [1980] P.N.G.L.R. 510, 513 (Supreme Court).
[134] *Id.*
[135] *Id.* at 543.

(4) the difficulties involved in marshalling evidence as to custom;
(5) the failure of the Parliament to enact comprehensive legislation under section 20 of the Constitution to provide for the declaration and development of the underlying law; and
(6) the cautiously traditional, common law approach of the judiciary in preference to the judicial boldness and innovativeness which could be justified under the Constitution.

The failure of the courts to advance the development of an indigenous jurisprudence in the decade of independence has been the subject of much critical analysis by both expatriate[136] and Papua New Guinean commentators.[137] However, another analysis of recent cases in both the civil and criminal areas provides some room for optimism that the now substantially national bench and the new expatriate judges "are prepared and sometimes appear to be eager to take whatever opportunities are afforded to them to be inventive in the creation of new law appropriate for the present needs of Papua New Guinea."[138]

V. LEGISLATIVE INACTIVITY

A. The National Parliament

The Constitutional Planning Committee expected that the National Goals and other directive portions of the Constitution would serve to "re-orient the thinking and attitudes of everyone who is a member of an elected body or who works in a government department, institution or authority, and to redirect the policies of those bodies towards the Goals."[139] The Constitution called upon the National Parliament to enact legislation to "declare and develop the underlying law" per section 20 and schedule 2. The Constitution also foreshadowed

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[136] *See, e.g.*, Bayne, *supra* note 89, at 163-66; Bayne, *The Constitution in the Courts 1975-1980*, in LAW AND SOCIAL CHANGE, *supra* note 7, at 229-38; Bayne, *Judicial Technique and the Interpretation of Pacific Island Constitutions*, in PACIFIC CONSTITUTIONS 293-301 (P. Sack ed. 1982) (hereinafter PAC. CONSTS.); O'Neill, *The Judges and the Constitution - The First Year*, 4 MELANESIAN L. J. 242-58 (1976); and Weisbrot, *The Impact of the Papua New Guinea Constitution on the Recognition and Application of Customary Law*, in PAC. CONSTS. at 265-67.

[137] *See, e.g.*, Gawi, *The Status of the Common Law Under the Constitution*, in ESSAYS ON THE CONSTITUTION OF PAPUA NEW GUINEA 5 (R. De Vere, D. Colquhoun-Kerr & J. Kaburise eds. 1985) (hereinafter ESSAYS); G.C.C. REPORT *supra* note 119, at 278-79; Narokobi, *In Search of Melanesian Jurisprudence*, in LEGAL PLURALISM 226-27 (P. Sack & E. Minchin eds. 1986); and Sakora, *Judicial Law-Making Under the Papua New Guinea Constitution*, in PAC. CONSTS., *supra* note 136, at 265-67.

[138] Roebuck, *Custom, Common Law and Constructive Judicial Lawmaking*, in ESSAYS, *supra* note 137, at 144.

[139] C.P.C. REPORT, *supra* note 30, at 2/15.

action by the National Parliament in other key areas relating to the development of an indigenous jurisprudence, such as with respect to the introduction of juries and assessors.[140]

The National Parliament, however, has apparently lost interest in issues of law reform and jurisprudence that do not, in its perception, deal directly with law and order.[141] In the twelve years since independence the Parliament has yet to consider legislation regarding the underlying law or the role of custom in the legal system, notwithstanding the clear constitutional mandate and the subsequent recommendation of the General Constitutional Commission that such matters be dealt with "as a matter of urgency."[142] Not only has the Parliament failed to take the initiative in this area, it has failed even to consider many important reports of the General Constitutional Commission, the Law Reform Commission and *ad hoc* review committees.[143] With few lawyers in the Parliament, and a preoccupation with matters of economic development, it is unlikely that the National Parliament can be expected to make law reform a high priority in the foreseeable future.

B. Local Government

Following the Derham Report recommendations in 1960,[144] Local Government Councils were established in Papua New Guinea as "building-blocks" to democratic political participation. Local government has often served as the focus of debates about the role of custom and tradition in the Pacific, including the Solomon Islands and Fiji.[145] In Papua New Guinea, sections 68-72 of the Local Government Act (1963) specifically empowered councils to advise and report on custom; make recommendations to the administration concerning the enforcement, variation or abolition of custom and, where such recommendations are accepted, to make a rule giving effect to it; make rules, with consent from the administration, regarding customary marriages and regulating the nature and amount of customary marriage settlements (brideprice); and, subject to a

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[140] P.N.G. CONST. § 186. On the use of assessors in Papua New Guinea as a medium for the ascertainment of customary law, see D. Weisbrot, *supra* note 9, at 91-93.

[141] *See* Weisbrot, *supra* note 10, *passim*, and Weisbrot, *supra* note 89, at 245.

[142] G.C.C. REPORT, *supra* note 119, at 278.

[143] *See, e.g.*, such Law Reform Commission Reports as FAIRNESS OF TRANSACTIONS (1976), THE ROLE OF CUSTOMARY LAW IN THE LEGAL SYSTEM (1977), and CUSTOMARY COMPENSATION (1980). *See* Weisbrot, *supra* note 9, at 967; Narokobi, *supra* note 33, at 23-24; D.P.A. REPORT, *supra* note 56, at 226-30, 394.

[144] D. Derham, *supra* note 18, at 62-66.

[145] Larmour, *Decentralisation in the South Pacific: Common Issues and Problems*, in DECENTRALISATION IN THE SOUTH PACIFIC 355 (P. Larmour & R. Qalo eds. 1985) [hereinafter DECENTRALISATION].

number of restrictions and consents, make rules regarding the use of customary land.

Matters of custom, dispute settlement, and land tenure did, in fact, concern the local Councils in their early years. However, there were no appropriate institutions, in the absence of village courts, to support the efforts or recommendations of the Councils. Councillors also complained that their recommendations were not followed by the colonial administration, and they ultimately gave up seeking to influence legal and political policy:

> [C]ouncillors have complained that the decisions their people demand from them are not supported by the courts or the administration. They want matters of custom dealt with in recognised courts by those who really know it. A result of this failure (due mainly to Australian respect for the British law, to the exclusion of custom) has been increasing disorder at village level . . . . [C]ouncil activities were subjected to the Administration's view . . . that economic development must have priority over political change . . . . The local government councils became involved in the routines of economic change.[146]

It was also apparent to the people that the Local Government Councils were well down the hierarchy of area administration. Even after the Councils were well established, important disputes, such as those over land, were taken directly to administrative officers, by-passing the Councils.[147] In recent times, some local Councils have made rules regarding brideprice and customary compensation payments, imposing restrictions on the amount and kind of payments when the amounts skyrocketed and payments demanded were increasingly in non-traditional forms, such as cash, beer and motor vehicles. However, as a general rule, the Local Government Councils have not been particularly influential, and may be superfluous following the establishment of the Village Courts and Provincial Governments in the mid-1970's.

C. Provincial Governments

After independence, a system of nineteen Provincial Governments[148] was established under amendments to the Constitution and enactment of an Organic Law. The system was set up out of a conviction that decentralization was appropriate in view of the highly concentrated bureaucracy inherited from the colo-

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[146] Rowley, *Using Local Government in a Strategy for Nation-Building in Papua New Guinea*, in LOCAL GOVERNMENT COUNCILS IN BOUGAINVILLE 12-13 (J. Connell ed. 1977).

[147] *Id.* at 12.

[148] These corresponded with the districts demarked by the colonial administration. There is also a National Capital District which covers Port Moresby.

nial administration and the size and diversity of the nation.[149] The system was also established in response to threats of secession by a number of the better-developed provinces.[150] The system adopted is unitary rather than federal in character. The Organic Act on Provincial Government[151] details legislative fields reserved for the National Parliament, and those that are primarily provincial. It also delineates areas of concurrent jurisdiction (in which national legislation takes precedence in the event of conflict), and those areas that represent unoccupied fields in which the Provincial Governments may enter.

The constitutional position considerably inhibits provincial action in the development of an indigenous jurisprudence. Decentralization in Papua New Guinea has been primarily political and administrative, rather than legal.[152] For example, "land and land development," "family and marriage laws," and "courts and tribunals (other than Village Courts)" are all areas of concurrent power, but areas in which there is already a substantial body of national legislation.[153] And while the Organic Act lists "the establishment and administration" of Village Courts as a primarily provincial subject,[154] the jurisdiction of such courts is still to be determined[155] by reference to the national Village Courts Act (1973).

An interesting study of the operations of the Provincial Governments found that, in general, very little legislation was being enacted apart from budget measures and model laws provided by the central bureaucracy; that is, the "virtual non-existence of policy legislation."[156] This was attributable in varying degrees to: (1) The lack of resources and personnel, such as legal officers and drafters, at the provincial level to assist with policy formulation and articulation; (2) the fact that national legislation often covered the field, with an effective central veto power in many other areas; (3) the lack of understanding of what powers the provinces actually do have; and (4) the effective assumption of an administrative, rather than parliamentary, role by most Provincial Governments.[157] Conversely, there is also evidence that the Provincial Governments have been frustrated by the failure of the National Parliament to act regarding the under-

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[149] C.P.C. REPORT, *supra* note 30, at 10/1.

[150] *See* Goldring, *supra* note 50, at 71; *see also* Premdas, *Papua New Guinea: Decentralisation and Decolonisation*, in DECENTRALISATION, *supra* note 145, at 115-16.

[151] Organic Act on Provincial Government §§ 24-28 (1976).

[152] R. Orr, Provincial Government and Customary Law 1, 11 (July 7, 1986) (paper presented at the Seminar on Developments in the Law on Decentralisation in Papua New Guinea, at the Institute for Applied Social and Economic Research, Port Moresby).

[153] P.N.G. CONST. §§ 27(m),(q), & (r). *See* Orr, *supra* note 152, at 13-14.

[154] Organic Act §§ 24, 25 (1976).

[155] *Id.* at § 39.

[156] Joyce, *Legislative Aspects of Political Devolution in Papua New Guinea*, 1 S. PAC. F. 142, 149 (1984).

[157] *Id.* at 150-56.

lying law, the role of custom, review of colonial legislation, and so on, and thus to express, or at least imply, what role the provinces are meant to play in legal development.[158]

In sum, while the preambles to most provincial constitutions call for development according to the "worthy customs and traditions of our people,"[159] most Provincial Governments have not involved themselves in the difficult task of legal development. One very notable exception is the New Ireland Provincial Government. In 1984, that province's Constitutional Review Committee expressed serious concern regarding the extent to which local customs, tradition and culture were being displaced by imported forms. The Committee recommended provincial legislation covering such matters as recognition of traditional shell money; protection of cultural artefacts and rituals; customary marriages; land transactions and residential qualifications; and penalties for breach of traditional laws and customs.[160]

In 1986, the New Ireland Provincial Government passed the Customary Compensation Act which requires that claims for customary compensation be made according to New Ireland custom; prohibits the payment of customary compensation where the death or injury resulted from payback, revenge or tribal fighting; limits the maximum value of such compensation; and establishes a Customary Compensation Tribunal before which claims for compensation may be negotiated and mediated or, if necessary, arbitrated. There is some question whether the Provincial Government had the power to make such a law,[161] but it is nevertheless a step in the right direction and may influence other Provincial Governments to follow suit.

VI. The Legal Profession: Education And Development

Sadly, the legal profession as a whole in Papua New Guinea has made little contribution either to the debate surrounding, or to the development of, a Melanesian jurisprudence. This is partly accountable to the fact that the profession has not been able to organize itself into a workable collective entity, much less organize around any particular issue.

Law Society elections are held intermittently, but the local profession has no codified ethical standards, no effective complaint or disciplinary mechanisms, no investigative apparatus, no fidelity funds or mandatory insurance schemes to protect clients, and little outside supervision over competence, behavior or trust accounts. In short, it is one of the least regulated and least accountable legal

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[158] Orr, *supra* note 152, at 4.
[159] *Id.* at 1-2.
[160] *Id.* at 2.
[161] *Id.* at 15.

communities in the world.

This is not to suggest that the legal profession is not beset by a range of institutional problems which make organization and action difficult. It is a very young profession, with nearly 80 percent based in the public service[162] and constrained, therefore, by its relative inexperience and an ethos of bureacratic non-activism in matters thought to be broadly political. Most of the senior national lawyers are already on the bench, in politics, or at the top level of the public service.

The still substantially expatriate private profession[163] mainly services the legal needs of the expatriate community and the multi-national companies doing business in Papua New Guinea. This segment of the profession has taken little interest in general matters of law reform and development, but has been quick to act[164] where it perceives its own interests or those of its commercial clients to be threatened. One case in point was the opposition to the Law Reform Commission's proposals in 1976 regarding a "fairness of transaction" bill, which would have allowed courts to look behind contracts which are otherwise valid at common law.[165]

The educational background of lawyers in Papua New Guinea and the admission rules also contribute to the general lack of professional involvement in law reform and development. The first few national lawyers admitted in the 1960's studied law in Australia. Since then, virtually all national lawyers, who since late 1980 have formed the majority of admitted lawyers in P.N.G., have been educated at the Law Faculty of the University of Papua New Guinea,[166] with a subsequent stint at the Legal Training Institute.

For many years, the Law Faculty required students to complete a one semester course on Customary Law and Land Tenure as part of the four-year LL.B. program and as part of the two-year Diplomas in Land Administration and Magisterial Service. Unfortunately, this requirement was dropped in 1981, on the somewhat dubious basis that issues of custom could be better dealt with within each subject area. A number of courses, in particular Family Law and Land Law, do deal with issues of customary law in a significant way, but the emphasis is still on a Western legal education and custom is overshadowed.

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[162] J. Kaburise, The Unrecognised Uses of Legal Education in Papua New Guinea 19 (Aug. 30, 1986) (paper presented at the 41st Australasian Universities Law Schools Association Conference, Goroka, Papua New Guinea).

[163] The legal profession was seventy-five per cent expatriate in 1982. Mitchell, *The Legal Profession and the Delivery of Legal Services in Papua New Guinea*, in LAW AND SOCIAL CHANGE, *supra* note 7, at 243.

[164] Bayne, *supra* note 28, at 151-52.

[165] LAW REFORM COMMISSION OF PAPUA NEW GUINEA, FAIRNESS OF TRANSACTIONS (Working Paper No. 5, 1976).

[166] Mitchell, *supra* note 163, at 241.

The Customary Law course, while it existed, served to focus interest and attention on the role of custom in legal development and symbolically asserted the importance and legitimacy of custom as a source of law in P.N.G. In addition, the Customary Law course dealt extensively with methods of adducing evidence of, and ascertainment of, customary law in the courts—a crucial topic which is not now adequately dealt with elsewhere in the curriculum.[167] The Legal Training Institute's program also tends to concentrate on training law graduates for practice in the private profession, and devotes little attention to customary law recognition or broader issues of legal development.

The Law Faculty at the University of Papua New Guinea once did attempt to pursue a policy which would have placed a greater focus on customary law and legal development. A 1974 government report[168] recommended that all university students should, as part of their degree programs, spend time engaged in work experience, preferably in their home areas. In response, the Law Faculty proposed a new curriculum which would have divided legal studies into two self-contained "modules," split by a year in the field. During that year, students would have been required to do research into the customary law of their home areas, give basic legal advice and information to the community, and possibly assist in development activities.[169]

The modular approach was approved by the Law Faculty and the University's Academic Board. However, the University Council, which has final approval, deferred the proposal for some time and effectively killed it. In substantial part, this was due to opposition by factions within the legal profession and the judiciary. One expatriate judge condemned the proposal as a "socialistic experiment,"[170] although a number of leading national lawyers supported the scheme.[171]

At the time of this debate in 1976, the Faculty's proposal had been given a boost from the National Parliament when it passed, by an almost unanimous vote, an amendment to what is now section 16(2) of the Post-Graduate Legal Training Act (1974). The amendment, referred to as the "Singeri Amendment" after its sponsor, Mr. Buaki Singeri, provided that all law students had to be certified by the Dean of the Law Faculty as having spent at least one year studying or carrying out work involving customary law and practices, and/or doing community legal work, before they could be admitted to the Legal Training Institute for professional training.[172]

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[167] *See* CLIFFORD *et al.*, *supra* note 92, at 271.

[168] G. GRIS, REPORT OF THE COMMITTEE OF ENQUIRY INTO UNIVERSITY DEVELOPMENT (1973).

[169] Weisbrot & Paliwala, *Lawyers for the People: Reviewing Legal Services in an Independent Papua New Guinea*, 4(2) MELANESIAN L. J. 184, 197 (1976).

[170] *Id.* at 198.

[171] Bayne, *supra* note 28, at 149.

[172] Weisbrot & Paliwala, *supra* note 169, at 198.

Section 16(3) provided a wide loophole, however, in that the Council in its discretion could resolve to waive these requirements "in the interests of maintaining a sufficient number of citizens qualified for admission to practice as legal practitioners."[173] This waiver has been exercised *every* year since the 1976 amendment came into force, effectively thwarting the clear aim of the amendment.

On a more positive note, the Law Faculty at the University of Papua New Guinea introduced the successful "Legal Education and Assistance Programme" (LEAP) in 1979. This program is conducted during the November to February ten week academic break. Accommodating thirty to fifty law students per year, it involves sending most of these students to their home provinces to provide legal aid and community legal education.[174] Although limited in scope, numbers, duration and resources, LEAP does meet the spirit of the abandoned modular approach and Singeri Amendment. LEAP exposes students to dispute resolution in their home areas and bridges the large gap in legal resources and knowledge (of Western law) between those in the urban centers and the rural majority.

No continuing legal education program exists in Papua New Guinea to remedy the serious deficiency in the training of national and expatriate lawyers with respect to customary law. Such education is also necessary to acquaint foreign lawyers with the particular circumstances of the legal system in P.N.G. and Melanesian society, to acquaint lawyers generally with new developments in the law, and to assist practitioners in refining their skills and techniques.[175]

The situation with regard to foreign-trained lawyers is even worse. As noted above, the private profession is still dominated by expatriate lawyers, and many of the most senior and influential government legal positions are still filled by expatriate lawyers.

The Lawyers' Admission Rules made pursuant to the Lawyers Act,[176] a colonial holdover, provide that practitioners admitted in Australia, England or New Zealand are automatically admissible in Papua New Guinea.[177] Lawyers from other foreign jurisdictions, such as the United States, Canada, or an African state, are presented with some obstacles to admission—generally, a two year waiting period and attendance at the Legal Training Institute.[178]

In neither case does the National Court, as the admitting authority, scrutinize whether the applicant for admission to practice law in Papua New Guinea:

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[173] Post-Graduate Legal Training Act § 16(13) (1974).

[174] Mitchell, *supra* note 163, at 248.

[175] D.P.A. REPORT, *supra* note 56, at 295, 405.

[176] Formerly the Legal Practitioners Act (1954), now REVISED LAWS OF PAPUA NEW GUINEA Ch. 91.

[177] Rule 2.

[178] Rule 5.

(1) Speaks one of the *lingua franche* (Tok Pisin or Hiri Motu); (2) is familiar with the Papua New Guinea Constitution, the supreme law of the land; (3) appreciates the role of custom in the P.N.G. legal system and is able to adduce evidence of custom where appropriate; (4) is familiar in general terms with local circumstances and conditions; or (5) intends to remain a resident in Papua New Guinea for any period of time.

If Papua New Guinea were a pure common law jurisdiction, the automatic admission of lawyers from three other common law countries might have some justification, particularly if there was reciprocity. However, the constitutional position is that the English common law is meant only to be one of the sources of the underlying law, and subordinate to local custom at that. Moreover, Australian, New Zealand, and English lawyers would have little training or experience in dealing with many of the most significant aspects of the Papua New Guinea Constitution: the human rights and civil liberties provisions; the National Goals and Directive Principles; the underlying law scheme; and the many other programmatic provisions which allow the courts great freedom to pursue social justice.

Many more legal cases in Papua New Guinea would, or could, have a constitutional dimension than in most other common law jurisdictions. Indeed, England and New Zealand have no written constitutions in the technical sense, relying mainly on convention, and Australia's constitution is primarily concerned with the mechanics of federalism. None of these jurisdictions has a written or enforceable constitutional declaration of human rights.

In May 1982, the Law Reform Commission and Legal Training Institute jointly sponsored a seminar on the need for a new act regulating the profession in Papua New Guinea.[179] Unfortunately, none of the issues raised above, except for a residency requirement for unqualified admission, were dealt with at the seminar. Nor do they appear to be addressed by the draft bill[180] which was circulated.

Most lawyers actively involved in litigation on behalf of nationals operate in the public sector, through the Public Solicitor's and Public Prosecutor's offices. According to a recent major study of the legal system in Papua New Guinea, many of these public lawyers "are simply inexperienced, unsupervised and grossly overworked."[181] Under the circumstances, competent advocacy is difficult enough to achieve without expecting counsel to also undertake complicated research into customary law; marshall all of the often conflicting documentary and testimonial evidence; and present it to the court in a cogent and compelling

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[179] LAW REFORM COMMISSION OF PAPUA NEW GUINEA, SEMINAR ON A LEGAL PROFESSION ACT FOR PAPUA NEW GUINEA (Working Paper No. 18, 1982).

[180] Based on the Advocates Act (1967) (Kenya).

[181] CLIFFORD *et al.*, *supra* note 92, at 155-56.

fashion, particularly in the absence of judicial or statutory guidelines for the presentation of such material.

VII. Existing Aspects Of Pluralism

A. *Recognition of Custom*

Notwithstanding the failure to transform the official legal system, as described above, it is essential to point out that local customs and usages survived the colonial period and have survived the modern State. While the reach of the State is significantly greater than that of the colonial administration, over 85 percent of the population is still rural and half are still mainly subsistence farmers. For most Papua New Guineans, contact with the formal legal system is limited, incidental and intermittent. Several recent studies have demonstrated that even in areas served by the Village Courts, the great majority of conflict cases do not get referred to *any* court, but rather are resolved, if at all, through unofficial dispute settlement mechanisms.[182]

Further, ninety-seven percent of all land in Papua New Guinea is still held communally according to customary land tenure, which provides a critical "refuge" for custom.[183] While governments, colonial and modern, have considered and even enacted a variety of schemes for land registration, tenure conversion, and so on,[184] none has been successfully implemented because of popular fear of intrusion into the last bastion of traditional custom, wealth, security and identity. However, there is also a growing body of compelling research which suggests that contemporary custom and customary law, particularly that relating to social control and cohesion, is a product of discontinuity during the colonial period, followed by a reinvention of "traditional" culture to suit modern needs.[185] A number of legislative schemes also give formal recognition to customary laws and institutions. These include the Customs Recognition Act

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[182] Bayne, *Village Courts in Papua New Guinea*, in JUSTICE PROGRAMS FOR ABORIGINAL AND OTHER INDIGENOUS COMMUNITIES 83 (K. Hazelhurst ed. 1985).

[183] Sack, *supra* note 16, at 19.

[184] *See generally*, Fingleton, *Land Policy in Papua New Guinea*, in LAW AND SOCIAL CHANGE, *supra* note 7, at 105-25; Eaton, *More Stop Than Go: Customary Land Policy Since the Commission of Inquiry into Land Matters*, in FROM RHETORIC TO REALITY 229-37 (P. King, W. Lee & V. Warakai eds. 1985); the special edition on land law in 11 MELANESIAN L. J. (1983); and R. JAMES, LAND LAW AND POLICY IN PAPUA NEW GUINEA (Law Reform Commission Monograph No. 5, 1985).

[185] *See, e.g.*., Fitzpatrick, *Custom, Law and Resistance*, in LEGAL PLURALISM (P. Sack & E. Minchin eds. 1985); M. CHANOCK, LAW, CUSTOM AND SOCIAL ORDER; E. HOBSBAWM & T. RANGER, THE INVENTION OF TRADITION (1983); Keesing, *Kastom and Anti-Colonialism on Malaita: 'Culture' as a Political Symbol*, 13 MANKIND 357 (1982); Tonkinson, *National Identity and the Problem of Kastom in Vanuatu*, 13 MANKIND 306 (1982).

(1963), which sets out the areas of civil and criminal law in which custom may be pleaded, recognized and enforced; the Marriage Act section 55 (1963), which recognizes customary marriages;[186] the Local Courts Act section 17 (1963), which permits local courts to make orders regarding customary law, including the validity or dissolution of a customary marriage; the Adoption of Children (Customary Adoptions) Act section 5(1) (1969), which recognizes customary adoptions;[187] the Wills, Probate and Administration Act (1966), which recognizes customary succession to property and stipulates that "traditional property," such as shell money, must pass according to custom, succession to such property not being subject to alteration by a will; and the Workers Compensation Act section 1 (1979), which extends benefits to persons who are regarded as customary dependents.[188]

All of the above Acts operate in the area of personal law where customary law has generally been recognized, even in colonial times, as having its major application. This is true in Papua New Guinea and in other countries which allow for pluralism.

Other pluralistic elements which are even more innovative include the Sorcery Act (1971), which creates certain offenses and recognizes certain defenses in criminal matters involving acts of sorcery or attacks upon alleged sorcerers; the Inter-Group Fighting Act (1977), which introduced the traditional concept of group responsibility to the criminal law, as well as encouraging settlement by mediation and compensation;[189] the Business Groups Incorporation Act (1974) and Land Groups Incorporation Act (1974), which allow customary groups to form the basis of modern business associations, and therefore to conduct business ventures, borrow money, and acquire, hold, dispose of, and manage land; and the Land Disputes Settlement Act (1975), which establishes Land Courts, that rely on customary law, to mediate land disputes in a relatively informal fashion.[190] The Business Groups legislation, in particular, has been a popular success.[191]

Unquestionably one of the most important institutional breaks with the colonial legal past was the establishment of the Village Court system in 1974,[192]

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[186] *See generally* Jessep, *Customary Family Law, the Courts and the Constitution*, in ESSAYS, *supra* note 137.

[187] *Id.*

[188] Earlier legislation had been inappropriately interpreted as restricting benefits to a Western-style small nuclear family. *See also* Mary Gugi v. Stol Commuters [1973] P.N.G.L.R. 341 (Supreme Court).

[189] *See* Weisbrot, *supra* note 9, at 70-75.

[190] *See* Zorn, *The Land Titles Commission and Customary Land Law: Settling Disputes Between Papua New Guineans*, 2 MELANESIAN L. J. 151 (1974).

[191] Weisbrot, *supra* note 9, at 97. *See also* Bayne, *supra* note 28, at 146-48.

[192] *See* Chalmers, *supra* note 11, at 169.

which is bound only by natural justice,[193] and the Village Courts Act and Regulations (1973). The aim of this system is to ensure "peace and harmony in the area for which it is established, by mediating in and endeavouring to obtain a just and amicable settlement of disputes."[194] The Village Courts represent a major step away from reliance on the substance and procedures of the common law through their emphasis on procedural and evidentiary informality, the banning of lawyers, selection of magistrates by the local community, reliance on local customs and usages, blurring of the civil-criminal distinction, and recognition of group responsibility. The Village Courts system also emphasizes the legitimacy and effectiveness of traditional dispute settlement mechanisms.

By most accounts, the Village Courts are working well. They have been established in large numbers, although national coverage is not yet quite complete; they are very widely used, more so than the Local, District and Children's Courts combined; and they serve to spur the sense of community and community involvement.[195] It is unfortunate that the Village Courts are still not fully established and have not finished sorting out basic problems of administration, for it is one of the significant failures of colonial policy that these courts were not already well entrenched before independence.[196]

The main practical problems that have been identified are inadequate supervision, lack of transport, and ineffective police support and coordination.[197] A more important structural problem is the extent to which the Village Courts have become too formal, relying on non-traditional mechanisms and regularly using coercive and adjudicative solutions.[198]

Other commentators are more sanguine and see the Village Courts, despite these problems, as being the best hope for the development of a truly Papua New Guinean system of law and justice.[199] It is most significant that all of the recent reviews of the Papua New Guinea legal system regard the Village Courts as, on balance, successful and recommend an increased role for the courts in the future.[200]

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[193] P.N.G. CONST. § 37(22). This is the English common law equivalent of the American concept of due process.

[194] Village Courts Act § 16 and Regulations (1973).

[195] CLIFFORD *et al.*, *supra* note 92, at 184.

[196] FENBURY, *supra* note 21, at 92-144.

[197] D.P.A. REPORT, *supra* note 56, at 284.

[198] *See* Paliwala, *Law and Order in the Village: The Village Courts*, in LAW AND SOCIAL CHANGE, *supra* note 7, at 191; *see also* Westermark, *Village Courts in Question: The Nature of Court Procedure*, 6 MELANESIAN L. J. 79 (1978).

[199] Oram, *Grass Roots Justice: Village Courts in Papua New Guinea*, in INNOVATIONS IN CRIMINAL JUSTICE IN ASIA AND THE PACIFIC 76 (W. Clifford ed. 1979).

[200] NATIONAL PLANNING OFFICE, REPORT OF THE COMMITTEE OF REVIEW ON LAW AND ORDER FOR THE NATIONAL PLANNING COMMITTEE iv (1982); D.P.A. REPORT, *supra* note 56, at 286, 402; *see also* CLIFFORD *et al.*, *supra* note 92, at volume II, 79-89.

A real threat to the continued expansion and success of the Village Courts has emerged, however, in the plans to decentralize control over these courts. While decentralization is desirable in theory, in this instance the transfer of authority from the Central Government to the Provincial Governments will create serious funding problems.[201] The transfer arrangements, which began in 1985, involve the Central Government transferring funds to the provinces for Village Courts using 1976-77 as the base year for funding. This fails to take into account the massive increase in the number and workload of the courts since that time, and if uncorrected will eventually result in starving the Village Courts of the funding necessary to maintain even existing levels of operation. It will also make impossible the recommended expansion of the Village Courts' role and responsibilities.

VIII. CONCLUSION

Most of the elements of legal pluralism discussed above were initiated by the colonial administration or the local House of Assembly[202] during the period leading towards independence. Few significant innovations have occurred since independence. It is crucial that Parliament and the people make up for this lost decade by beginning now to consider the important question of the basis on which all legal development will proceed in Papua New Guinea. Much momentum has already been lost from the dynamic period of 1972-75 and, if current practices go unchecked, the unadapted common law and its institutions will become permanently entrenched as the foundation of formal law in Papua New Guinea.

There are numerous practical impediments to the success of such a project. A key problem is whether lawyers, judges, politicians and others in Papua New Guinea are truly interested in such a project, notwithstanding the exhortation of the Constitutional Planning Committee Report, the Law Reform Commission, the General Constitutional Commission, and the Constitution itself. There are two aspects to this problem. The first is that the proposed reconception of Melanesian jurisprudence is regarded by some as a matter of high philosophy, far removed from the already challenging but more immediate and tangible problems of the courtroom, the marketplace and the legislative chamber. Although law has long been regarded in instrumental terms, it is no longer necessarily the instrument of choice. However, the Law Reform Commission, speaking about the need to recognize custom in the criminal area, correctly identified the danger of allowing a system of law and justice to operate which has no roots in the community:

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[201] VILLAGE COURTS SECRETARIAT, ANNUAL REPORT 8-10 (1979).

[202] The pre-independence legislature.

> We believe it unacceptable that a person who is innocent in the eyes of his people in his community and well believes he is doing right should be convicted of an offence . . . . To punish one people by applying standards and world view of another people is inherently wrong and is fundamentally unjust. We believe no independent and self-respecting nation can tolerate this. A criminal justice system which punishes people for things they do not consider to be wrong cannot be effective, respected and supported. At worst, it will disintegrate and crumble because it has no solid base which is the community acceptance of the wrongfulness of an act or omission.[203]

A more subtle, but invidious, problem is the unease that local elites experience in dealing with Melanesian custom and culture. The organizing principle of colonial rule, even the more benevolent form of colonialism later practiced, is that outside domination is justifiable because the repositories of modern thought and technologies (including law) have the right and responsibility to govern "primitive" or "backward" peoples until such time as the indigenous population is deemed capable of managing their own affairs. This notion of the "civilizing mission" is more durable than colonialism itself, for it informs many of the practices and policies beyond those of the decolonization period.

Both the Derham Report and the International Commission of Jurists' recommendations were infused with the spirit of Western "liberal legalism" that dominated the 1960's. The proponents of liberal legalism considered themselves to be in direct philosophical opposition to the proponents of, and apologists for, continued colonial rule. And certainly by the standards of the time, liberal legalists such as Derham provided a strong counterpoint to those who insisted that indigenous peoples in Papua New Guinea and elsewhere were incapable of any degree of self-rule for some generations. There is, nevertheless, substantial common ground with colonial attitudes insofar as there are shared assumptions that Western law and institutions are superior, universalist and value-neutral, and are instrumental in achieving development.[204] Both colonialists and liberal legalists thought it "natural" that the law in Papua New Guinea should speak with a Western voice.

This neglects, however, the fact that many of the central assumptions of Western law are inappropriate in Papua New Guinea. For example, traditional social organization in Papua New Guinea is not based on the individual, but rather on a complex web of reciprocal relations within clan groupings.[205] Simi-

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[203] LAW REFORM COMMISSION OF PAPUA NEW GUINEA, THE ROLE OF CUSTOMARY LAW IN THE LEGAL SYSTEM 60 (Report No. 7, 1977).

[204] For an excellent critique of the transplantability of the liberal legal model of law, see Trubek & Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974(4) 4 WIS. L. REV. 1062.

[205] Weisbrot, *supra* note 9, at 61. This recalls Tonnies' *gesellschaft-gemeinschaft* dichotomy. *See* F. TONNIES, COMMUNITY AND SOCIETY (C. Loomis ed. and trans. 1957).

larly, the State in Papua New Guinea is not the primary locus of social control (and coercion), particularly as compared with the clan, the church and other social relations. Finally, adjudication in formal courts with restrictive rules of evidence and procedure, with the aim of vindicating individual rights, is not regarded as a central or desirable mode of dispute settlement.[206]

Perhaps it should not be surprising, after one hundred years of contact with Western law, religion and education, that modern Papua New Guinean leaders are ambivalent about seeking to restore the official primacy of traditional ways. The internalization of Western values plays against the reality of life in a largely rural, dispersed, Third World country. This tension is obvious in the P.N.G. Constitution which declares Papua New Guinea a Christian country,[207] establishes a Westminster style of parliamentary government,[208] and continues the domination by Western forms of law, while at the same time it calls for development of all aspects of society by reference to traditional Melanesian values and institutions[209] and places a positive obligation on public agencies to see that this eventuates.[210]

The overall project may appear daunting, but there are some steps which could be taken to push the process along. Immediate thought must be given by Parliament to enacting legislation, replacing the "transitional" provisions of Schedule 2 of the Constitution, that calls for declaration and development of the underlying law. Adoption of the Law Reform Commission's well-constructed proposals on the underlying law and criminal responsibility[211] would improve the situation regarding judicial development of the law.

Over twenty years of experience with the Customs Recognition Act and schedule 2 of the Constitution, however, caution against relying exclusively on the courts to develop the law. As discussed above, ascertainment of customary law and formulation of underlying law by the courts on a case-by-case basis will inevitably be slow and difficult. Further, the integrationist policy of recognizing and enforcing custom in the Western-style formal courts involves the hazardous, if not impermissible, practice of divorcing customary law from its processes, and raises a number of other practical and theoretical difficulties.[212]

For these reasons it is also important to pursue a strategy of extending official recognition to traditional institutions, or the invention of "neo-traditional" institutions such as the Village Courts. This would return legal decision-making

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[206] *See generally* STRATHERN, *supra* note 24.

[207] P.N.G. CONST. preamble.

[208] P.N.G. CONST. part VI.

[209] National Goal and Directive Principle No. 5.

[210] P.N.G. CONST. sched. 2.

[211] LAW REFORM COMMISSION, *supra* note 179, at 17-27 & 73-80; *see* Weisbrot, *supra* note 9, at 84-89.

[212] *See supra* note 81.

and developmant to the grassroots level, as envisaged by the Constitutional Planning Committee.

Consideration should also be given to legislating on matters of substantive customary law. The development of an indigenous jurisprudence would be fostered by the Parliament confirming broad Melanesian concepts of law and justice which have widespread acceptance. These might include recognition of the extended family, or *wantok* system; group responsibility; strict civil liability; and compensation as a major aspect of dispute settlement. This might also spur provincial governments and local government councils into using the powers they already have, but rarely utilize, to pass ordinances dealing with detailed matters of local custom.

What is called for is not the mere, and invariably futile, codification of custom, but rather the progressive development of the law in a way that consciously seeks to suit modern Melanesian circumstances and sensibilities. This will initially involve a full scale review of the "total law, assessing its strengths, weaknesses, gaps and appropriateness."[213] Then there must be a rational, national process of development of appropriate substantive law, procedures, and institutions. This process must have regard for the directive portions of the Constitution, such as the National Goals and Basic Rights, customary law and processes. It must also consider appropriate adaptations of Western law, hybrid forms, and the need for innovation when necessary.

Only after such a process may it be said that Papua New Guinea has fundamentally decolonized its legal system. And only through such a process can the mass of people, as well as those directly involved in the legal system, be given a role in the establishment of a system of justice which flows from them and commands their respect.[214]

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[213] D.P.A. REPORT, *supra* note 56, at 229.

[214] *See* NAROKOBI, THE MELANESIAN WAY 88-111 (H. Olela ed. 1980).

Aboriginal Law in Australia: The Law Reform Commission's Proposals for Recognition

Richard Chisholm*

I do not hesitate to assert my full conviction, that whilst those tribes, which are in communication with Europeans, are allowed to execute their barbarous laws and customs upon one another, so long will they remain hopelessly immersed in their present state of barbarism.[1]

I. INTRODUCTION

The above quotation captures what has been the dominant theme of the legal treatment of Aboriginal people in Australia. The prevailing attitude "was one of total non-recognition, accompanied in most cases by blank incomprehension."[2] The translation of this attitude into political and legal reality was to devastate Aboriginal people. There were no treaties and no payments of compensation. The invaders simply claimed title to all the land. The system that was imposed, and that remains today, was based on a lie, a legal fiction so gross that it is hard to believe—that when the white man came, Australia was uninhabited.[3] Aboriginal people were deprived of their land and subjected to a system of laws

* Associate professor of law, University of New South Wales, Australia.

[1] Captain Grey, in dispatches from London to governors in Australia, cited in AUSTRALIAN LAW REFORM COMMISSION, THE RECOGNITION OF ABORIGINAL CUSTOMARY LAWS ¶ 44 (REPORT NO. 31, 1986) [HEREINAFTER ALRC 31]. *See also* ALRC 31, ¶ 1, (quotation of Grey on the Method for Promoting the Civilization of Aborigines).

[2] *Id.* at ¶ 98.

[3] Cooper v. Stuart (1889) 14 A.C. 286, 291 (P.C.). *See also* Milirrpum v. Nabalco (1971) 17 F.L.R. 141, 201 (N.Terr.S.Ct.). Mr. Justice Murphy of the Australian High Court, after referring to the fact that the Aboriginal people did not give up their lands peacefully, said that the Privy Council's views in Cooper v. Stuart "may be regarded as having been made in ignorance or as a convenient falsehood to justify the taking of the Aborigines' land." Coe v. The Commonwealth (1979) 24 A.L.R. 118, 33 (Austl.). For discussion, see ALRC 31, *supra* note 1, at ¶¶ 64-68. *See also* Keon-Cohen and Hanks, "Indigenous Land Rights in Australia and Canada", in ABORIGINES AND THE LAW 74-102 (P. Hanks & B. Keon-Cohen eds. 1984) [hereinafter Indigenous Land Rights].

that, in general, undermined what remained of traditional authority after the European invasion. In particular, the imposed system brought disruption to Aboriginal families.

This approach did not go completely unchallenged. There was a persistent undercurrent of views more sympathetic to the rights of Aboriginal people.[4] Among the "settlers" there were some, at various levels of authority, who believed that some recognition should have been given to native land title. The extent of such views has become increasingly apparent, especially with the publication of Henry Reynolds' important studies, *Frontier*[5] and *The Law of the Land*,[6] both published in 1987. But these views never became dominant, and were always rejected when they surfaced in the courts or in government decisions.

The position of Aboriginal people under European law posed problems. Since the law ignored their title to land, their main contact with the law was at the receiving end of the criminal law. A Select Committee on Aborigines in 1837 said that to require Aborigines to observe British laws would be "absurd," and to subject them to severe penalties for not observing them would be "palpably unjust."[7]

The injustice of subjecting Aboriginal people to a criminal law which they did not understand, and in courts where they could not adequately defend themselves may be clear enough. But is it equally unjust to subject Aboriginal people today, after nearly two hundred years of non-Aboriginal domination, to the invaders' laws? As Australia approaches its bicentennial celebrations in 1988, the unresolved, complex problems between black and white Australians cast a shadow on the festivities. There are likely to be black boycotts and protests, and many non-Aboriginal people approach the year with misgivings at celebrating what can plausibly be regarded as two hundred years of oppression.

So what can be done? This article considers one significant initiative, the publication by the Australian Law Reform Commission of a 1986 report on the recognition of Aboriginal customary law.[8]

The Commission, established in 1973,[9] is a permanent federal body responsible for proposing law reforms in matters referred to it by the national (federal) government. Its published reports, generally considered in Australia to be of

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[4] Indeed, original instructions from London to Captain James Cook were that he should acquire territory "with the consent" of the Natives. ALRC 31, *supra* note 1, at ¶ 65. For other examples, see H. REYNOLDS, FRONTIER chs. 6 & 7 (1987) [hereinafter FRONTIER].

[5] FRONTIER, *supra* note 4.

[6] H. REYNOLDS, THE LAW OF THE LAND, (1987) [hereinafter LAW OF THE LAND].

[7] REPORT OF SELECT COMMITTEE ON ABORIGINES, cited in ALRC 31, *supra* note 1, at ¶ 1.

[8] ALRC 31, *supra* note 1.

[9] The Commission became a statutory body in 1975, when the Law Reform Commission Act (1973)(Cth) came into force.

very high quality, have dealt not only with matters strictly within the legislative powers of the federal parliament, but also with matters covered by the law of the states and territories.[10]

The Commission was asked in 1977 to inquire into and report upon "whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only."[11] The Commission's terms of reference referred to the need to ensure that every Aborigine enjoys basic human rights, and also to "the right of Aborigines to retain their racial identity and traditional life style or, where they so desire, to adopt partially or wholly a European life style."[12]

The Report, in two volumes, comprises nearly one thousand pages of tightly written text, and covers a wide range of topics. Part I covers the historical and legal background; Part II deals with general principles for the recognition of Aboriginal customary law, including such issues as discrimination and the protection of human rights; Part III deals with marriage, children, and family property; Part IV with the criminal law and sentencing; Part V with problems of evidence and procedure; Part VI with local justice mechanisms for Aboriginal communities; Part VII with the recognition of traditional hunting, fishing, and gathering rights; and Part VIII with the implementation of the Committee's recommendations. The Report includes draft legislation giving effect to its recommendations. Disappointingly, the Commission considered the question of customary rights to land as outside the scope of its inquiry.[13] It did not, however, ignore land rights in formulating its proposals.

In preparing its Report, the Commission drew extensively upon international law and upon the legal experience and scholarship of other jurisdictions, especially those of North America. It seems appropriate that the Commission's Report be discussed in publications outside Australia. It is a work of extensive scholarship and careful thought, and is likely to be of interest to others seeking to promote justice for indigenous people throughout the world.

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[10] The political sensitivities of the states make it awkward for a federal body to make recommendations to state parliaments, especially as each state has its own permanent law reform body. However, the federal parliament has had a measure of responsibility for the "territories", notably the Northern Territory and the Australian Capital Territory. The Australian Law Reform Commission has occasionally made recommendations regarding matters on which the federal parliament might take action in a territory. The Commission expects that the cogency of their argument will persuade the states to adopt the recommendations. *See e.g.*, AUSTRALIAN LAW REFORM COMMISSION, CHILD WELFARE LAW IN THE AUSTRALIAN CAPITAL TERRITORY (Report No. 18, 1981). The Commission thus has the potential to promote a degree of national uniformity in Australian law reform. This potential, however, has generally been frustrated by the states' preference for doing things their own way.

[11] ALRC 31, *supra* note 1, at xxx.

[12] *Id.*

[13] ALRC 31, *supra* note 1, at ¶ 212.

To deal with this large and complex report within a reasonable framework, this article will discuss only the background and general direction of the Commissions's recommendations. It will also focus, by way of illustration, on Part III of the Commissions's Report, entitled "Marriage, Children, and Family Property."

II. BACKGROUND

Aboriginal people represent just over 1% of the Australian population. Although more likely than non-Aborigines to live outside urban areas, they live in all parts of Australia. Many live in the remote areas of the Northern Territory and Western Australia, and thus have limited involvement with the non-Aboriginal community. Nevertheless, most, perhaps two-thirds, live in or around cities and country towns.[14] There has been a great deal of inter-marriage, and in some states, such as New South Wales, there are very few persons having purely Aboriginal ancestry. There are, however, easily identifiable Aboriginal communities.

Aboriginal people, of course, live in many different situations. They differ in ways that reflect such factors as their original groupings, responses to relocation, and interaction with the non-Aboriginal community. Despite the wide variety of life experiences among Aboriginal people, poverty and associated problems are widespread. Statistics on housing, unemployment, health, life expectancy, and other social indicators consistently reveal Aboriginal people to be the most underprivileged group in Australia. Aboriginal people are grossly over-represented in criminal statistics, and Aboriginal children in the child welfare system.[15] The figures, which are in some ways comparable to those in desperately poor third-world countries, provide a grim backdrop to all discussions of Aboriginal affairs, including law reform.

Turning to the legal and constitutional situation of Aboriginal people, it has already been mentioned that from the beginning of colonization in 1788, the British Colonial Office treated Australia, for the purpose of its acquisition and the application of English law, as a "settled" colony. It was viewed as a place uninhabited by a recognized sovereign or by a people with recognizable institutions and laws.[16] The legal theory was that, in such circumstances, the new settlers brought with them the general body of English law.

It is not necessary here to trace the history of the initial application of English law, the relationships between the law-making powers of the new colonies and

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[14] See the discussion and citations in ALRC 31, *supra* note 1, at ¶ 33.

[15] *See generally*, AUSTRALIAN DEPARTMENT OF ABORIGINAL AFFAIRS, ABORIGINAL SOCIAL INDICATORS (1984). The statistics are summarized in ALRC 31, *supra* note 1, at ¶ 1.

[16] ALRC 31, *supra* note 1, at ¶ 64.

the Commonwealth of Australia, and subsequent modifications as British rule waned and Australia became increasingly independent.[17] It is sufficient to say that all parts of Australia inherited the common law, and that the legislatures of the states and the Commonwealth acquired power to re-shape the law as they saw fit for Australian conditions. In Australia today, the Australian Constitution marks the boundaries between the legislative competence of the states and that of the Commonwealth. It provides that the Commonwealth Parliament may make laws on a range of matters, notably those listed in section 51. Such laws prevail over any inconsistent laws of the states.[18] Broadly speaking, the states have legislative power over general criminal matters and over matters limited to the government of their own citizens. The Commonwealth has power over a range of specific matters seen as having national importance.

The six states of the Commonwealth of Australia are New South Wales, Victoria, South Australia, Western Australia, Queensland, and Tasmania. Each state has its own constitution, under which it has general power to make laws operating within the boundaries of the state. The Northern Territory has its own legislature and is essentially self-governing. The Australian Capital Territory, physically within New South Wales but under Commonwealth jurisdiction, is also acquiring a limited measure of self-government.

The law in all jurisdictions follows the common-law pattern. This is true as to the respective roles of the legislature and the courts, and as to the general principles of criminal and civil law and procedure. The common-law tradition of precedent is apparent in the legislative acts of Parliament, and other bodies exercising delegated legislative power, as well as in the decisions of the courts.

The Commonwealth Constitution and the constitutions of the several states do not include a set of established human rights provisions.[19] The only constitutional provision relevant to human rights for the Aboriginal population is contained in section 51(26). That section gives the Commonwealth Parliament the power to make laws for the peace, order, and good government of the Commonwealth with respect to a variety of matters, including "the people of any race for whom it is deemed necessary to make special laws."[20]

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[17] The most recent development has been the enactment of the Australia Act (1986)(Cth) which formally recognizes Australia's sovereignty. Complementary legislation has been passed by the various Australian States and by the United Kingdom Parliament.

[18] AUSTL. CONST. § 109.

[19] Whether such provisions ought to be established in the Commonwealth Constitution has been the subject of much debate. The only provision of the Commonwealth Constitution resembling a fundamental right is § 116, which forbids the establishment of any religion. This, however, has limited application. Attorney-General for Victoria v. The Commonwealth (1981) 146 C.L.R. 559. On the general subject of constitutional rights in Australia, see AUSTRALIAN CONSTITUTIONAL COMMISSION, REPORT OF THE ADVISORY COMMITTEE ON INDIVIDUAL AND DEMOCRATIC RIGHTS UNDER THE CONSTITUTION (1987).

[20] Until 1967, Aboriginal people had been expressly excluded from this section of the Consti-

III. Position of Aboriginal People Under Existing Australian Laws

Most Australian lawyers would probably say that Australian law applies without differentiation to Aboriginal and non-Aboriginal people. There is much to support this perception. No treaties have ever been made with Aboriginal people in Australia. Australian civil law has never recognized any rights of Aboriginal people arising from their prior sovereignty or possession of the land.[21] Attempts to claim exemption for Aboriginal people from the operation of the law have not succeeded, at least up to the present time.[22] Aboriginal people are Australian citizens, no more and no less.[23]

These statements, however, do not tell the whole story. In the nineteenth century, the position of Aboriginal people under the law was problematical. The most common question was whether Aborigines should be subjected to the criminal law. To some, it seemed wrong to apply English law to actions by one Aboriginal against another, particularly where the actions had significance in the context of Aboriginal tradition or law. Injustice was also perceived in holding Aborigines subject to rules of conduct to which they had never consented and which they did not necessarily understand. In practice, such rules offered them little or no protection.[24] At a practical level, language difficulties and unfamiliarity with the English-style court system made it very difficult for Aborigines to

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tution. In 1967 a referendum overwhelmingly supported the deletion of this exclusion of Aboriginal people. This referendum is of particular significance because it can be regarded as the demonstrated wish of this generation of Australians that the Commonwealth should have legislative responsibility for Aboriginal people. The vote was particularly striking because it has proved extremely difficult to obtain the necessary majorities for the passage of bills amending the Constitution. *See* Hanks, "Aborigines and Government: The Developing Framework," in Aborigines and the Law 19, 23-24 (P. Hanks & B. Keon-Cohen eds. 1984) [hereinafter Aborigines & Government].

[21] It is still arguable that Aboriginal people possess rights arising from prior occupation, but existing authorities are all against this conclusion. *See generally*, Law of the Land, *supra* note 6; Aborigines and the Law chs. 1,2, & 4 (P. Hanks & B. Keon-Cohen eds. 1984); ALRC 31, *supra* note 1, at ¶¶ 82-82B and the literature cited therein. The question was not authoritatively determined by the High Court in Coe v. Commonwealth (1979) 24 A.L.R. 118. For an historical treatment of the question, see Law of the Land, *supra* note 6.

[22] R v. Jack Congo Murrell (1836) 1 Legge 72 (N.S.W.S.Ct.Cas.); discussed in A. Castles, An Australian Legal History 526-531 (1982) [hereinafter Castles], and in ALRC 31, *supra* note 1, at ¶ 40. *See also* Tuckiar v. R (1934) 52 C.L.R. 335 (Austl.); and R v. Wedge [1976] 1 N.S.W.L.R. 581 (N.S.W.S.Ct.).

[23] *See* Aborigines & Government, *supra* note 20, at 23-24.

[24] This view was argued forcefully, but unsuccessfully, in R v. Jack Congo Murrell (1836) 1 Legge 72 (N.S.W.S.Ct.). For further examples, see Frontier, *supra* note 4, at ch. 7. Reynolds quotes a correspondent to a 1842 newspaper, writing that "the irretrievable step of taking possession of a country, infers many minor wrongs to its inhabitants, besides the first great act of spoliation; but he who would govern in a country so situated, must steel his breast to their wrongs which are unanswerable." Frontier, *supra* note 4, at 178.

defend themselves in court, or to appear as witnesses. Despite the apparently clear ruling in *R v. Jack Congo Murrell* (1836)[25] that Aborigines were subject to the ordinary criminal law, application was variable because of the uncertainty of early colonial policy.[26] By 1850, however, it had become accepted that, at least in theory, Aboriginal people were subject to the law and entitled to its protection.

There appears to be a reasonably close connection between government policy relating to Aboriginal people and the extent to which Aboriginal customary law is recognized. The legal and political history of black/white relations includes periods in which the non-Aboriginal government wished to allow Aboriginal people the right to retain and practice their own laws. These periods included a period before 1850, during which there was considerable vacillation and uncertainty about the matter; a period in the 1930s; and the period beginning in the mid-1970s. From 1940 to this recent period, however, it was widely assumed that Aborigines were a dying race and that the only appropriate policy was one of assimilation into the non-Aboriginal community. The policy of assimilation[27] suggested that Aboriginal customary law should be suppressed rather than encouraged.[28]

In recent years, however, Australian governments have begun to speak of policies of "self-management" and "self-determination" for Aboriginal people.[29] Despite the ambiguity of such terms, and frequent reluctance by governments to translate these policies into practice, it is clear that the encouragement of Aboriginal customary law is consistent with these policies as opposed to the earlier policy of "assimilation".

It is thus not surprising that most examples of recognition of customary law have occurred since the mid-1970s. There is a growing distinction between Aboriginal and non-Aboriginal people in the law. These distinctions can be regarded as one form of recognition of Aboriginal customary law.

One of the many contributions of the Law Reform Commission's work is the systematic and detailed presentation of the extent to which the law already accords some recognition of the special position of Aboriginal people. Australia is a country in which any legal recognition of racial or cultural difference tends to be seen as apartheid, and any notion of legal pluralism is regarded with deep suspicion. It is therefore important to document to what extent the law has

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[25] (1836) 1 Legge 72; discussed in CASTLES, *supra* note 22, at 526-31.

[26] *See* ALRC 31, *supra* note 1, at ¶¶ 61-80A. *See also* CASTLES, *supra* note 22, at 515-42.

[27] *See generally* ALRC 31, *supra* note 1, at ¶ 26.

[28] *See e.g.*, the quotation at the beginning of this article, cited in note 1.

[29] *See e.g.*, the statement of The Hon. C. Holding, MHR, Commonwealth of Australia, that "[t]his Government looks to achieve further progress for the Aboriginal and Torres Strait Islander through the two principles of consultation and self-determination." PARLIAMENTARY DEBATES (HOUSE OF REPRESENTATIVES), 3487 (8 December 1983), cited in ALRC 31, *supra* note 1, at 29.

already distinguished between Aboriginal and non-Aboriginal peoples. This section, drawing heavily on the Law Reform Commission's work, offers a brief account.

A. Legislation: Aboriginal Land Rights

Although the civil law has not recognized Aboriginal claims to land arising from prior possession, grants of land have been made by legislation since the 1960s.[30] It is not possible here to describe the different forms such legislative grants take, or the mix of objectives and policies that lie behind them. It seems clear, however, that the most important theme of the land rights claims is that land rights are necessary for Aboriginal communities to achieve a measure of dignity, independence, and control over their own affairs. This goal is usually identified by the term "self-determination".[31] The possession of land rights is a key element in the exercise of self-determination, and in the consolidation and development of Aboriginal customary law. This point becomes apparent when one considers rights associated with land. The protection of sacred and significant sites[32] and of traditional forms of food-gathering[33] are of particular significance.

The granting of land and associated rights is therefore a considerable step towards the encouragement of Aboriginal customary law. A grant of land rights may, depending on the terms of the legislation, give the Aboriginal community power to control entry to the land. Although this power does not include any degree of *formal* immunity from the exercise of power by police or other civil law authorities, the possession of secure tenure over land does greatly enhance the opportunity for the community to run many aspects of its affairs according to customary law.

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[30] For a detailed account, see Indigenous Land Rights, *supra* note 3, at 74-102. Recent developments are generally discussed or referred to in the ABORIGINAL LAW BULLETIN published by the Aboriginal Law Centre, University of New South Wales.

[31] For example, in New South Wales, the Aboriginal Land Rights Act (1983), was based upon reports in 1980 and 1981, which expressly linked land rights with the policy of Aboriginal self-determination. *See* NEW SOUTH WALES, FIRST REPORT OF THE SELECT COMMITTEE OF THE LEGISLATIVE ASSEMBLY UPON ABORIGINES (1980), and SECOND REPORT OF THE SELECT COMMITTEE OF THE LEGISLATIVE ASSEMBLY UPON ABORIGINES (1981). For a detailed discussion, see M. WILKIE, ABORIGINAL LAND RIGHTS IN NEW SOUTH WALES 13-36 (1985).

[32] Aboriginal and Historical Relics Preservation Act (1965)(S.Austl.); Aboriginal Sacred Sites Act (N.Terr.); Aboriginal Relics Preservation Act (1967)(Queensl.); Aboriginal Relics Act (1975)(Tas.); Archaelogical and Aboriginal Relics Preservation Act (1972)(Vict.); and Aboriginal Heritage Act (1972)(W.Austl.).

[33] *See e.g.*, Land Act § 106(2) (1933)(W.Austl.); Aboriginal Land Rights Act (1983)(N.S.W.).

B. *Legislation: Other Acknowledgements of Aboriginal Customary Law*

There are several recent legislative acts that either refer to or encourage Aboriginal customary law. Recent child welfare and adoption legislation includes provisions designed to prevent the unnecessary removal of children from their families and communities, and to bring a measure of Aboriginal decision-making into the procedures involved.[34] While the legislation does not expressly refer to customary law, it permits and encourages a process of decision-making that is likely to draw on traditional patterns of Aboriginal child care, which might properly be seen as an aspect of Aboriginal customary law.

Other West Australian and Northern Territorial legislation explicitly provides for distribution of Aboriginal property upon death.[35] Some Commonwealth,[36] Northern Territorial,[37] and Victorian[38] legislation also treats customary Aboriginal marriage as "marriage" for certain purposes under civil law.

There is also legislation in Queensland, Western Australia, and South Australia establishing "Aboriginal courts" or involving Aboriginal personnel in courts or tribunals.[39] The Queensland Aboriginal courts have limited jurisdiction, primarily over minor criminal matters, and do not appear to actually apply customary law principles as much as civil law. The Western Australian Aboriginal courts were introduced on an experimental basis in 1979. In South Australia, Aboriginal assessors may be appointed in connection with land claims.[40]

C. *Judicial Recognition: Modified Punishment for Offenders*

Perhaps the best known form of recognition of Aboriginal customary law occurs when a court, in sentencing an Aboriginal person found guilty of an offense, takes into account the punishment that the person has received, or is likely to receive, under Aboriginal customary law.[41] This modification of legal punishment is perhaps not very different in principle from other less controver-

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[34] Community Welfare Act § 69 (N.Terr.); Adoption Act § 50 (1984)(Vict.); and Children (Care and Protection) Act § 87 (1987)(N.S.W.).

[35] Aboriginal Affairs Planning Authority Act § 35 (1972)(W.Austl.) and Administration and Probate Act § 6(4), 71B (N.Terr.).

[36] Compensation (Commonwealth Government Employees) Act (1971).

[37] Status of Children Act (N.Terr.); Family Provision Act (N.Terr.); Administration and Probate Act (N.Terr.); Workmen's Compensation Act (N.Terr.); Motor Accidents (Compensation) Act (N.Terr.) and Criminal Code (N.Terr.).

[38] Adoption Act § 11 (1984)(Vict.); Childrens (Guardianship and Custody) Act § 12(12)(1984)(Vict.).

[39] ALRC 31, *supra* note 1, at ¶ 83.

[40] Pitjantjatjara Land Rights Act § 33 (1981)(S.Austl.); Maralinga Tjarutja Land Rights Act (1984)(S.Austl.).

[41] The leading cases are discussed in ALRC 31, *supra* note 1, at ¶¶ 490-97.

sial sentencing practices.

It is common enough in children's court, for example, for the court to take into account the hiding that the child is expected to receive on returning home. Similarly, where the circumstances of an offense involve hardship for the adult offender, it is by no means unknown for the court to regard this as part of the "punishment" and therefore impose a lighter sentence.

It does appear, nevertheless, that modification of sentencing practices in light of likely punishment under Aboriginal law is not merely an acknowledgement of what is likely to happen. It is also an affirmation of the appropriateness of subjecting a member of an Aboriginal community to punishment according to the law of his or her community.

D. Judicial Recognition: Incorporation of Aspects of Customary Law into Legal Principles

Apart from sentencing offenders, aspects of customary law have also been taken into account by the courts in connection with the application of civil law to the circumstances of Aboriginal people.[42] For example, customary law takes into consideration the question of whether a person has been "provoked". Actions such as the uttering of prohibited words or the disclosure of secrets, which would not irritate a non-Aboriginal, might constitute a serious insult or offense under customary laws.[43] Similarly, the amount of compensation to be paid to an Aboriginal might be increased if an injury entails loss of status and privilege under Aboriginal law.[44]

Another well-known example of judicial modification of civil law categories is the creation of the "Anunga Rules." These rules require the police to adhere to certain safeguards, such as making available an interpreter or "prisoner's friend," when questioning traditionally oriented Aboriginal people suspected of having committed an offense.[45] It may be, however, that this decision should be seen as a response simply to the difficulties such Aboriginal people may face when being questioned by the police, rather than an indirect acknowledgment of customary law.

The same doubt need not be held in relation to the next example. In a bold exercise in statutory interpretation, Chief Justice Forster of the Northern Terri-

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[42] *See generally*, ALRC 31, *supra* note 1, at ¶¶ 69-83.

[43] *See* R. v. Patipatu [1951] N.T.J. 18 (N.Terr.S.Ct.); R. v. Muddarubba [1956] N.T.J. 317 (N.Terr.S.Ct.); *cf.* D.P.P. v. Camplin [1978] A.C. 705; Moffa v. R. (1977) 13 A.L.R. 225 (Austl.).

[44] Napaluma v. Baker (1982) 29 S.A.St.R. 192 (S.Austl.S.Ct.); Dixon v. Davies (1982) 17 N.T.R. 31 (N.Terr.S.Ct.).

[45] R. v. Anunga (1976) 11 A.L.R. 412.

tory Supreme Court held that a tribal marriage constituted a "marriage" for the purpose of the law of adoption. This interpretation allows an Aboriginal couple, married according to traditional law, to be eligible to adopt a child.[46] Whether it is always, or generally, a satisfactory approach to translate notions of customary law into the most analogous civil law category is, however, a more difficult question. While it is probably appropriate to manipulate civil law categories to enable an Aboriginal couple to acquire a child by adoption, it may be that not all legal consequences of "marriage" and "adoption" will fit harmoniously into the patterns of Aboriginal customary law. If so, it would not be sensible to recognize adoption under customary law as "adoption" for all purposes under the general law.[47]

E. Administrative Decisions

One very important way in which the civil law allows for the emergence and development of customary law is through the undocumented decisions of those who administer it. These decisions are generally undocumented. It is well known, for example, that the police are sometimes reluctant to intervene in disputes between Aboriginal individuals because such disputes may be satisfactorily resolved according to customary methods. Similarly, it is widely accepted practice in child welfare policy to avoid hasty intervention to remove Aboriginal children from their families and communities. Instead, child welfare personnel will work with members of the community to resolve problems within the patterns of Aboriginal child care arrangements.[48] These policies of "judicious non-intervention" may allow Aboriginal communities to apply their own solutions to problems, and thereby strengthen and develop their customary law.

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[46] Roberts v. Devereux, (N.Terr.S.Ct., Forster C.J.) 22 April 1982 (unreported decision).

[47] The general problem is discussed at ALRC 31, *supra* note 1, at ¶ 204. On the subject of adoption, it is reasonably clear that the exclusion of birth parents characteristic of adoption under non-Aboriginal law does not generally accord with child rearing practices among Aboriginal people. Thus Ditton and Bell have pointed out that among Central Australian Aboriginal people where children were brought up by persons other than their parents, this was done "with the all round approval of the concerned parties. Children continue to know their actual parentage and to be aware of the consequences which flow from this relationship. These are consequences which would not follow for a white child adopted under Australian law." Bell and Ditton, "Law: The Old and the New, Aboriginal Women in Central Australia Speak Out," in CANBERRA, ABORIGINAL HISTORY 97 (2nd ed. 1984), quoted in ALRC 31, *supra* note 1, at ¶ 344.

[48] *See generally* R. CHISHOLM, BLACK CHILDREN: WHITE WELFARE? (1985) [hereinafter BLACK CHILDREN]. *See infra* notes 111-32 and accompanying text for a more detailed discussion of this topic in connection with the Law Reform Commission's recommendations.

IV. The Nature and Significance of Aboriginal Customary Law

A. Aboriginal Customary Law as "Law"

What is Aboriginal customary law, and to what extent does it exist today? The Commission was very aware of the danger of defining "law" in narrow terms that would merely reflect the characteristics of law familiar to the person making the definition. In recent times, legal scholars generally avoid this trap. Thus the Commission marshalled considerable support for a view of Aboriginal customary law that includes much of the experience of present day Aboriginal people. In addition to the work of academic writers,[49] the Commission cited the "Gove Case,"[50] a much discussed decision of the Northern Territory Supreme Court on an Aboriginal claim to land rights. The following is Justice Blackburn's response to an argument based on a narrow definition of "law":

> Implicit in much of the Solicitor-General's argument . . . was . . . an Austinian definition of law as the command of a sovereign. At any rate, he contended, there must be the outward forms of machinery for enforcement before a rule can be described as a law. . . . It had been argued that for a system to be recognised as a system of law there must be a definable community, and some recognised sovereignty. . . . Where, it was asked, was there any indication of authority over all the clans, and where, beyond the influence of the elders, was the authority within each clan? Feuds were admitted to be common, did not this show that the law was absent?[51]

Justice Blackburn rejected this argument, ending in a much-quoted passage:

> None of these objections is in my opinion convincing . . . . The specialization of the functions performed by the officers of an advanced (sic) society is no proof that the same functions are not performed in primitive (sic) societies, though by less specially responsible officers. Law may be more effective in some fields to reduce conflict than in others . . . the same is patently true of our system of law. Not every rule of law in an advanced society has its sanction. . . . I do not believe that there is utility in attempting to provide a definition of law which will be valid for all purposes and answer all questions. If a definition of law must be produced, I prefer "a system of rules of conduct which is felt as obligatory upon them by members of a definable group of people" to "the command of a sovereign", but I do not think that the solution to this problem is to be found in

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[49] See the citations in ALRC 31, *supra* note 1, at ¶¶ 98-101, especially J. Comaroff, J., & S. Roberts, Rules and Processes, (1981); Maddock, "Aboriginal Customary Law," in Aborigines and the Law 212, (P. Hanks & B. Keon-Cohen eds. 1984) [hereinafter Maddock].

[50] Milirrpum v. Nabalco Pty. Ltd. (1971) 17 F.L.R. 141, cited in ALRC 31, *supra* note 1, at ¶ 100.

[51] Milirrpum v. Nabalco Pty. Ltd. (1971) 17 F.L.R. 141, 266.

> postulating a meaning for the word "law". I prefer a more pragmatic approach . . . . What is shown by the evidence is, in my opinion, that the system of law was recognised as obligatory upon them by members of a community which, in principle, is definable, in that it is the community of Aboriginals which made ritual and economic use of the subject land. In my opinion it does not matter that the precise edges, as it were, of this community were left in a penumbra of partial obscurity. . . . The social rules and customs of the [Aboriginal] plaintiffs cannot possibly be dismissed as lying on the other side of an unbridgable gulf. The evidence showed a subtle and elaborate system of law highly adapted to a country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence.[52]

Submissions to the Australian Law Reform Commission from both Aboriginal and non-Aboriginal people, and information gathered from the Commission's own research, provide ample support for the view that Aboriginal law is in force today. For example, a senior Aboriginal community worker with the State Department of Community Welfare told the Commission that "Aboriginal customary law[,] which is still recognised and practiced in traditional areas today[,] is the same law which has been handed down from generation to generation and it must be recognised and respected by the Law Reform Commission."[53]

B. Is Aboriginal Law "Customary"?

A further issue, at least for some commentators, is whether Aboriginal law in present-day Australia could be called "customary." The late Professor T.G.H. Strehlow, an anthropologist, told the Commission that "[t]rue 'tribal law' is probably dead everywhere. It could not change, for there were not aboriginal agencies that had the power to change any of the traditional 'norms.' "[54]

It is of course *possible* to define customary law in a way that excludes modifications resulting from post-contact adaptation, but such a definition is surely too narrow.[55] Even "traditional" laws have capacity to adapt and change, and where the modern version has a continuity with the past, the fact that it might have changed significantly as a result of post-contact experiences and circumstances should not of itself be a reason for refusing to treat it as "customary" law. The Australian Law Reform Commission states the matter in these words:

> Changes or adaptations in traditional rules and customs in an attempt to cope

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[52] *Id.* at 266-68.

[53] ALRC 31, *supra* note 1, at ¶ 103.

[54] *Id.* at ¶ 119.

[55] *See generally* Maddock, *supra* note 49, at 212.

> with the great changes European settlement has brought about, no doubt produce something which could be described as "synthetic". All legal and cultural systems with a long history are synthetic in this sense. The fact that legal systems are synthetic does not mean that they are less real or important to those whom they affect.[56]

C. Two Laws

To acknowledge the continuing existence and relevance of Aboriginal law is not to say it is the *only* system of law utilized by Aboriginal people. On the contrary, the interaction between the Aboriginal and non-Aboriginal community, and many of the consequences of the European invasion, pose problems for which customary law has no answer. Even where Aboriginal customary law is much in evidence, it seems that Aboriginal people do not envisage that it will or should be the only source of law. Many Aboriginal people see themselves as living under "two laws" and see the question as being the proper spheres of each.[57]

D. The Scope and Content of Aboriginal Customary Law

The Commission is surely correct in concluding that Aboriginal customary law exists in Australia. It must be admitted, however, that practices and norms may approach the outside edge of the definition of "customary law" in communities where Aboriginal people have a great deal of interaction with non-Aboriginal people. Ken Maddock writes of "indeterminate zones of a continuum stretched out between a notional pure tribal life at one end and the varieties of White Australian life at the other."[58]

This difficulty is acute in the case of Aboriginal people in urban populations, whether in cities or in country towns. In many cases, the people insist that their Aboriginality is a key to their life experiences, and that even though their adaptation to their present circumstances is great, they are still in a real sense living according to Aboriginal ways, or customary law. In some matters, such as family relationships, there is much to be said for the view that the prevailing pattern of responsibilities for children, and the role of the extended family, is an expression of Aboriginal customary law, even among "urban" Aboriginal

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[56] ALRC 31, *supra* note 1, at ¶ 121. In support, the Commission cites Tay, "Law and Legal Culture," 27 BULL. ASLP 15, 16 (1983).

[57] ALRC 31, *supra* note 1, at ¶ 105, quoting COMMISSION OF INQUIRY INTO POVERTY, LAW AND POVERTY IN AUSTRALIA, 280-81 (Second Main Report 1975).

[58] Maddock, *supra* note 49, at 216.

populations.

It is obviously very difficult in these circumstances to say how many Aboriginal people live under customary Aboriginal law. The Australian Law Reform Commission, using survey data collected by the Department of Aboriginal Affairs, estimated that there are 158 Aboriginal communities, comprising a population of about 16,500 persons, which are "possibly traditionally oriented" in the sense that English is not the main language, initiation rituals are performed, traditional law authority is consulted in administering justice to members, and traditional forms of behaviour and methods of communication are used to an appreciable extent. The Commission recognized that this data is an extremely rough and ready indication of the relevance of customary law.[59] It may be a considerable underestimate, as it does not include town and city Aborigines, who may, as noted, claim that their lives are governed in some respects by customary law.

Identifying the content of Aboriginal customary law may present a formidable obstacle for outsiders. It is not in written form. Nor is it easy, as it may be in Western societies, to distinguish between rules of custom, religion, and law. It is not possible for the Commission to set out the content of Aboriginal customary law, which certainly varies considerably between different Aboriginal communities. Nor is it necessary to do so, for the Commission considers that the nature of Aboriginal customary law is best considered in light of particular issues and forms of recognition. In many cases, it is enough to specify Aboriginal customary law in general terms.[60]

The question of the content of Aboriginal law is relevant to a discussion of principles governing placement of Aboriginal children under the child welfare system. To what extent should the general law attempt to formulate the content of Aboriginal customary law? How could it do so in a way that is appropriate for different Aboriginal communities? Is it practicable to refer in general terms to "Aboriginal customary law," leaving the court, or other body, to determine in each particular case what that law requires?

E. Summary

The evidence relating to Aboriginal customary law in Australia today may be summarized as follows:

(1) Aboriginal customary law exists and plays an important part if the lives of many Aboriginal people in Australia today.

(2) The application of customary law varies greatly. In some more remote Aboriginal communities, it governs many and perhaps most aspects of life. In

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[59] *Id.*

[60] ALRC 31, *supra* note 1, at ¶¶ 100-01.

communities that have more contact with non-Aboriginal society, its application may be limited. It may govern matters of family relationships, sacred sites and religious matters, and some aspects of "law and order." On the other hand, matters such as social security entitlements, motor traffic laws, and other topics essentially arising from interaction with the non-Aboriginal community, will generally fall outside customary law. In such matters the Aboriginal community may well expect the non-Aboriginal law to apply.

(3) It is difficult to state the categories of customary law or the types of persons to whom it applies. Traditional groupings and identifications are complex enough in their own right. But such social stuctures are further confused by the relocation of Aboriginal people; the loss of land, upon which the exercise of traditional authority and social structures is based; and by contact with European society and institutions that undermine traditional authority. It may be that some aspects of customary law apply mainly, or entirely, to persons living in a geographical area; while other aspects, such as marriage laws, might be held applicable to Aboriginal persons identified with a particular clan, tribe or other group, regardless of their residence.

V. "RECOGNIZING" ABORIGINAL LAW

What does it mean to "recognize" Aboriginal customary law? Is recognition desirable? One of the most valuable aspects of the Commission's report is its analysis of the different forms that recognition may take. The Commission's approach is to insist that the advantages and disadvantages of different forms of recognition be dealt with on a case-by-case, or topic-by-topic, basis. The Commission's analysis grew out of its review of the arguments for and against recognition.

A. Arguments in Favor of Recognition

The starting point of the Commissions's analysis is the assertion that Aboriginal Customary law does, in fact, play a major part in the lives of many Aboriginal people. There is impressive evidence supporting this assertion in the submissions made to the Commission and in the fruits of the Commission's own visits to Aboriginal communities.[61] There is also evidence that non-recognition of Aboriginal customary law adversely affects Aboriginal communities. Some instances of this are clear enough, as where traditional marriage is not recognized as "marriage" for the purpose of the general law, or where a person is punished under both the general criminal law and Aboriginal law, thus suffer-

[61] *Id.* at ¶ 103.

ing double jeopardy.[62] Thus, non-recognition of customary law can be seen as creating injustice.[63] More fundamentally, non-recognition undermines traditional authority in Aboriginal communities. As one submission stated:

> The authority of the community in general, and of the elders in particular, is challenged whenever an individual is punished for doing something which he has never been told is wrong. Their power is eroded whenever offences committed within the community are tried and punished by someone else . . . . [K]nowledge of the ultimate "superiority" of European law is a further challenge to the power of the elders . . . . [T]he basic problems can be attacked only if an attempt is made to restore and maintain the traditional authority of tribal Aboriginals so that, to the maximum extent possible, European law is applied in tribal areas only at the request of the tribal community.[64]

This submission is linked with the observation that Aboriginal people themselves express a desire for recognition of their own laws. Australian government policy also emphasizes "self-management" or "self-determination" for Aboriginal people. It is argued that the general civil law is failing to maintain order in Aboriginal communities, and that customary law might be more effective. Recognition of customary law might also be useful as a symbolic expression of respect for Aboriginal people, and an indirect acknowledgment of responsibility for past wrongs.[65] Finally, it is argued that the law already recognizes customary law, but in a haphazard and uncertain fashion. It is therefore necessary to establish clarity and consistency in this area.[66]

B. The Basis for Recognition: Benefit or Self-Determination?

The power of the Commission's arguments somewhat conceal a fundamental issue in determining how Aboriginal customary law might be appropriately recognized. Does the case for recognizing customary law depend on establishing, to the satisfaction of the non-Aboriginal majority, that to do so would be for the benefit of Aboriginal people? If so, the recognition of customary law could be just as paternalistic as other policies relating to Aboriginal people. The dominant majority will recognize Aboriginal customary law only when the majority, as distinct from the Aboriginal people themselves, thinks it is beneficial to the Aboriginal people.

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[62] *Id.* at ¶ 104.

[63] *Id.* at ¶ 110.

[64] Submission of the sub-committee of Queensland Law Society, cited in ALRC 31, *supra* note 1, at ¶ 104.

[65] ALRC 31, *supra* note 1, at ¶ 109.

[66] *Id.* at ¶ 111. Also see arguments noted in ¶ 112.

An alternative approach, implicit in some of the arguments of the Commission, commences not with other people's views about what is good for Aborigines, but with the policy of "self-determination." Under this approach, the primary question is whether Aboriginal people wish their customary law to be recognized. If they do, then it should be recognized, whether or not the non-Aboriginal majority consider that such recognition would benefit Aboriginal people.

This second approach can be qualified in a variety of ways, and substantial qualifications appear inevitable in practice. For example, the position can be taken that customary law should be recognized provided that basic human rights of Aboriginal individuals are not infringed; or, provided that the consequences do not seem clearly disadvantageous to Aboriginal people; or, provided that it does not cost too much. Through such a process of dilution, the second approach could become virtually identical with the first: The qualifications could amount to saying that customary law will be recognized "provided that we, the non-Aborigines, think it would be best."

The distinction between the two approaches nevertheless deserves more explicit treatment.[67] Under the first approach, customary law should be recognized only to the extent that it is beneficial to Aboriginal people, and only to the extent that such benefit is not outweighed by costs or negative effects. Under the second approach, Aboriginal people are seen as having a right to recognition of their law, unless there are good reasons not to. What is regarded as constituting "good reasons" will determine the real difference between the two approaches. The two approaches do, nevertheless, seem importantly different. In an area where prediction is notoriously difficult, and evaluations laden with complex value-judments, the "onus of proof" may be of considerable importance. To put it crudely, where recognition is desired by Aboriginal people, the difference between the two approaches is whether recognition will be implemented only if shown to be beneficial, or implemented unless shown to be harmful. This issue will be discussed below. For convenience, the two approaches will be referred to as the "demonstrated benefit" approach and the "self-determination" approach.

C. Arguments Against Recognition

The Commission also received a range of submissions arguing against recognition of Aboriginal customary law, or at least against certain forms of recognition. The Commission considers some of these submissions in connection with issues of discrimination, equality and pluralism (chapter 9), and human rights

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[67] *See infra* notes 144-48 and accompanying text. Policies underlying the Aboriginal child placement principle are discussed in BLACK CHILDREN, *supra* note 48, at 104-06.

(chapter 10). The remainder, rather a rag-bag, are dealt with in chapter 8, and are briefly considered here.

First, certain aspects of Aboriginal law, especially those relating to sacred or ritual matters, are secret. Therefore, how can they be recognized? The Commission believes that experience with Aboriginal land claims indicate that such problems can be adequately managed. For example, it is possible to arrange it so that secret matters are disclosed only to those required to determine the legal issues.[68] Second, it is feared that recognition will entail loss of control by Aboriginal communities over their law and its development. The Commission points out, however, that while this may be an excellent reason not to attempt codification of Aboriginal laws, it does not apply to other forms of recognition. A third argument arises in connection with the question whether present-day Aboriginal law is "customary." The Commission recognizes that Aboriginal law has had to adapt to a changing world, and that much of the traditional law may have been lost. This fact, nevertheless, is not accepted by the Commission as a good reason for failing to recognize Aboriginal law altogether; although it may "influence the ways in which recognition can occur."[69]

A closely related argument is that Aboriginal customary law is declining as, in the words of one submission, "Aboriginal culture has become, and continues to become, more westernised."[70] The Commission thought that this prediction could not be confidently made. A generation before, one could hardly have predicted the development of land rights legislation, or the "outstation" movement, where Aboriginal communities deliberately move away from European influence in a conscious attempt to consolidate and re-discover their traditions. Nevertheless, the potential for drastic and unanticipated change is a good reason to ensure that forms of recognition be kept flexible to allow for change and development on the part of Aboriginal communities. Recogition should also be tentative and open to review.[71]

Another argument is that recognition should be restricted to tribal Aborigines living in their own separate communities. The Commission feels that this view exaggerates the difficulties of recognizing Aboriginal law in other settings, and appears to be based on the assumption that Aboriginal law would be the only legal system. In fact, in connection with family law, the Commission has in mind forms of recognition in which there will be accommodations between the general law and Aboriginal law.[72] A form of recognition which restricts the operation of Aboriginal law to a geographical area seems unrealistic, given the

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[68] *Id.* at ¶ 115 & ch. 25.

[69] ALRC 31, *supra* note 1, at ¶ 121.

[70] G. Tambling, MHR, quoted in ALRC 31, *supra* note 1, at ¶ 122.

[71] ALRC 31, *supra* note 1, at ¶ 122. Also see the related argument discussed in ¶ 123.

[72] *Id.* at ¶¶ 124, 125.

mobility of Aboriginal people; and inadequate, given the significance of customary law in the lives of the many Aboriginal people who do not lead "tribal" lives in isolated communities.

Finally, some arguments are directed at the overwhelming problems of definition on such matters as traditional marriage. The Commission, however, thinks this difficulty is overstated, and points to the experience of other jurisdictions where elements of customary law are recognized.[73]

D. The Commission's Conclusion on Recognition in General

The Commission concludes that these objections to the recognition of Aboriginal customary law are either unpersuasive or are, on examination, objections to particular forms of recognition. In its view, there are good arguments for recognizing Aboriginal customary laws, including in particular:

(1) the need to acknowledge the relevance and validity of Aboriginal customary laws for many Aborigines;
(2) the Aborigines' desire for recognition of their laws in appropriate ways;
(3) their right, recognised in the Commonwealth Government's policy on Aboriginal affairs and in the Commission's Terms of Reference, to choose to live in accordance with their customs and traditions, which implies that the general law will not impose unnecessary restrictions or disabilities upon the exercise of that right;
(4) the injustice inherent in non-recognition in a number of situations.[74]

The Commission points out that "recognition" can take different forms.[75] Some approaches are inherently flawed. For example, an attempt to codify Aboriginal customary law seems likely to "freeze" the law at a particular time, destroying its flexibility. If customary law is codified, its later development will be in the hands of the legislature rather than under the control of Aboriginal communities. The objective of enhancing the ability of Aboriginal communities to organize their own affairs, reflected in the Commission's terms of reference, would be impeded.[76]

The report canvasses these and related issues[77] at length, and the Commis-

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[73] *Id.* at ¶ 126.

[74] *Id.* at ¶ 127.

[75] *Id.* at ¶¶ 198-208.

[76] *Id.* at ¶ 202.

[77] In chapters 9 and 10, the Commission discusses in detail the question whether the recognition of Aboriginal customary law would be in some way "discriminatory," or would be in breach of basic human rights. It is not possible to pursue the argument here, but it may be noted that the Commission concluded that measures recognising customary law would not involve discrimination if they were a reasonable response to the special needs of Aboriginal people, were generally

sion concludes by stating a preference for a "flexible,"[78] or "functional"[79] approach to recognition. The Commission recommends that particular regard be paid to the realities of each situation. It favors forms of recognition which avoid the need for precise definitions of "Aboriginal customary law," a term which the Commission defines broadly. This approach is illustrated by the following brief account of the Commission's treatment of aspects of family law.

VI. THE COMMISSION'S RECOMMENDATIONS ON MARRIAGE, FAMILY PROPERTY, AND CHILDREN

A. Aboriginal Marriage and Family Structures

Traditional marriage arrangements, according to the evidence put to the Commission, are of continuing importance in many Aboriginal communities. In some communities, however, the significance of these arrangements, and the degree of adherence to traditional rules, has been eroding in recent times.[80] In spite of this erosion, these traditional practices are given very little recognition in Australian law. Recent amendments to the adoption legislation in Victoria and the Northern Territory are notable exceptions.[81] Traditional marriage practices are also recognized in connection with compensation for Commonwealth government employees.[82] To what extent should such practices be recognized?

It might be thought that recent changes in the law, in some jurisdictions, make recognition of traditional marriages unnecessary. The "Status of Children" Acts of the mid-1970s largely obliterated the distinction between nuptial and extra-nuptial children.[83] In New South Wales, most traditional marriages would also fall within the statutory definition of "de facto relationships."[84] This

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accepted by them, and did not deprive individual Aborigines of basic human rights or access to the legal system and its institutions. *See e.g., Id.* at ¶¶ 165, 192.

[78] *Id.* at ¶ 208.

[79] *Id.* at ¶ 209.

[80] *Id.* at Ch. 12.

[81] Adoption Act § 11(1)(b) (1984)(Vict.) (This provision is not yet in effect); Adoption of Children Act (N.Terr.). See additional Northern Territory legislation cited in ALRC 31, *supra* note 1, at ¶ 240. There are also proposed amendments in New South Wales. *See e.g.*, Adoption of Children Amendment Act (1987).

[82] Compensation (Commonwealth Government Employees) Act § 3 (1971)(definition of "spouse").

[83] For example, the Children (Equality of Status) Act (1976)(N.S.W.). For a discussion of such legislation, which has been passed in all Australian states and territories apart from Western Australia, see A. DICKEY, FAMILY LAW, 237-48 (1985).

[84] See in particular the De Facto Relationships Act (1984)(N.S.W.), and cognate legislation such as the Adoption of Children (De Facto Relationships) Amendment Act (1984). Similar legislation has been proposed in Victoria, but has not yet been enacted. It is likely that other

classification allows for spousal maintenance and property adjustment somewhat similar to those applicable to marriage.[85] Would it be best to allow recognition of traditional marriages under such laws relating to de facto relationships? The Commission thinks not. Apart from the fact that these reforms do not yet exist outside New South Wales,

> [t]here is a more fundamental objection. To treat a traditional marriage as a de facto relationship is to deny recognition of what it purports to be. It is true that Aborigines enter into de facto relationships. But some Aborigines enter into traditional marriages, recognised by themselves and others as distinctive, socially-sanctioned arrangements. If possible, these should be specifically recognised, thus maintaining rather than eroding a distinction Aborigines themselves are concerned to maintain.[86]

In accordance with its general approach, the Commission recommends that traditional Aboriginal marriage be given "functional" recognition. In other words, the question of recognition should be considered in relation to particular matters. The polygamous nature of a minority of traditional marriages, for example, would be one relevant factor in determining the appropriateness of attaching various consequences to the relationship.[87]

On specific matters,[88] the Commission recommended that:

(1) The children of traditional marriages should be recognized as legitimate.[89]

(2) Traditional marriages should be recognized in adoption legislation so that parties to these marriages are eligible to adopt. Consent of both parents would also then be required before the adoption of their children could occur.[90]

(3) Traditional marriages should not be recognized for the purpose of the law of maintenance and property distribution.[91]

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states and territories may enact legislation along similar lines.

[85] For a detailed treatment, see J. WADE, AUSTRALIAN DE FACTO RELATIONSHIPS LAW, (CCH)(1986); *see also* R. CHISHOLM, C. FOREMAN, & S. O'RYAN, AUSTRALIAN FAMILY LAW: STATE LEGISLATION (1987).

[86] ALRC 31, *supra* note 1, at ¶ 245.

[87] *Id.* at ¶¶ 258-260. There was some difference of opinion within the Commission on the difficult question of under-age marriages in accordance with Aboriginal law. *Id.* at ¶ 261.

[88] The Commission noted that recognition of traditional marriages could raise questions in many other legal contexts. In some cases, however, the rule might be irrelevant to Aboriginal people, or might not conform to Aboriginal tradition and law. The topic should be kept under review, and appropriate amendments made where the need arises. *Id.* at ¶ 324.

[89] *Id.* at ¶ 271.

[90] *Id.* at ¶ 278.

[91] *Id.* at ¶¶ 280-294. The Commission's reasons for non-recognition in this case include the absence of any Aboriginal pressure for change, and the danger that in some contexts the recognition of traditional marriages might create obligations which do not correspond with Aboriginal

(4) Traditional marriages should be recognized for the purposes of worker's compensation, accident compensation, superannuation,[92] and criminal injuries compensation.[93]

(5) Traditional marriages should be recognized for the purposes of the Social Security Act (1947)(Cth).[94]

(6) The rules relating to spousal immunity in testifying against each other, and the protection of marital communications should apply to parties to traditional marriages.[95]

(7) The criminal law of bigamy should not be extended to traditional marriages.[96]

(8) The common law rule that a man cannot be convicted of raping his wife, in those jurisdictions where it has not been amended, should not apply to traditional marriages.[97]

(9) Sexual intercourse between parties to a traditional marriage might constitute the offense of carnal knowledge where the wife is under the age at which a person may legally consent to sexual intercourse. The majority of the Commission recommended that traditional marriage should be a defense to the charge, whatever the age of the wife, provided that the intercourse was with her consent.[98]

(10) While stressing the need for protection against domestic violence and for appropriate reform of the relevant legislation, the Commission recommended that the Family Court's jurisdiction not extend to traditional marriages, and therefore that traditional marriages not be recognized for the purpose of this part of the law.[99]

(11) Traditional marriages should be recognized for the purpose of the Income Tax Assessment Act (1936)(Cth).[100]

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traditions and perceptions. The question might need to be reviewed in the event of future developments.

[92] That is, a pension or other payment payable on retirement from employment. Payments under superannuation schemes, which take various forms, are a significant part of the wealth of many Australians at the point of retirement.

[93] ALRC 31, *supra* note 1, at ¶ 295-301.

[94] *Id.* at ¶¶ 302-12.

[95] *Id.* at ¶¶ 313-16. The Commission noted recent reform initiatives in this area, but felt that as long as such rules remained they should apply to traditional marriages as well as marriages under the Marriage Act (1961)(Cth).

[96] *Id.* at ¶ 317.

[97] *Id.* at ¶ 318.

[98] *Id.* at ¶¶ 319-20. Professor Crawford, the Commissioner in charge of the reference, dissented from this recommendation. *Id.* at ¶ 261.

[99] *Id.* at ¶¶ 321, 323.

[100] *Id.* at ¶ 322.

B. Protection and Distribution of Family Property

It is an ironic comment on the processes and priorities of Australian law reform that the national law reform body is earnestly considering issues relating to the distribution of property belonging to individual Aboriginal people, while the great question of Aboriginal land rights is outside its terms of reference. The technical flavor of this part of the Commission's report[101] reflects the fact that, for the most part, few Australian Aborigines have enough personal property to make these questions of great moment. It appears that there were no submissions from Aboriginal people themselves on these questions.

On many aspects of property law, the Commission received no evidence of any problems with the present law. For example, it seems that Aboriginal reciprocal or customary obligations associated with gifts do not pose practical difficulties in view of the informal nature of the general law of gifts. It is unlikely that questions regarding such general gift giving would be dealt with by the regular court system. Existing law seems adequate to ensure that words such as "wife" or "husband," when used in wills made by Aboriginal persons will be interpreted in accordance with the meaning the deceased would have given to such terms.

The rules of intestate succession present a more difficult question. These rules are based on notions of kinship which are different than, and likely to be more narrow than, those that prevail among many Aboriginal people.[102] The Commission recommends that traditional marriages be recognized for the purpose of intestate succession. But should the law go further and create different rules of distribution?

Three Australian jurisdictions have already answered this question in the affirmative.[103] Queensland offers the simplest solution: A state official administers the estates of Aboriginal persons who die without appointing an executor. If it is impractical to determine who should succeed under the ordinary rules, the official may, as a matter of discretion, determine who should succeed.[104] It is therefore possible for this discretion to be exercised in a way that conforms to Aboriginal customary law, but there is no guarantee or legislative encouragement for this.

In Western Australia, the Public Trustee administers the estates of Aboriginal people (narrowly defined) who die intestate. The Public Trustee distributes

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[101] *Id.* at Ch. 15, ¶¶ 326-43.

[102] *Id.* at ¶ 337.

[103] Aboriginal Affairs Planning Authority Act (1972)(W.Austl.); Administration and Probate Act § 71B (N.Terr.); Community Services (Aborigines) Act (1984)(Queensl.). *See* ALRC 31, *supra* note 1, at ¶ 339.

[104] Community Services (Aborigines) Act § 75 (1984)(Queensl.), considered in ALRC 31, *supra* note 1, at ¶ 339.

according to the ordinary rules unless no person can be ascertained who is entitled under those rules. In that event, distribution may take place according to a special regime, but this amounts to little more than the ordinary rules incorporating a recognition of traditional marriages. If nobody is entitled, the estate vests in the Aboriginal Affairs Planning Authority for the benefit of persons of Aboriginal descent.[105]

A more interesting and further-reaching provision is that of the Northern Territory, under which persons may claim an interest in the estate under "the customs and traditions of the community or group to which the intestate Aboriginal belonged."[106] The claimant may apply to a court for an order of distribution in accordance with Aboriginal customs. The applicant must attach a plan for such intestate distribution with the application. This goes further than the legislation previously mentioned in that it provides for distribution to be made according to customary law even when it is possible to make the distribution according to the ordinary rules. However, the system does not operate where there is a will, or where the estate is subject to claims for family provision.[107]

The Commission favors an approach similar to that taken by the Northern Territory. It is critical, however, of one provision in that legislation which excludes from the distribution system the estate of an Aboriginal person who marries under the Marriage Act (1961)(Cth).[108] The Commission also recommends that family provision legislation be amended to allow claims by members of the extended family network of Aboriginal persons.[109]

Finally, the Commission addresses the question of priority between distribution under customary law, distribution according to the terms of any will, and distribution according to claims under the family provision. The Commission recommends that testate estates of Aboriginal persons continue to be subject to family provision claims. On other issues there was a division of opinion. A majority of the Commission believes that a will, and claims under family provision legislation, should prevail over customary distribution.[110]

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[105] Aboriginal Affairs Planning Authority Act §§ 33-35 (1972)(W.Austl.), considered in ALRC 31, *supra* ¶ 339.

[106] Administration and Probate Act §§ 71A-71F (N.Terr.).

[107] *Id.*

[108] The Commission believes that this provision wrongly excludes persons who enter a traditional marriage which is later sanctioned by a church marriage. ALRC 31, *supra* note 1, at ¶ 349.

[109] *Id.* at ¶ 342.

[110] One Commissioner, Professor Michael Chesterman, expressed his opinion that the customary distribution should prevail over a will and not be subject to claims under family provision legislation. ALRC 31, *supra* note 1, at 232, ¶ 342.

C. Child Custody, Fostering and Adoption

In contrast with questions of property, legal issues associated with the care of children are of great practical importance, and have been the subject of a great deal of concern by Aboriginal people.[111] Problems have arisen in reported cases, and legislative responses may already be found in several Australian jurisdictions.

The background to these issues has become reasonably well known in recent years.[112] Child care law and practice have formed a part of the overall governmental policy towards Aboriginal people since contact. While there have been significant shifts in emphasis over time, the application of the child welfare system to Aboriginal children has been dominated, until recently, by a deliberate policy of assimilating Aboriginal children into what was often referred to as the "wider" community.

This policy background, explicit in many government reports,[113] was expressed in a variety of ways. The authorities were more likely to consider children in Aboriginal communities as "neglected," or as fitting within other appropriate legal categories justifying intervention. Once taken into care, Aboriginal children were often placed in settings, such as institutions or non-Aboriginal foster placements, that separated them from their communities and Aboriginal roots. The system made no effective provision that allowed Aboriginal people to share in the decision-making regarding the custody and care of their children.

To some extent, these practices also applied to poor, non-Aboriginal families. But for some time, Aboriginal child welfare was administered under legislation dealing with "Aboriginal welfare," and not under the ordinary child welfare laws.[114] Even where the formal law did not distinguish between Aboriginal and

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[111] These issues are dealt with in ALRC 31, *supra* note 1, at Ch. 16, ¶¶ 344-92.

[112] Among the citations given in ALRC 31, *supra* note 1, see P. READ, THE STOLEN GENERATIONS (1982) [hereinafter STOLEN GENERATIONS]; ROYAL COMMISSION ON HUMAN RELATIONSHIPS, FINAL REPORT vol.4 (1977); REPORT OF ABORIGINAL CHILDREN'S RESEARCH PROFECT (1982)(N.S.W.); INTERNATIONAL YEAR OF THE CHILD, NATIONAL COMMITTEE OF NON-GOVERNMENTAL ORGANISATIONS, ABORIGINAL CHILDREN AND THE LAW (1979); BLACK CHILDREN, *supra* note 48. See also sources discussed in H. GAMBLE, LAW FOR PARENTS AND CHILDREN, Ch.12 (2nd ed. 1986).

[113] For example, in its report for the year 1910, the Aborigines Protection Board (N.S.W.) stated that "[t]he Board recognise[s] that the only chance these children have is to be taken away from their present environment and properly trained by earnest workers before being apprenticed out, and after once having left the aborigines' reserves they should never be allowed to return to them permanently." REPORT OF ABORIGINES PROTECTION BOARD, 4 (1910), quoted in BLACK CHILDREN, *supra* note 48, at 16. *See also* STOLEN GENERATIONS, *supra* note 112.

[114] The legal history in New South Wales is traced in BLACK CHILDREN, *supra* note 48.

non-Aboriginal children, as in New South Wales since 1969,[115] it seemed to many Aboriginal families, and to many commentators, that the system was still applied harshly to Aboriginal people. The statistics certainly show a disproportionate involvement of Aboriginal children in the child welfare system. It is difficult, though, to determine the extent to which this reflects the high incidence of poverty, and associated social problems, in many Aboriginal communities.[116] The Commission deals with this topic in considerable detail. It reviews reported case law[117] in which courts made custody and adoption decisions relating to Aboriginal children. The Commission concludes that the results "represent what appear to be enlightened and sensitive interpretations of the paramount consideration of the best interests of the child."[118] The Commision also concludes, however, that the past policy of assimilation, and "the emphasis which sometimes tends to be placed on material comfort in determining placements," also led to less satisfactory judgments and administrative decisions.[119] "Freddie's Case,"[120] decided in 1976, is a notorious example: The childrens' court made the child a state ward while his mother, to the knowledge of the welfare authorities, was in the hospital with a broken leg. She was therefore unable to participate in the custody proceedings. The child was subsequently placed with a visiting American couple for the purpose of adoption. The Northern Territory Supreme Court, however, refused to make the adoption order. This decision was to prove highly influential in the later development of the law.

By the time the Law Reform Commission wrote its final report, there were already several responses to the problem. In 1976, Aboriginal representatives at the first Australian Conference on adoption[121] developed a powerful critique of current approaches to Aboriginal child placement, and initiated the Aboriginal Children's Services. These organizations have since spread throughout Australia.[122] The Department of Aboriginal Affairs, stirred by Freddie's Case and Ab-

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[115] The Aborigines Welfare Board was abolished by the Aborigines Act § 4 (1969).

[116] For example, 12% of the 3,000 or so children in substitute care in New South Wales in 1985 were Aboriginal. Aboriginal people as a whole, however, constituted only about 1% of the total population in New South Wales. For similar statistics in other Australian states and territories, see ALRC 31, *supra* note 1, at ¶ 346.

[117] *See e.g.*, In the Marriage of Sanders (1976) 10 A.L.R. 604 (Full Court of the Family Court of Australia); In the Matter of F.; Mc Millan v Larcombe (1976) N.T.L. 1001 (N.Terr.S.Ct.); and F. v. Langshaw (1983) 8 Fam.L.R. 832 (N.S.W.S.Ct.), *aff'd sub nom.* Rushby v. Roberts, [1983] 1 N.S.W.L.R. 350 (N.S.W.Ct.App.).

[118] ALRC *supra* note 1, at ¶ 351.

[119] *Id.*

[120] In the Matter of F.; Mc Millan v. Larcombe (1976) N.T.L. 1001 (N.Terr.S.Ct.).

[121] Sommerlad, "Homes for Blacks - Aboriginal Community and Adoption", in PROCEEDINGS OF THE FIRST AUSTRALIAN CONFERENCE ON ADOPTION (C. Picton ed. 1976).

[122] *See* ALRC 31, *supra* note 1, at ¶ 370.

original initiatives, formulated a set of guidelines aimed at reducing the number of cases in which Aboriginal children are unnecessarily removed from their families and communities.[123] These guidelines may have been influential, but were only formally adopted by state welfare Ministers in 1984. At that time, the Ministers also endorsed a major working party report[124] which stated that "within the framework of sound child care practice[,] the child's Aboriginality is a significant issue which must be reflected both in decision making processes and in daily practice."[125] To that end, the working party's report recommended a set of proposals which, along with similar proposals from other sources, became known as "the Aboriginal child placement principles." These principles comprise, in essence, a preference for placement of Aboriginal children in Aboriginal families or communities—ideally with members of the children's extended family. They also include proposals for involving Aboriginal communities and agencies in the decision-making process when placement is made of an Aboriginal child.

The Commission also drew upon other sources. In the United States, the Indian Child Welfare Act (1978)[126] embodies a version of the "placement principle." The Commission, and many Aboriginal people themselves, consider this Act a valuable model for Australia because the American Indians were subjected to child welfare policies similar to those applied to the Aboriginals in Australia. Somewhat analogous developments occurred in Canada,[127] although there is no national legislation along the lines of the United States Act of 1978. Even in Australia, provisions implementing elements of the child placement principle were introduced in the Northern Territory,[128] in Victoria,[129] and in New South Wales.[130] A more equivocal provision appeared in draft legislation

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[123] DEPARTMENT OF ABORIGINAL AFFAIRS, Doc. B 10.3 (Jan. 1980), cited in ALRC 31, *supra* note 1, at ¶ 352.

[124] WORKING PARTY OF THE STANDING COMMITTEE OF SOCIAL WELFARE ADMINISTRATORS, ABORIGINAL FOSTERING AND ADOPTION: REVIEW OF STATE AND TERRITORY PRINCIPLES, POLICIES AND PRACTICES (1983) [hereinafter ABORIGINAL FOSTERING], discussed in ALRC 31, *supra* note 1, at ¶ 352.

[125] ABORIGINAL FOSTERING, *supra* note 122, at 31, quoted in ALRC 31, *supra* note 1, at ¶ 352.

[126] Indian Child Welfare Act (1978)(U.S.A.), discussed in ALRC 31, *supra* note 1, at ¶¶ 353-56.

[127] *See* ALRC 31, *supra* note 1, at ¶ 357, (discussing the Ontario Children and Family Services Act (1985), the Spallumcheen Band By-Laws (British Columbia), and tripartite agreements between the governments of Canada and Manitoba and the (Indian) Four Nations Confederacy).

[128] Community Welfare Act §§ 69, 43 (1983)(N.Terr.)

[129] Adoption Act §§ 37, 50 (1984)(Vict.).

[130] Community Welfare Act (1982), discussed in ALRC 31, *supra* note 1, at ¶ 363. This Act, which was never enforced, was effectively repealed by subsequent acts. Notable among these acts is the Children (Care and Protection) Act (1987), which came into effect in January 1988. Section 87 of the 1987 Act includes a less equivocal statement of the Aboriginal child placement

in Queensland that has not yet been passed by the Parliament of that state.[131]

Reviewing these and other developments, the Commission concludes:

> [that the] legislation should deal expressly with the placement of Aboriginal children. It is not sufficient to rely on the sensitivity of particular welfare officers, authorities and magistrates in ensuring that appropriate principles are applied - and that concealed ethnocentric judgments are not applied - in deciding on the future of Aboriginal children. Legislation providing a statutory basis for an Aboriginal child placement principle would help to ensure that those involved in making decisions on Aboriginal child placements make every effort to ensure that, wherever possible, Aboriginal children are placed within the care of their own families and communities.[132]

It is not possible to canvass all the issues dealt with by the Commission. Some other issues addressed by the Commission, however, include the definition of "Aboriginal child,"[133] and the application of the placement principle to juvenile offenders[134] and to custody disputes between parents.[135] Legislative and other support that may be given to Aboriginal child care agencies is also discussed.[136] The Commission also raises the thorny problem of jurisdiction, but concludes that it would not be useful to make changes, such as establishing Aboriginal courts, at the present time.[137] Finally, the Commission considers some technical problems arising under the Social Security Act (1947)(Cth),[138] and possible recognition of traditional adoption. It concludes, however, that it would not be constructive to recognize traditional adoption in the sense of translating it into adoption as understood in general Australian law.[139]

VII. CONCLUSION

In 1988, Australia celebrates its Bicentenary. Aboriginal issues have already cast a shadow over the celebratory tone of the event. Many non-Aboriginal Australians feel a certain awkwardness in celebrating two hundred years of an "occupation" that has involved the grossest injustices to Aboriginal people. Contin-

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principle.

[131] Family and Community Development Bill (1984)(Queensl.), discussed in ALRC 31, *supra* note 1, at ¶ 362.

[132] ALRC 31, *supra* note 1, at ¶ 367.

[133] *Id.* at ¶ 366.

[134] *Id.* at 257, ¶ 76.

[135] *Id.* at 257-58, ¶ 376.

[136] *Id.* at ¶ 375, n. 199 and accompanying text.

[137] *Id.* at ¶¶ 377-82.

[138] *Id.* at ¶¶ 387-91.

[139] *Id.* at ¶ 383-86.

uing effects of this occupation are revealed almost daily in research on "social indicators" that show Aboriginal people to be at the bottom of the heap in areas such as infant morbidity and mortality, unemployment, inadequate housing, involvement in the criminal justice system, and alcoholism.[140] Australia has far to go in meeting the reasonable demands of Aboriginal people and communities. Perhaps in the course of a concerted effort to meet these claims, a vision of the future will emerge. The Australian Bicentennial celebrations may have some value if they provoke a determination to bring about a measure of justice for Aboriginal people. In that task, if there is the will to undertake it, the thirty-first Report of the Law Reform Commission will provide an invaluable beginning.

The Report is a beginning, and not an end, for a number of reasons.[141] First, the Commission's terms of reference do not refer to the general challenge of ensuring justice for Aboriginal Australians, but only to the recognition of Aboriginal customary law. Even within this area, the great issue of land rights was treated as being outside the terms of reference. Second, the Commission, while engaging in considerable consultation with Aboriginal people in the preparation of its Report, stresses that such consultation should continue during the process of implementation of its recommendations. The Commission quoted from an unpublished paper by Russell Barsh:

> [I]t is fundamentally inappropriate to think in terms of "settling" Aboriginal rights or claims. What we need is not a final accounting, like a proceeding in bankruptcy, but a process of political empowerment giving Aboriginal communities some time and security to establish for themselves who they are, what they want to achieve, and what kind of relationship they feel they can have with Australia.[142]

Third, there are possible limits on the extent to which a Law Reform Commission can advance a theoretically satisfying treatment of matters on which it is asked to report. The Commission's own view is that its recommendations are presented not merely, or even principally, as a concession to Aboriginal claims or demands:

> The recognition of Aboriginal customary laws is not part of a negotiated and independent settlement of claims, nor is it as such a matter of self-government or autonomy. The recommendations are primarily a response to the legal system's

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[140] *See supra* notes 12-13 and accompanying text.

[141] The Commission's own views about the significance of its Report are contained in Chapter 39, "Implementation and the Future." ALRC 31, supra note 1, at ¶¶ 1030-37.

[142] Barsh, Indigenous Policy in Australia and North America, 12 (1983)(unpublished manuscript), quoted in ALRC 31, *supra* note 1, at ¶ 1033.

> search for justice in dealing with Aboriginal people of Australia, a people with distinctive traditions and ways of life. Seen in this perspective, the recognition of Aboriginal customary laws has the aspect of a principled response to legal and cultural diversity, and not just another government "service".[143]

This passage captures both the strength and weakness of the Commission's work. It stresses that the ideas stem from a sense of justice. But in a pluralistic community, whose sense of justice should be embodied in reports of Law Reform Commissions, which are unelected bodies having expertise in law? The Commission, in referring to "the legal system's search for justice" appears to be saying that the criteria for evaluating the justice of its proposals can be found in the law itself. The role of a law reform body, under this view, is to bring a sophisticated, but non-political, perspective to problem solving. This perspective should lead to conclusions that are acceptable across the spectrum. The validity of such conclusions will then not be undermined by changes in government.

There are major difficulties, however, in using the law itself to provide the criteria by which the justice of particular proposals are evaluated. It is not "the legal system" that is conducting the search for justice, but human beings who bring to the task their particular views of what the world is and what it might become. The strength of such reports, therefore, lies in the detailed reviews of the law and relevant facts, and the clarification of issues and arguments. The weakness is that the underlying basis for the proposals, which cannot really be found in existing law, is never quite articulated.

The problem may be illustrated by examining laws relating to the welfare of Aboriginal children. These laws provide a good example of the significance of distinguishing between two bases for law reform relating to Aboriginal people. These two bases are the "demonstrated benefit" approach and the "self-determination" approach.[144] Many of the proposals of the Commission can be justified under either approach. Thus, a law that requires the authorities to show good reason before removing children from Aboriginal communities, and that requires prior consultation with the parents and leaders of the community, can be readily defended *either* in terms of the welfare of the children, or in terms of the rights of Aboriginal people to manage their own affairs and pass on their heritage to their children.

In other situations the two policies lead to different results. For example, suppose an Aboriginal mother dies giving birth to a child by a non-Aboriginal father, and the father wishes to have the child placed for adoption with a non-Aboriginal couple. Or suppose a child of eleven wishes to remain in the care of a non-Aboriginal foster parent rather than being returned to the mother's Ab-

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[143] ALRC 31, *supra* note 1, at ¶ 1037.

[144] *See infra*, note 67 and accompanying text.

original community. In such cases, it may be difficult to justify a preference for the Aboriginal claim by reference to the welfare of the particular child, if only because Aboriginal and non-Aboriginal views may differ on what constitutes the child's "welfare." On the other hand, it might be possible to justify a preference for an Aboriginal placement in such cases on the basis of a policy of giving effect to Aboriginal self-determination. This notion, however, takes us beyond traditional ideas of child welfare law. Indeed, Aboriginal self-determination might suggest that the decision not be made by a non-Aboriginal court, or other authority after consulting with Aboriginal representatives; and not by giving preference to placement with Aboriginal people. Rather, it may suggest that the decision be made through a mechanism yet to be identified or developed by the Aboriginal community.

At this point, the debate shifts from child welfare to self-government, as it has so dramatically in Canada.[145] For some Aboriginal leaders, as for many of the indigenous nations and peoples in North America, this is the true debate: Not the narrower issues of welfare or recognition of Aboriginal laws by the non-Aboriginal legal system, but the broader issues of sovereignty[146] and self-government. Such notions are generally unfamiliar and threatening to non-Aboriginal Australians, and are consequently liable to be treated as absurd or utopian. It may be one of the consequences of the previous commitment to a "White Australia" that many Australians, unlike Canadians, have little idea what Aboriginal claims to "sovereignty" or "self-determination" might involve. It is hardly reasonable to expect Aboriginal people, with so little opportunity for self-government in the two hundred years since the White invasion, to present a detailed program. The actual demands they have made seem both limited and

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[145] *See e.g.*, the discussion in ALRC 31, *supra* note 1, at ¶¶ 1036-37 *citing* HOUSE OF COMMONS, SPECIAL COMMITTEE ON INDIAN SELF-GOVERNMENT REPORT (K. Penner, Chair, 1985)(Ottowa); B. MORSE, ED., ABORIGINAL PEOPLES AND THE LAW: INDIAN, METIS AND INUIT RIGHTS IN CANADA (1985). *See also* Crawford, Hennessy, & Fisher, "Aboriginal Customary Law: Proposals for Recognition", in IVORY SCALES: BLACK AUSTRALIANS AND THE LAW, 190-223 (K. Hazlehurst ed. 1987) (providing an overview of the ALRC Commission Report).

[146] Aboriginal claims to sovereignty have been expressed by the people of Darney Island (Torres Strait) in Wacando v. the Commonwealth (1981) 37 A.L.R. 317; and by Paul Coe on behalf of the Aboriginal nation in Coe v. The Commonwealth of Australia (1979) 24 A.L.R. 118. See Nettheim, "Justice or Handouts? Aboriginals, Law and Policy," in IVORY SCALES: BLACK AUSTRALIANS AND THE LAW, 13-14 (K. Hazlehurst ed. 1987) [hereinafter Nettlheim]. Henry Reynolds has drawn attention to the sovereignty issues in more recent Aboriginal claims, stating that "[u]p till recently Aboriginal activists have worked within existing institutions seeking property, not sovereignty. Frustrated by a successful right-wing counter-attack they have accepted the premise of their arch-opponents, that land and sovereignty must be pursued together. If land rights means a nation within a nation, they now say, so be it." LAW OF THE LAND, *supra* note 6, at 177. *See also* Hookey, "Settlement and Sovereignty," in ABORIGINES AND THE LAW 1-18 (P. Hanks & B. Keon-Cohen eds. 1984).

reasonable. Such demands include certain land rights; a degree of control over the care and education of children, and over the involvement of police and other authorities in Aboriginal communities; relief from discrimination; and the provision of adequate services.[147] Phrases such as "self-determination" may have different shades of meaning for different Aboriginal people and communities. The common core, however, appears to be a yearning for control over their own lives and destiny as Aboriginal communities, and a sense that there should be some formal repudiation of the wrongs done to Aboriginal people.[148] How far that yearning, that demand for self-determination or self-government, can be met under present day conditions in Australia is perhaps the greatest legal and moral issue facing Australia as it celebrates its Bicentenary.

It is hardly surprising that, while those working on the Law Reform Commission Report were highly sensitive to these issues,[149] such issues are not specifically addressed in the reasoning leading to the Commission's recommendations. It was perhaps not the task of the Commission to address such underlying issues. Its task is the "review, modernisation and simplification of the law,"[150] rather than the formulation of basic policy on such politically sensitive issues as self-determination for Aboriginal people. The Commission's report, for all its thoroughness and scholarship, cannot be seen as a resolution of the issues; even if its very sensible recommendations can, and should, be implemented at once. But, until those underlying issues, currently expressed in Aboriginal demands for self-determination, are genuinely addressed, it seems unlikely that real progress can be made. The Minister for Aboriginal Affairs, Mr. Gerry Hand, provoked both support and opposition when he announced that he would not be attending the Bicentennial celebrations.[151] Aboriginal Aus-

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[147] For a useful overview, see Nettheim, *supra* note 144 at 8-27.

[148] Reynolds writes that "Australia will continue to be an imperial nation where the indigenous people are ruled by a legal system which enfolds old injustice. . . . [E]ventually there will have to be a formal settlement. Nothing else will suffice. . . ." LAW OF THE LAND, *supra* note 6, at 173, 175. Another expression of the need for some formal acknowledgment, as distinct from specific arrangements relating to land and other resources, is the proposal of a committee of the Constitutional Commission to include in the preamble to the Constitution the words, "Whereas Australia is an ancient land previously owned and occupied by Aboriginal peoples who never ceded ownership." AUSTRALIAN CONSTITUTIONAL COMMISSION, REPORT OF THE ADVISORY COMMITTEE ON INDIVIDUAL AND DEMOCRATIC RIGHTS UNDER THE CONSTITUTION 72 (1987). The Constitutional Commission is a body established by the Commonwealth Government in December 1985 to review the Australian Constitution. It is to report in 1988.

[149] ALRC 31, *supra* note 1, at ¶¶ 1036-37.

[150] This phrase is taken from the reverse side of the title page of the ALRC Report. A fuller description of the Commission's purpose is set out in the Law Reform Commission Act §§ 6, 7 (1973)(Cth).

[151] A selection of newspaper headlines gives an indication of the debate: "Minister Backs Black Protests," Sydney Morning Herald, 4 Jan., 1988, at 1; "PM Backs Hand's 1988 Boycott," Sydney Morning Herald, 5 Jan., 1988, at 3; "Government Bid to Head Off Black Protests,"

tralians are entitled to feel that they have little to celebrate in 1988 except their survival; and many non-Aboriginal Australians would feel more comfortable if the Bicentennial activities exhibited a national determination to respond to what is arguably Australia's greatest legal and moral challenge—the achievement of justice for Aboriginal people. The Law Reform Commission's fine Report can be a major contribution to meeting that challenge, but only if it is matched by a generous and just response by the majority of Australians and their political leaders.

Sydney Morning Herald, 8 Jan., 1988, at 1; "Black Rage," Sydney Morning Herald, 9 Jan., 1988, at 37 (leading feature article).

The Role of Custom and Traditional Leaders Under the Yap Constitution

by Brian Z. Tamanaha*

I. INTRODUCTION

In Yap, the coexistence of the Western way of life and the Micronesian way of life is everywhere apparent. Traditionally garbed, bare breasted women sipping Coca-Cola while sitting on the back of a new pick-up truck is not an uncommon sight. Pole-driven bamboo rafts are used for fishing almost as often as fiberglass speedboats with forty horsepower engines. The radio station alternates between broadcasting Yapese love songs and American country music. Though less obvious, nowhere is this combination more intimately woven than in the Yapese system of laws and governance.

The Constitution of Yap preserves a core group of fundamental rights for the people, and sets out a government with a legislature, executive, and judiciary. On the surface there appears to be little difference between the Constitution of Yap and that of any state in the United States. This article will illustrate, however, that there are two remarkable, uniquely Yapese, differences. First, custom and tradition reign supreme, even to the derogation of fundamental rights. Second, the three branches of government are subject to the dictates of a fourth branch composed of traditional leaders. Indeed, custom and traditional leaders have in some ways gained strength in Yap through incorporation into the constitution.

Part II of this article briefly describes the background of Yap. Part III elaborates upon the Constitution and its treatment of custom and traditional leaders. Part IV discusses the interaction between the Constitution of Yap and the Constitution of the Federated States of Micronesia in their respective treatment of custom and traditional leaders.

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* Assistant Attorney General, Office of Attorney General, Yap, Federated States of Micronesia. B.S., University of Oregon, 1980; J.D., magna cum laude, Boston University School of Law, 1983. The author wishes to thank B.K. Maglaw and the people of Yap for their friendship and generosity.

II. BACKGROUND

Yap State of the Federated States of Micronesia consists of over one hundred widely spaced islands in the Western Carolines. Yap Islands Proper, the population center and location of the capital city, Colonia, is a group of four contiguous high islands which lie about 450 miles southwest of Guam.[1] The Outer Islands, made up almost exclusively of atolls and low islands, extend south and east of Yap Islands Proper.[2] Together, these islands and atolls form what is referred to as the "Old Yap Empire,"[3] stretching almost 700 miles east to west from Truk to Belau.

The origin of the Yapese is unknown.[4] Anthropologists believe the unique culture and language of the Yapese indicate the islands have been settled continuously, in relative isolation, for a long period of time.[5] Their initial encounter with the Western civilization occurred in the sixteenth century and interaction was sporadic until the second half of the nineteenth century, when both Spain and Germany asserted ownership rights to Yap.[6] During this latter period, a permanent foreign presence was established on Yap in the form of the administering government, trading companies, and missionaries.[7] Spain sold Yap to Germany in 1899.[8]

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[1] Yap Islands Proper consists of the islands of Rumung, Map, Gagil-Tomil, and Yap. Except for Rumung, these islands are joined by bridges to form a single unit. The total land area is approximately thirty-eight square miles, about sixteen miles in length and from one to six miles in width. They are called high islands because of extant hills and ridges, some as high as 600 feet. *See generally* S.G. LINGENFELTER, YAP: POLITICAL LEADERSHIP AND CULTURE CHANGE IN AN ISLAND SOCIETY 5-14 (1975).

[2] There are 134 Outer Islands of Yap. *See* FIRST NAT'L DEV. PLAN 1985-1989, FEDERATED STATES OF MICRONESIA, OFFICE OF PLANNING AND STATISTICS 8 (1985) [hereinafter NAT'L PLAN]. The major populated islands and atolls consist of Ulithi, Fais, Sorol, Lamotrak, Ngulu, Satawal, Eauripik, Woleai, Faraulep, Ifalik, and Elato. The populations of these islands range from under a hundred to several hundred. People from Yap Islands Proper are locally referred to as Yapese, while people from the Outer Islands are either referred to as Outer Islanders, or by specific reference to their home island. The Yapese speak a language unlike any other in Micronesia, and unlike that of the Outer Islanders. *See* H.M. SOHN, WOLEAIAN REFERENCE GRAMMAR 1-5 (1975). The Outer Islanders speak a language similar to Trukese. NAT'L PLAN, at 9.

[3] *See* N. MELLER, THE CONGRESS OF MICRONESIA 147 (1969); S.A. DESMITH, MICROSTATES AND MICRONESIA 163 (1970).

[4] *See* D. LABBY, THE DEMYSTIFICATION OF YAP 1-2 (1976); *see also* LINGENFELTER, *supra* note 1, at 15 (the Yapese appear to be a mixture of racial groups).

[5] *See* LABBY, *supra* note 4, at 1-2; *see also* E.W. Gifford and D.S. Gifford, *Archaeological Excavations in Yap*, 18 ANTHROPOLOGICAL RECORDS 195 (1959) (samples of charcoal have been found on Yap dating to around A.D. 176).

[6] *See* LABBY, *supra* note 4, at 2-3 (Pope Leo XII awarded sovereignty over Yap to Spain, but gave Germany trading rights); LINGENFELTER, *supra* note 1, at 183-85.

[7] LABBY, *supra* note 4, at 3.

[8] *Id.*

Japan occupied Yap in 1914, taking over by force from Germany.[9] In 1920, Japan began to administer Yap through a League of Nations' mandate.[10] Following World War II, in 1947, the United States became the administering authority of Yap by virtue of the United Nations Trusteeship over the Pacific Islands.[11] In 1978, Yap, Truk, Pohnpei, and Kosrae voted to adopt the proposed Constitution of the Federated States of Micronesia,[12] which served as a charter for the four states to form a union, although the trusteeship had not yet terminated. Not until November 3, 1986, the effective date of the Compact of Free Association between the United States and the Federated States of Micronesia, did Yap, as a part of this new nation, become self-ruling and free of external control.[13]

A major effect of this long period of foreign contact was a drastic decrease in the population of Yap, due primarily to the introduction of disease. Studies estimate that the maximum population prior to Western contact ranged between 30,000 and 50,000.[14] A census of Yap taken in 1899 showed a population of 7,808.[15] The number of people declined by another thirty percent during Japanese rule between 1920 and 1937.[16] By 1946 there were only 2,582 Yapese.[17] Since then the population has gradually increased. There are now estimated to be between 11,000 and 12,000 persons in the state, with about two-thirds of this total on Yap Islands Proper.[18]

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[9] *Id.* at 4.

[10] *Id.*; *see also* U.S. DEP'T OF INTERIOR, THE TRUST TERRITORIES OF THE PACIFIC ISLANDS, 39TH ANNUAL REPORT 3 (1986) [hereinafter 39TH ANNUAL REPORT].

[11] 39TH ANNUAL REPORT, *supra* note 10, at 3.

[12] *Id.*

[13] *Id.* at 4, 271; *see also id.* at 273, app. C ("By the President of the United States of America, A Proclamation"); *id.* at 276, app. C ("A Presidential Proclamation"). Despite implementation of the Compact of Free Association, the independence of the Federated States of Micronesia is still subject to question because the United Nations Security Council never took a formal vote approving termination of the trusteeship. No vote was taken out of concern that the Soviet Union would veto termination, having already expressed strong reservations regarding the Compact agreement. *See generally* 41 U.N. SCOR Supp. (July 1985-June 1986), U.N. Doc. S/18238 (1986) (wherein the Soviet Union states its objections). Nevertheless, the United States and the Federated States of Micronesia (FSM) assert the position that the FSM is now a free and independent, self-governing nation. *Id.* at 37.

[14] LABBY, *supra* note 4, at 2; LINGENFELTER, *supra* note 1, at 15. These population estimates, along with those provided in the text accompanying notes 15, 16, and 17, *infra*, cover Yap Islands Proper only. Reliable estimates of the population for the Outer Islands during these periods are not available.

[15] LABBY, *supra* note 4, at 2.

[16] DESMITH, *supra* note 3, at 163.

[17] LABBY, *supra* note 4, at 6.

[18] NAT'L PLAN, *supra* note 2, at 80.

Yapese culture developed in a fashion adaptive to a high density population with scarce resources.[19] Thus, depopulation had an effect on the culture,[20] as did the forced interaction with so many different external influences. Even with long term foreign domination and constant pressure to change, however, Yapese culture has proven resilient.[21] It is often observed that Yap remains the most traditional area in Micronesia.[22]

The dominant feature of Yapese culture is its adherence to a complex caste system.[23] At one time there were nine different social classes, with each village in Yap belonging to a particular class.[24] The four lowest social classes made up the low caste.[25] The high caste villages owned the land of the low caste villages. In return for being allowed to remain on the land, the low caste had to provide specific types of labor and tribute to the high caste without compensation.[26] The high caste villages were located on the best, most productive lands,[27] and they controlled all the fishing rights.[28] From a social standpoint, members of the low caste were treated in some ways reminiscent of untouchables.[29] They

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[19] LINGENFELTER, *supra* note 1, at 15-16 ("Present social values reflect these past conditions in which resources were extremely scarce and competition to obtain them intense.").

[20] LABBY, *supra* note 4, at 2-3 (Muller found that "depopulation had irreparably upset the process of the hereditary transmission of ritual information and priestly position and that the Yapese religious system was in a state of near collapse.").

[21] D.L. OLIVER, THE PACIFIC ISLANDS 358 (rev. ed. 1961) ("Even though it was continuously under the influence of traders, priests, and officials for scores of years, the Yap Islanders clung tenaciously to their own culture."); R. TRUMBULL, TIN ROOFS AND PALM TREES: A REPORT ON THE NEW SOUTH SEAS 270 (Yapese men are "considered the most conservative of all Micronesians in their resistance to amelioration of local customs by the American influence . . . .").

[22] Patterson, *At the Birth of Nations*, 170 NAT'L GEOGRAPHIC 460, 488 (1986); DESMITH, *supra* note 3, at 163-64 ("Many Micronesians regard Yap as a picturesque anachronism.").

[23] For an in depth discussion of the Yapese caste system *see* LABBY, *supra* note 4, at 69-93. *See also* LINGENFELTER, *supra* note 1, at 91-98, 121-58.

[24] MELLER, *supra* note 3, at 145. In addition to ranking between villages, the clans or land estates within each village were ranked. LINGENFELTER, *supra* note 1, at 89-98; *see also* MELLER, at 146.

[25] MELLER, *supra* note 3, at 145. Even the low caste villages were ranked in a hierarchy, with the higher ones considered "servant" villages and the lower ones considered "serf" villages. LINGENFELTER, *supra* note 1, at 155-59.

[26] LINGENFELTER, *supra* note 1, at 155-59 (Servants were required to bring the first fruits of all their crops, and build clubhouses or men's houses. Serfs were required to build the house of the chief, repair it, clean the yard, and provide other general services.); LABBY, *supra* note 4, at 85-90. The high caste had some reciprocal obligations, in a patron-dependent type relationship. MELLER, *supra* note 3, at 145.

[27] LINGENFELTER, *supra* note 1, at 140; LABBY, *supra* note 4, at 86 (low caste villages "were generally described as living off in the bush in land that was poor and not very productive, having few resources.").

[28] LABBY, *supra* note 4, at 86 (low caste generally had no independent sea rights).

[29] TRUMBULL, *supra* note 21, at 270.

were required to use paths restricted to the "contaminated;"[30] they had to step off a path when encountering a high caste person;[31] and no high caste would eat food cooked by the low caste in their pots.[32] The Outer Islanders, in their relations with Yap Islands Proper, also had the status of low caste serfs, although there were some distinctions.[33] Important aspects of this caste system still exist,[34] including caste based land ownership rights, services provided by the low caste at funerals, segregation by village, and subtle forms of social restrictions.

Traditional Yap also had a well defined system of leadership. The village formed the basic organizational unit. Each village had three separate chiefs, each chief with a specific role.[35] Generally, a chief held his position by virtue of his plot of land, the land giving status to the owner.[36] Chiefs consulted with the village council prior to making decisions,[37] but once a chief gave an order it was absolute.[38] Villages were aligned into three groups, each associated with one of the three highest ranking villages in Yap.[39] Each alliance was led by a paramount chief who came from the controlling high village.[40] Over time these competing and occasionally warring groups of equal rank maintained a balanced tripartite system of leadership.[41]

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[30] LINGENFELTER, *supra* note 1, at 159 (low caste also had to observe numerous taboos and respect patterns).

[31] MELLER, *supra* note 3, at 145 (low caste also could not wear combs in their hair).

[32] LABBY, *supra* note 4, at 87.

[33] MELLER, *supra* note 3, at 150; *see* LINGENFELTER, *supra* note 1, at 147-55 (describing the "Old Yap Empire" and the relationship between the outer Islanders and the Yapese).

[34] 39TH ANNUAL REPORT, *supra* note 10, at 2 ("This [social stratification] reached a peak on Yap where five of the original nine distinct classes are still recognized today."); Patterson, *supra* note 22, at 488-89 ("Many of the people of Yap state, the most traditional of the islands of Micronesia, still cling to their old island dress and abide by old-time taboos that separate villages by caste, with the upper, or 'pure,' caste expecting menial labor from the lower, 'polluted' caste."); DESMITH, *supra* note 3, at 163 ("Indeed, a caste system, involving residential segregation, still persists in a modified form.").

[35] For a complete explanation of the system of chiefs in Yap, see LINGENFELTER, *supra* note 1, at 99-120.

[36] MELLER, *supra* note 3, at 146.

[37] LINGENFELTER, *supra* note 1, at 100.

[38] MELLER, *supra* note 3, at 146.

[39] *See generally* LINGENFELTER, *supra* note 1, at 120-34. ("The three highest ranking (bulce) villages in Yap are Ngolog in Rull municipality, Teb in Tamil municipality, and Tholang section of Gacpar village in Gagil."). All of the Outer Islands—except one outer island given to another village as a gift in marriage—came under the authority of the high village in Gagil. *Id.* at 147-55.

[40] MELLER, *supra* note 3, at 146.

[41] LINGENFELTER, *supra* note 1, at 122-31.

The German administrators altered this system by establishing ten districts, although they continued to rely upon the high villages to lead each district.[42] The Japanese and American administrators retained the composition of these ten districts, later renamed municipalities.[43] The Germans, and to a lesser extent the Japanese and Americans, ran the affairs of the Yapese through the traditional leaders.[44] Using the traditional Yapese political structure, the Germans recognized six paramount chiefs.[45] The Japanese allowed the village chiefs to administer local affairs.[46] The Americans held elections for the positions of District Chief, which were won by high-ranking traditional leaders.[47] Much of the traditional leaders' power over social affairs, and a significant amount of their political power, has survived to the present.[48]

III. INTEGRATION OF CUSTOM AND TRADITIONAL LEADERSHIP INTO THE CONSTITUTION

Yap is unusual in the Pacific because custom and traditional leadership have secured a primary role in the government and laws of the State. Also unusual is Yap's integration of a western-style, egalitarian, democratic constitution, with customs based upon an inegalitarian caste system and traditional leadership undemocratic by nature. There are currently no written decisions of the Yap State Court,[49] or of the Court of the Federated States of Micronesia, addressing this incorporation of custom and traditional leadership into the Yap Constitution.[50] The constitution is relatively new, having become effective on December 24,

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[42] *Id.* at 194-95.

[43] *Id.*

[44] *Id.* at 184-93; MELLER, *supra* note 3, at 146-47.

[45] LINGENFELTER, *supra* note 1, at 185.

[46] *Id.* at 186.

[47] *Id.* at 188-89.

[48] NAT'L PLAN, *supra* note 2, at 7 (traditional leaders in Yap play an important role in the government); *see also* MELLER, *supra* note 3, at 146 ("Much of this authority remains today . . . . Because foreigners have regarded the district chiefs as possessors of unqualified powers, they have attempted to govern Yap through the chiefs and have thereby enhanced the districts chief's authority."); LINGENFELTER, *supra* note 1, at 196-97 (recognizing the persistence of traditional leadership, due primarily to the continuation of traditional concepts regarding land, from which leadership status is derived.).

[49] Indeed, thus far the Yap State Court has issued only one written decision, Dabchur v. State of Yap, No. 1987-001 (App. Div. Yap Aug. 24, 1987).

[50] The relationship between the state and national courts in the Federated States of Micronesia (FSM) is similar to that in the United States. *See generally* In re Nahnsen, 1 FSM Intrm. 97, 101-09 (Pon. 1982). Assuming jurisdictional requirements are met, state courts may consider questions involving the national constitution and national courts may consider questions involving the state constitutions. *Id.* at 108.

1982, and its application to specific situations is still unknown. Identifying where Western legal principles will give way to Yapese culture promises to be a difficult task with significant implications for the future direction of the state.

A. The Constitution of Yap

The Constitution of Yap consists of a preamble and fifteen articles.[51] Articles I through VII set out the basic structure of the government. This section briefly summarizes the content of each of these first seven articles. Article III and parts of article V contain the seminal provisions on custom and traditional leaders. The relevant portions of these articles are examined in detail in sections B and C of this part.

Article I is a straightforward supremacy clause: "This Constitution is the supreme law of the State. An act of government in conflict with this Constitution is invalid to the extent of the conflict."[52]

Article II has thirteen separate sections almost identical in content to the Bill of Rights of the United States Constitution. The rights guaranteed by this article include: freedom of speech and press; separation of church and state; protection against unreasonable search and seizure; due process and equal protection; right to counsel and confrontation in criminal cases, as well as speedy and public trial; right against self incrimination; right against excessive bail, or cruel and unusual punishment; right to seek a writ of habeas corpus; prohibition against bill of attainder, ex post facto law, or law impairing obligation of contract; prohibition against slavery; right of just compensation for taking of property; right to sue government for redress; and reservation of rights to the people.[53]

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[51] The subject of each article can be discerned from its title:
Article I: Supremacy
Article II: Fundamental Rights
Article III: Traditional Leaders and Traditions
Article IV: Suffrage and Elections
Article V: The Legislature
Article VI: The Executive
Article VII: The Judiciary
Article VIII: Local Government
Article IX: Taxation and Finance
Article X: Amendment
Article XI: Legislature and Election Districts
Article XII: Health and Education
Article XIII: Conservation and Development of Resources
Article XIV: General Provisions
Article XV: Transition

[52] YAP CONST. art. I, § 1.

[53] *Id.* art. II, §§ 1-13.

Article III creates the councils composed of traditional leaders—Council of Pilung for Yap Islands Proper and Council of Tamol for the Outer Islands—and describes their duty in general terms to "perform functions which concern tradition and custom."[54] Section 2 of this article provides that "[d]ue recognition shall be given to traditions and customs in providing a system of law, and nothing in this Constitution shall be construed to limit or invalidate any recognized tradition or custom."[55]

Article IV grants the people the right to vote and prescribes the registration and voting requirements.[56]

Article V vests the legislature with the power to enact laws, and sets forth the procedures it must follow.[57] Minimum residency and age qualifications are imposed for legislators;[58] legislative immunity is granted for actions taken in the exercise of official functions;[59] and general housekeeping rules are set out.[60] This article describes a standard procedure for the enactment of laws,[61] except for a provision mandating review of bills by the traditional councils.[62]

Article VI vests the executive power in the Governor, and lists his duties along with the duties of the Lieutenant Governor.[63] The Governor and Lieutenant Governor are elected on a joint ticket; on each joint ticket one person must be from Yap Islands Proper and one person from the Outer Islands.[64]

Article VII vests the judicial power in the state court.[65] Judges are appointed by the Governor, with the advice and consent of the Legislature, for a term of six years.[66] Section 7 of this article is a judicial guidance clause: "Court decisions shall be consistent with this Constitution, State traditions and customs, and the social and geographical configuration of the State."[67]

Articles VIII through XV deal with miscellaneous matters secondary to the individual rights and political structure provided for in the first seven articles.[68] These last eight articles enumerate powers of the state government (including

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[54] *Id.* art. III, § 1.

[55] *Id.* § 2.

[56] *Id.* art. IV.

[57] *Id.* art. V.

[58] *Id.* § 6.

[59] *Id.* § 9.

[60] *Id.* §§ 11-14.

[61] A bill is passed by a majority vote of two-thirds of the members. *Id.* § 13. A bill becomes law if it passes two readings of the legislature on separate days. *Id.* § 15.

[62] *Id.* § 16.

[63] *Id.* art. VI.

[64] *Id.* art. VI, § 2.

[65] *Id.* art. VII, § 1.

[66] *Id.* § 3.

[67] *Id.* § 7.

[68] *Id.* arts. VIII-XV.

the power to tax and spend),[69] describe affirmative obligations imposed on the state in areas ranging from health and education[70] to conservation,[71] address the transition from Trust Territory laws to the state constitution,[72] and cover a number of other items.

The language and structure of the Yap Constitution can be misleading. It appears from the language of the constitution that its text is the supreme law of the land. The structure of the constitution appears, upon cursory review, to create a three branch system of government. Neither appearance is correct.

B. Custom and Tradition

To understand the full extent of the primacy of custom and tradition in Yap, the article I supremacy clause of the constitution must be read in conjunction with section 2 of article III on custom. The interaction between these two clauses can be clarified by reference to the legislative history of the Yap Constitutional Convention. Numerous proposals were offered at the Yap Constitutional Convention for the codification of specific customs.[73] All of these proposals were consolidated for discussion and ultimately rejected in favor of Proposal No. 58, which reads: "Due recognition shall be given to traditions and customs in providing a system of law, and nothing in this Constitution shall be construed to limit or invalidate any recognized tradition or custom, except as otherwise provided by law."[74] This proposal was derived word for word from the Yap District Charter, which was enacted in 1978 by the Yap District Legislature under the Trust Territory administration.[75]

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[69] *Id.* art. IX.

[70] *Id.* art. XII.

[71] *Id.* art XIII.

[72] *Id.* art. XV.

[73] *See, e.g.*, Proposal No. 66 (relating to traditional relationship between Yap Islands Proper and the Outer Islands); Proposal No. 69 (relating to traditional rank and relationships among villages and estates); Proposal No. 104 (relating to the customary rights, obligations, and privileges associated with Yapese names); Proposal No. 127 (relating to traditional classes of people), PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF YAP OF 1982 [hereinafter CONVENTION] (Records of the Constitutional Convention are maintained at the Office of the Governor of the State of Yap and can be obtained upon request.).

[74] COMM. ON CIVIL LIBERTIES AND TRADITIONS, STAND. COMM. REP. NO. 22 (Apr. 15, 1982), CONVENTION, *supra* note 73 (this proposal encompasses all customs and traditions).

[75] *See* YAP DIST. CHARTER, 3 T.T. CODE § 285 (1978) ("Due recognition shall be given to traditions and customs in providing a system of law, and nothing in this article shall be construed to limit or invalidate any recognized tradtion or custom, except as otherwise provided by law."). Proposal No. 58 was taken directly from section 285 of the Yap Dist. Charter, which in turn was derived from section 14 of the Trust Territory Code. *See* 1 T.T. CODE § 14 (1966) ("Due recognition shall be given to local customs in providing a system of law, and nothing in this chapter

The delegates to the Convention made one significant alteration to Proposal No. 58, eliminating the phrase "except as otherwise provided by law." The Standing Committee Report explained that this phrase was deleted because it: confuses the purpose and intent of the proposal. The reason is that the first part of the proposal states that "Due recognition shall be given to traditions and customs in providing a system of law . . . ." That alone mandates that the government shall not enact laws which are inconsistent with traditions.[76] The drafters of the constitution apparently intended the first part of article III, section 2, to proscribe any legislation violative of custom, in effect creating a supremacy clause for custom and tradition.

The second part of article III, section 2—"nothing in this Constitution shall be construed to limit or invalidate any recognized tradition or custom"—is a rule of construction which applies to the interpretation of the constitution.[77] Again, removal of the qualifying phrase "except as otherwise provided by law" radically changed the meaning of the provision. The delegates were aware that the Trust Territory Court previously interpreted this phrase to mean custom must give way when in conflict with written law.[78] To reverse this result, they removed the phrase. Previously bound by the Charter, custom now lies within a protected sphere beyond the reach of the constitution. Simply stated, when a recognized tradition is challenged as violative of the constitution or, more aptly, when an interpretation of the constitution is challenged as violative of a recognized tradition, the tradition must prevail.[79] Thus, removal of the qualifying phrase effectively raised Yapese custom and tradition above the constitution.

This conclusion does not invalidate the article I supremacy clause, it merely changes the way the constitution should be viewed. The constitution is the

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shall be construed to limit or invalidate any part of the existing customary law, except as otherwise provided by law."). The Trust Territory Code was a comprehensive set of laws established by the United States for the entire Trust Territory of the Pacific Islands.

[76] STAND. COMM. REP. NO. 22, *supra* note 74, at 3.

[77] *See* STAND. COMM. REP. NO. 54 (May 27, 1982), CONVENTION, *supra* note 73 (describing this part of article III, section 2, as dealing "with a situation where a provision of the constitution might conflict with traditional laws.").

[78] *See* Trust Territory v. Lino, 6 T.T.R. 7 (Tr. Div. Marshall Is. 1972); *see also* Ngiruhelbad v. Merii, 2 T.T.R. 631 (App. Div. 1961); Figir v. Trust Territory, 4 T.T.R. 368 (Tr. Div. Yap 1969). For this holding, the Trust Territory Court also relied on 1 T.T. CODE § 102, which reads:

> The customs of the inhabitants of the Trust Territory not in conflict with the laws of the Trust Territory shall be preserved. The recognized customary law of the various parts of the Trust Territory shall have full force and effect of law so far as such customary law is not in conflict with the laws mentioned in section 101 of this chapter.

1 T.T. CODE § 102 (1966).

[79] Tradition would prevail in the sense that the offending interpretation would be struck or avoided. No part of the constitution itself would be declared invalid.

"supreme law of the State."[80] This supreme law, however, incorporates a separate, unwritten, paramount source of law which controls interpretation of the document. The Yap Constitution is the exception to the axiom proclaimed by Chief Justice Marshall that "[c]ertainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law . . . ."[81]

Consequently, conflicts will arise which have no parallel in the application of other constitutions.[82] For example, article II, section 4, of the constitution provides that no person shall be denied equal protection or be discriminated against "on account of race, sex, religion, language, ancestry, or national origin."[83] Yet the legislative history of the Constitutional Convention leaves no doubt that the traditional caste system is one of the customs protected under the purview of article III.[84] To be consistent with article III, then, the equal

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[80] YAP CONST. art. I.

[81] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[82] Interpretation of the United States Constitution also relies upon extra-textual sources. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (penumbras formed by emanations from the Bill of Rights to give them life and substance). Social or cultural values have been explicitly relied upon in interpretation. *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957) (rely upon community standards to find obscenity); Robinson v. California, 370 U.S. 660 (1962) (Douglas, J., concurring) (discussing social values when defining cruel and unusual punishment). The difference between this use of external sources of law and the Yap Constitution's incorporation of custom and tradition lies in which prevails in the case of direct conflict. It is seldom explicitly suggested that an interpretation of the United States Constitution which violates a social standard is invalid and must be altered for that reason alone. Nonetheless, there are specific instances in the history of United States constitutional interpretation where social pressures have resulted in altering the meaning of the document from one case to another. The "separate but equal" doctrine was found not violative of the equal protection clause in Plessy v. Ferguson, 163 U.S. 537 (1896). Almost sixty years later, in Brown v. Board of Education, 347 U.S. 483 (1954), the Court found that this same doctrine did violate the equal protection clause. *See generally* J.H. ELY, DEMOCRACY AND DISTRUST (1980) (for a discussion of "noninterpretivism"—going beyond the document to enforce norms). From this perspective, it can be asserted that the Yap Constitution merely makes its reliance on custom explicit, whereas the United States Constitution does the same without acknowledgement. There is one further critical difference. Custom and tradition look to the past, binding the Yap Constitution to a time gone by. Social and cultural values which give meaning to the United States Constitution, however, come from the present, removing the bonds of the past. In this regard, the extra-textual sources used in interpreting these respective constitutions are opposite in purpose and outcome.

[83] YAP CONST. art. II, § 4.

[84] Proposal No. 69 reads in its entirety: "The rank and relationships of villages and estates of Yap Island Proper and Mogmog, and their concomitant titles and authority, on the date this Constitution is approved, are recognized by the State, and no action shall be taken to alter them." Proposal No. 69 (Mar. 24, 1982), CONVENTION, *supra* note 73. This proposal is a specific reference to the class distinctions between villages. The Standing Committee on Civil Liberties and Traditions rejected this proposal on the grounds that it "need not become a part of our Constitution in that Proposal No. 58, which protects our traditions and customs adequately addresses

protection clause must be interpreted in a way which does not invalidate the caste system.[85] The caste system operates through ancestry and therefore affects a protected class. Presumably, the definitions of the terms "equal protection" and "discrimination" cannot be altered, nor can the terms be construed in a manner which avoids application to the caste system. Perhaps the only resolution would be to graft, through interpretation, an additional clause on the end of article II, section 4, for example: "except as allowed by recognized custom or tradition."[86]

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those relationships and ranks as well." STAND. COMM. REP. NO. 27 (Apr. 15, 1982), CONVENTION, *supra* note 73. Proposal No. 65 reads: "Due recognition shall be given to the traditional system of power and relationships between, among, and within the villages of Yap Island Proper. Nothing in this Constitution limits or invalidates any part of this system and no law may be enacted against such system." Proposal No. 65 (Mar. 24, 1982), CONVENTION, *supra* note 73. This proposal also refers to the caste system, and like Proposal No. 69 it was rejected by the Standing Committee because Proposal No. 58 already protected those relationships. *See* STAND. COMM. REP. NO. 39 (Apr. 15, 1982), CONVENTION, *supra* note 73. Finally, Proposal No. 66 reads: "Due recognition shall be given to the traditional system of power and relationships between and among Gachpar and Wanyan and the Outer Island of the State. Nothing in this Constitution limits or invalidates any part of this system and no law may be enacted against such system." Proposal No. 66 (Mar. 24, 1982), CONVENTION, *supra* note 73. This proposal is a reference to the traditional dominance of a village on Yap Islands Proper over all of the Outer Islands, which requires the Outer Islanders to defer and pay tribute to the village, and involves land ownership rights of the Outer Islands by this village. Again, the Committee rejected this proposal in favor of Proposal No. 58, with an added emphasis that it "is in full accord with the purpose and intent of the Proposal [No. 66]." STAND. COMM. REP. No. 23 (Apr. 15, 1982), CONVENTION, *supra* note 73. The drafters of the constitution insured that their intent, as reflected in the standing committee reports, would bind interpretation of the constitution. Article XIV, section 6, requires that "[t]he meaning of any provision of this constitution shall be determined in accordance with the intent of the delegates." YAP CONST. art. XIV, § 6. The standing committee report to this provision adds: "If the meaning [of any provision of the constitution] is for any reason ambiguous or unclear or its application to a particular question at hand cannot be ascertained after reasonable effort, then the official records of this convention are to be consulted and relied upon." COMM. ON GEN. PROVISIONS, STAND. COMM. REP. No. 45 on Proposal No. 100 (Apr. 16, 1982), CONVENTION, *supra* note 73. Thus, the official records of the Constitutional Convention unequivocally indicate that traditional class distinctions are among those customs protected by article III, section 2.

[85] The constitution limits actions of the government, not purely private actions. *See* YAP CONST. art. I, § 1 ("act of government in conflict"). Government action recognizing the caste system is almost certain to be taken due to article V, section 1, of the constitution, which requires the codification of traditional laws. The government action requirement would also be fulfilled by judicial enforcement of class related rights, most significant of which are land claims.

[86] The drafters of the constitution anticipated that this type of conflict would arise:

> Your Committee felt that one concern must be clarified. Some people would believe that the Constitution and our traditions might conflict with each other in some way. However, it is felt that such would not occur for it is our belief that the Constitution will be created with our traditions and customs in mind. Therefore, the two should be thought of as really a part of a whole and not inconsistent with each other.

STAND. COMM. REP. No. 35 (Apr. 15, 1982), CONVENTION, *supra* note 73.

A similar dilemma was judiciously avoided following consideration of another fundamental rights proposal. Section 12 of Proposal No. 3 prohibited slavery and involuntary servitude.[87] The Standing Committee acknowledged that "involuntary servitude might exist to some degree. . . . Some people might believe that low caste people are at times pressured to perform certain tasks against their will. This might be true in some cases."[88] The Committee's candid recognition of the caste system and potential conflicts which might arise from a prohibition against involuntary servitude resulted in a clause which only prohibits slavery.[89]

Besides article III, section 2, three additional clauses were included in the constitution to solidify the position of custom and tradition in the legal system of the state. The judicial guidance clause, article VII, section 7, requires that court decisions be consistent with custom and tradition.[90] An interpretation

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[87] Proposal No. 3, section 12 reads: "Neither slavery nor involuntary servitude, except as punishment for crime, shall exist in the State." Proposal No. 3 (Mar. 16, 1982), CONVENTION, *supra* note 73.

[88] STAND. COMM. REP. No. 44 on Proposal No. 3, at 5 (Apr. 15, 1982), CONVENTION, *supra* note 73. The report continues:

> However, the low caste people still have the choice to abandon the lands given them by their landlords in cases of extreme abuse. Notice is given here to the relationship between chiefs and their serfs based upon reciprocal assistance to one another. Therefore, it is equally arguable that this system does not exist here. Your Committee feels that this portion of Section 12 [should] be deleted, and recommends passage as amended.

Id. at 5-6.

[89] *See* YAP CONST. art. II, § 10. Proposal No. 3, the fundamental rights proposal, also had a section which guaranteed the "freedom of movement and migration." Proposal No. 3, § 11, *supra* note 87. To this day, Yap follows traditional restrictions on travel from one village to another. The Committee on Civil Liberties and Traditions acknowledged that "there are places where people or certain people are not allowed by traditions." STAND. COMM. REP. No. 44, *supra* note 88. This section was also excluded from the constitution.

[90] YAP CONST. art. VII, § 7. *See* STAND. COMM. REP. No. 35, at 1, *supra* note 86 ("It is felt that the court should do nothing to interfere with the traditions of this State. To do that, the court should observe our tradition and look to it for guidance when deciding disputes."). Although no state court decision has addressed this issue, the Attorney General's Office and Public Defender's Office share the opinion that this clause operates to render traditional justification a valid defense to a criminal charge. This view is opposite to the position of the Trust Territory High Court. *See* Figir v. Trust Territory, 4 T.T.R. 368 (Tr. Div. Yap 1969). The effect of custom is routinely taken into account in the exercise of prosecutorial discretion. In a recent case, three juveniles causing a disturbance in a village were caught by the villagers, beaten, bound to a tree, and held until a traditional apology was tendered by the offenders' village. Although this action was illegal under the criminal code, no prosecution ensued because the villagers' response was legitimate under tradition. (No official citation is available to document this incident due to the fact that no charges were filed. However, the case was handled by the Office of the Attorney General on Yap, and may be confirmed by an inquiry directed to the Attorney General.)

clause, article XIV, section 6, dictates that the meaning of all constitutional provisions be determined in accordance with the intent of the delegates.[91] Finally, article XV, section 1, mandates the codification of traditional laws within a reasonable time following the effective date of the constitution.[92]

These four constitutional provisions ensure that virtually every action of the legislature, executive, and judiciary will be preceded by an inquiry into the effect of that action on custom and tradition.[93] All laws must be written, applied, and interpreted in a way which does not limit or invalidate any recognized custom or tradition. Considering that Yapese continue to follow many traditional practices in all aspects of everyday life, the scope of this constitutionally protected sphere is coextensive with the whole of Yapese society. Thus, although social and cultural change cannot be halted, the constitution was designed so that, at the very least, such change will not be brought about or hastened by actions of the government.

C. Traditional Leaders

Even more extraordinary than the secure position of custom is the role preserved by the constitution for traditional leaders. Created by section 1 of article III, the Councils of Pilung and Tamol, composed of traditional leaders, are

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[91] YAP CONST. art. XIV, § 6. *See supra* note 84 and accompanying text. The delegates to the Convention were well aware that the language of the constitution in large part came from Trust Territory charters and laws, which in turn came from the United States Constitution and laws. They expressly disavowed the Trust Territory High Court practice of "slavishly" following United States case law precedent, and emphasized that such precedent "shall not be controlling and it shall not even be used as advisory unless it is clear that that interpretation is entirely consistent with the values, customs and traditions of this State." COMM. ON GEN. PROVISIONS, STAND. COMM. REP. No. 45, at 1-2, *supra* note 84.

[92] YAP CONST. art. XV, § 1. The reasons for this proposal are: the lawmakers and the courts of this State would be able to refer to our traditional laws easily if they are codified; the future generations would be able to know them even if future generations decide not to use them as guidance; and codification would resolve much confusion about traditional laws in the minds of the people. COMM. ON CIVIL LIBERTIES AND TRADITIONS, STAND. COMM. REP. No. 38, at 1 (Apr. 15, 1982), CONVENTION, *supra* note 73. The Committee distinguished traditional laws from customs, the former being those norms which require punishment if violated, and the latter being all other traditions which do not involve punishment for breach. *Id.*

[93] A wide range of areas, including, *inter alia*, property rights, family relations, education, even fishing rights, are in some way related to customs and tradition. *See, e.g.*, Yap State Business License Act of 1986, Yap S.L. No. 1-213, § 8(2)(d) (prior to granting business license, must consider "effect on Yapese customs, culture and traditions"); Alcoholic Beverage Drinking Permit Law of 1986, Yap S.L. No. 1-226, § 49(3)(c) (when applying law, court must consider the "requirements and dictates of customs and traditions"); State Fishery Zone Act of 1980, Yap S.L. No. 1-55, § 7 ("Traditionally recognized fishing rights wherever located within the State Fishery Zone and internal waters shall be preserved and respected.").

described almost benignly as having functions which concern tradition and custom.[94] The full power wielded by these Councils is not evident until article V on the legislature describes the process for enacting laws. Every bill passed by the legislature must be presented to both Councils individually for consideration.[95] The Councils have the power to "disapprove a bill which concerns tradition and custom or the role and function of a traditional leader as recognized by tradition and custom."[96] This disapproval power is unrestricted and not subject to review, and disapproval can be based on any grounds—the bill need not violate a custom to be disapproved—so long as the bill concerns custom, tradition, or the role of traditional leaders. Furthermore, the Councils alone decide whether a bill concerns custom and tradition.[97] Unlike a veto by the Governor,[98] disapproval by the Councils is absolute and cannot be overriden by the legislature.[99]

This vesting of absolute veto power in the Councils was perhaps the most controversial issue at the Constitutional Convention. The Standing Committee on Government Structure and Function rejected this proposal,[100] which was a carry-over provision from the 1978 Yap District Charter.[101] In its place the Committee inserted a proposal which required that only bills dealing with custom and tradition be transmitted to the Councils,[102] and gave the Councils the power to comment on a bill, but not to disapprove.[103] Delegates to the Convention disagreed with the Committee's recommendation and reinstated the Coun-

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[94] YAP CONST. art. III, § 1.

[95] *Id.* art. V, § 16.

[96] *Id.*

[97] *Id.* (The "Councils shall be the judge of the concernment of such bill.").

[98] *Id.* § 19 (legislature may override executive veto by two-thirds vote of members).

[99] The constitution provides: "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." YAP CONST. art. V, § 17. There is no provision for override of a Council veto.

[100] *See* COMM. ON GOV'T STRUCTURE AND FUNCTIONS, STAND. COMM. REP. No. 10, at 5 (Apr. 15, 1982), CONVENTION, *supra* note 73.

[101] The review and veto power of the Councils orginated in the 1978 Yap District Charter under the Trust Territory Administration. *See* 3 T.T. CODE § 309, 310. The Charter was drafted by a charter commission which had among its members two traditional chiefs. Thus, by the 1982 Constitutional Convention, the Councils had exercised review and veto power for almost four years. Prior to the 1978 Charter, the Councils of traditional leaders existed in one form or another, but never exceeded an advisory capacity.

[102] *See* STAND. COMM. REP. No. 10, *supra* note 100, at 4-5 ("Your Committee finds this more consistent with the role of the Councils. The experience under the State Charter demonstrates much time was wasted by transmitting bills to the Councils that did not concern tradition and custom.").

[103] Proposal No. 5, at 4-5 (Mar. 16, 1982), CONVENTION, *supra* note 73.

cils' full review and veto powers.[104]

In practice, all bills transmitted to the Councils are reviewed by them without a threshold determination of whether the bill concerns custom and tradition or the role of traditional leaders. Since the enactment of the constitution, the Councils have not disapproved any bills.[105] This fact by no means indicates perfunctory review. Rather, it is a reflection of the sensitivity of the Councils to the authority of the legislature, and the sensitivity of the legislature to the authority of the Councils. As a matter of course, bills known to be controversial, such as those dealing with land, are circulated to the Councils for their review and feedback prior to any official legislative action. Bills certain to be disapproved are not introduced until the concerns of the Councils are appeased.

Apart from veto power over legislative acts, and likely a direct result thereof, the Councils exercise authority in many different areas of government. The State Judiciary Act provides for the creation of municipal courts, of which "the presiding judge shall be the traditional leader representing the municipality in the Council of Pilung or Council of Tamol."[106] By statute, the Councils serve in an advisory role to the Governor and legislature, to the departments and offices of the executive branch, and to the municipalities, on matters relating to custom and tradition.[107] The Historic Preservation Officer must report to the Councils,

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[104] Unfortunately, despite the critical importance of this issue, the records of the Constitutional Convention do not contain a recorded debate on this provision.

[105] The Council of Pilung did disapprove of a bill under the same authority granted to it by the predecessor clause in the Yap District Charter. In mid-1980, the Council disapproved of a bill appropriating $14,326.00 "for the purpose of purchasing a mini-bus to provide public transportation." *See* Bill No. 1-144, 1st Yap Leg., 2d Reg. Sess. (1980). The Council's explanation of its disapproval is completely devoid of any mention of how the bill relates to custom and tradition, stating merely: "The Council of Pilung therefore vetoed Bill No. 1-144 at this time to enable the State Legislature to fund other projects which are priority for the State government." Letter from Chairman of Council of Pilung to Speaker of Legislature (May 23, 1980). It appears that the Council simply did not agree with the purchase.

This instance of Council disapproval of a bill apparently having nothing to do with custom illustrates the potential problem with the fact that the constitution assigns the Councils the right to decide what relates to custom. Even judicial review of their determination is open to doubt; the language appears to vest final authority in the Councils, and their determination may easily be considered a non-reviewable political question.

[106] State Judiciary Act of 1981, Yap S.L. No. 1-92, § 29. Municipal courts have jurisdiction over cases involving land situated within the municipality, and in civil cases where both parties reside in the municipality. *Id.* § 30. The Judiciary Act requires that the parties first attempt to resolve the dispute in accordance with tradition and custom. If that fails, they may file a case in the municipal court, with a right to appeal to the state court for a *de novo* trial. *Id.* §§ 31, 33. Currently only three municipalities have functioning courts which hear cases, and only five cases have been resolved up to this point. No written record is kept of municipal court proceedings. There is a push now for the development of the municipal court system, particularly to resolve land disputes.

[107] Yap S.L. No. 1-6, § 2 (1979). Council members also receive compensation and expense

which have review and approval power over the Office's annual budget and plans.[108] The Councils also appoint members to serve on a wide variety of state boards and commissions, covering areas including health services, water supply, land planning, and crime.[109]

Article III, section 2, of the constitution also protects the traditional powers of the members of the Councils. Historically, traditional leaders in Yap had three basic powers: supreme right to the lands; authority over everyone; and power to terminate a human life.[110] The legislative history to the Constitutional Convention expressly recognizes the former two powers as continuing, but disavows the latter power as discarded over time.[111] Thus, members of the Councils have substantial powers in their individual capacities apart from their authority as council members. Aspects of this individual power cross over into the government arena. For instance, it is widely acknowledged that the traditional leaders jointly confer to pick the candidates for political office, then support these candidates on the village level.[112]

"The Constitution of the State of Yap is a unique one, in which it provides for four branches of the Yap State Government: the Executive, the Legislative, the Judiciary, and the Traditional Chiefs (Council of Pilung and Tamol)."[113] Unlike the other three branches, however, the Councils transcend the separation of powers concept by exercising quasi-legislative, quasi-executive, and judicial functions, not to mention the functions of a chief, all at the same time.[114] Their concentration of power is formidable, and the will of these traditional leaders is seldom openly challenged.

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accounts. *Id.*

[108] State Historic Preservation Act of 1980, Yap S.L. No. 1-58, § 8 (1980).

[109] *See, e.g.*, Yap State Health Services Board, Yap S.L. No. 1-54, § 1 (1980); Gagil-Tomil Water Authority Act of 1984, Yap S.L. No. 1-183, § 5 (1984); Yap Islands Planning Commission, Yap Dist. L. No. 5-8 (1980); Commission on Crime, Yap S.L. No. 1-160, § 3 (1983).

[110] STAND. COMM. REP. No. 36 (Apr. 15, 1982), at 2, CONVENTION, *supra* note 73.

[111] *Id.* at 1-3. The proposal considered by this committee report—preserving the authority of traditional leaders—was not included in the constitution, but the broad language of article III, section 2, would encompass the rights discussed.

[112] NAT'L PLAN, *supra* note 2, at 7 ("The Council of Pilung, traditional leaders from Yap Islands proper, and the Council of Tamol, chiefs from the outer islands, play an important role in the government and in the selection of candidates for political office."); *see also* MELLER, *supra* note 3, at 256 (signature of a chief on a nominating petition carries considerable importance).

[113] 39TH ANNUAL REPORT, *supra* note 10, at 142-43.

[114] It is possibile for one person to be a member of both the legislature and council. Members of the legislature tend to be from the high caste, and at least one current member is in the line of succession of traditional leaders. Obvious conflicts would result if one person were to take a seat on both entities. Nothing in the constitution, however, prohibits such an occurrence.

IV. Interaction Between Yap Constitution and FSM Constitution

The constitutions of all four states of the Federated States of Micronesia (FSM)—Pohnpei, Kosrae, Truk, and Yap—provide varying degrees of protection to custom and tradition, though none go so far as the Yap Constitution. Moreover, the Yap Constitution alone grants traditional leaders a role in the government. Under the supremacy clause of the FSM Constitution, the state constitutions and laws may not violate the national constitution.[115] Significant questions in this regard are raised by the Yap Constitution's extra solicitous treatment of custom and traditional leaders.

Article V of the FSM Constitution is devoted to traditional rights and traditional leaders.[116] Section 2 of this article reads: "The traditions of the people of the Federated States of Micronesia may be protected by statute. If challenged as violative of Article IV [Declaration of Rights], protection of Micronesian tradition shall be considered a compelling social purpose warranting such governmental action."[117] The application of this provision is less than clear. Section 2 imposes a conclusive presumption in favor of statutorily protected traditions, in effect operating as a limitation on the article IV Declaration of Rights.[118] By negative implication, as a delegate to the Convention noted,[119] the language of

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[115] *See generally* Suldan v. FSM, 1 FSM Intrm. 339, 342-50 (Pon. 1983) ("Thus, the Constitution allocates powers between state and national governments and among the executive, legislative and judicial branches of the national government but exercise of those powers must be in accordance with the [FSM] Constitution itself."). The FSM Supreme Court concluded that the supremacy clause of the FSM Constitution operates in a fashion similar to that of the U.S. Constitution. Suldan v. FSM, 1 FSM Intrm. 339, at 345-50. The legislative history to the supremacy clause adds: It provides that the Constitution shall be the supreme law of Micronesia, meaning that no other document, law, or treaty shall be given legal effect greater than the Constitution. Laws enacted by the national legislature or passed by the [state] legislative bodies and ordinances promulgated on a local level must be in conformance with this Constitution. 2 JOURNAL OF THE MICRONESIAN CONSTITUTIONAL CONVENTION OF 1975 784 (1976) [hereinafter MICRO. CON. CON.], at 784 (STAND. COMM. REP. No. 16). In addition to the supremacy clause, a general provision in the FSM Constitution reads: "It is the solemn obligation of the national and state governments to uphold the provisions of this Constitution and to advance the principles of unity upon which this Constitution is founded." FSM CONST. art. XIII, § 3.

[116] FSM CONST. art. V (Traditional Rights). Sections 1 and 3 of this article relate to traditional leaders; section 2 deals with tradition.

[117] FSM CONST. art. V, § 2.

[118] *See* FSM CONST. art. IV (Declaration of Rights). This article is drawn almost exclusively from the Bill of Rights of the United States Constitution. *See* Alaphonso v. FSM, 1 FSM Intrm. 209, 214-17 (App. Div. 1982); FSM v. Tipen, 1 FSM Intrm. 79, 83 (Pon. 1982).

[119] A delegate to the Constitutional Convention expressed concern that "the passage of this, while it protects some, at the same time it will kill the others which are not enacted into law which will be interpreted as not compelling reasons for enactment." MICRO. CON. CON., *supra* note 115, at 394 (statement of Delegate Olter). The Journal does not record any further discussion on this issue and contains very little on the entire section.

this section indicates that a tradition not affirmatively protected by statute is invalid if in conflict with a constitutional right.[120]

The foregoing interpretation renders doubtful the validity of Yap's conflicting customs since none are currently protected by statute. However, an alternative interpretation exists which would not result in the automatic invalidation of conflicting, unprotected traditions. Section 2 can be read to recognize an implicit general principle that fundamental rights may be restricted when necessary to further a compelling social purpose, including instances other than tradition: a "strict-scrutiny" type balancing approach. Under this interpretation, statutes protecting tradition are presumed to fulfill the compelling social purpose requirement, thus alleviating the burden of proof and predetermining the outcome of the balance. Traditions not affirmatively protected by statute, and consequently not entitled to this advantage, may nevertheless be upheld against constitutional challenge by a showing that they too fulfill a compelling social purpose. The FSM Supreme Court has yet to address this critical issue.[121] The Yap Constitution's all encompassing protection of custom and tradition will be completely vitiated unless this latter proposed interpretation is adopted as correct.

Both Pohnpei and Kosrae are in accord with the FSM constitutional provision that traditions protected by statute prevail over fundamental rights.[122]

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[120] The FSM Constitution has a supremacy clause which appears to bind state constitutions and laws to the standards set out in the FSM Constitution, but thus far no court opinion has addressed this issue. *See* FSM CONST. art. II ("An act of the Government in conflict with this Constitution is invalid to the extent of the conflict."); *see also* FSM CONST. art. XIII, § 3 ("It is the solemn obligation of the national and state governments to uphold the provisions of this Constitution and to advance the principles of unity upon which this Constitution is founded."). See *supra* note 115 and *infra* note 125 for further discussion of this issue.

[121] The court has stated the general proposition that "[c]ustomary law is not placed in an exalted or overriding posture under the constitution and statutes of the Federated States of Micronesia, but neither is it relegated to its previous inferior status." FSM v. Mudong, 1 FSM Intrm. 135, 139 (Pon. 1982). This language is broad enough to be consistent with either interpretation suggested.

[122] The Constitution of Pohnpei in pertinent part reads:

> Section 1. Customs and traditions.
>
> This Constitution upholds, respects, and protects the customs and traditions of the traditional kingdoms in Pohnpei.
>
> Section 2. Protection of customs and traditions.
>
> The Government of Pohnpei shall respect and protect the customs and traditions of Pohnpei. Statutes may be enacted to uphold customs or traditions. If such a statute is challenged as violating the rights guaranteed by this Constitution, it shall be upheld upon proof of the existence and regular practice of the custom or tradition and the reasonableness of the means established for its protection, as determined by the Pohnpei Supreme Court.

POHNPEI CONST. art. V (Tradition), §§ 1-2.

The Kosrae Constitution does not have a separate article on tradition. Protection for tradition is

Truk follows the old Trust Territory Code provision that traditions are invalid to the extent they conflict with written law.[123] Only Yap places traditions above fundamental rights without first requiring an affirmative statute to protect the tradition in question.[124] Indeed, Yap goes substantially further by raising tradition above the entire constitution, not just the fundamental rights provision.

Although the validity of the Yap Constitution is not at stake, a customary right upheld against a challenge under the Yap Constitution may conceivably be declared invalid under the FSM Constitution.[125] Yap's purposeful omission

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contained in the phraseology of the Article on fundamental rights:

> Section 1. Except when a tradition protected by statute provides to the contrary
>
> (a) no law may deny or impair freedom of expression . . . .
>
> (l) Imprisonment for debt is prohibited.
>
> Section 2. The State Government shall protect the State's traditions as may be required by the public interest.

KOSRAE CONST. art. II.

[123] The Truk State Charter is reprinted in Volume II of the FSM Code, at 1021-51 (1982). Truk is the only state which has yet to adopt its own constitution. The section of the charter dealing with custom and tradition, article I, section 17, is identical to Proposal No. 58 of the Yap Constitutional Convention which was also derived from the state charter. *See supra* notes 74-76 and accompanying text for a discussion of the meaning of this language.

[124] It can be argued that article III, section 2, of the Yap Constitution satisfies the FSM Constitution's requirement of protecting tradition by statute. Pursuant to this argument all customs and traditions in Yap would be entitled to the "compelling social purpose" exception. There are obvious problems with this argument. The Pohnpei Constitution "upholds" customs and traditions, yet it still requires statutory protection for specific traditions to prevail over fundamental rights. More important, a blanket grant of protection to all traditions inevitably demeans the value of declared fundamental rights. Each and every recognized custom and tradition, no matter how trivial or perhaps even harmful, would prevail over constitutional rights. Ultimately the constitution itself would suffer a loss of prestige.

[125] The question of whether a government action, valid under a state constitution, may nevertheless by struck under the FSM Constitution Declaration of Rights has never been addressed by the FSM Supreme Court. Although the supremacy clause would appear to foreclose any arguments to the contrary, the question remains open. The legislative history provides a compelling basis for asserting that essentially local matters cannot be invalidated by the FSM Constitution:

> [N]ations such as Micronesia which lack the bond of common cultural origin and which lack the advantage of compact geography must permit local autonomy in order to have efficient government and to avoid the destructive consequences, real or imagined, of domination by one group over another. Your Committee therefore proposes the establishment of a union of autonomous states with state rule constitutionally guaranteed, in which the collective government of all the states is responsible for external affairs and for the solution of national problems, and the individual state governments are responsible for all other affairs of government.

STAND. COMM. REP. No. 33, MICRO. CON. CON., *supra* note 115, at 813. As one commentator observes:

> There is no statement in the text of the [FSM] Constitution or in the Convention record expressly stating that the Declaration of Rights shall apply to state and local government actions. However, there are no statements to the opposite effect, and there are strong

of the involuntary servitude clause is a likely candidate for such treatment.[126] Regardless of whether the Yap Constitution allows obligatory services to be required from the low caste, this practice may be struck under the FSM Constitution's prohibition against involuntary servitude.[127] A similar analysis would apply to the equal protection and discrimination clauses, raising doubts about the legal enforceability of the entire range of class relations, from land ownership to fishing rights, threatening the very core of traditional Yapese culture. Yap may remedy this problem only by enacting legislation to protect specific traditions.[128]

There is also a substantial question raised as to the validity of the purely private exercise of customary rights, without involvement of any government action. Section 701 of Title 11 of the FSM Code makes it a criminal and civil offense to deprive, oppress, threaten, or intimidate "another in the free exercise or enjoyment of, or because of his having so exercised any right, privilege, or immunity secured to him by the Constitution or laws of the Federated States of Micronesia . . . ."[129] Under a literal interpretation of this section, a high caste person who asserts his customary right to order off the land a low caste person who refuses to provide obligatory services will be committing a crime and may subject himself to imprisonment as well as civil liability. This would be an extraordinary outcome considering that the high caste person was exercising his right under custom protected by the Yap Constitution. The interaction between the FSM Code and the Yap Constitution in such a situation is unclear.

The role given to traditional leaders under the Yap Constitution raises additional issues. Article V of the FSM Constitution allows the state constitutions to provide an active, functional role for traditional leaders.[130] No state constitution

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implications throughout the Constitution and the Convention record that the Declaration does apply beyond the national government.

Burdick, *The Constitution of the Federated States of Micronesia*, 8 U. HAW. L. REV. 419, 455 n.259 (1986).

[126] *See supra* notes 87-89 and accompanying text.

[127] FSM CONST. art. IV, § 10. The delegates to the Convention offered a way to uphold the validity of a tradition notwithstanding this clause:

> However, the determination of what constitutes "involuntary servitude" or what is regarded as "badges of slavery" shall be made in the context of well established Micronesian customs. There may be duties which the individual owes according to the customs of his community which may not constitute either slavery or involuntary servitude.

STAND. COMM. REP. No. 23, MICRO. CON. CON., *supra* note 115, at 804. In a sense, this comment suggests a change in the meaning of term "involuntary servitude," and would do the same to the terms "discrimination" and "equal protection."

[128] Perhaps the codification of traditional laws, as required by article XV, section 1, of the Yap Constitution, would satisfy this requirement.

[129] 11 T.T.C. § 701(1) (1982).

[130] FSM CONST. art. V, § 3 ("The constitution of a state having traditional leaders may provide for an active, functional role for them.") Article V further provides:

other than that of Yap so provides. The difficulty for Yap arises from the nature of the role provided—absolute veto power.

Article VII, section 2, of the FSM Constitution mandates that "[a] state shall have a democratic constitution."[131] The Committee recommending this provision recognized that "democratic" is a word of "inexact meaning."[132] The Committee expressed its understanding of the term used in this context:

> In using the word "democratic" in the proposed article, the Committee envisions a republican form of government representing the electorate of the various states. The citizens would exercise effective popular control of policymakers through the election process. There would be political equality within the system with certain basic political freedoms enjoyed by all.[133]

"Democratic" as defined by the Committee appears to conflict with allowing unelected traditional leaders absolute veto power over legislation.

An instructive comparison can be found in the proposed Chamber of Chiefs, included in an early draft of the FSM Constitution but excluded from the final version.[134] Consisting of traditional leaders from each state, the Chamber of Chiefs was to be placed in the executive branch of the national government with the power to disapprove bills relating to custom and tradition. The chiefs were to convey their disapproval to the Prime Minister, who in turn would veto all disapproved bills.[135] The Committee Report to this proposal stated it is "important to note that such a bill is only vetoed, which means that it is then treated like any other vetoed measure. Any procedures for overriding an executive veto by the legislature would apply."[136] The Yap Constitution does not allow override of Council veto.[137] Whether this factor alone will be sufficient for

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> 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.

FSM CONST. art. V, § 1.

[131] *Id.* art. VII, § 2.

[132] STAND. COMM. REP. No. 36, MICRO. CON. CON., *supra* note 115, at 836.

[133] *Id.*

[134] *Id.* at 838-40.

[135] *Id.*

[136] *Id.* at 839.

[137] Following defeat of the proposal for a chamber of chiefs, the position of the Yap traditional leaders, expressed by Delegate Petrus Tun, now Governor of Yap, is prescient considering the later enacted Yap Constitution:

> [The traditional leaders'] instructions were that they did not want their roles, their powers, debated about and legislated upon. They did not want to occupy a corner of the national government. They did not want to have veto powers over national legislation for two reasons: They believed that their participation at the level of government was wrong and,

a court to conclude that Yap's Constitution is undemocratic cannot accurately be predicted.[138] If the absolute veto power of the Councils is declared unconstitutional, the institutional power base of Yap's traditional leaders will be eviscerated.

V. CONCLUSION

The Constitution of Yap exemplifies the renowned ability of the Yapese to accept a thing foreign but in the process imbue it with Yapese characteristics. What started as a constitution modeled after that of the United States became a constitution which exalts custom above all else and enhances the power of traditional leaders. Otherwise incompatible concepts are bound together in a single document. Despite the potential problems identified in this Article, since enactment of the constitution the political structure of Yap has functioned smoothly and effectively, in part because traditional ways still operate to handle most affairs of the Yapese independant of the government apparatus.

Change, however, is inexorable and accelerating. Many Yapese travel to the United States for education and work, then return with new ideas and attitudes. More than half of the population of Yap is under the age of eighteen.[139] The youth, concerned about jobs and exposed to American television, exhibit diminishing fealty to and knowledge of traditional ways.[140] There is a growing trend toward lawsuits and the assertion of legal rights, and away from traditional settlement procedures.

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secondly, they did not want to put themselves in a position where their veto power could be overridden.

Id. at 459.

[138] In a case applying article V on traditional leaders, the FSM Supreme Court held that governmental officials have "the obligation to conduct proceedings involving traditional leaders with scrupulous care and sufficient sensitivity to avoid diminishing unnecessarily the stature of any traditional title." In re Iriarte, 1 FSM Intrm. 255, 271-72 (Pon. 1983) (bail proceedings for traditional leaders charged with crime). The Supreme Court has also recognized the weight of the Judicial Guidance Clause, article XI, section 11, of the FSM Constitution, which states that "[c]ourt decisions shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia." *See* Semens v. Continental Air Lines, Inc., 2 FSM Intrm. 131, 137-42 (Pon. 1985). These opinions may be relied upon to validate the role given to Yap's traditional leaders, except that traditional Yap simply was not democratic. When the FSM Constitution mandated a democratic form of government, a clean break from the past was being made, leaving custom and tradition behind.

[139] *See* FIRST FIVE YEAR DEV. PLAN, 1983-87, YAP STATE GOV'T, at 86 (adopted by YAP STATE RES. No. 1-116 (1986)).

[140] *See* LABBY, *supra* note 4, at 8-9 ("As people were faced with surviving in the world of jobs and a consumer economy, much of the traditional culture I wanted to study had become of little importance to them, and less and less of such information was being transmitted between generations.").

This ongoing change raises serious questions about the prominent role preserved by the constitution for custom and traditional leaders when applied to future generations. Delegates to the Constitutional Convention were cognizant of the seeds of social disruption inhering in article III. They warned: "We cannot live in the past. We cannot make our Constitution inflexible to social and cultural changes."[141] The most likely source of discord is the caste system.[142] Those disadvantaged by the caste system may come to despise the constitution if it is used to legitimize the inequities of caste relations under the guise of "custom and tradition." To avoid a crisis, the Yapese must draw upon their talent for compromise to interpret and apply the constitution in a way that benefits all segments of Yapese society. The constitution will then stand as an enduring monument to the Yapese determination to be Yapese.

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[141] COMM. ON CIVIL LIBERTIES AND TRADITIONS, STAND. COMM. REP. No. 22, at 2, *supra* note 74.

[142] A resolution approved by the delegates to the Constitutional Convention eloquently, if obliquely, speaks to this concern:

> WHEREAS, the purpose of a constitution, as a supreme law of the land, is to preserve, protect, and promote the rights, equality, and freedom of every person who abides and is governed by that document; and
>
> WHEREAS, conversely it is not in the best interests of the citizens of a political entity to have a constitution which incorporates provisions that abridge, restrict, or unduly impinge upon either personal rights and freedom of choice or due governmental processes; and
>
> WHEREAS, the Islands of Yap are well known as a bastion of conservatism regarding our traditional and customary ways irrespective of whether they are proscriptive or prescriptive, beneficial or detrimental, equalitarian or feudalistic in nature; and
>
> WHEREAS, it is a pervasive and compelling fact that the customs, culture, and traditions of any society must evolve and change if it is not to become moribund; and
>
> WHEREAS, it would not be in the best interest of the people of the State of Yap if its supreme law of the land were to inflexibly preserve certain customs and traditions contrary to the laws of change and which preforce may interfere, interdict, and intervene in the exercise of individual freedom of choice and due democratic, governmental processes; now, therefore,
>
> BE IT RESOLVED, that the Delegates in this sacred and historical Convention assembled, agree to adopt and approve a constitution which will preserve, protect, and promote those customs and traditions which will foster individual freedom of choce [sic] and due democratic, governmental processes; and
>
> BE IT FURTHER RESOLVED, that the Delegates of this Convention abjure the incorporation, adoption, and approval of constitutional provisions which would legitimize and confirm traditions and customs that are inimical to individual freedom of choice and due democratic, governmental processes.

Res. No. 6 (Apr. 6, 1982), CONVENTION, *supra* note 73.

The Common Law as a Source of Law in the South Pacific: Experiences in Western Polynesia

by Guy Powles*

* B.A., LL.M. (Hons) (Victoria University of Wellington, New Zealand), Ph.D. (Australian National University); senior lecturer in Law, Monash University, Melbourne, Victoria, 3168, Australia.

Whenever possible, author's original citations are expressed according to the rules in *A Uniform System of Citation*. In several instances, however, the citations conform instead with the mode of citation in the original jurisdiction.

I. INTRODUCTION: ASSESSING THE HEALTH OF THE COMMON LAW

In a region characterized by the vigorous reassertion of cultural identity, the rapid expansion of governmental and entrepreneurial activity and continuing external interference, it is timely to ask: What is the state of health of one of England's most notable contributions—the Common Law? Because no established "fitness test" is available, one must select those elements of the legal systems, and aspects of their administration, which might facilitate an assessment of the Common Law in the South Pacific. The areas herein chosen for examination are: the methods by which, and the terms on which, the Common Law as a source of law has been and can be expected to be received into each jurisdiction; the scope of the Common Law in relation to other sources of law, such as Customary Law; the relationships between the Common Law and applicable constitutions and statutes; the language of the legal system being examined; the structure of the courts; the roles and training of the judiciary and lawyers; and the use of law reporting and precedent.[1]

This article focuses on the two Western Polynesian nations of Tonga and Western Samoa. The article begins, however, with a preliminary look at the form of language used to describe the Common Law introduced to the region. Leaving aside for present purposes the qualifications and provisos intended to render the Common Law subject to local laws, circumstances, and customs, it is helpful to focus on the words and phrases which describe the imported law itself, as a source of law.

Also, in order to appreciate the meaning of the language of reception used in the cases of Tonga and Western Samoa, this article reviews briefly: the variety of wording used to define the Common Law source for each of the other juris-

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[1] "The Common Law in Asia and the Pacific" was the subject of a conference held at the University of Hong Kong in December 1986. A draft of this article was presented to the conference, and the helpful comments of other participants are acknowledged. There, as in this article, it was understood that the term "the Common Law" included "Equity" and the rules, principles and doctrines of both.

dictions in the region, the changes in that definition, if any, consequent upon the attainment of independence by the host state, and other constitutional or statutory limitations on the status of the Common Law as a source of law.

A. Whose Common Law?

The ten major "Common Law" jurisdictions of the South Pacific region are the Cook Islands, Fiji, Kiribati, Nauru, Papua New Guinea, the Solomon Islands, Tonga, Tuvalu, Vanuatu, and Western Samoa. Table I provides details of their colonial origins. Australia and New Zealand are excluded from the survey because, to the extent that they acquired the Common Law as part of the baggage which English settlers brought with them and remained predominantly English in speech and attitude, their experience has been different from that of the rest of the region. In the ten cases referred to, the Common Law was applied by legislation, either British or enacted in the host jurisdiction.

The wording used in the legislation currently governing the importation of the Common Law in these jurisdictions can be grouped broadly into three categories. As to the first, the language used clearly introduces that Common Law which was applied or in force in England, usually at a given "reception" date. The language used in the second category is less explicit but the reference to English statutes seems to indicate that it is the Common Law in force in England which is intended to apply. The language of the third category, by contrast, seems to indicate that today the English Common Law may be found developing differently outside England, thereby offering a choice. The following sections illustrate each category.

1. The Common Law in Force in England

The first formulation, which refers specifically to that Common Law which was applied or in force in England, defines an ascertainable body of law, the only possible variable being the date at which its content is to be determined. In this sense, the Common Law stands as a source of law, readily identifiable as to substance and content. For example, in Nauru under the Australian administration, "the principles and rules of common law and equity that for the time being are in force in England"[2] were to be applied. The Constitution of Nauru of 1968 carried forward existing law.[3] Under subsequent legislation, Nauru has adopted as its law "the common law [and] the principles and rules of equity which were in force in England on 31 January 1968," as subsequently altered

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[2] Laws Repeal and Adopting Ordinance 1922-1967, (Nauru), §§ 11 & 13-16.

[3] NAURU CONST., 1968, art. 85

or adapted.[4] Nauru has gone further and provided that the common law "which was in force in England on 31 January 1968" relating to certain specified areas is to apply "and have force and effect in Nauru."[5]

In the case of Papua New Guinea, on independence in 1975, only those principles and rules were adopted which "formed, immediately before Independence day, the principles and rules of common law and equity in England."[6] Of course, the intention of the Papua New Guinea Constitution was that such law would then be subjected to a process described as the "development of an underlying law of Papua New Guinea."[7]

The Cook Islands took on board "the law of England as existing on 14 January 1840," the date the Colony of New Zealand was established, and for that purpose "all rules of common law or equity relating to the jurisdiction of the superior courts of common law and of equity in England" were to be applied by the High Court of the Cook Islands.[8] When, in 1965, the Cook Islands assumed almost independent status in free association with New Zealand, the Cook Islands' Constitution adopted existing law without comment.[9]

Reference to a reception date indicates that the law received was the Common Law as stated by the courts of England at that date. Subsequent changes to the Common Law in England are not strictly binding on the courts of the host jurisdiction, although they are highly persuasive. This was particularly so prior to the independence of each of the nations involved, and remains particularly so today in jurisdictions where final appeal lies to the Privy Council in the United Kingdom.

2. *The Common Law and Statutes of General Application*

The legislative language of those nations in the second group contains wording which, only by implication, ties the Common Law to a date of application in England. It could be argued that "the common law of England and the rules

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[4] Custom and Adopted Laws Act, 1971 (Nauru), § 4. By amendment, such law is to be altered or adapted to take into account alterations or adaptations which may have taken place in England since that date. Custom and Adopted Laws Amendment (No. 2) Act 1976, (Nauru), § 3.

[5] The areas are "liability for criminal offences, the contractual and tortious liability of infants and the interpretation and effect of statutes." *Id.*, § 4.

[6] PAPUA NEW GUINEA CONST. 1975, §§ 9, 20 and schedule 2.2.

[7] In developing the underlying law—and by way of contrast with the words of limitation in Schedule 2.2—the courts may have regard to decisions of courts of any country that has a legal system similar to that of Papua New Guinea (schedule 2.3).

[8] Cook Islands Act, 1915 (N.Z.), §§ 615-16.

[9] COOK ISLANDS CONST., art. 77.

of equity" made applicable in Tonga,[10] and "the substance of the English common law and doctrines of equity" applied by United Kingdom Order in Council to the colonial entities which later became Solomon Islands, Tuvalu, Kiribati, and Vanuatu,[11] might refer to the "English Common Law system" discussed below.[12] However, in each case, there was a linked reference in the same provision to "the statutes of general application in force in England" on a certain date,[13] and each country carried forward into independence a number of such statutes in respect of which the decisions of English courts would continue to be significant. In the case of Fiji, which received "the common law, the rules of equity and the statutes of general application in force in England on 2 January 1875,"[14] the absence of a comma after "application" might permit the interpretation that the limitation to the common law of England on a certain date applies only to the statutes; but the better view is that the link is clear.

An opinion of the Court of Appeal of Solomon Islands on the wording of the Solomon Islands Constitution of 1978 makes the point that reference to United Kingdom statutes in conjunction with "the common law" must mean that the latter is also law which is in force in the United Kingdom.[15] Furthermore, the "existing law" which was made to apply on independence to these countries (with the exception of Tonga) was the British colonial law in force immediately prior to Independence Day.[16] In other words, colonial status gave special meaning to the "English common law" of the United Kingdom Order in Council.

3. *English Common Law as Developed Elsewhere*

Language which seems to have a very different meaning from the above is that of the Western Samoan Constitution which, on independence in 1962, adopted as law "the English common law and equity for the time being."[17] The pre-independence formula had been the same as that of the Cook Islands[18] and was brought forward as existing law,[19] subject, however, to the constitu-

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[10] Civil Law Act, 1966 (Tonga, Cap.14) § 3.

[11] Western Pacific (Courts) Order in Council, 1961 (U.K., S.I. 1961 No. 1506, at 3066), § 15.

[12] See *infra* text accompanying note 20.

[13] The date was October 18, 1966 in Tonga (later removed by the Civil Law Amendment Act, 1983, No. 12) and January 1, 1961 in the U.K. Order in Council.

[14] Supreme Court Ordinance, 1875 (Fiji, No. 14), §§ 22 & 24 (now Supreme Court Act, Revised Laws, 1978, Ch.13).

[15] Cheung v. Tanda, [1984] Solomon Islands L.R. 108.

[16] *See infra* notes 31-33. For the position of French law in Vanuatu, see text accompanying note 33.

[17] WESTERN SAMOA CONST., art. 111 (definition of "law").

[18] Samoa Act, 1921 (N.Z.), §§ 349-50.

[19] WESTERN SAMOA CONST., art. 114.

tional meaning.

In the absence of words limiting the law to that which is actually applied or in force in England, it seems that the Common Law referred to here is a body of law exported from England, but not necessarily being applied there at the time of "reception" (which, in Western Samoa, is continuous); that is to say the law as it is in England whenever the host court considers the matter. As the Western Samoan Supreme Court has said, "the adjective English is descriptive of a system and body of law which originated in England and is not descriptive of the courts which declare such law."[20] The Chief Justice of the Samoan Court used this reasoning to justify his preference for the approach to a criminal law issue taken by the High Court of Australia to that of the House of Lords with which it conflicted.[21] Thus, just as the English Common Law may be declared in different ways in the superior courts of Commonwealth countries, it follows that that system of law which is called the English Common Law may be adopted by a country in non-specific terms without the requirement that the law currently in force in England should necessarily be preferred. Roberts-Wray's view some twenty-two years ago was that " 'the Common Law' is one of the great legal systems of the world and reference to England could be eliminated—without creating any doubt as to its meaning."[22]

It is but one step further to say that each independent country ultimately determines and applies its own Common Law, thus, in appropriate cases, contributing to the English Common Law. According to this reasoning, the Common Law of or within a country is a *type* of law, as is statute law, but Common Law received from outside is a *source* of law which is defined with more or less precision.[23] The significance of the language of reception (as in the case of the first two categories considered above) is that it may have the effect of according preeminence to one specific source of law, such as the decisions of the courts of England at the relevant date. The suitability, for Western Samoa, of a wider choice is discussed later in this article.[24]

Despite the departure from the Pacific of the United Kingdom as a colonial

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[20] R.J.B. St. John, C.J., in Opeloge Olo v. Police, Supreme Court of Western Samoa, No. 5092 (1980).

[21] The Judge preferred the decision of the High Court of Australia in R. v. O'Connor, (1980) 29 A.L.R. 449, to that of the House of Lords in D.P.P. v. Majewski [1976] 2 All E.R. 142. The Judge, on secondment from the Australian Federal Court, also drew some support from a decision of the Court of Criminal Appeal of New Zealand, R. v. Kamipeli [1975] 2 N.Z.L.R. 610.

[22] K. ROBERTS-WRAY, COMMONWEALTH AND COLONIAL LAW 566 (1966).

[23] The expression "justice, equity and good conscience" also refers to a *type* of law—a type requiring the application of standards at a certain level of abstraction, but in respect of which the actual source of law selected for the case in hand (as in the case of "Common Law") is not defined. It is now clear that the expression connotes much more than English principles and is likely to be interpreted in the light of the circumstances of the applying jurisdiction.

[24] *See infra* text accompanying notes 107-08.

power, the Privy Council still plays a role of some significance in the region. Although the law lords (the most senior British judges) of the House of Lords of the United Kingdom constitute the highest court in respect of the law in force in England, the Judicial Committee of the Privy Council, which comprises mainly the same senior judges and was historically the highest appellate court for the British colonies, retains some influence with regard to the terms on which the Common Law in force in England may be departed from. Of the ten jurisdictions covered by this survey, only the Cook Islands and Tuvalu have retained the right of appeal to the Privy Council, although Fijians had that right prior to the 1987 military coup, and Kiribati has preserved it solely for Banaban Islanders.

More importantly, perhaps, the Privy Council remains the highest appellate court for New Zealand, Hong Kong, Malaysia and Singapore, and right of such appeal was not finally abolished in Australia until 1987. The Privy Council has delivered judgments on appeal from these jurisdictions which have demonstrated a gradual process of divergence from the uniformity of the English Common Law which had existed during the colonial period.[25] In decisions dependent to some extent upon the wording of the statute of reception in each jurisdiction, the Privy Council has concluded that: for Australia, although there are advantages if law develops along similar lines within those parts of the English-speaking world where the law is built upon a common foundation, the need for uniformity is not compelling in areas of law which are of considerable domestic significance, and where the issue is one of judicial policy;[26] for Malaysia, it is for the courts of Malaysia to decide whether to follow English case law, which is persuasive and not binding, and the Privy Council will not interfere unless the court has clearly "committed some error of legal principle recognized and accepted in Malaysia;"[27] for New Zealand and Hong Kong (where there is continuing reception of English case law), once it is decided or accepted that English law applies to the matter in hand, the local court (and the Privy Council on appeal) is bound to follow the relevant authority of the House of Lords on the subject.[28]

The Privy Council's reasoning will be authoritative in South Pacific jurisdictions where appeal lies to it, and will carry some weight in those from which there is no appeal. If constitution and statute law permit, the local courts are likely to prefer the Privy Council approaches taken in the Australian and Malay-

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[25] I am indebted to the discussion of these jurisdictions by R.C. Beckman in his unpublished paper presented to the Hong Kong conference. *See supra* note 1.

[26] Australian Consolidated Press v. Uren [1969] A.C. 590.

[27] Jamil bin Harun v. Yang Kamsiah [1984] 1 A.C. 529.

[28] (New Zealand) Hart v. O'Connor [1985] 1 A.C. 1000; (Hong Kong) Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd. [1985] 3 W.L.R. 317.

sian cases. However, recent decisions from New Zealand and Hong Kong[29] could be said to cast doubt on the reasoning of the Western Samoan Chief Justice referred to above[30] (where the constitution requires continuing reception), unless his analysis can be sustained on the ground that an independent state with no direct links with the United Kingdom is entitled to regard the Common Law as having a broad "Commonwealth" character.

B. The Common Law on Independence

On independence, the constitutional approaches taken by most countries in the region differed. Nauru, Papua New Guinea, Cook Islands, and Western Samoa have been mentioned. Solomon Islands continued the existing law but added a further provision which seemed to acknowledge that, but for the provision, there would have been a close link between "the principles and rules of the common law and equity" (not described as English), certain statutes of "the Parliament of the United Kingdom," and the interpretation of such Common Law and statutes by the courts of England.[31] This further provision declared, however, that the High Court of Solomon Islands could free itself of such connections in the sense that it is not "bound by any decision of a foreign court given on or after 7 July 1978" (Independence Day).[32] This seems to mean that in Solomon Islands "the common law" may now be regarded as more than that determined by the courts of the United Kingdom.

Fiji, Tuvalu, and Kiribati continued the existing law without constitutional intervention, leaving open the question of how "English" the Common Law is intended to be in the future.[33] Vanuatu, formerly an Anglo-French condominium, brought forward "the British and French laws in force or applied in the New Hebrides immediately before the day of Independence," which were also, of course, colonial laws. Then, for the future, the Constitution of Vanuatu declared that such laws would apply "to the extent that they are not . . . incompatible with the independent status of [Vanuatu]."[34] Such status seems inconsistent with any limitation, express or implied, that the imported law is to be that which is in force in Britain or France.

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[29] *See supra* note 28.

[30] *See supra* text accompanying notes 20-21.

[31] SOLOMON ISLANDS CONST., 1978, § 76 and schedule 3, § 2.

[32] *Id.* schedule 3, § 4. But a decision of the House of Lords after 1978 which corrects an English decision made before 1978 may be binding on Solomon Islands courts. Cheung v. Tanda, [1984] Soloman Islands L.R. 108.

[33] FIJI CONST., 1970; TUVALU CONST., 1978 (repealed 1986); KIRIBATI CONST., 1979; their respective U.K. Orders in Council; and TUVALU CONST., 1986, schedule 5, § 2.

[34] VANUATU CONST., 1980, § 93.

C. *The Status of the Common Law*

In addition to attempting to define the origin of the Common Law, the constitutions and legislation of the region placed limitations on the Common Law, thereby affecting, in one way or another, its status in relation to other sources of law. Various devices have been used. First, the traditional British colonial limitation was to provide that the Common Law is to apply only so far as the circumstances of the host country and its inhabitants permit. This limitation is part of the legal history of all of the jurisdictions under review. Nevertheless, there seems to have developed a presumption in favor of the application of the Common Law to a particular matter unless there is express law to the contrary or evidence called in court which establishes the local "circumstances."[35] Secondly, more specific directions may be given to the courts as to which source of law to turn to or which considerations to take into account. The Common Law may be ranked in order of priority or qualified in such a way as to give Customary Law precedence in certain circumstances.

The wording of the reception law has been mentioned,[36] some of which is quite specific, such as that of the 1976 amendment to the Nauru Custom and Adopted Laws Act,[37] and that of Parts 1 to 5 of Schedule 2 of the Constitution of Papua New Guinea.[38] The broader limitations on the application of the Common Law on independence have been mentioned[39] for the Solomon Islands[40] and Vanuatu.[41] The Western Samoan Constitution ranks the sources of law clearly, so as to give precedence to statute and Customary Law which has acquired the force of law.[42]

The new Constitution of Tuvalu of 1986, which replaced the original 1978 constitution, emphasizes the "maintenance of Tuvaluan values, culture and tradition" as principles of the constitution which are adopted as part of the "basic law of Tuvalu."[43] In determining the scope and exercise of the fundamental rights and freedoms of citizens, the courts of Tuvalu are required to have regard to "traditional standards, values and practices" as well as other law.[44] Thirdly, a local or regional court may be established as the highest court of appeal for the jurisdiction, thereby severing the direct chain of authority from the Common

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[35] Cheung v. Tanda, [1984] Soloman Islands L.R. 108.

[36] *See supra* text accompanying notes 5-6.

[37] *See supra* note 5.

[38] *See supra* note 6.

[39] *See supra* text accompanying notes 32-34.

[40] *See supra* note 32.

[41] *See supra* note 34.

[42] *See supra* note 17. *See also infra* text accompanying notes 96-118.

[43] TUVALU CONST., § 13.

[44] *Id.*, §§ 11, 15(5), 29.

Law courts of the former colonial power.[45] Fourthly, subject areas such as land, chiefly titles or adoption are set aside and declared to be the province only of Customary Law—beyond the reach of the Common Law. An example is customary land in Fiji, Western Samoa, Papua New Guinea, and Vanuatu. Finally, certain courts are established as Customary Law courts, usually with exclusive jurisdiction in defined subject areas. The Customary Law courts are not empowered to apply the Common Law.

In sum, independence provided each new nation four opportunities in relation to imported Common Law: (1) to determine the sources of existing law to be carried forward (which were bound to be colonial in the case of former colonies or territories); (2) to define new approaches to the recognition and reception of Common Law (for example, by clarifying the source, as in Nauru, or by declaring that the common law of the state, as a type of law, includes the English Common Law, as a system of law, as in Western Samoa); (3) to clarify doubts as to the status of the courts in relation to the superior courts of other countries; and (4) to place conditions upon the application of existing and new laws in order to protect local laws, circumstances, customs, or traditions. This survey has revealed no consistency in the de-colonizing experience of South Pacific jurisdictions, nor any since independence.

Change of political status seems to require more than the application of fresh conditions to the importation of law. One would expect attention to be directed to the sources of such law as well as to the protection of customary law. Such a reassessment would look beyond the question of the status of courts to a policy of recognition of the Common Law as a wide-spread system from which relevant elements may be accepted to suit the purposes of the jurisdiction.

II. Western Polynesian Experiences

The present task is to examine the state of the Common Law in Tonga and Western Samoa. The task is threefold: to consider (1) the reception and scope of the Common Law; (2) the language of the legal system; and (3) the court structure and wider aspects of the Common Law system. For a person whose research interests in the past have been largely concerned with the state of Customary Law,[46] this exercise represents a study of the reverse side of the coin.

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[45] *See supra* text accompanying notes 25-30 for discussion of the Privy Council.

[46] C.G. Powles, The Status of Customary Law in Western Samoa (Wellington 1973); C.G. Powles, The Persistence of Chiefly Power in Western Polynesia, (Ph.D thesis, Australian National University) (1979); Powles, *Traditional Institutions in Pacific Constitutional Systems: Better Late or Never?* in Pacific Constitutions 345 (P.G. Sack ed. 1982); and Powles, *Legal Systems and Political Cultures*, in P.G. Sack & E. Minchin (eds.), Legal Pluralism 191 (P.G. Sack & E. Minchin eds. 1986).

The approach must be historical, culminating with a current assessment. To understand the introduction of a new source of law into a society, developments over time must be considered. Although the Pacific experience with the Common Law is much shorter than that of parts of Asia and Africa, the comparatively early arrival of European law in Western Polynesia is one of the factors distinguishing this part of the region from the rest. The approach must also have regard to the nature of the island societies in question. The rate and manner of absorption, adaptation, or rejection of new concepts will depend largely upon characteristics of the host environment.

Settled over 3,000 years ago, Tonga and Western Samoa are at the historical base and traditional heart of the growth and spread of Polynesian civilization. It was from these two groups that, about 1,700 years ago, the great sailing canoes made their way east to the Marquesas and thence to Hawaii, Tuvalu, the Cook Islands, and New Zealand. The social organization of Fiji was molded in the process of Polynesian expansion.

Long periods of isolation between groups of islands fostered separate linguistic and cultural development, resulting today in the several Polynesian nation-states and territories, which still have much in common. For example, the populations have been vulnerable, not only to physical disaster, but to rapid penetration by the consequences of alien human contact, including both disease and disruptive social ideas and practices. Nearly all Samoans and Tongans professed adherence to Christianity before the end of last century, and many had done so fifty years before that.

A significant factor, which tends to distinguish Polynesia and Micronesia from Melanesia, is the homogeneous composition of the Polynesian population; each island group possesses a common culture and language. This homogeneity is associated with vigorous traditional organization of a hierarchical nature, and with extensive, even nation-wide, kinship groupings and allegiances which are conducive to the formation of broad bases of power. The economic and diplomatic remoteness of island groups and the historical development of "port towns" have helped to focus power at the center of each group.

The small scale of island societies has profound implications for political organization, the administration of government, and the legal system.[47] In common with most other island states and territories of the Pacific, those of Polynesia share certain characteristics which set them apart from larger Third World

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[47] Benedict, *Sociological Aspects of Smallness* in B. BENEDICT, PROBLEMS OF SMALLER TERRITORIES 45 (London 1967); Allan, *Bureaucratic Organisation for Development in Small Island States* in R. SHAND (ed.), THE ISLAND STATES OF THE PACIFIC AND INDIAN OCEANS: ANATOMY OF DEVELOPMENT 383 (R. Shand ed. 1980); May & Tupounuia, *The Politics of Small Island States*, in SHAND, *supra*, at 419; Commonwealth Secretariat, *Cooperation for Legal Change in Small States*, in REPORT OF MEETING OF LAW OFFICERS OF SMALL COMMONWEALTH JURISDICTIONS (Isle of Man 1983).

nations. For example, because new governments expect to possess most of the political functions and administrative paraphernalia of the modern state, the relatively few experienced personnel must fulfill multiple roles. Public duties conflict with kinship rules, and the intensity of personal relationships is such that the political executive finds itself particularly close to the legislature, judiciary, and public service. Generally speaking, leaders are highly visible and close to the people. The cost of government is also often higher per capita than would be acceptable in wealthier countries. In these circumstances, Western-style political and legal institutions sometimes operate under strain, and are often modified in practice.

A. Tonga

1. The Setting

Tonga has a population of 98,000 and a land area of 700 square kilometers. Possibly because of the distances between the groups comprising the Tongan archipelago, and the very considerable administrative authority required to mount oceanic voyages, Tonga's chiefly system persisted in a hierarchical form which readily became highly centralized last century. With the support of missionaries, the enterprising inheritor of a regional chiefdom established his claim to the title Tu'i Kanokupolu in the then most powerful Tongan lineage, and unified Tonga under his leadership as King Taufa'ahau Tupou I.[48] The Tongan Constitution of 1875, which is now one of the world's oldest extant constitutions, relegated all rival chiefs to a status forever subordinate to that of the monarch. At the same time, this constitution entrenched the powers of thirty-three of the chiefs as hereditary nobles to control Parliament and, together with a further six hereditary estate-holding chiefs, to control most of the land.[49] Today, the first King's great-great-great-grandson, Taufa'ahau Tupou IV, rules through a constitutional document which provides for the Western-style institutions of Cabinet, Parliament, Electorate, and Judiciary, but which, in the absence of many of the conventions of the type which limit the power of the British sovereign, preserves the ultimate authority of the Tongan Crown and the power of the hereditary chiefs. The way in which this is done may be summarized as follows:

—The perpetual succession of the crown, which is the source of authority of the

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[48] A measure of Taufa'ahau's success was the early international recognition of his sovereignty, in an otherwise colonized Pacific, by treaties with France in 1855, with Germany in 1967, with Great Britain in 1879, and with the United States in 1886.

[49] TONGA CONST. (1875, as amended in 1882) and HEREDITARY LANDS ACT, 1882.

constitution, is secured.[50]

—The King is immune from impeachment under a charter which cannot be amended without his consent.[51]

—The King may, without consultation, appoint and dismiss Ministers including the Prime Minister, summon and dissolve Parliament and appoint its Speaker, refuse his assent to any bills passed by Parliament, appoint nobles and grant hereditary lands, suspend *habeas corpus*, proclaim martial law, make treaties and command the military forces.[52]

—The Privy Council comprising the King and his Ministers is required "to assist the King in the discharge of his important functions."[53]

—Parliament consists of nine representatives elected by the commoners, nine elected by the nobles, and the Ministers who "sit as nobles." It considers bills introduced only by Ministers.[54]

—The Privy Council, with the chief justice or a justice of appeal sitting in an advisory capacity, is the final appeal tribunal in civil and land matters.[55]

—The noble members of Parliament have the exclusive right to discuss and vote on laws relating to the monarch and to their chiefly titles and lands.[56]

Of course, the King is seldom called upon to rely on his residual powers, and the formalities of consultation and delegation are generally preserved. The Tupou dynasty is today regarded as a traditional Tongan institution representing a past of which people are proud and a source of leadership and authority on which many Tongans are glad to rely, for the present. Nevertheless, the King does not hesitate to reinforce his chiefly image by requiring customary deference and large-scale presentations of foodstuffs, nor to promote awareness of his constitutional supremacy by public exposure to the document itself, as in the case of the elaborate celebrations conducted for the centennial of the constitution in 1975.

The noble title was created after the fashion of the English baronial; that is to say, although it is an honor or dignity held from the monarch, it is inalienable (except for treason), hereditary, and is permanently associated with estates. As to both royal and noble titles, the principle of succession primarily in the male line was consistent with traditional thinking in relation to the *ha'a* (lineage) leadership, but to confine the principle in a constitutional strait-jacket was not.

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[50] TONGA CONST., §§ 31-33 (revised 1967).

[51] *Id.* §§ 31, 41, 67, 79.

[52] *Id.* §§ 9, 36, 38, 39, 44, 46, 51, 61, 68, 77, 104.

[53] *Id.* § 50.

[54] *Id.* §§ 59-60 (as amended in 1985); Rules for the Proceedings of the Legislative Assembly, 1974, r.88.

[55] TONGA CONST. § 50 (revised 1948). In relation to appeals to the Privy Council of Tonga, the 1967 publication of the Constitution is in error. In this case, the 1948 wording is correct.

[56] TONGA CONST. § 67 (revised 1967).

In traditional times, adjustments would have occurred by way of the segmentation and re-alignment of groups. From time to time, succession would have deviated from the ideal of the blood line in order to accommodate the reality of contemporary power. Indeed, the contrast between ancient and modern Tonga is exemplified by the fact that, while the Tupou dynasty may perhaps be dependent on some of the chiefly lines for the preservation of royal blood, the law of the state places the supreme chief beyond the need to rely on support from other chiefs.

Because of the importance of land in the lives of the people, reference should be made to the systems of land tenure and land distribution which were devised over one hundred years ago. It was intended that every Tongan male, on reaching sixteen years, would be entitled to an 8¼ acre allotment for life (to pass to his eldest son), together with a smaller urban allotment.[57] Complexities and delays in the implementation of the systems have operated to the benefit of the royal family, and the thirty-three nobles and six hereditary estate holders. The position today is that less than half of Tonga is held under registered allotment as envisaged by the schemes. Another twenty per cent has been allocated to people in one way or another but, as it is not registered, chiefs exercise some influence over tenants, and abuses may occur in other ways. Some eight per cent is held by the chiefs undistributed. Of the males over sixteen years, little more than one half hold registered allotments.[58] One assessment of the Tongan position is that considerations of chiefly power, kinship, and bureaucratic inadequacy have conspired to obstruct land schemes the concept of which was inconsistent with chiefship. On the other hand, the registered Tongan allotment-holder and his family enjoy a measure of freedom in their daily lives which can largely be attributed to that inconsistency. By extolling the virtues of independence and entrepreneurship in relation to the use of land, government has encouraged people generally to work for the benefit of their own families.

The absence of land alienation should also be noted. It was a remarkable achievement that during the nineteenth century spate of land-grabbing by Europeans in the Pacific, and indeed to the present day, Tonga has persevered with its policy that no land may be sold and that all leases require government approval.[59]

Tonga possesses a relatively poor agricultural economy, barely adequate for the subsistence of its present population. Factors inhibiting the improvement of living conditions arise not so frequently from the relationship of allotment-holder and landlord-chief, but rather from wider deficiencies in policies for the

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[57] HERIDATARY LANDS ACT, 1882, LAWS OF TONGA (1891); LAND ACT, 1927, LAWS OF TONGA (1967) ch. 63.

[58] Minister of Land, Survey and Natural Resources, *Annual Report* (Nuku'alofa 1983).

[59] TONGA CONST. § 109 (1875); TONGA CONST. § 104 (revised 1967); LAND ACT, 1927.

national economy, and in particular, for education. These are policies in respect of which the ordinary Tongan has little influence.

2. *Reception and Scope of the Common Law in Tonga*

Tupou I and his missionary advisors sought to preserve Tonga's independence from further political and spiritual interference. British and American styles of governmental institutions were examined. The Hawaiian Constitutions of 1840, 1852 and 1864 were heavily drawn upon for guidance and, when the Tongan framework was put together under the 1875 constitution, it was hoped that the Great Powers, who were then engaged in carving up the Pacific and Africa, would recognize Tonga's "advanced" self-reliance, and leave it alone.[60]

For the first thirty years, the chief justices and associate justices were Tongan and, as in the case of all official positions, there was no professional training. All proceedings were conducted in the Tongan language unless a foreigner was involved. The constitution made detailed provision for the powers and functions of the supreme court, circuit courts and police courts,[61] and it subsequently became an outstanding feature of the Tongan legal system that thorough provision would be made for every aspect of the administration of justice, mainly in the form of detailed statutes.

Most importantly for the present discussion, the constitution began with a Bill of Rights, one of the earliest examples of the art. This declaration, originally of thirty-two sections, prohibited slavery, punishment without trial, search without warrant, double jeopardy, retrospective laws, and confiscation of property except for public purposes; and it protected freedom of worship, sanctity of the Sabbath, freedom of speech and press, the operation of the writ of *habeas corpus*, impartial trial by jury, and the taxpayer's right to vote. The declaration remains today in twenty-nine sections.[62] Part of the significance of the Declaration of Rights lay in the fact that, for many years, it contained the only statement of general legal principles applicable in the Kingdom. Indeed, until 1966,[63] the formal laws of Tonga made no reference to the reception of legal concepts from elsewhere. Rather, the constitution provided merely that "the powers of the Supreme Court shall extend to all cases in law and equity arising under the Constitution and laws of this Kingdom."[64]

As may be gathered from the introductory remarks above, the form of government under the King was intended to reflect the Westminster model of

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[60] Treaties attest to the success of this policy. *See supra* note 48.

[61] TONGA CONST. §§ 86-108 (1875).

[62] *Id.* §§ 1-32; TONGA CONST. §§ 1-29 (1967).

[63] Civil Law Act. *See infra* note 86.

[64] TONGA CONST. § 92 (1875); TONGA CONST. § 90 (1967).

responsible cabinet and independent judiciary. Advisers, administrators, and clerks were from Britain, Australia, and New Zealand, as the Protestant missionaries continued to be. Some traders were German. Inevitably, the legal system assumed a very British appearance, which was enhanced in 1891 and again in 1903 by the consolidation of all laws into codes in both Tongan and English.[65]

Dissension between church groups and financial instability brought British intervention in 1887, the proclamation of Tonga as a British protectorate in 1900, and a period of British involvement which was not formally ended until 1970.[66] For some time, British policy required that there should be British-appointed Europeans in key positions in the Cabinet and public service, and as chief justice as well as Treasurer.

Read together, the Treaty of 1900 and the Notes (Supplementary Agreement) of 1905,[67] which Tupou II was forced to sign, supplanted the constitution as supreme law.[68] The British government, which could always provide the ultimate sanction, was beyond the jurisdiction of Tongan courts. As far as Britain wished to, she could lawfully—if indirectly—rule Tonga. The Treaty and Supplementary Agreement remained part of the law of Tonga until revoked in 1958.[69]

3. *A Common Law-Trained Senior Judiciary*

With the appointment of Robert Skeen as chief justice in 1905 began the practice of appointment of expatriate judges who usually were English. During the reign of Queen Salote (1918-1965), the role of chief justice was often controversial, in part because, until 1944, the chief justice was also a Privy-Councillor, Member of Cabinet, Member of the Legislative Assembly, Legal Advisor to the Queen, Law Draftsman, and Chief Police Magistrate. As chief justice, he could issue prerogative writs and make orders against the executive, preside over impeachment proceedings against Ministers in the Legislative Assembly, suspend laws at variance with the constitution,[70] and give decisions in the land court affecting chiefly titles and land estates.[71] Under the constitution, the chief justice was thus the most powerful person in Tonga next to the monarch, and,

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[65] LAWS OF TONGA (1891 and 1903).

[66] Tonga Act, 1970 (U.K.).

[67] Treaty between Tonga and Great Britain, 18 May 1900, and Note of Points Accepted by the King, 18 January 1905 (annexed to LAWS OF TONGA, 1948).

[68] See observations of the Chief Justice in *In re* Tonga ma'a Tonga Kautaha (1910) 1 T.L.R. 5, at 6.

[69] Treaty between Tonga and Great Britain, 1958.

[70] TONGA CONST. §§ 75, 82 (1967).

[71] *See infra* text accompanying note 91.

until Queen Salote began to assert her position in relation to appointments, the British government chose the incumbent.

It is significant for the status of the supreme court in Tonga, and hence for that of the Common Law, that, since 1950, the Tongan government has preferred not to have a resident chief justice. With the exception of a short period, 1973-76, the supreme court has been served by a resident puisne judge (English). A judge (also expatriate) of the Supreme Court or Court of Appeal of Fiji has usually acted as chief justice of Tonga on the rare occasions that such office is needed.[72] One consequence of the residence overseas of the chief justice (when there is one) is that, not only is any extra-judicial political influence nullified, but citizens wishing to ask the chief justice to exercise powers, such as the potentially embarrassing ones of suspension of ordinances and impeachment of Ministers, which may not be exercised by a puisne judge, must wait until the government makes the services of the chief justice available.

4. *Informal Reception of the Common Law*

Without formal direction to apply the Common Law until 1966,[73] the chief justices and judges of the supreme court nevertheless took the view that the Common Law extended to this corner of the South Pacific. In their judgments, they made it clear that the supreme court had inherent jurisdiction to issue prerogative writs in the name of the King,[74] to adopt English principles for the guidance of the Judge sitting on appeal from the magistrate's court,[75] and to apply well established English Common Law principles in areas where Tongan law was silent—such as the law of tort,[76] the law relating to dismissal of servants by the Crown[77] and natural justice, such as the right to be heard, particularly in land cases.[78] On the other hand, the absence of Tongan law on a subject was held to be no excuse for applying the relevant English statute[79] or rule of court.[80] The distinction between English Common Law principles, which can fill gaps, and English statutes, which cannot be accepted in Tonga, was maintained.

The Tongan approach accorded clear precedence to the written word. The architects of the new state intended the constitution and laws of 1875 to 1891,

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[72] *See infra* text accompanying note 94.

[73] *See infra* text accompanying note 86.

[74] S.P. Afuha'amango v. G. Goodacre (Minister of Finance) (1954) 1 T.L.R. 70.

[75] Police v. S. Vamanrav (1954) 1 T.L.R. 72.

[76] T.T. Mataele v. M. Niu (1956) 1 T.L.R. 83.

[77] T.S. Tu'akoi v. Deputy Premier (1958) 2 T.L.R. 196.

[78] S. Taufa v. S. Vilingia, Land Court No. 2/83 (26 October 1984). *See* 11 COMMONWEALTH L. BULL. 1269 (1935).

[79] 'A Niu v. L. Fifita (1946) 1 T.L.R. 36.

[80] Morris Hedstrom Ltd. v. M. Manu (1955) 1 T.L.R. 100.

the formative period, to embody certain Tongan Customary Law but, more importantly, to achieve major changes in social structure which would entrench the government under the Sovereign. It was thus essential that imported concepts should not erode the written framework. Today, the courts may depart from the clear meaning of the statute if the court is satisfied that the plain meaning would lead to manifest injustice.[81]

5. *Land and Noble Title Cases*

A major preoccupation of the Tongan judiciary this century has been the interpretation and application of the constitution and legislation governing the distribution of land and the succession to land and noble titles. From their arrival, European judges were determined to impose on the Tongan Crown the legal precedents and limitations in respect of land and noble title matters which were spelled out in the constitution and legislation, and in the Treaty and Supplementary Agreement with Britain.[82]

It was regarded by the British as conducive to instability to permit the Monarch of the day to grant land and confer titles free of the rights of interested persons to contest such matters in the courts. Over the period 1905 to 1961, the supreme court and land court established and affirmed on many occasions the proposition that such disputes should be determined not by the Sovereign but by law—subject to the rules of a judicial tribunal, and largely without regard for pre-constitutional custom.[83] In the *Fulivai* case,[84] the Tongan Privy Council was prepared for the first time to go behind the constitution and inquire as to the antecedents of a noble chief who had been appointed at the original granting of constitutional honors in 1880. Because of evidentiary difficulties, such an inquiry will be rare, even though the English Common Law rule against hearsay has long been held not to exclude evidence relating to ancestors.[85] In respect of Tongan land-holders generally, of particular significance has been the land court's insistence on adherence to administrative procedures and principles, such as the right to be heard. The cumulative effect of extensive legislation and its rigorous application by the courts has been to foster attitudes of respect for the letter of the law and acceptance of authority.

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[81] M. Fifita v. Minister of Lands, Privy Council Appeal No. 9/72 (12 February 1974). *See* 1962-73 T.L.R. 45.

[82] *See supra* note 67.

[83] Powles, The Persistence of Chiefly Power in Western Polynesia, *supra* note 46, at 281-84, 321-28.

[84] Fulivai v. Kaianuanu (1961) 2 T.L.R. 178.

[85] H. Tu'iha'ateiho v. Deputy Minister of Lands, Land Court (19 August 1985), affirming earlier decisions.

6. *Reception of the Common Law Today*

In order to remove any doubts as to the role of English Common Law in the Tongan legal system, the Civil Law Act of 1966 provided that Tongan courts "shall apply the common law of England and the rules of equity, together with statutes of general application in force in England at the date on which this Act shall come into force,"[86] and, in 1983, the reference to the date was removed.[87] The imported law is to be applied only so far as no other provision has been made in the Kingdom, and "as the circumstances of the Kingdom and of its inhabitants permit and subject to such qualifications as local circumstances render necessary."[88]

For the reasons given above, English Common Law is seldom, if ever, confronted with unwritten Tongan custom. Such custom is not recognized as having any significant role to play in the work of the courts. Tongan custom in relation to the status of chiefs and the inheritance of property, as a body of traditional law, has long ago been taken and transformed into a codified amalgam of local and introduced law, and it is to this which the Common Law must defer.

7. *The Language of the Legal System*

The Tongan Constitution of 1875 and related legislation were adopted officially in Tongan, in which language most Tongans were then literate. Initially, the constitution required all laws to be in both languages, but this provision was removed in 1888.[89] In practice, statutes have continued to be printed in both languages, but Hansard, subsidiary legislation, rules, government reports, and all court proceedings other than those before an expatriate judge, are usually in Tongan only. On the other hand, foreigners on trial in Tonga are accorded the right to have the English version of the law prevail where there is any difference in meaning.[90]

The primary limitation on the reach of the Common Law in Tonga is the extent of Tonga's statutes rather than the language used. Because the law applied in the magistrate's courts is almost entirely statutory, the fact that Common Law concepts may not be well articulated in Tongan is of less significance. It is left to the expatriate judge in the supreme court and land court to apply and explain the Common Law.

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[86] 18 October 1966, Civil Law Act, § 3.

[87] Civil Law Amendment Act, 1983.

[88] Civil Law Act, 1966, § 4.

[89] TONGA CONST. § 32 (1875); Constitution Amendment, 1888.

[90] TONGA CONST. § 32 (1875); TONGA CONST. § 29 (1967).

8. Court Structure

Most of the judicial work of the kingdom is carried out by ten magistrates (all Tongan) of the magistrates' courts sitting in nine locations to deal with most criminal and civil matters, and to hold inquests. The criminal jurisdiction extends to offenses punishable by two years' imprisonment or a fine of $500, together with more serious offenses where the defendant chooses to be tried in the magistrates' court. Claims up to $500 may be heard in the civil jurisdiction.[91]

The work of the supreme court and land court have been described above.[92] The supreme court comprises the chief justice or judge (the former, when there is one, being resident overseas and seldom participating). All matters concerning land and noble titles are dealt with in the land court where the judge (usually the chief justice or judge of the supreme court) sits with an assessor whose responsibility it is to advise on custom.[93] In land and civil cases (but not in criminal matters) there is a right of appeal to the Privy Council where the King sits with his Ministers and a judge especially appointed from overseas (sometimes the chief justice) who acts in an advisory capacity.[94]

The courts are administered by the registrar of the supreme court and land court, and his staff, who are trained on the job. They are not responsible for advising the magistrates.

9. Legal Education, Training and Representation

Magistrates are senior members of the community, many of whom have practiced as advocates.[95] There is at present no formal training for magistrates. They are assisted by detailed statutory rules as to procedure and evidence, and by guidance from the chief justice or judge who is an experienced lawyer from a Common Law jurisdiction.

A distinctive feature of the Tongan court system is the licensing of local advocates to practice in the courts for fees approved by the court. For seventy years, advocates have handled cases of all types in Tonga. Currently, some twenty-two local advocates are licensed, some of whom are also members of Parliament, but are not permitted to be public servants. Applicants for a license

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[91] Magistrates' Court Act, LAWS OF TONGA ch. 9 (1967).

[92] *See supra* text accompanying notes 70-85.

[93] Land Act, 1927. *See* 'A Taumoepeau, *The Land Court of Tonga*, in PACIFIC COURTS AND LEGAL SYSTEMS (C.G. Powles & M. Pulea, eds.) (forthcoming).

[94] There is no court of appeal, and the 1966 proposal for such a court which appears in the LAWS OF TONGA (1967) did not in fact become law. *See supra* note 55.

[95] Helu, *Independence of Adjudicators and Judicial Decision-making in Tonga*, in PACIFIC COURTS AND LEGAL SYSTEMS, *supra* note 93.

as an advocate have usually been required to study general principles of law and Tongan law and to pass an examination. There are no rules as to desirable qualities or experience, nor for the conduct and practice of the advocates. Supervisory power lies with the chief justice or judge. There is only one degree-qualified lawyer in private practice and four are employed in the Crown Law Office. A small number of lawyers from New Zealand and Australia apply for licenses to handle cases from time to time.[96]

10. Law Reporting and Precedent

There is no system for the regular reporting and publication of judgments. In 1959, Judge Hunter prepared and published two volumes of judgments of the supreme court, land court, and Tongan Privy Council for the period 1908 through 1962. In 1973, Chief Justice Roberts published, in a third volume, his judgments in the land court and some privy council judgments, for the period 1966 through 1973. There has been no publication since.

Nevertheless, as far as the chief justice or judge is concerned, there has been little difficulty in retaining access to judgments over time and, as Chief Justice Roberts said in the preface to his volume, it is the practice to follow precedents—"a feature of Tongan law, which has adopted the organic pattern of the Anglo-Saxon legal system."[97]

B. Western Samoa

1. The Setting

Western Samoa has a population of 161,000 and a land area of 2,900 square kilometers. Despite a common Polynesian origin, Samoa and Tonga reveal remarkable contrasts;[98] but these pages will be limited to areas necessary for the present discussion. Less hierarchical and centralized than the Tongan, Samoan chiefship is associated essentially with locality. The basic unit of traditional Samoan politics is the village to which the chiefly titles of the constituent family descent groups belong. Thus, the antiquity, complexity, and stability which Samoan village organization presents today are the natural focal point of inquiry into the status of Customary Law, with which the Common Law finds itself in competition. To family group and village must be added certain large-scale district and lineage allegiances which divide supra-village level politics into fac-

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[96] T. Manu, *Lawyers in Tonga: A Personal View*, in PACIFIC COURTS AND LEGAL SYSTEMS, *supra* note 93.

[97] H.S. Roberts, *Preface*, in TONGAN L. REP. 1962-73.

[98] Powles, The Persistence of Chiefly Power in Western Polynesia, *supra* note 46.

tions, without, however, forming the structure of a cohesive national system.

The Samoan archipelago was partitioned by the Great Powers in 1900 and the smaller eastern part became, and has remained, American Samoa. This account is concerned with Western Samoa, which became, in 1962, the first independent state in the Pacific Island region. Western Samoa has succeeded in retaining a relatively comprehensive, unwritten, Customary Law system.

The *matai*, holders of chiefly titles, are the heads of extended family descent groups which have rights in respect of both the chiefly title and the area of land which is associated with it. Conceptually, all customary land (eighty percent of Western Samoa) is either appurtenant to a chiefly title or held as village land. The *matai* has authority over the group and its land. Nevertheless, a combination of kinship rules and those relating to title appointment and succession insure that the group retains a significant measure of influence over its *matai*. Succession is not hereditary, and, although consanguinity with earlier title holders is one consideration, service to the family and personal achievement are also considered. The group which appoints a *matai* will remind him of his dependence on it for support in village affairs and in all matters involving prestige; while at the same time, the *matai* is the custodian of the honor of its members.

Matai meet regularly in *fono*, council, the political organ of the village. Every title has its known rank in the status hierarchy, reinforced by village ceremonial. As an institution of government, the village *fono* functions as executive, legislature, and judiciary, and often regards itself as autonomous in relation to district and national government. Samoan history contains many examples of large-scale and successful resistance by villages to control or interference from the center.[99]

One of the consequences of *de facto* village authority and autonomy has been the reluctance of Western Samoan legal advisors to provide for village affairs by constitution or legislation. It is also apparent that, in the course of the formation of the Samoan Constitution of 1962, Samoan leaders were advised that it was feasible for such constitution to provide for the modern state while making no reference at all to traditional village authority.[100] Thus, in effect, the informal and customary status of such authority was preserved.

The vigor of Samoan chiefship has promoted its expansion over the last thirty years to a point where a large proportion of public servants and businessmen have taken titles, reflecting the desire to express non-traditional achievement in traditional terms, and reflecting the tendency of chiefly rank and personal achievement to chase each other up the status scale. On the other hand, the same vigor has led to the proliferation of chiefly titles by means of the splitting of titles between persons important to the group, and the creation of new title names. Over the period 1961 to 1985, *matai* numbers rose from

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[99] J.W. DAVIDSON, SAMOA MO SAMOA (London 1967).

[100] I CONSTITUTIONAL CONVENTION DEBATES 74, 76 (1960).

4,500 to 16,000, from 3.9% of the population to 10.3%. Today, one in every five adults is a *matai*. Thus, the process by which chiefship has successfully invaded areas previously non-traditional has encouraged a certain dissipation of chiefly authority.[101]

2. *Early Encounters with the Common Law*

While Tongan leaders were preparing the documents which were the forerunners of their 1875 Constitution, the chiefs of Samoa were embroiled in Great Power rivalry that saw the consuls of Germany, Great Britain, and the United States manipulating local Samoan politics while at the same time being manipulated by them. Samoa's first constitution was adopted by chiefs in 1873 and, like the Tongan, owed much to American thinking. However, due to the instability referred to, this constitution gave way to another in 1875, which, in turn, was superseded by laws and Constitutions of 1880 and 1887, until the Powers, by Treaty of 1889 (Final Act of the Conference on Samoan Affairs—Berlin) imposed a procedure under which the Samoan people would choose a king and government. It was also the intention that the Supreme Court of Samoa, established under the Treaty, would apply "the practice and procedure of common law, equity and admiralty, as administered in the Courts of England . . . so far as applicable." In the performance of one of its principal functions, however, namely the determination of the dispute as to which chief should be king, the court was required to apply "the laws and customs of Samoa."[102] Under the protection of the Treaty, numerous laws were introduced to govern the islands, and the culmination of international rivalry was the permanent partition of the group in 1900, when German law came to apply as the only European law in Western Samoa.

Commercial interests, land claims, and the growth of a European enclave in Apia had exposed Samoa to the Common Law in a way which did not occur until thirty years later in Tonga. Of course, law and litigation were largely concerned with the problems of foreigners and, in the case of the British, English law applied, with appeal to the Privy Council.[103]

The fourteen-year German administration left Samoan Customary Law relatively intact under the jurisdiction of the Land and Titles Commission established in 1903, which subsequently became the land and titles court of today.

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[101] Powles, *Legal Systems and Political Cultures*, *supra* note 46.

[102] The Final Act of the conference on Samoan Affairs (Treaty of Berlin), 1889, art. III, established a Supreme Court with wide civil and criminal jurisdiction, § 9; English procedure, § 10; and power to determine royal succession, § 6.

[103] For example, McArthur & Co. v. Cornwall [1892] A.C. 75, *reproduced in* [1930-1949] W.S.L.R., ix.

New Zealand occupied Western Samoa in 1914 and repealed all existing law in 1920.[104] Western Samoa became a mandate for which New Zealand was responsible to the League of Nations, and subsequently a trusteeship under the supervision of the United Nations Trusteeship Council.

3. *The Formal Reception of Common Law*

The charter for New Zealand administration was the Samoa Act of 1921, together with a large number of New Zealand statutes of general application which were made applicable to Western Samoa. "The law of England as existing on 14 January 1840" (the date on which the colony of New Zealand was established) was in force, "save so far as inconsistent with the Act or any enactment or inapplicable to the circumstances of the Territory." Only those English statutes in force before 14 January 1840 which were in force in New Zealand at the commencement of the Samoa Act (7 December 1921) were to be applicable. All rules of common law or equity in England were to be construed as relating to the jurisdiction of the High Court of Western Samoa.[105] The high court applied the Common Law as part of the law of Western Samoa,[106] subject to the area clearly demarcated as the province of Customary Law discussed below.[107]

4. *The Common Law in the Independent State*

The constitution of 1962 brought forward the existing law and added:

> the English common law and equity for the time being insofar as they are not excluded by any other law in force in Western Samoa, and any custom or usage which has acquired the force of law in Western Samoa or any part thereof under the provisions of any Act or under a judgment of a Court of competent jurisdiction.[108]

However, as one would expect, the constitution and its provisions (including the new definition of "English common law") take precedence over existing law.

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[104] Samoa Constitution Order, 1920 (N.Z.).

[105] Samoa Act, 1921 (N.Z.), §§ 349-50.

[106] For example, Inspector of Police v. Tagaloa & Fuataga (1927) [1921-1929] W.S.L.R. 18, and on appeal, *id.* at 23; *In re* Moke Ta'ala (1956) [1950-1959] W.S.L.R. 51.

[107] Customary Law might nevertheless be required to accord natural justice in relation to the right to be heard in one's defense. Mose v. Masame (1948) [1930-1949] W.S.L.R. 140. *See infra* text accompanying note 112.

[108] WESTERN SAMOA CONST., art. 111 (definition of "law").

As discussed in the first part of this article, the words of importation in 1962 appear to have a different meaning from those of 1921. A review of the reported decisions of the Supreme Court of Western Samoa since independence demonstrates continuing affinity with New Zealand but also no reluctance to consider and attach weight to the decisions of the superior courts of Australia, as well as those of the United Kingdom. Indeed, in interpreting the "fundamental rights" provisions of the constitution, the Supreme Court has examined decisions of the United States.[109] The supreme court appears to have been less willing to rule on the questions of precedent. The decision in *Opeloge Olo v. Police* referred to above,[110] which was the opinion of a single judge, appears to be the first ruling on the meaning of "English common law." Perhaps of some significance is the fact that Western Samoa has never been under the administration of the United Kingdom and has had New Zealand lawyers on the high court (now supreme court) bench for sixty years. The only exception was the judge in *Opeloge Olo v. Police*, appointed from Australia for two years. Under the Samoa Act (N.Z.) of 1921, appeals from the high court went to the New Zealand Supreme Court. Judges now appointed to the Western Samoa Court of Appeal are from New Zealand or are members of the Court of Appeal of Fiji. It is inevitable that Western Samoan courts will from time to time follow developments in the Common Law which are adopted elsewhere in the Pacific region in preference to the decisions of the superior courts of England.

5. *The Scope of the Common Law*

Unlike Tonga, Western Samoa has a structure of government and legislation which adheres quite closely to the "Westminster-Common Law model." The most obvious deviation within the constitution itself is the requirement that all law must be tested against its "fundamental rights" provisions—not a Common Law concept. As far as central government is concerned, there is a further exception which provides for *matai* suffrage. This impinges on the legal system in relation to electoral disputes[111] and the constitutional validity of the electoral legislation.[112]

The constitution does not elaborate the jurisdiction of the supreme court, but

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[109] Ti'a Si'omia v. Police (1971) [1970-1979] W.S.L.R. 21.

[110] Opeloge Olo v. Police, *supra* note 20.

[111] In the frequent litigation alleging electoral offenses and deficiencies, the Supreme Court sitting as the Electoral Court applies British and New Zealand tests, but has considered developments in other jurisdictions, such as the Cook Islands. J.R. Callander, Acting C.J., in Fao Avau v. Va'ai Kolone, W. Samoa Sup. Ct., Misc. No. 5979 (1982).

[112] The Court of Appeal of Western Samoa reversed a Supreme Court ruling that the electoral system was discriminatory. Attorney General v. Saipa'ia Olomalu, W. Samoa Ct. App., 26 August 1982; *see* 14 VIC. U. WELLINGTON L. REV. 275 (1984).

the court has had no difficulty in deciding that, like any Common Law superior court, it has the inherent jurisdiction of a superior court of record.[113] The principal limitation on the reach of the Common Law in Western Samoa lies in the preservation by law of the application of "Samoan custom and usage" in relation to the holding of *matai* titles and customary land.[114] As explained above, the phenomenon of *matai*ship has invaded almost all aspects of life in Western Samoa. Eighty percent of land is "customary land" and cannot be alienated except by lease or license in accordance with statute.[115] The constitution has confirmed the jurisdiction of the land and titles court in relation to *matai* titles and customary land.[116] Moreover, the effect of the constitutional declarations referred to is to give constitutional force to the statutory reservation of exclusive jurisdiction in these matters to the land and titles court.[117] Together with these provisions must be read the definition of "law" set out above[118] which accords primacy over Common Law to those principles and rules of Customary Law which have acquired legal force under the judgments of the court. A duality of legal systems has thus been created, and is endorsed by the constitution.

Two principal areas of difficulty require further consideration. First, the constitution is clearly intended to protect Customary Law from the encroachment of Common Law. The inability of the courts to apply English Common Law thinking to Samoan customary institutions, however, is also attributable to acknowledgement of the incompatibility of the two sources of law. Although the Westerner may see the descent group as a corporation,[119] and the *matai* title, like the Tongan title, as an English baronial, the only Samoan customary concept tackled by the courts with any confidence has been the description of the *matai's* land-holding rights as a trust for the benefit of the group.[120] By and large, the separation of jurisdictions between supreme court and land and titles court has enabled the issue of which law applies to be settled as a preliminary matter before the merits of the legal argument are considered. Thus, both courts have usually been able to decline to consider suggestions that Customary Law

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[113] For example, the Court of Appeal upheld the power to punish contempt. *In re* Tapu Leota (1964) [1960-1969] W.S.L.R. 106.

[114] WESTERN SAMOA CONST., arts. 100-01. Samoan custom in relation to land-holding had been protected previously under the Samoa Act, 1921 (N.Z.) § 278.

[115] WESTERN SAMOA CONST., art. 102.

[116] *Id.* art. 103.

[117] Land and Titles Act (W.S.), 1981 (preceded by the Land and Titles Protection Ordinance, 1934).

[118] *See supra* note 108.

[119] M.G. SMITH, CORPORATIONS AND SOCIETY (London 1974).

[120] Petition of Seumanutafa, Land and Titles Court [1960-1969] W.S.L.R. 228 (1969); *see* C.C. MARSACK, NOTES ON THE PRACTICE OF THE LAND AND TITLES COURT 22 (Apia 1961); C.G. POWLES, STATUS OF CUSTOMARY LAW IN WESTERN SAMOA, *supra* note 46.

might be subject to Common Law—or vice versa.[121]

More direct confrontation between the two legal systems is becoming increasingly difficult to avoid in the area of Common Law damages for harm alleged to have been caused by the actions of *matai* in enforcing their *fono*, council, decisions which have no statutory basis. There is also more widespread awareness that such decisions may be tested against the "fundamental rights" provisions of the constitution, such as the freedoms of religion and movement.[122] On the other hand, because the confrontation between village and state is frequently political, the enforcement of court judgments in this area becomes sensitive and, wisely, is seldom left to the court alone. The question of whether the inherent jurisdiction of the supreme court will ultimately give it authority to deal with doubts or inconsistencies in relation to the application of Customary Law, or in relation to any failure by the land and titles court to carry out its functions properly, has not yet arisen but may well do so.

The second and obvious area of conflict in Western Samoa occurs when Customary Law is pleaded in the supreme and magistrate's courts. Here, despite the popularly recognized "law and order" functions of the village *fono*, the absence of any statutory basis for the *fono* denies the courts legal justification for accepting *fono* decisions as conclusive. Such decisions may be considered in mitigation but not as *autrefois convict* or *res judicata*. Problems of "double jeopardy" and "abuse of process" seem inevitable.[123] Similarly, the courts have, to date, rejected arguments that the formal acceptance of a ritual *ifoga*, public apology, should preclude a civil action for damages at Common Law.[124] Uncertainty in the area leaves the situation open to abuse.

Finally, it should be noted that the Common Law is vigorous in areas where it is not excluded, such as contract law. Furthermore, the Common Law notion of the standards of perception and behavior of the "reasonable man" has struck a responsive chord in the deliberations of the land and titles court, where the Customary Law test of *amiotonu*, just and proper behavior, is today applied with Christian overtones.

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[121] For example, determinations as to whether the building in dispute was subject to the same law as the land on which it stood were decisive of the question of which court had jurisdiction. See the apparently conflicting judgments of Methodist Church of Australasia v. Vaeau (1960) [1960-1969] W.S.L.R. 10 and Su'a, T. v. Su'a, T.C. (1978) [1970-1979] W.S.L.R. 179.

[122] Certain Judges (for example, R.J.B. St. John, C.J., in T. Tuivaiti v. Sila F., W. Samoa Supreme Court, 17 December 1980) have sought to outlaw banishment, the ultimate village sanction, which was used by the Germans and the New Zealanders (*see* Inspector of Police v. Tagaloa & Fuataga, *supra* note 106) and tolerated in mild form by the Land and Titles Court.

[123] Powles, Fundamental Rights in the Constitution of Western Samoa (Wellington 1970) (research paper).

[124] Lemalu, P. v. F. Jessop (1960) [1960-1969] W.S.L.R. 214.

6. *The Language of the Legal System*

The Samoan language is suited to the complex social organization of society and has thus embraced the workings of government and the courts, as well as the introduced procedures for the maintenance of order and the resolution of disputes. Where Tongan statutes played the main role in perpetuating the language of Tongan law, it was the Samoan *fono*, both village and national, which ensured that all but the least used English terms would be expressed in Samoan. Thus, the language of the courts is Samoan, and English is used (with translation into Samoan) only when the bench or parties require it.

7. *Court Structure and the Judiciary*

The bulk of the formal court work is handled in the magistrates' courts, which are in two divisions. The higher jurisdiction of the stipendiary magistrate (S.M.) requires legal qualification and practice, and one of the two S.M.s is usually on contract from New Zealand. *Fa'amasino Fesoasoani*, assistant magistrates, of whom there are nine, each holding a respected chiefly title, sit alone in the lower jurisdiction. The magistrates' courts hold most of their sittings in the main centers, one on each island, but the S.M.s also go on circuit on the second large island of Savai'i.

However, the Customary law "informal" system of 200 village *fono*, councils, deals regularly with local offenses, and indeed with all conduct which threatens village harmony. Described as the "watchdogs of Samoan custom," the *fono* constitute the most highly institutionalized traditional court system in the Pacific.

The chief justice and judge of the Samoan Supreme Court are currently a Western Samoan (trained in New Zealand) and a New Zealand lawyer, respectively, the latter on contract. Also seconded from New Zealand is a further judge of the supreme court who sits as president of the land and titles court.

Because of its exclusive jurisdiction over *matai* titles and customary land, the land and titles court enjoys a high status. It comprises fifteen Samoan judges, nine of whom are also assistant magistrates, holders of respected chiefly titles appointed for three-year terms, and assessors who are senior *matai* appointed from a list. The four most senior of the Samoan judges preside as deputy-presidents. Most of the work of the court is carried out in three almost continuous sittings of the court—two on one island and one on the other—made up of a deputy president, two or three Samoan judges and one or two assessors for each sitting. The president is responsible for guidance on legal and procedural matters and for the appeal procedure. Appeals by way of limited rehearing on certain grounds are heard by the president and two Samoan judges. There is no further appeal. Appeal lies from the Supreme Court to the Court of Appeal of

Western Samoa, usually made up of three lawyers appointed mainly from New Zealand to deal with cases as required.

The Justice Department administers the courts. Registrars, deputies, and clerks have no formal training but some attend overseas on-the-job courses. The staff of the land and titles court have additional responsibilities under the Land and Titles Act with regard to the investigation and settlement of disputes.

8. *Legal Education, Training, and Representation*

There is a marked distinction between the backgrounds of two groups of personnel. On the one hand, the Samoan judges and assistant magistrates are familiar with Customary Law but have no formal legal training. The legally qualified judges, stipendiary magistrates, and legal practitioners, however, have usually graduated from New Zealand or Australian law schools and have little or no grounding in Customary Law. Of course, many of the sixteen lawyers in private practice have since acquired considerable experience in customary matters and, indeed, the first Western Samoa citizen to be appointed chief justice is a senior lawyer of part-Samoan blood whose experience has equipped him to work in both legal systems.

Debate continues as to whether legal practitioners should be permitted to appear in the land and titles court. The long held view still prevails, namely that Customary Law rules—and particularly the customary procedures and non-legal personnel who operate them—work better without the Common Law and the lawyers who espouse it. There is growing pressure for change.[125]

9. *Law Reporting and Precedent*

Although there is no system for regular reporting and publication of judgments, the Attorney General's office under the earlier stimulus of the former Attorney General, Mr. Nerone Slade, has produced five volumes of law reports, for the periods 1921-29, 1930-49, 1950-59, 1960-69, and 1970-79. Access to judgments selected for these periods is thus available to practitioners. Given the interest shown by the supreme court in developments in the wider Common Law system,[126] Western Samoa has need of assistance in building further upon its collection of law reports from the principal Common Law jurisdictions.

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[125] *See* Va'ai, *The Western Samoan Legal Profession* and Epati, *Lawyers and the Customary Law Court* in PACIFIC COURTS AND LEGAL SYSTEMS, *supra* note 93.

[126] *See supra* notes 20, 21, 108.

III. CONCLUSION

Tonga's legal system today reflects a longstanding compromise between English and Tongan concepts, which is now largely codified and regarded as traditionally Tongan. More recent statutes in the commercial area, such as the Bills of Exchange Act and the Off-Shore Bank Act, are not used or understood outside the business community. The Common Law is thus regarded as specifically English. However, in the area of government and the authority of the royal family and nobles, the Tongan amalgam of Common Law and Customary Law is likely to be in an increasingly uneasy state. As has been shown, the Tongan experience with the Common Law is quite different from that of Western Samoa. It has no parallel in the Pacific.

In Western Samoa, the Common Law co-exists with Customary Law so as to produce considerable conflict and uncertainty. Nevertheless, Customary Law is kept alive as a developing sub-system of law.

It is helpful here to contrast the Western Samoan provisions for an exclusive Customary Law jurisdiction, complete with its own court, with those of Fiji, where custom enjoys no such facilities, and has not been incorporated into statute in the Tongan manner. The indigenous people of Fiji retain a system of traditional organization which is basically Polynesian. In Fiji, as in Western Samoa, Customary Law issues may not be determined in the Fiji Supreme Court, nor may the Common Law be applied in customary areas such as land tenure and chiefly succession. But it is now apparent that, without a tribunal to apply Customary Law, the Fijian living under such law is deprived of adequate means whereby disputes in such areas may be determined.[127] It is unlikely that the change of government by coup in 1987 will lead to any encroachment by the Common Law into areas regarded as the province of Fijian traditional authority.

It seems clear that further attention is required in Western Polynesia (including Fiji) to the law relating to the authority of chiefs, and to the extent to which Common Law remedies and universal (Bill of Rights) standards may apply to such chiefly law.[128]

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[127] Under the Native Lands Act (Fiji, Cap. 133) and the Native Land Trust Act (Cap. 134), the Native Land Commission and Trust Board have exclusive powers but lack adequate dispute resolution functions. See criticism expressed in N. Dikau v. Native Land Trust Board, Sup. Ct. of Fiji, No. 801 of 1984, dated 9 May 1986; and T. Bavadra v. Native Land Trust Board, Sup. Ct. of Fiji, No. 421 of 1986, dated 11 July 1986.

[128] Polynesia lags behind Africa with regard to studies of the nature and role of chiefship in the modern state. For example, there have been several African Conferences on the subject, the latest major one being the 'Conference on the Role of Traditional Rulers in the Governance of Nigeria' arranged by the Institute of African studies, University of Ibadan, in September 1984.

TABLE 1

The "Common Law" Jurisdictions

	Former Status	Independence Date	and Style
COOK ISLANDS (17,200)*	New Zealand Territory	1965	Self-governing in free association with New Zealand
FIJI (715,200)	British Colony	1970	Sovereign Democratic State (Republic declared 1987)
KIRIBATI (65,300)	Part of British Colony of Gilbert and Ellice Islands	1979	Sovereign Democratic Republic
NAURU (8,600)	United Nations Trust Territory administered by Australia	1968	Independent Republic
PAPUA NEW GUINEA (3,400,000)	New Guinea—U.N. Trust Territory; Papua—Australian Territory	1975	Sovereign Independent State
SOLOMON ISLANDS (282,000)	British Solomon Islands Protectorate	1978	Sovereign Democratic State
TONGA (98,000)	British Protected State	1970	Kingdom
TUVALU (8,700)	Part of British Colony of Gilbert and Ellice Islands	1978	Sovereign Democratic State
VANUATU (140,200)	British and French Condominium of New Hebrides	1980	Sovereign Democratic State
WESTERN SAMOA (161,000)	United Nations Trust Territory administered by New Zealand	1962	Independent State

*Estimated population. Estimates taken from SOUTH PACIFIC COMMISSION, NOUMEA, STATISTICAL SUMMARIES (1987).

In Pursuit of Fisheries Cooperation: The South Pacific Forum Fisheries Agency

by David J. Doulman, Ph.D.*

The South Pacific Forum Fisheries Agency (FFA), based in Honiara, Solomon Islands, is an organization of politically independent and self-governing Pacific island countries.[1] The agency was formally established in 1979.[2] Its principal objective is to assist member countries to develop and manage their fisheries resources in a coherent and coordinated way.[3]

FFA has sixteen members: Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau,

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* David J. Doulman is the Senior Economist for the Forum Fisheries Agency in Honiara. He received his doctorate degree from James Cook University, Australia. Dr. Doulman has written extensively on tuna and fisheries in the Pacific islands region; his writings include publications by the Pacific Islands Development Program at the East-West Center in Honolulu, where he directed a project on multinational corporations in the Pacific Tuna Industry from 1985 to 1987.

[1] The views expressed in this article are those of the author. They do not necessarily represent the views of the Forum Fisheries Agency or any of its member countries.

[2] *See generally* Van Dyke & Heftel, *Tuna Management in the Pacific: An Analysis of the South Pacific Forum Fisheries Agency*, 3 U. HAW. L. REV. 1 (1981).

[3] This objective is embodied in the following prefatory remarks in the agreement establishing the Forum Fisheries Agency:

> THE GOVERNMENTS COMPRISING THE SOUTH PACIFIC FORUM . . . .
>
> *Recognising* their common interest in the conservation and optimum utilisation of the living marine resources of the South Pacific region and in particular of the highly migratory species;
>
> *Desiring* to promote regional co-operation in respect of fisheries policies;
>
> *Bearing* in mind recent developments in the law of the sea;
>
> *Concerned* to secure the maximum benefits from the living marine resources of the region for their peoples and for the region as a whole and in particular the developing countries; and
>
> *Desiring* to facilitate the collection, analysis, evaluation and dissemination of relevant statistical scientific and economic information about the living marine resources of the region, and in particular the highly migratory species;
>
> HAVE AGREED [to establish the Forum Fisheries Agency].

South Pacific Forum Fisheries Agency Convention, *done* at Honiara, Solomon Islands, 1979, *reprinted in* Van Dyke & Heftel, *supra* note 2, at 60.

Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Vanuatu, and Western Samoa. Dependent territories in the Pacific islands region (e.g., American Samoa and New Caledonia) are not eligible for membership in the agency, nor are metropolitan powers (e.g., the United States and the United Kingdom) or distant-water fishing nations (DWFNs)[4] (e.g., Japan and Taiwan). These groups are excluded from the organization to insure that conflicts do not arise in the execution of the agency's mandate. FFA member countries recognized from an early stage that their interests and those of metropolitan countries and DWFNs were fundamentally incompatible, and that DWFN involvement in the agency would inhibit the agency's ability to represent properly and to further island countries' interests.[5]

Since 1979 the FFA has assisted members to derive increased benefits from the exploitation of fisheries resources within their respective exclusive economic zones (EEZs).[6] The major gains have been in the distant-water tuna fishery where the agency has provided members with negotiation support in concluding access agreements with DWFNs. By helping redress the information imbalance in negotiations, FFA members have obtained higher financial returns from their tuna resources and have induced DWFNs to curb their presentation of misleading information about their fishing operations and marketing arrangements. The agency has also assisted members to expand and restructure domestic fishing industries, secure markets for marine products, improve artisanal fishing capabilities, enhance fisheries administration and legislative services, implement a regional fisheries surveillance program, and undertake professional development programs for fisheries personnel.

This article reviews FFA activities and achievements since 1980. By way of background, the article commences with a review of events leading to the agency's establishment. This is followed by a discussion of how policy is formulated within the agency. FFA's administration is addressed in terms of its organizational structure, work program, and financial aspects. In the next section the agency's principal activities are examined. The conclusion of the article postu-

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[4] Distant-water fishing nations are those whose fishing fleets travel to catch fish in other nations' waters or in international waters. *See* D. DOULMAN, FISHING FOR TUNA: THE OPERATION OF DISTANT-WATER FLEETS IN THE PACIFIC ISLANDS REGION (Pacific Islands Development Program Research Report Series No. 3, 1986).

[5] For this reason the South Pacific Commission in 1983 failed in its efforts to form a broadly-based, Article 64 type tuna management body. Some island countries saw merit in such an organization but the majority did not. The initiative died for lack of support.

[6] The exclusive economic zone (EEZ) is a zone that may extend up to 200 nautical miles beyond the baselines from which the territorial sea is measured. Within this offshore zone the coastal nation has sovereign rights for "exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil. . . ." United Nations Convention on the Law of the Sea, *done* at Montego Bay, Dec. 10, 1982, art. 56, ¶ (1)(a).

lates why the FFA has been as successful as it has been and why it has achieved such international standing and respect.

I. BACKGROUND

By 1976 it had become clear that the international community favored the implementation of changes to the existing management, use, and ownership of the ocean's resources. One of these changes involved the introduction of 200-mile EEZs.[7] The consensus for change emerged at the U.N.-sponsored Law of the Sea Conference that began in 1974. Pacific island states were represented at these conferences. They realized that if they were to gain additional economic returns from the marine resources adjacent to their coastlines while concurrently insuring the wise and proper use of resources, they should declare EEZs and initiate measures to manage their newly-acquired sources of wealth.

Furthermore, island countries recognized that their smallness, isolation, and lack of industrial fishing capacity would disadvantage them in their dealings with foreign fishing interests. They were aware also that some DWFNs had major objections to the proposed Law of the Sea changes so that not all DWFNs could be expected to sign the convention after negotiations were completed. Island countries therefore believed that they were potentially vulnerable to economic exploitation by larger and more powerful nations, and that it was in their own interests, and in the interests of the region as a whole, to form a unified bloc.

The initial proponents of the bloc were Fiji and Papua New Guinea.[8] Both countries presented papers on marine issues to the 1976 meeting of the South Pacific Forum (SPF) in Suva.[9] Fiji's paper focused on substantive issues arising from the Law of the Sea conferences then in progress, and proposed that a meeting of SPF members be held for a broad investigation of regional fisheries cooperation. The SPF accepted Fiji's proposal and directed the South Pacific Bureau for Economic Cooperation to convene a meeting.[10] This task was undertaken with the assistance of the South Pacific Commission, and at the 1977 meeting in Port Moresby, SPF members agreed in principle to establish the FFA. It was further agreed that the interim headquarters of the agency would be in Sydney, Australia, but that the permanent headquarters would be in

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[7] *Id.* For a description of provisions of the 1982 Law of the Sea Convention concerning highly migratory species and the EEZ, see Burke, *Highly Migratory Species in the New Law of the Sea*, 5 OCEAN DEVEL. & INT'L L. 273 (1984).

[8] Gubon, *History and Role of the Forum Fisheries Agency*, in TUNA ISSUES AND PERSPECTIVES IN THE PACIFIC ISLANDS REGION 245 (D. Doulman ed. 1987).

[9] *Id.* at 246. Papua New Guinea's paper emphasized the need for regional cooperation in environmental protection and fisheries conservation. *Id.* at 245-46.

[10] *The Islands State Their Claim to the Sea's Riches*, PAC. ISLANDS MONTHLY, Dec. 1976, at 53.

Honiara, Solomon Islands.[11]

Shortly after this decision, planning for the proposed agency encountered difficulties. One of the more important problems resulted from the inability of SPF members to agree at their 1978 Niue meeting on a convention to establish the agency. The major impediment to agreement related to agency membership, particularly with respect to participation by the United States and other DWFNs.[12]

The FFA membership issue polarized opinion within the SPF. Fiji, Kiribati, Nauru, Tonga, and Papua New Guinea opposed U.S. membership, while Australia, New Zealand, Western Samoa, Cook Islands, and Niue supported U.S. membership. Fiji and Papua New Guinea went as far as indicating that they would completely withdraw support for the agency if the United States were permitted to join.[13] Incensed by this reaction, the U.S. government retaliated by withholding its promised financial support (US $75,000) for the agency's establishment.[14]

Sensitive about its role in the SPF, Australia was reluctant to push its own interests openly, let alone to advance the interests of the United States.[15] This attitude prompted the Australian government to modify its stance on the membership issue. While maintaining that U.S. involvement would be beneficial to the functioning of the agency, Australia agreed to support the island states in establishing the type of management organization they considered appropriate.[16]

Intense and persistent lobbying by the United States continued in an effort to secure agency membership. This lobbying effort led to a meeting between Papua New Guinea's Minister for Foreign Affairs and the U.S. Secretary of State in an attempt to resolve the matter. This meeting was followed up by a visit to Port Moresby in 1979 by the U.S. Ambassador to the United Nations to discuss the membership issue.[17] Fiji and Papua New Guinea, however, would not budge on the issue so that when the agency was formally inaugurated in July 1979, the United States was excluded.

The primary reason for the exclusion of the United States from the agency

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[11] The agency's interim headquarters were never established in Australia. From its inception the agency was located in Solomon Islands.

[12] *Forum Agrees to Fraser's Fisheries Plan*, Papua New Guinea Post Courier, Sept. 28, 1978, at 4.

[13] *SPF: Fiji Threats to Pull Out*, Papua New Guinea Post Courier, Sept. 29, 1978, at 3.

[14] *U.S. to Hold Up Cash*, Papua New Guinea Post Courier, Oct. 2, 1978, at 4.

[15] *Australian Fishing Plan Frustrated: PNG, Fiji Won't Take the Bait*, AUSTRALIAN FIN. REV., Sept. 26, 1978, at 9.

[16] *U.S. Rethinks on Fish Agency*, Papua New Guinea Post Courier, Oct. 13, 1979, at 4.

[17] *Young Takes up Tuna Case*, Papua New Guinea Post Courier, May 3, 1979, at 3.

related to its position on tuna.[18] The U.S. tuna industry had been successful in having the U.S. government adopt a policy whereby the United States does not recognize coastal state jurisdiction over certain highly migratory species of fish, including tuna.[19] Furthermore, the U.S. tuna policy encourages U.S. fishermen to operate illegally in the EEZs of other countries because the government financially compensates fishermen if they are apprehended for illegal fishing.[20] This policy has led to the arrest of U.S. vessels in North, Central, and South America, as well as in several Pacific island countries.

When FFA membership was first addressed, the United States adopted the position that it had a right to membership because of its responsibilities for the U.N. Trust Territory of the Pacific Islands (TTPI). However, while the majority of island countries believed that the TTPI was entitled to representation, the approach adopted by the United States hardened countries' attitudes towards its participation in the agency. With patience and an appreciation of island ways, the U.S. membership issue might have been resolved. While the U.S. position on tuna was a major impediment to membership, a lack of understanding of Pacific island protocol and poorly developed U.S. policy towards the region were also handicaps.

II. Organization and Activities of the Forum Fisheries Agency

A. Policy Direction

The Forum Fisheries Committee (FFC), consisting of member countries, directs the activities of the FFA.[21] One commentator has summarized the duties of the FFC as follows: the FFC is required to "(1) provide detailed policy and administrative guidance and direction to the agency, (2) provide a forum for parties to consult on matters of common fisheries concerns, and (3) carry out other functions as necessary to give effect to [the FFA Convention]."[22] The FFC meets at least annually, but it can meet more frequently if member countries so desire. In addition to providing policy direction to the agency, the FFC approves the agency's annual work program and budget. The committee also reviews and endorses senior staff appointments.

Although FFC meetings are formally conducted, decisions are normally

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[18] Report of the Eighth Meeting of the South Pacific Forum, Port Moresby, Papua New Guinea 31 (1977), *cited in* Gubon, *supra* note 8, at 247.

[19] Van Dyke & Nicol, *U.S. Tuna Policy: A Reluctant Acceptance of the International Norm*, in Tuna Issues and Perspectives in the Pacific Islands Region, *supra* note 8, at 109.

[20] *Id.*

[21] *See* South Pacific Forum Fisheries Agency Convention, in Van Dyke & Heftel, *supra* note 2, at 61-63.

[22] Gubon, *supra* note 8, at 250.

reached through consensus. Meetings are characterized by frank and open discussion, lacking the political intrigue and lobbying that is often associated with meetings of regional and international organizations. The FFC provides FFA with clear policy guidance and an unambigious work program. It is this uncomplicated and direct approach by the FFC that enables FFA to carry out its mandate so effectively and to represent properly the interests of its member countries.

FFC meetings rotate among member countries in alphabetical order. The chairmanship of the committee also rotates from country to country on an annual basis. Fiji chaired the FFC in 1987, with Kiribati acting as deputy chairman. In 1988 Kiribati assumed chairmanship, and the deputy chair passed to Marshall Islands.

B. Administration

1. Organizational structure

FFA's chief executive is a director who has overall responsibility for the agency's operations. The director is required to maintain close liaison with member countries to insure that their needs are being met by the FFA. This liaison is critical because if members feel that the agency is failing to meet their needs, they could withhold support and this would prejudice the agency's performance. To complement the director, a deputy director is responsible for technical and management aspects of the agency. The deputy director, usually with a broad fisheries, management, and policy background, is primarily responsible for supervising the implementation of the agency's work program.

Senior professional staff within the agency include an economist, a computer systems manager, a legal officer, a fisheries development officer, a research coordinator, a fisheries surveillance and enforcement officer, a U.S. tuna treaty manager, and a financial controller. These staff members are assisted by an industry economist, a statistician, a computer analyst, and a range of support staff. All professional staff are appointed on a contract basis and preference in appointment is normally given to nationals from FFA member countries. FFA member countries have deliberately tried to restrict the size of the agency so as to minimize costs and the level of bureaucracy. At the same time, FFA management emphasizes flexibility and responsiveness in output so as to meet member countries' demands.

2. *Work program*

FFA's work program is reviewed and approved annually by FFC. The program focuses on policy issues in fisheries management and development where economic and legal considerations play an important role.

The work program is currently divided into eleven sub-programs.[23] Each sub-program consists of separate, but related, activities. The sub-programs relate to (i) the agency's operation and staffing; (ii) harmonization of members' fisheries regimes and access arrangements; (iii) fisheries surveillance and enforcement; (iv) information services; (v) tuna fishing development; (vi) economic analysis; (vii) fishing patterns; (viii) fisheries and administrative training; (ix) the regional register of fishing vessels; (x) delineation of fishing and related zones, and (xi) work program management.

As part of its reporting system to member countries and funding agencies, FFA's work program is budgeted by activity and sub-program. This enables countries to monitor sub-program costs and implementation schedules while providing clear accountability for funding agencies.

3. *Finance*

FFA is financially supported by member countries and by a range of international and national development organizations. Members make annual contributions to the agency. Two-thirds of the total contribution is paid by Australia and New Zealand, with the remainder coming from island countries. Contributions from these countries take into account the special circumstances of small island countries. Contribution schedules are reviewed periodically by the FFC, primarily in response to requests from members relating to economic hardship.

To supplement member contributions, organizations such as the Australian Development Assistance Bureau, New Zealand Overseas Development Assistance, the Canadian International Development Agency (CIDA), the International Centre for Ocean Development (ICOD), the Commonwealth Secretariat, the European Economic Community, and the United Nations Development Programme directly support agency programs. The Food and Agriculture Organization of the United Nations has also directly supported FFA programs in the past. Some of these organizations fund FFA staff positions or make financial appropriations to the agency for broadly defined areas of activity. Appropriations of this nature give the agency a high degree of flexibility in meeting the needs of member countries.

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[23] Forum Fisheries Agency, Fisheries Institutional Arrangements in the South Pacific (1987) (unpublished paper presented at the Symposium on South Pacific Fisheries Development in Tokyo, Japan).

In addition to direct financial support for its approved activities, FFA plays a catalytic role in assisting members to obtain development assistance from organizations such as the U.S. Agency for International Development. In some cases FFA assists countries to identify, define, and prepare project proposals and also provides direction and support at the implementation stage if this type of assistance is sought.

By regional and international standards, FFA's budget is small. In the 1986 fiscal year the agency's budget was $1.5 million (U.S.), rising to $2.6 million (U.S.) in 1987.

In July 1987, the Canadian government announced its intention to increase significantly its development assistance to countries and organizations in the Pacific islands region. This assistance is aimed at marine resource development. The FFA fisheries programs will be a major recipient of Canadian support under the expanded program. Canada is targeting marine resource development because of its critical importance to all island countries and the lack of alternative land-based development opportunities in many island states.

C. Major Activities

1. Access negotiations

When the FFA was established, assistance to member countries in their access negotiations with DWFNs was identified as a primary task. Having declared EEZs, the island countries were in a weak negotiating position because they lacked information about the commercial fisheries that fell within their zones. In the absence of up-to-date information, countries found it difficult to determine the economic value of their fisheries, and consequently, they were disadvantaged in trying to extract a fair financial return from DWFNs for the fish harvested from within their EEZs.

DWFNs, on the other hand, were not as badly placed. Some DWFNs, such as Japan, had operated in the region for several decades and were well acquainted with fishing grounds and seasonal influences on stock abundance. Moreover, they enjoyed a virtual monopoly on fishing catch rates and market information. A considerable information imbalance favored DWFNs in access negotiations.

Shortly after the FFA's formation, island countries started to meet on a regular basis to exchange information concerning their negotiations with DWFNs and other matters of common interest. It became clear from these meetings that DWFNs were presenting different information concerning the same fishery to different FFA member countries so that the need for closer regional cooperation was heightened. To attempt to circumvent these difficulties with DWFNs, FFA members agreed to provide detailed briefs to each other following access negoti-

ations, to exchange access agreements and other related information, to introduce measures to standardize terms and conditions of fisheries access throughout the region, and perhaps most importantly, to investigate the possibility of implementing regional licensing agreements.

These initiatives put the DWFNs on the defensive. Nevertheless, island countries have continued their pursuit of closer fisheries cooperation, and following the conclusion of a tuna treaty with the United States in 1987,[24] FFA members began to review regional arrangements for other distant-water fleets operating in their EEZs.

As FFA gained strength after its establishment, it was able to initiate independent research and to monitor Japanese official publications and the Japanese press. Information gathered in this way bolstered the negotiation position of FFA member countries. While working at this level, the agency also undertook extensive analysis of distant-water fleet operations in the region and began to evaluate the importance of particular fisheries zones to different DWFNs. In time, the FFA developed sophisticated monitoring procedures based on catch and price data for fish taken from member countries' EEZs. These procedures enabled FFA to provide member countries with a relatively accurate assessment of the value of fish harvested by each DWFN or type of fishing gear. Armed with this information, island countries were better equipped to negotiate terms of fisheries access with DWFNs.

When the FFA started to support member countries in their distant-water access negotiations, some DWFNs were reluctant to enter into negotiations with these countries supported by FFA personnel. The DWFNs claimed that the negotiations were bilateral arrangements and that, therefore, negotiations should not be open to third parties. Island countries, in response, successfully argued that the FFA personnel were part of their negotiating team.

The participation of FFA personnel in an advisory capacity at negotiations made it difficult for DWFNs to play one island country off against another as they had done previously. Some DWFNs would argue that if a particular country did not grant more favorable terms of access, their fleets would move to another country's zone where such terms could be obtained. These arguments were persuasive, and facing a revenue loss if the fleets did move, island countries sometimes sold their resources too cheaply. However, FFA attendance at access negotiations effectively put an end to this DWFN negotiation strategy.

Despite impressive gains made in the negotiation of distant-water access agreements, scope exists to improve existing agreements and, in some cases, to

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[24] Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America, *done* at Port Moresby, April 2, 1987. For a discussion of the impact of this treaty on American Pacific islands, see Woodworth, *U.S. Tuna: A Proposal for Resource Management in the American Pacific Islands*, 10 U. HAW. L. REV. 151 (1988).

remove anomalies. For this reason, it is expected that FFA will remain closely involved in the negotiation of distant-water fishing agreements over the medium-term.

2. *Domestic industry and marketing services*

When the FFA was established, the primary focus of attention was on fishing relations between member countries and DWFNs. As these relations matured, however, FFA members saw the need to concentrate on the development of domestic processing and fishing industries. Initially, effort was directed towards the tuna industry, but more recently activities have expanded to include a wider range of other fishery and marine products.

In responding to member countries' requests for assistance in the development of domestic industries, FFA attempts to provide "in-house" expertise. If the type of assistance required by a country is not available within the agency, it will contract a specialist to undertake the work.

The provision of marketing advice to members is a growing area of FFA activity, especially for miscellaneous marine products, such as shells. Historically, the harvesting of these products in the Pacific islands region was important, but with the rise of synthetics, their international demand slackened. Small but expanding markets exist, however, and some FFA member countries seem well placed to supply such products to these markets. Assisting member countries with the development of fishing and processing industries, and the marketing of their products, is expected to be a growth area within the agency.

3. *Legal services*

FFA's legal services unit provides a broad range of services to member countries. These services include drafting and advising on proposed and existing fisheries legislation, providing opinions on specific legal matters, facilitating professional development of legal officers in member countries on a one-to-one basis and through the mounting of seminars and workshops, participating in DWFN access negotiations and advising on agreements, and legally assisting members in the establishment and management of domestic fishing industries.

A major task of the legal services unit has been to review fisheries legislation of individual member countries and to advise on the incorporation of changes resulting from the Law of the Sea Convention. As part of this review, an attempt has been made to tailor the legislation to suit the needs of members because much of the fisheries legislation previously in force was simply duplicate legislation from metropolitan countries. This foreign legislation, developed in an alien environment, provided basic rules for fisheries operations but it did

not, in most cases, meet the specific needs of FFA member countries. To strengthen the position of island countries in their dealings with DWFNs, the legal services unit reviews and provides drafting assistance for fisheries access agreements so as to incorporate minimum terms and conditions of fisheries access that FFA member countries have adopted, to remove ambiguities in interpretation, and to standardize agreements where this is feasible.

4. Small-scale fisheries promotion and research coordination

At the time of the agency's establishment, member countries were primarily concerned with DWFN access arrangements. As relations between DWFNs and FFA members stabilized, however, the agency started to shift attention toward the small-scale fisheries needs of member countries.

The principal focus of FFA's activities in the small-scale fisheries field is to assist member countries to promote and implement appropriate fisheries programs and projects. A wide range of country requests are handled by the agency, ranging from advising on fishing gear and technology to securing development assistance for projects.

To reinforce the promotion and implementation of small-scale fisheries programs, the FFA also provides technical assistance to its members concerning inshore fisheries research. This assistance consists of advising member countries on the formulation and implementation of research programs, identifying and facilitating the provision of funding for research, and coordinating research efforts among countries.

The promotion of small-scale fisheries and the assistance provided in the research area will continue to be focal areas of FFA's work program. As development opportunities arise and the need for resource conservation grows, it is expected that demands for agency services by member countries will increase.

5. Surveillance and enforcement

The EEZs of FFA member countries are large by international standards, and particularly large in relation to the land area and surveillance and enforcement capabilities of FFA countries. For this reason, the agency attaches high priority to the surveillance and enforcement needs of its members. The FFA seeks to increase the general effectiveness of countries' ability to monitor distant-water fishing activity within their EEZs and to promote closer surveillance cooperation on a regional basis. An integral component of the surveillance and enforcement program is the professional development of surveillance personnel in the region.

To enhance surveillance and enforcement capabilities, FFC directed the agency to mount several activities of a short-term and long-term nature. To this

end, the agency has embarked upon a comprehensive schedule of work that seeks to evaluate different telecommunication systems, to improve surveillance and enforcement provisions in DWFN access agreements, and to develop a computer system for tracking distant-water fishing vessels while operating in the region. This work is undertaken with a view to enable FFA countries to communicate, exchange, and compare current information supplied by distant-water fishing fleets.

To facilitate regional surveillance and cooperation among FFA members, the agency presents regular workshops to report on surveillance developments in the region. The surveillance personnel from member countries are able to discuss common problems and solutions and, importantly, to develop a spirit of togetherness.

At the regional level, the FFA is also developing more formal ties with the Australian and New Zealand air forces. The agency is able to supply critical fisheries information to air force surveillance patrols that increases their effectiveness. Information collected on these patrols is analyzed and passed to FFA member countries where it can be utilized by naval and fisheries surveillance vessels.

In addition to these surveillance and enforcement initiatives, the FFA also maintains a regional register of fishing vessels. This register fosters a high degree of compliance by DWFN fleets operating in EEZs of member countries because of the heavy penalties that can be imposed if a vessel fishes illegally, or if it fails to adhere to the terms and conditions of its fisheries access license.

6. *Professional development*

The FFA assigns importance to the education and training of nationals from member countries. Special emphasis is given to this aspect of the agency's work because it is recognized that the localization process within countries and the development and expansion of small-scale and commercial fisheries is critically related to the availability of well-trained and skilled national personnel.

The agency is directly and indirectly involved in fisheries training at several different levels. Periodically, FFA organizes workshops that are designed to extend participants' understanding of specific subjects. Sometimes these workshops are mounted in conjunction with international organizations such as the U.N. Food and Agriculture Organization and the U.N. Centre for Transnational Corporations. The workshops are designed to be of maximum benefit to senior level officials, politicians, and industry personnel who are directly involved in formulating, approving, and implementing government policy and commercial fisheries projects. Some of the workshops that have been held have examined issues relating to fisheries access negotiations, development of national tuna industries, fisheries surveillance and enforcement, and fisheries legislation

and prosecutions.

The FFA, in cooperation with Fiji's University of the South Pacific (USP), also conducts formal marine resources training. These organizations jointly sponsor the Ocean Resources Management Program, offering undergraduate and graduate studies. This program is funded by CIDA. While workshops and more informal types of training represent a short-term commitment by FFA, the formal training provided at USP represents a long-term commitment.

Some specialized fisheries training is not available in the Pacific islands region, however, and it is necessary for islanders to undertake this training abroad. FFA actively participates in identifying training opportunities around the world and in securing training funds. Normally, these specialized courses are not more than six months in duration, though the agency also assists nationals from member countries to obtain financial support for longer-term graduate level training.

An integral component of FFA's training function is its fellowship program. This program is widely acclaimed among member countries and it is in high demand. The program enables Pacific islanders to come to Honiara and to be attached to the various units within the agency. For example, a large number of fellows have been attached to the agency's computer unit where they received training in a wide range of computer applications and data base development and management. Similarly, other fellows have been attached to the legal services unit where they have worked alongside the agency's legal officer.

The FFA's fellowship program is extremely valuable in insuring that close ties are maintained between the agency and member countries. The program permits the agency to keep abreast of its member's problems and plans while giving personnel from these countries an opportunity to participate in the day-to-day operations of the agency.

If requested, the agency can also arrange for fellowship in other member countries. This type of attachment is sometimes requested, particularly if personnel from one member country want to observe a project of special interest elsewhere in the region. This interchange of personnel and sharing of research and experiences strengthens regional ties between countries and fosters a more genuine sense of regional camaraderie.

III. Conclusion

The FFA has been successful in achieving the primary goal for which it was established for several reasons. The agency's guiding philosophy has always been that it exists for one reason: to meet the needs of member countries as speedily and as fully as possible. In this respect, the agency does not have an initiating role, but rather responds to requests made by members. This is a major difference between the agency and other regional and international organizations ac-

tive in the Pacific islands region.

In providing a service function, it is necessary for the FFA to maintain close contact with member countries. This enables the agency to gain an intimate understanding of members' needs, problems, and aspirations. Because it is a small organization, unencumbered by bureaucracy, the agency can respond to members' requests for advice or assistance in a flexible and timely manner. Member countries appreciate the agency's capacity to respond to their needs and, as a consequence, provide the FFA with excellent guidance and support.

Other advantages that the FFA has over some other regional organizations in the Pacific islands region are that it has a singular function, it is relatively young by regional standards, and it does not have to accommodate competing interests. In having a specialized function, the FFA can direct its entire effort to achieving a specific and clearly defined objective. The agency does not have to balance different objectives and arrange trade-offs among them so as simultaneously to satisfy a broader set of members' goals. Moreover, the FFA adopts a multidisciplinary approach to solving problems with a team of fisheries specialists.

The agency's youth means that it is not encumbered by precedent and established procedures. Other regional organizations are constrained in this way and these constraints inhibit their capacity to respond to members' needs.

Consisting only of independent and self-governing South Pacific countries, the FFA membership has parallel fishing needs and interests. This homogeneity provides a natural basis for cooperation. If the agency's membership lacked homogeneity, scope for cooperation would be reduced and FFA would be a less effective organization.

A measure of FFA's success is the interest in it in other parts of the world. For example, countries in the Caribbean and in the southwest Indian Ocean have indicated a desire to duplicate the agency and its functions. The agency is held in high international regard and it is recognized as an important and competent organization in the fisheries world.

As the agency moves towards maturity and as additional demands are placed on it, caution must be exercised to insure that its growth does not inhibit its flexibility, responsiveness, and the quality of its output. FFA members must be aware that the erosion of these positive attributes is a natural consequence of expansion. With time, members will be forced to make a hard decision: Do they want a smaller organization and the type of service they currently receive, or do they want a larger, less responsive agency capable of providing a broader range of services?

U.S. Tuna: A Proposal for Resource Management in the American Pacific Islands*

by Donald C. Woodworth**

** A.B. 1968, Whitman College; J.D. 1971, University of Washington; Member of the Bar, District of Columbia, State of Washington, Northern Mariana Islands, Federated States of Micronesia, Trust Territory of the Pacific Islands. The author is a partner with the law firm of MacMeekin, Cutler & Woodworth in Washington, D.C. The firm is counsel to the Commonwealth of the Northern Mariana Islands in consultations with the United States on oceans and fisheries policy, among other matters. The opinions expressed in this article are those of the author, and do not necessarily represent the official position of the government of the Commonwealth of the Northern Mariana Islands.

The author appreciates the assistance rendered to him in the preparation of this article by his partner, Daniel H. MacMeekin, and by Justin Rutka, Fisheries Economist/Analyst at the Western Pacific Regional Fisheries Management Council.

I. INTRODUCTION

Throughout the 1980's America's tuna policy has caused trouble in the Pacific. In notorious "tuna-wars," U.S. tuna vessels have been arrested for illegal fishing within the 200-mile exclusive economic zones (EEZ)[1] of various Pacific island nations.[2] The names of these vessels—*Danica*, *Jeanette Diana*, *Ocean Pearl*, *Priscilla M.*, and *Tradition*—have come to symbolize a federal policy

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[1] The exclusive economic zone (EEZ) is defined and described in Part V of the United Nations Convention on the Law of the Sea, *done* at Montego Bay, December 10, 1982 [hereinafter 1982 Convention]. The EEZ is a zone "beyond and adjacent to the territorial sea," *id.* art. 55, which extends "200 nautical miles from the baselines" of the territorial sea. *Id.* art. 57. This usually makes it a zone 197 nautical miles in breadth, but it is commonly refered to as the 200-mile exclusive economic zone.

Within this zone, the coastal state has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for economic exploitation and exploration of the zone, such as the production of energy from the water, currents, and winds." *Id.* art. 56(1).

[2] Van Dyke & Nicol, *U.S. Tuna Policy: A Reluctant Acceptance of the International Norm*, in TUNA ISSUES AND PERSPECTIVES IN THE PACIFIC ISLANDS REGION 105, 112-15 (D. Doulman ed. 1987); *see also* Larson & Rutka, *Case Study: United States Tuna Policy*, in THE UNITED STATES WITHOUT THE LAW OF THE SEA TREATY: OPPORTUNITIES AND COSTS, 7 CENT. FOR OCEAN MGMT. STUD. PROC. 213 (1983).

that the governments of the new nations of the South Pacific view as colonial at best.[3] Dissatisfaction with U.S. policy contributed to Soviet success in negotiating fishing agreements with the young nation of Kiribati in 1985, and in 1987 with Vanuatu.[4]

Two years of negotiations by the United States with sixteen South Pacific island states culminated in the signing, on April 2, 1987, of a regional fisheries access agreement, the Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America (the South Pacific Tuna Treaty).[5] This agreement provides the American purse seine tuna fleet[6] access to rich tuna grounds in a huge area of the Pacific region for a period of five years, in return for the payment of some sixty million dollars to the member states of the South Pacific Forum Fisheries Agency (SPFFA).[7] Although Kiribati seized the U.S. tuna vessel, *Tradition*, in May of 1987, after the agreement had been signed, the South Pacific Tuna Treaty is expected eventually to end the tuna wars and to restore the United States' good relations with

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[3] Smyser, *U.S. Rights a Fishing Wrong* (editorial), HONOLULU STAR-BULL., Jan. 20, 1987 at A-14, col. 3. Other, less flattering characterizations have been invoked to describe federal policy and the behavior of American tuna fishermen in the region, for example: "piracy," National Coalition for Marine Conservation, *Pirates of the South Pacific*, MARINE BULL., Sept. 1985, at 1; or "bullying," *Sharks Among the Tuna* (opinion), PAC. ISLANDS MONTHLY, June 1985, at 5.

[4] Sterba, *Restless Region: Long Ignored as Safe, South Pacific Islands Now Vex Washington*, WALL ST. J., Mar. 5, 1986, at 1, col. 1.; *Agreement on Fishing Rights in Pacific* (editorial), HONOLULU STAR-BULL., Oct. 21, 1986, at A-16, col. 1; Sterba, *Vanuatu Finds Flirting With Moscow Makes Once-Cool U.S. an Ardent Suitor*, WALL ST. J., Feb. 2, 1987, at 26, col. 1.

[5] Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America, *done* at Port Moresby, Papua New Guinea, Apr. 2, 1987 [hereinafter South Pacific Tuna Treaty].

[6] The American purse seine tuna fleet in the western Pacific consisted, in 1985, of about 60 fishing vessels, of which 45 were classified as superseiners, over 1,000 GRT (gross registered tonnage). By comparison, there were 98 purse seine vessels of 11 other nations registered to fish in the area. *See* Doulman, *Development and Expansion of the Tuna Purse Seine Fishery*, in TUNA ISSUES AND PERSPECTIVES IN THE PACIFIC ISLAND REGION, 133, 138-43 (D. Doulman ed. 1987).

[7] The South Pacific Forum Fisheries Agency was created in 1979 by the South Pacific Forum Fisheries Agency Convention *done* at Honiara, Solomon Islands, July 10, 1979, *reprinted in* Van Dyke & Heftel, *Tuna Management in the Pacific: An Analysis of the South Pacific Forum Fisheries Agency*, 3 U. HAW. L. REV. 1, 60 (1981). The Agency is a policy and administrative advisory agency which is organized to provide a forum for consultation on common fisheries and to promote "intraregional coordination and cooperation in fisheries management, relations with distant water fishing countries, surveillance and enforcement, processing and marketing of fish, and accessibility to the 200-mile zones of other parties." *Id.* at 18.

The members of South Pacific Forum Fisheries Agency are Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Vanuatu, and Western Samoa. The Marshall Islands participate as an observer. Slatyer, *Tuna and the Impact of the Law of the Sea*, in TUNA ISSUES AND PERSPECTIVES IN THE PACIFIC ISLANDS REGION, 27, 31 (D. Doulman ed. 1987).

the island states in the region.[8]

Left unprotected by the agreement, however, are the interests of the American islands of the Pacific. These islands, consisting of American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the State of Hawaii, have for some years sought to control and manage the tuna fishery in the 200-mile exclusive economic zones surrounding their shores.[9]

Federal policy under the Magnuson Fishery Conservation and Management Act (Magnuson Act or FCMA)[10] encourages the negotiation and implementation of international agreements for conservation and management of tuna as a highly migratory species.[11] Where the U.S. interest in the tuna fishery, as that of a distant water fishing nation (DWFN),[12] is to secure access to the resource for its fishing fleet, this goal has been accomplished in the South Pacific by the recently concluded agreement. Where the U.S. interest in the tuna fishery, as that of a coastal state, is to ensure conservation and proper management of the tuna resource within the waters of America's 200-mile zone, this goal has not been accomplished. The effect of the South Pacific Tuna Treaty access agreement is to isolate the tuna stocks found adjacent to the American Pacific islands as the main unregulated tuna resources in the western Pacific region and the treaty neglects the American islands' interest in these resources.

This article examines the South Pacific Tuna Treaty and points out that the treaty establishes a regional tuna management structure which does not contemplate participation by the U.S. Pacific islands. The article discusses federal tuna policy under the FCMA in the context of the 1982 United Nations Convention

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[8] *Court settles tuna case*, PAC. DAILY NEWS, Jun. 12, 1987, at 3, col. 2; *Kiribati Seizes U.S. Tuna Boat*, PAC. DAILY NEWS, May 6, 1987, at 3, col. 1; *American Tuna Crew Arrested*, WEST HAWAII TODAY, May 5, 1987, at 5, col. 1. *See also*, *Contempt for Tuna Accord*, PAC. ISLANDS MONTHLY, Aug. 1987, at 5.

[9] Other islands of the Pacific which fall under the jurisdiction of the United States, and so could logically be included within the category of "American Pacific islands," are: Baker Island, Howland Island, Jarvis Island, Johnston Island, Kingman Reef, Midway Island, Palmyra Atoll, and Wake Island. This article does not address the prospects for management of the tuna in the waters surrounding these islands because they were originally uninhabited, they lack a permanent resident population, and they are without an elected local government. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, MARINE MINERALS: EXPLORING OUR NEW OCEAN FRONTIER 292 (1987).

[10] 16 U.S.C. §§ 1801-82 (1982 & Supp. IV 1986) [hereinafter FCMA].

[11] Tuna are the only species defined as "highly migratory species" under the FCMA. *Id.* § 1802(14).

[12] A distant water fishing nation is one whose citizens and nationals fish in vessels of the nation's registry in waters outside the territorial sea and exclusive economic zone of that nation, especially where such fishing occurs in waters under the coastal state jurisdiction of another nation. For a description of the activities or distant water fishing nations in the Pacific, see D. DOULMAN, FISHING FOR TUNA: THE OPERATION OF DISTANT-WATER FLEETS IN THE PACIFIC ISLANDS REGION 11 (Pacific Islands Development Program, East-West Center, Honolulu 1986).

on the Law of the Sea[13] and concludes that, although the South Pacific Tuna Treaty advances U.S. interests as a distant water fishing nation, it neither fulfills federal obligations to conserve and manage U.S. domestic tuna resources, nor achieves the goal of regional cooperation established by Article 64[14] of the 1982 Convention. Finally, the article suggests means to allow the American Pacific islands to participate in the regional tuna management regime.

II. THE SOUTH PACIFIC TUNA TREATY

The South Pacific Tuna Treaty is a potential breakthrough in relations between the United States and the sixteen South Pacific states party to the negotiations. During ten rounds of negotiations[15] many differences between the parties were reconciled.

A. Recognition of Coastal State Tuna Sovereignty

Perhaps the most significant single provision of the South Pacific Tuna Treaty is in the first paragraph of the preamble: "ACKNOWLEDGING that in accordance with international law, coastal States have sovereign rights for the purposes of exploring and exploiting, conserving and managing the fisheries resources of their exclusive economic zones or fisheries zones. . . ."[16]

The text of the treaty does not perpetuate the distinction between "fish" and "highly migratory species" which prevails under the FCMA. The treaty makes no explicit distinction between tuna and other fish.[17] The treaty, however, prohibits intentional fishing for species other than tuna.[18] Indeed, the agreement is primarily concerned with providing access for the U.S. purse seine fleet to tuna grounds within the 200-mile zones of the South Pacific states which are parties to the agreement. In this context the above acknowledgment makes clear that the United States currently recognizes the jurisdiction of these states over the tuna resource.[19]

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[13] *See supra* note 1.

[14] 1982 Convention, *supra* note 1, art. 64; *see also infra* text accompanying note 93.

[15] For a history of these negotiations, see Van Dyke & Nicol, *supra* note 2, at 117.

[16] South Pacific Tuna Treaty, *supra* note 5, at 1.

[17] The treaty defines "fishing" without restricting the meaning of "fish" to any particular species. *Id.* art. 1.1(c).

[18] Vessels are prohibited from use "for directed fishing for Southern Bluefin Tuna, or for fishing for any kinds of fish other than tunas, except that other kinds of fish may be caught as an incidental by-catch." *Id.* annex I, part 3, § 5.

[19] Van Dyke & Nicol, *supra* note 2, at 121. The authors expressed concern that annex I, part 1(3) may hedge the acknowledgment of sovereignty by preserving the United States' option to withdraw its recognition of the coastal sovereignty of a Pacific Island state as suggested in the

B. *Compensation*

The treaty provides a minimum payment of twelve million dollars per year for the next five years to the Pacific island nations. Of this amount, the U.S. government will provide ten million dollars: nine million dollars in cash economic aid, and an additional one million dollars in fisheries development assistance.[20] The Forum Fisheries Agency (FFA) plays an important role in the administration of the financial assistance provided under the treaty.[21] An agreed minute, signed October 6, 1986, in Nuku'alofa, Kingdom of Tonga, designates the FFA as the administrative representative of FFA member states to coordinate the cash, technical, and economic development assistance grants provided under the treaty.[23]

The U.S. tuna industry will contribute a minimum of $1.75 million per year in license fees at the rate of $50,000 per vessel for thirty-five vessels. If more than thirty-five licenses are desired, an additional five licenses will be made available at the same rate of $50,000. Beyond forty licenses, ten additional licenses will be made available at the rate of $60,000 per vessel. The license fees are indexed to the average estimated landed value for fish landed at American Samoa and so may be adjusted to reflect market changes.[23] In addition, the U.S. tuna industry will provide $250,000 in technical assistance "in response to requests co-ordinated through the Forum Fisheries Agency."[24] Thus, the U.S. industry contribution will be no less than two million dollars for the first year, and the total compensation no less than twelve million dollars.

Magnuson Fisheries Conservation and Management Act (FCMA), 16 U.S.C. § 1822(e). The annex states that "[n]othing in this Annex and its Schedules, nor acts or activities taking place there-under, shall constitute recognition of the claims or the positions of any of the parties concerning the legal status and extent of waters and zones claimed by any party." South Pacific Tuna Treaty, *supra* note 5, annex I, part 1, § 3(3). As the disclaimer of recognition is limited to the terms of the annex, it is doubtful that it may be interpreted to obviate the acknowledgment of sovereignty contained in the text of the treaty.

[20] The remaining two million dollars will be paid by U.S. tuna industry sources. *See infra* text accompanying notes 24-25.

[21] For a description of the role of the Forum Fisheries Agency, see Doulman, *In Pursuit of Fisheries Cooperation: The South Pacific Forum Fisheries Agency*, 10 U. HAW. L. REV. ____ (1988).

[23] Agreed Minute Relating to Financial Arrangements for the Proposed Treaty on Fisheries between Certain Pacific Island States and the United States of America, United States-Forum Fisheries Agency, Oct. 20, 1987, *reprinted in* Van Dyke & Nicol, *supra* note 2, at 131 [hereinafter Agreed Minute].

[23] South Pacific Tuna Treaty, *supra* note 5, annex II, schedule 2, part 1(1).

[24] Agreed Minute, *supra* note 22.

C. Access

A minimum of thirty-five and a maximum of fifty U.S. flag purse seine tuna vessels will have access to "some 10 million square miles of rich ocean fishing grounds in the South Pacific Ocean" over a five year period.[25]

1. The Treaty Area

The area to which a license issued under the treaty provides access is of particular interest because it covers large areas of the high seas as well as the exclusive economic zones surrounding the South Pacific states. The "Treaty Area" is defined by metes and bounds[26] in the treaty and includes not only those areas "subject to the fisheries jurisdiction of Pacific Islands parties" but also "all other waters within rhumb lines connecting the . . . coordinates, designated for the purposes of this Treaty, except for waters subject to the jurisdiction in accordance with international Law of a State which is not a party to this Treaty."[27] This definition apparently includes the waters of American Samoa, and all high seas areas within the coordinates. It does not include the exclusive economic zones of Guam, the Commonwealth of the Northern Mariana Islands, or the State of Hawaii.

2. The Licensing Area

Access to the Treaty Area is restricted, however, to a smaller area within the Treaty Area, known as the "Licensing Area." The treaty defines this area as "all waters in the Treaty Area except for . . . (i) waters subject to the jurisdiction of the United States in accordance with international Law . . . ."[28] This exception would apparently remove the exclusive economic zone of American Samoa from the purview of the treaty, and so exclude all U.S. Pacific islands from the regional tuna management treaty.

D. Enforcement

Until now, disputes between U.S. tuna fishermen and the South Pacific states have tended to become exaggerated beyond the factual issue of whether or not a particular U.S. vessel was fishing illegally in the 200-mile fishing zone of a

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[25] Statement by the Principal Deputy Press Secretary to the President on the Pacific Regional Fisheries Treaty, 22 WEEKLY COMP. PRES. DOC. 1434 (Oct. 23, 1986).

[26] South Pacific Tuna Treaty, *supra* note 5, art. 1.1(k).

[27] *Id.*

[28] *Id.* art. 1.1(e).

South Pacific state. The South Pacific states, not being parties to any agreement with either the U.S. government or the U.S. tuna fleet, enforced their laws unilaterally. The arrest of U.S. flag vessels, captains, and crews strained foreign relations and triggered severe trade sanctions under the U.S. Fishermen's Protective Act[29] and the FCMA.[30]

Under the Fisherman's Protective Act, the United States must "take such steps as are necessary" to protect and secure the release of any U.S. vessel and crew which is arrested for tuna violations by a foreign government.[31] The Secretary of State will reimburse the vessel owner for any fines, license fees, or other charges required to secure the release of the vessel and crew, as well as for the value of any fish confiscated or lost to spoilage due to the arrest.[32] In addition, the United States compensates the owner and crew for income lost as a result of the arrest. Such payments are deducted from any foreign assistance granted to the arresting state by the United States.[33]

Under the FCMA, even more powerful trade sanctions are invoked in the event of seizure of a U.S. fishing vessel. Prohibitions banning the importation of all fish and fish products from the fishery involved are mandatory in the event of a finding by the Secretary of State that a U.S. vessel has been seized without "authorization under an agreement between the United States" and the seizing nation.[34] The embargo may be applied to fish and fish products other than the fishery involved.[35] These sanctions so far have been applied against various South and Central American nations as well as against Canada and several South Pacific states.[36]

The application of trade and diplomatic sanctions immediately transforms vessel seizures from disputes between a foreign state and a private U.S. citizen or company to international incidents with serious foreign policy ramifications for the United States as a whole. Perhaps the clearest example of how this happens may be seen in the incident of the *Jeanette Diana*.[37] This U.S. flag vessel was arrested for illegal fishing on June 20, 1984, by the government of the Solomon Islands. The High Court of the Solomon Islands ordered the vessel forfeited and placed her for sale.[38] The United States responded by prohibiting

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[29] Fishermen's Protective Act of 1967, 22 U.S.C. §§ 1971-76 (1982 & Supp. IV 1986).

[30] Tsamenyi, *The South Pacific States, the USA and Sovereignty over Highly Migratory Species*, 10 MARINE POLICY 29, 37-38 (1986).

[31] 22 U.S.C. § 1971 (1982 & Supp. IV 1986).

[32] *Id.* §§ 1973, 1977.

[33] *Id.* § 1975.

[34] 16 U.S.C. § 1825(a)(4)(B) (1982 & Supp. IV 1986).

[35] *Id.* § 1825(b)(2).

[36] Tsamenyi, *supra* note 30, at 37-38; Van Dyke & Nicol, *supra* note 2, at 111-15.

[37] *Id.*

[38] *Id.*

the importation of fish products from the Solomon Islands under the provisions of the FCMA. The Solomon Islands government reacted by banning from its waters for the term of the embargo all vessels registered in the United States or owned or commanded by U.S. citizens. Then, the Solomon Islands government announced that it would consider inviting the USSR to fish in its exclusive economic zone.[39] Thus, because the United States applied sanctions, the issue took on international political significance with implications far greater than the substance of the dispute warranted.

The implementation of the South Pacific Tuna Treaty should resolve the main enforcement issues between the United States and the South Pacific states and prevent such disputes from escalating into major foreign policy conflicts. Article 4 of the treaty places primary responsibility for enforcement on the United States: the U.S. government is required to "enforce the provisions of this Treaty and the licenses issued thereunder."[40] Other provisions require the United States to assist in the investigation of alleged breaches of the treaty, the service of legal process, prompt adjudication of claims, and satisfaction of judgments.[41]

Article 5 recognizes that the Pacific island parties also may enforce the provisions of the treaty and the licenses issued thereunder in the waters of their own exclusive economic zones. The Pacific island parties promise to notify the United States in the event of the arrest of a U.S. fishing vessel, however, and to defer to enforcement proceedings instituted by the United States under Article 4.[42] In return, the United States agrees not to impose the sanctions of the Fishermen's Protective Act or the FCMA as a result of enforcement efforts by a Pacific island party.[43] In addition, Article 6 of the treaty sets out a means of consultation and dispute settlement which will submit disputes arising under the treaty to arbitration.[44]

The enforcement provisions of Articles 4 and 5, and the consultation provisions of Article 6 are well designed to defuse confrontations between the United States and the Pacific island parties to the treaty. The United States has made three major policy changes in the treaty that should dramatically improve U.S. relations in the South Pacific on the fisheries issue. First, the U.S. government

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[39] Tsamenyi, *supra* note 30, at 38.

[40] South Pacific Tuna Treaty, *supra* note 5, art. 4.1.

[41] *Id.* arts. 4.2, 4.3(b)(ii), 4.3(b)(iii) & 4.3(b)(iv).

[42] *Id.* art. 5.6.

[43] *Id.* art. 5.4 provides that:

> The Government of the United States shall not apply sanctions of any kind including deductions, however effected, from any amounts which might otherwise have been paid to any Pacific Island party, and restrictions on trade with any Pacific Island party, as a result of any enforcement measure taken by a Pacific Island party in accordance with this Article.

[44] *Id.*

has acknowledged Pacific island coastal state jurisdiction over tuna found within the 200-mile zone of the state. Second, the U.S. government has assumed a primary role in the enforcement of the treaty provisions against the U.S. tuna fleet. Finally, the U.S. government has agreed not to invoke the diplomatic and trade sanctions of the Fishermen's Protective Act and of the FCMA against Pacific island parties who bring enforcement actions against U.S. fishing vessels under the treaty provisions. These policy concessions bode well for calming Pacific tuna waters for the American tuna fleet and improving U.S. relations with the South Pacific nations party to the treaty.

E. Exclusion of the American Pacific Islands

Unfortunately, the American Pacific islands, including Hawaii, American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands, are all excluded from the South Pacific Tuna Treaty and from the Forum Fisheries Agency. The American Pacific islands are excluded in two ways. First, as pointed out above,[45] the definition of the term "Licensing Area" excepts all "waters subject to the jurisdiction of the United States in accordance with international law."[46] Second, the treaty defines the terms "Pacific Island party" and "Pacific Island state" respectively in such a way as to exclude all American Pacific island jurisdictions. The treaty provides that "Pacific Island party" means "a Pacific Island State party to this Treaty"[47] and that "Pacific Island State" means "a party to the South Pacific Forum Fisheries Agency Convention, 1979."[48] None of the American Pacific islands meet the second test because none are parties to the South Pacific Forum Fisheries Agency Convention.

The exclusion of the American Pacific islands from the treaty could damage the efforts of these islands to participate peripherally in the tuna fishery. Article 2 of the treaty is prejudicial to the continuation and development of tuna fishery support industries in American Samoa, the Commonwealth of the Northern Mariana Islands, and Guam. American Samoa is home to the largest tuna canneries in the Pacific, both Guam and the Northern Mariana Islands host substantial tuna transshipment operations, and all three have developed support businesses related to this industry.[49] Yet, Article 2 commits the United States to promote the development of support industries in competitor islands, draining business and jobs away from the American Pacific islands.[50] This provision

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[45] *See supra* text accompanying note 28.

[46] South Pacific Tuna Treaty, *supra* note 5, art. 1.1(e).

[47] *Id.* art. 1.1(g).

[48] *Id.* art. 1.1(h).

[49] DOULMAN, *supra* note 12, at 11.

[50] The South Pacific Tuna Treaty, *supra* note 5, art. 2.2, provides that the United States shall:

discourages the governments of the American Pacific islands as they plan for future development.

Thus, the South Pacific Tuna Treaty is well designed to provide the American fleet access to South Pacific tuna fishing grounds and to improve U.S. relations with the young nations of the region. Many goals of the South Pacific states who are parties are realized through the treaty, and the United States has made important policy concessions to bring about agreement.

The treaty does not address, however, the aspirations of the American Pacific islands to regulate their tuna resources. Part III of this article examines the stated desire of the governments of the American Pacific islands to engage in tuna management and suggests that both U.S. law and international law require the islands' resources to be included in regional efforts to manage this most important Pacific fishery.

III. TUNA POLICY IN THE AMERICAN PACIFIC ISLANDS

U.S. tuna policy under the FCMA has caused nearly as much confusion and protest in the American Pacific as have the "tuna wars" in other parts of the Pacific. In 1979, the National Marine Fisheries Service and the U.S. Coast Guard prevented local fishermen from fishing for tuna in the waters surrounding the Northern Mariana Islands; a less appropriate application of the Magnuson Act can hardly be imagined.

A. The Olwol Incident

In 1979, a group of local fishermen, organized as a nonprofit fisheries development company, the Marianas Fisheries, Inc., leased, repaired, and outfitted a 26-ton skipjack tuna vessel of Japanese manufacture, the *M/V Olwol*. The fishermen prepared the vessel for sea and announced plans for a maiden fishing voyage in early June, inviting friends and relatives to attend the launch. The big day was spoiled, however, when the fishermen learned that the National Marine Fisheries Service would consider fishing from the *Olwol* to be a violation of the FCMA that would subject the vessel to arrest.[51]

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promote the maximization of benefits generated for the Pacific Island parties from the operations of fishing vessels of the United States licensed pursuant to this Treaty, including (a) the use of canning, transshipment, slipping and repair facilities located in the Pacific Island parties; (b) the purchase of equipment and supplies, including fuel supplies, from suppliers located in the Pacific Island parties; and (c) the employment of nationals of the Pacific Island parties on board licensed fishing vessels of the United States.

[51] Ginoza, *Fishermen May Ignore Local Law*, PAC. DAILY NEWS, June 6, 1979, at 3, col. 1; Murphy, *Ludicrous Fed Fish Laws Stymie Islands* (Editorial), PAC. DAILY NEWS, June 7, 1979, at

The fishermen decided to try their luck anyway. On July 18, 1979, while tuna fishing a short distance offshore of Saipan, the *Olwol* was boarded by a U.S. Coast Guard officer from the cutter *Pt. Harris*. The *Olwol*'s captain was advised that, as a foreign hulled vessel, the *Olwol* was fishing illegally under the FCMA. The fishermen were instructed to pull in their fishing lines and put ashore.[52]

This incident was litigated[53] and resolved by the issuance of Presidential Proclamation 4726,[54] which suspended the application of the vessel documentation laws of the United States and permitted the use of foreign-built, U.S.-registered vessels in the territorial sea and fisheries conservation zone surrounding the Northern Mariana Islands. This proclamation cleared the way for the grant of a U.S. Certificate of Registry[55] to the *Olwol*.[56]

Although the legality of using foreign hulled vessels in the Northern Mariana Islands fisheries conservation zone was resolved, the *Olwol* incident left unanswered the question of whether or not the FCMA applied to the Northern Mariana Islands.[57] At the time of the first enactment of the FCMA, the Northern Mariana Islands were excluded from the exclusive federal fisheries jurisdic-

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19, col. 1. Remarks by Pedro R. Deleon Guerrero, spokesman for Marianas Fisheries Inc., typify the sentiment of island fishermen toward the inconsistency in federal policy. Following NMFS attempts to prevent the *Olwol* from fishing, Mr. Guerrero stated:

> I feel the organization [Marianas Fisheries, Inc.] is not violating any law and if the federal government is going to block our venture then I will feel disappointed with the federal government. Everyone wants to see the development of a local fishing industry. Well, this ship was chartered for training in fishing and that's exactly what we are going out for.

Ginoza, *Fishermen May Ignore Local Law*, PAC. DAILY NEWS, June 6, 1979, at 3, col. 1.

[52] Appellants' Opening Brief at 12, Marianas Fisheries, Inc. v. Baldridge, (9th Cir. 1982) (No. 81-4097).

[53] A complaint was filed on behalf of the Marianas Fisheries, Inc., in Civil Action No. 79-031, on July 9, 1979. Defendants were the United States, and several federal agencies, including the Departments of Commerce and Transportation, the National Oceanic and Atmospheric Administration, and the Coast Guard. The court entered a preliminary injunction against the defendants on September 18, 1979, enjoining the United States from enforcing the FCMA against the *Olwol*, or otherwise preventing the plaintiffs from fishing in the waters surrounding the Northern Mariana Islands. After Presidential Proclamation 4726, the *Olwol* was issued a U.S. Certificate of Registry on October 21, 1980. The complaint was dismissed as moot on November 21, 1980. Court file, Marianas Fisheries, Inc. v. Baldrige, (D.N.M.I., 1981) (No. 79-031).

[54] 45 Fed. Reg. 12,359 (1980).

[55] The Certificate of Registry verifies that the *Olwol*, a vessel of foreign manufacture, is a vessel of the United States only for the purposes set out in Presidential Proclamation 4726. Defendant's Supplemental Memorandum in Support of Motion to Dismiss, Exhibit "I", Marianas Fisheries, Inc. v. Baldridge, (D.N.M.I., 1980) (No. 79-031).

[56] Proclamation No. 4726, *supra* note 54.

[57] The question of "the applicability or non-applicability of the FCMA remains unanswered" according to the trial court. Decision on Motion for Clarification, Marianas Fisheries v. Baldridge, *supra* note 55; S. CONF. REP. NO. 94-711, 94th Cong., 2d Sess. 42 (1976).

tion as a part of the Trust Territory of the Pacific Islands.[58] One strong indication that the Act was not intended to apply to the Northern Mariana Islands was that the islands were not given voting membership on the Western Pacific Regional Fisheries Management Council (WESPAC).[59]

A related question left unresolved by the *Olwol* litigation was why, assuming the FCMA applied in the waters of the Northern Mariana Islands, the United States had enforced the FCMA to prevent local fishermen from fishing for tuna. The exclusion of tuna as a highly migratory species[60] would seem to preclude any federal restrictions on tuna fishermen, especially upon U.S. fishermen such as the plaintiffs. The United States admitted during the litigation that enforcement against the *Olwol* by the Coast Guard was "overbroad in that . . . commercial or other fishing for highly migratory species by foreign hulls beyond 3 miles of the coastline is not illegal under the FCMA . . . ."[61] The impression remained that the U.S. law could be applied to prevent local fishermen from fishing for tuna in their traditional waters, but would not prevent foreign fishermen from exploiting the islands' tuna resource.[62]

The incident served as a warning to the people of the Northern Mariana Islands that "the United States wished to control our waters, even to the extent of excluding our own people from fishing in them."[63] Partly as a result, the Northern Mariana Islands enacted the Commonwealth Marine Sovereignty Act[64] which establishes jurisdiction over highly migratory species, as well as other marine resources, as set out in the 1982 Law of the Sea Convention.[65] In 1980, Guam enacted a similar law to assert exclusive rights to control all ocean resources in a 200-mile zone surrounding that island.[66]

In 1983, the United States enacted amendments to the FCMA which made clear that the act was intended to apply to the Commonwealth of the Northern Mariana Islands, along with the other islands of the American Pacific. Voting membership on the WESPAC, for example, was granted to the Northern Mariana Islands.[67] In protest against U.S. tuna policy, the Northern Marianas de-

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[58] S. CONF. REP. NO. 94-711, 94th Cong., 2d Sess. 42 (1976).

[59] Pub. L. No. 94-265, (Apr. 13, 1976) (current version at 16 U.S.C. § 1852).

[60] 16 U.S.C. § 1813 (1982 & Supp. IV 1986).

[61] Defendant's Responses to Plaintiff's Request for Admission of Fact and Genuineness of Documents at 5, Marianas Fisheries v. Baldridge, (D.N.M.I. 1981) (No. 79-031).

[62] Rosario, *Judge Reverses Fisheries Decision*, PAC. DAILY NEWS, Apr. 6, 1981, at 6, col. 1; Murphy, *Fishing Shaft. . . .* (Editorial), PAC. DAILY NEWS, July 24, 1979, at 23, col. 1.

[63] Address by Pedro A. Tenorio, Lieutenant Governor of the Commonwealth of the Northern Mariana Islands, Western Legislative Conference, Annual Meeting, in Honolulu (Sept. 23, 1987).

[64] Marine Sovereignty Act of 1980, N. Mar. I. Pub. L. 2-7, 2 CMC §§ 1101-43 (1980) [hereinafter Marine Sovereignty Act of 1980].

[65] *Id.* § 1114(a)-(b).

[66] Pub. L. No. 15-114, 1 Guam Code Annot. § 402 (Mar. 3, 1980).

[67] *See, e.g.*, Pub. L. No. 97-453 § 5(1)(B)(a)(8), 96 Stat. 3299 (Dec. 22, 1980), (codified as

clined to nominate persons for appointment to its position on the WESPAC.[68]

B. The WESPAC Protest

The other islands of the American Pacific all assumed their places on WESPAC as provided in the FCMA. Members representing the State of Hawaii and the territories of American Samoa and Guam have been appointed by the Secretary of Commerce. Since at least 1981, WESPAC has voiced its objection to the exclusion of tuna from the FCMA. In testimony before the U.S. Congress in 1981, Hawaii State Senator Wadsworth Y.H. Yee, WESPAC Chairman, identified the tuna exclusion as a critical shortcoming of the FCMA that was particularly troublesome to WESPAC:

> First, eighty percent of our fishery resources have been excluded from the Council's consideration since the FCMA excludes tuna, the major resource in the Western Pacific and essential to fisheries development in the region. Tuna are central to the development of strong domestic fisheries in the Western Pacific and to the protection of previously established fisheries.[69]

In August of 1981, Chairman Yee communicated on behalf of WESPAC more specific suggestions as to how the tuna issue should be handled:

> The FCMA should be amended to place the U.S. in a parity position with other nations with respect to management of highly migratory species in the central and western Pacific Ocean. We believe that foreign access to highly migratory species in the U.S. fisheries conservation zone of the central and western Pacific should be conditioned on international agreements and subject to a charge of reasonable rent (fees, services, or both) with the rent to be directed toward local fishery development projects in the area of origin. This is the approach being successfully used by such new U.S. affiliated governments as the Republic of Belau, the Marshall Islands, and the Federated States of Micronesia . . . . Most importantly, U.S. policy would become reasonable and acceptable in this part of the world.[70]

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amended at 16 U.S.C. § 1852(a)(8)(1982 & Supp. IV 1986)).

[68] *See, e.g.*, Letter from Pedro A. Tenorio, Acting Governor of the Northern Mariana Islands, to Dr. William E. Evans, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration (Feb. 25, 1987).

[69] Testimony by Wadsworth Y.H. Yee prepared for presentation before Subcommittee on Wildlife Conservation and the Environment, Committee on Merchant Marine and Fisheries, U.S. House of Representatives (Sept. 24, 1981) 2 (copy supplied to the author by the Western Pacific Regional Fishery Management Council on July 23, 1987).

[70] Letter from Wadsworth Y.H. Yee to John Breaux and Edwin Forsythe, Members of the U.S. House of Representatives (Aug. 10, 1981) (discussing amendments to the FCMA).

Chairman Yee expressed similar concerns when he stated that "[i]n the eyes of U.S. policy, tuna are like a ghostfish, having form and substance while on the high seas but turning into

Finally, WESPAC undertook a major initiative in the Congress by advocating amendment of the FCMA to "resolve this conflict by including tuna within the management purview of the Regional Fishery Management Councils."[71] Most of the chairmen of the eight regional fishery management councils favor the inclusion of tuna within the jurisdiction of the FCMA Act.[72] A 1986 National Oceanic and Atmospheric Administration study also recommended the repeal of the exclusion of "highly migratory species," i.e., tuna.[73]

This suggestion has some obvious merit. Continuing the tuna exclusion policy is costly to the United States.[74] Moreover the policy is counterproductive. One authority has found that "the contradictions and inequities generated by the U.S. tuna exception . . . have had a demonstrably negative impact on the conservation of the tuna fishery, on the relevant economies, and on the conduct of U.S. foreign affairs."[75]

It is not the first time that such a suggestion has been made. The initial WESPAC recommendations[76] in this regard are several years old and legislation to remedy this problem, an "American Tuna Protection Act," was introduced in Congress in 1981.[77] Because Congress has declined to change this policy, it is difficult to be optimistic about a legislative remedy in the immediate future. This article suggests that the FCMA currently mandates participation of the American Pacific islands in regional tuna management efforts, and that arrangements for such participation should not be forestalled by continuing to seek amendment of the FCMA.

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illusions when they enter national waters." Yee, *National Policies on Tuna Stifle Regional Aspirations of Island Fisheries*, HAWAIIAN INT'L BILLFISH ASS'N TOURNAMENTS PROGRAM 13 (Aug. 13, 1982).

[71] Letter from Wadsworth Y.H. Yee to Senator Robert Packwood, *et al.* (May 2, 1983).

[72] The national council of Chairmen of the Regional Fishery Management Councils is preparing a report on the subject, which is due for publication shortly. Letter from Wadsworth Y.H. Yee to the author (June 20, 1987).

[73] NAT'L OCEANIC AND ATMOSPHERIC ADMIN., U.S. DEP'T OF COMMERCE, FISHERY MGMT. STUDY 19 (1986).

[74] Harrison, *Costs to the United States in Fisheries by not Joining the Law of the Sea Convention*, in CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION 342, 351-61 (J. Van Dyke, ed. 1985).

[75] Wade, *A Proposal to Include Tunas in U.S. Fishery Jurisdiction*, 16 OCEAN DEV. & INT'L L. 255, 292 (1986).

[76] Letter from Wadsworth Y.H. Yee to Congressmen Breaux and Forsythe, *supra* note 70; *see also* letter from Wadsworth Y.H. Yee to Senator Lowell Weicker (Sept. 11, 1981).

[77] S. 1564, 97th Cong., 1st. Sess., 127 CONG. REC. 19,178 (1981).

IV. U.S. Tuna Conservation and Management Policy

A. Under the Magnuson Act

The WESPAC articulated well the goals of the American Pacific islands for their tuna fishery in stating that access of foreign fishing fleets to domestic tuna stocks should be conditioned upon international agreement and the payment of reasonable rent to be retained by the island government and applied to stimulate the local economy.[78] These general goals are consistent with U.S. tuna policy under the FCMA.

Although the FCMA excludes tuna from the "sovereign rights and exclusive fishery management authority asserted under section 1811 . . . over fish,"[79] the FCMA is not silent on the subject of tuna management. To the contrary, the declared purpose of the Congress is "to support and encourage the implementation and enforcement of international fisheries agreements for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of such additional agreements as necessary."[80] To this end, the Secretary of State is required to initiate and conduct negotiations for access agreements and conservation and management agreements for tuna.[81]

The South Pacific Tuna Treaty has generally been characterized as an access agreement.[82] Although the treaty grants the U.S. fleet access to the tuna in the Treaty Area, it does not limit the harvest that may be taken or the level of effort that may be expended in pursuing the tuna. As such, it is predominantly an access agreement;[83] it does not accomplish the goal of conservation and management of highly migratory species.[84]

All the American Pacific islands have stated their desire that the tuna re-

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[78] *See supra* note 70.

[79] 16 U.S.C. § 1812 (1982 & Supp. IV 1986).

[80] *Id.* § 1801(b)(2).

[81] Section 1822(a)(4) provides that the Secretary of State:

> shall, upon the request of and in cooperation with the Secretary [of Commerce], initiate and conduct negotiations for the purpose of entering into international fishery agreements—
>
> (A) which allow fishing vessels of the United States equitable access to fish over which foreign nations assert exclusive fishery management authority, and
>
> (B) which provide for the conservation and management of anadromous and highly migratory species . . . .

Id. § 1822(a)(4).

[82] *See, e.g.*, Statement by the Principal Deputy Press Secretary to the President on the Pacific Regional Fisheries Treaty, *supra* note 25.

[83] The Treaty is an access agreement of the kind described in 16 U.S.C. § 1822(a)(4)(A), *supra* note 81.

[84] The Treaty does not limit the allowable harvest, and so is not a conservation and management agreement of the kind described in 16 U.S.C. § 1822(a)(4)(B), *supra* note 81.

source be managed and conserved and that the access of the fishing fleets of distant water fishing nations to these fisheries be subject to the consent and agreement of the island governments. Although these desires have sometimes been expressed in proposals to amend the FCMA to repeal the tuna exclusion, these goals can and should be furthered by negotiation of an international compact or agreement of the kind contemplated by the FCMA. The need for international cooperation is even more apparent when federal tuna policy under the FCMA is considered in the context of the 1982 Law of the Sea Convention.

The FCMA was not intended to contradict the 1982 Convention. At the time of enactment it was expressely designed to be compatible with the ongoing United Nations negotiations.[85] Until amended in 1986, the express policy of the FCMA was "to support and encourage active United States efforts to obtain an internationally acceptable treaty, at the Third United Nations Conference on the Law of the Sea, which provides for effective conservation and management of fishery resources."[86]

B. Within International Law

Although the quoted section of the FCMA has been amended to reflect the "fact that the United States has decided not to sign the Convention that emerged from the Third United Nations Conference on the Law of the Sea,"[87] the FCMA retains the commitment to conserve and manage tuna by international agreement. This legal commitment is the basis of the stated tuna policy of the United States under customary international law and under the 1982 Convention.

When President Reagan proclaimed the United States exclusive economic zone, he stated that the proclamation did not change existing U.S. policy regarding "highly migratory species of tuna which are not subject to United States jurisdiction and require international agreements for effective management."[88] The proclamation makes clear that the United States does not assert sovereign jurisdiction over tuna within its exclusive economic zone and that international management is a practical necessity; but it stops short of denying that other coastal states may claim sovereignty under Article 56[89] of the 1982

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[85] Magnuson Fishery Conservation and Management Act, Pub. L. No. 94-265, § 2(c)(5), 90 Stat. 331 (Apr. 13, 1976); *amended by* Pub. L. No. 99-629, § 101(c)(1), 100 Stat. 3707 (Nov. 14, 1986) *codified at* 16 U.S.C. § 1801(c)(5)(1982 & Supp. IV 1986).

[86] *Id.*

[87] S. REP. NO. 67, 99th Cong., 1st Sess. 16; *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 6256.

[88] Proclamation No. 5030, *reprinted in* 1 PUB. PAPERS: RONALD REAGAN 380 (Mar. 10, 1983).

[89] *Id.*

Convention.

In a statement accompanying the proclamation, the President also indicated that, despite the decision not to sign the 1982 Convention, many of its provisions would be honored.[90] The practice of the United States in the international tuna fishing community indicates that, although the United States does recognize the sovereign rights of other coastal states over the tuna resource according to the 1982 Convention, the United States not itself claim coastal state sovereignty over tuna found within its exclusive economic zone.

On at least two occasions, the United States has recognized the sovereignty of coastal states over the tuna resource. The Eastern Pacific Ocean Tuna Fishing Agreement, signed in 1983, recognizes such coastal state jurisdiction.[91] And, as has been pointed out above, the recognition of coastal state tuna jurisdiction is a cardinal feature of the South Pacific Tuna Treaty.[92] Thus, the United States has accepted and acted in accordance with the tuna provisions of the 1982 Convention in negotiating for access to the tuna fisheries of foreign nations. In order to comply fully with the tuna provisions of the FCMA and with the 1982 Convention, the United States must cooperate in the Pacific regional tuna management efforts not only as a distant water fishing nation, but also on behalf of the American Pacific islands as the steward of important tuna resources.

C. The Duty to Cooperate under Article 64

Article 64 of the 1982 Convention establishes a duty of both coastal states and distant water fishing nations to cooperate where tuna are concerned:

> The coastal State and other States whose nationals fish in the region for the highly migratory species . . . shall co-operate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions where no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall co-operate to establish such an organization

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[90] The President stated:

> the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight. In this respect the United States will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states.

Statement on United States Ocean Policy, 1 PUB. PAPERS: RONALD REAGAN 378-79 (Mar. 10, 1983).

[91] Burke, *Highly Migratory Species in the New Law of the Sea*, 14 OCEAN DEV. & INT'L L. 273, 308 (1984).

[92] *See supra* note 16 and accompanying text.

and participate in its work.[93]

The United States has advanced Article 64 as embodying customary international law regarding tuna management.[94] Reading the FCMA policy, favoring conservation and management of tuna by international agreement, along with the U.S. pledge to accept and abide by the customary international law reflected in the 1982 Convention, demonstrates that U.S. policy favors full participation in the South Pacific regional tuna management efforts.

To achieve the kind of cooperation required in Article 64 is no small undertaking. The Article requires a "regional" approach to conserve and manage the tuna resource that will apply not only "throughout" the region, but also "within and beyond the exclusive economic zone."[95] This effort "may include a relatively large number of states, many coastal and some DWFN, and an enormous geographical area, as in the eastern Pacific and in the central and western Pacific."[96]

Article 64 requires that the coastal states and the distant water fishing states cooperate specifically in an effort to ensure "conservation" and promote "optimum utilization" of tuna throughout the region.[97] In addition, related provisions of Articles 61 and 62 require that the coastal states and international organizations: 1) establish a total allowable catch; 2) ensure against over-exploitation; 3) maintain or restore the maximum sustainable yield; 4) consider the effects of harvest upon associated or dependent species; and 5) exchange scientific, harvest, and other relevant data.

In order to accomplish these goals for the far-ranging Pacific tuna fishery, the broadest possible regional cooperation will be necessary. As one authority has noted:

> Managing a highly migratory stock such as tuna requires consistent control over the fishery on that stock throughout its whole migration range. It calls for the cooperation of all the resource-adjacent nations . . . through whose maritime zones the fish migrate. Where the stock also passes through the international waters of the high seas, the cooperation of distant-water fishing nations . . . whose fleets fish there is also needed.[98]

Article 63 requires each Pacific island coastal state with a tuna resource and the

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[93] 1982 Convention, *supra* note 1, art. 64.

[94] *See, e.g., The Question of Sovereign Rights Relative to Tuna*, OCEAN SCI. NEWS, June 13, 1983, at 2, *cited in* Burke, *supra* note 91, at 304.

[95] 1982 Convention, *supra* note 1, art. 64.

[96] Burke, *supra* note 91, at 282.

[97] 1982 Convention, *supra* note 1, art. 64.

[98] Copes, *Tuna Fisheries Management in the Pacific Islands Region*, in TUNA ISSUES AND PERSPECTIVES IN THE PACIFIC ISLANDS REGION 3, 3 (D. Doulman ed. 1987).

fishing nations which harvest that resource to seek to "agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks . . . ."[99] The Pacific tuna stocks travel through the waters of some twenty-two countries, territories and other Pacific states, and are harvested by a dozen distant water fishing nations. One fisheries economist has noted that "[t]he complexity of these circumstances has prompted suggestions that tuna management be coordinated across the whole Pacific, involving even more countries in a management agreement."[100]

For the short term, the South Pacific Tuna Treaty is a dramatic advance in the effort to regulate the Pacific tuna resource; one that will promote the commercial and political interests of both the United States and the South Pacific states involved. The treaty does not, however, accomplish the tuna conservation and management goals provided under Article 64 of the 1982 Convention or under the FCMA. In the long run, participation by the American Pacific islands in these regional efforts will be to the advantage of all parties to the treaty, and will be necessary to the effective management of tuna resource.

V. Prospects for Tuna Management in the American Pacific Islands

A. Obstacles to Cooperation

The difficulty in involving the American Pacific islands in the Pacific tuna management efforts stems from two main factors: 1) the FCMA exclusion of tuna from U.S. sovereign jurisdiction; and 2) related U.S. attempts to deny South Pacific coastal states sovereignty over tuna resources in their exclusive economic zones.[101] Neither position has proven persuasive under international law.

Two conceptual weaknesses of the U.S. position are: 1) the claim that the definition of tuna as a highly migratory species justifies exclusion from coastal state sovereignty; and 2) the claim that customary international law, as reflected in Article 64 of the 1982 Convention on the Law of the Sea, prevents coastal states from asserting sovereignty over highly migratory species as provided in Article 56 of the 1982 Convention.[102]

The first claim under the FCMA draws a legal distinction without a scientific

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[99] 1982 Convention, *supra* note 1, art. 63.

[100] Copes, *supra* note 98, at 15, *citing* Castilla & Oreggo, *Highly Migratory Species and the Coordination of Fishery Policies within Certain Exclusive Economic Zones: The South Pacific*, 9 Ocean Mgmt. 21 (1984).

[101] Gubon, *History and Role of the Forum Fisheries Agency*, in Tuna Issues and Perspectives in the Pacific Islands Region, 245-47 (D. Doulman ed. 1987).

[102] For an explanation of these claims, see *The Question of Sovereign Rights Relative to Tuna*, *supra* note 94, at 304.

difference. The FCMA defines "highly migratory species" to include only tuna while excluding other equally migratory species such as marlins, sailfish, swordfish, porpoises, and whales.[103] Thus, "the U.S. position on highly migratory species policy is inconsistent and reflects political expediency rather than a principle or a considered policy."[104]

The second claim contorts the plain meaning of Article 64, which expressly states that the requirements of cooperation it contains "apply in addition to" the sovereignty provisions of Article 56. One authority states that this claim "defies explanation, since the United States is the only country holding that opinion, and one country's view has never sustained customary international law."[105]

1. *Membership in the South Pacific Forum Fisheries Agency*

Given the unpersuasive legal and scientific foundation underlying U.S. tuna policy and the harsh economic and political sanctions that have been invoked to enforce the policy against coastal tuna states, it is not surprising that the management of U.S. tuna in the Pacific within the context of an international treaty organization faces great difficulty. Members of the South Pacific Forum have been suspicious of direct involvement in the Forum Fisheries Agency on the part of the United States or other distant water fishing nations since the Forum Fisheries Agency Convention was under consideration.[106] This suspicion led eventually to a decision at the Ninth South Pacific Forum meeting in Niue on September 18, 1978, to reject a proposal for a South Pacific Regional Fisheries Organization with a broad-based membership.[107] The Draft Convention[108] would have permitted membership not only by members of the South Pacific Forum, but also by members of other independent states in the region, "nations with territories in the region, territories in the region with authorization from the responsible government, *plus* independent nations (outside the region) that share a common interest in the conservation, use, or management of the living resources . . . ."[109]

Instead, the SPFFA Convention limits membership to approved "states and territories *in the region*" and so excludes the United States and other distant

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[103] Harrison, *supra* note 74, at 352.

[104] Burke, *supra* note 91, at 306.

[105] Slatyer, *supra* note 7, at 33.

[106] Gubon, *supra* note 101, at 247.

[107] Van Dyke & Heftel, *supra* note 7, at 15.

[108] South Pacific Bureau for Economic Development (SPEC), South Pacific Regional Fisheries Organization Draft Convention Art. XV, SPEC(75), FA-CONV (Suva, Fiji, June 10, 1978).

[109] Van Dyke & Heftel, *supra* note 7, at 13 (emphasis original).

water fishing nations.[110] Although the SPFFA Convention leaves open the possibility that dependent territories may acquire membership, other provisions of the SPFFA Convention, especially the requirement that all parties to the Convention "recognise that the coastal state has sovereign rights, for the purpose of exploring and exploiting, conserving and managing the living resources, *including highly migratory species* within its exclusive economic zone,"[111] may be interpreted to prevent the membership of the American Pacific islands.

This restricted membership policy prevents the SPFFA from itself fulfilling the mandate of Article 64 of the 1982 Law of the Sea Convention.[112] The SPFFA Convention recognizes this limitation and does not intend the FFA to be the ultimate administrative body to conserve and manage the region's fisheries. As stated in the SPFFA Convention:

> [T]he Parties recognize that effective co-operation for the conservation and optimum utilisation of the highly migratory species of the region will require the establishment of additional international machinery to provide for co-operation between all coastal states in the region and all states involved in the harvesting of such resources.[113]

Membership in the FFA would be to the advantage of the American Pacific islands, providing a mechanism for the exchange of scientific, statistical, legal, commercial, and technical information relevant to tuna management and development.[114]

Article VII of the SPFFA Convention lists scientific and advisory functions which should be a foundation for regional cooperation.[115] The FFA is intended to "collect, analyse, evaluate and disseminate" regional fisheries information to member nations. This information includes: 1) statistics and biological information with respect to the highly migratory species; 2) management procedures, legislation, and agreements adopted by other countries; 3) prices, shipping, processing, and marketing of fish and fish products; and 4) technical advice and information assistance in the development of fisheries policies and negotiations, and assistance in the issuance of licenses, the collection of fees, and in matters pertaining to surveillance and enforcement.[116] Parties to the SPFFA Convention are required to supply some of this information to the FFA, including, most

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[110] *Id.* at 18 (emphasis added).

[111] SPFFA Convention, art. III(1), *reprinted in* Van Dyke & Heftel, *supra* note 7, at 60 (emphasis added); for a description of the formation of the SPFFA, see Kent, *Fisheries Politics in the South Pacific*, 2 OCEAN Y.B. 346, 375-81 (1980).

[112] Van Dyke & Heftel, *supra* note 7, at 38, 48.

[113] SPFFA Convention, *supra* note 7, art. III(2).

[114] *Id.* art. 5.

[115] *Id.* art. VII.

[116] *Id.* art. IX.

importantly, catch and effort statistics for fishing operations in waters under their jurisdiction or conducted by vessels under their jurisdiction, and certain biological and statistical data.[117]

Membership in the FFA would be the most direct means of involving the American Pacific islands in regional tuna management. Given the U.S. recognition of the FFA members' sovereignty over tuna fisheries expressed in the South Pacific Tuna Treaty, the American Pacific islands seem to qualify for membership under Article II of the SPFFA Convention.[118] If U.S. national tuna policy proves a disability to the islands' membership, however, participation in a larger or parallel regional organization could accomplish similar results.

2. *Accession to the South Pacific Tuna Treaty*

Article 12.3 of the South Pacific Tuna Treaty provides that the treaty "shall remain open for accession by States referred to in paragraph 1 of this Article."[119] Paragraph 1 permits signature by all of the "Pacific Island States."[120] Article 1.1(h) in turn defines "Pacific Island State" to include only the parties to the SPFFA Convention. Thus, the American Pacific islands may not presently accede to the treaty. If one or more of the American Pacific islands were granted membership in the FFA, however, they would then become eligible for accession.

During negotiation of the South Pacific Tuna Treaty, the United States, to its credit, proposed a provision to permit accession not only by the Pacific Island states but by "any other entity of Micronesia, Polynesia, or Melanesia" as well.[121] This language would presumably have permitted the participation of the American Pacific islands "subject to the consensus of the Parties."[122] The provision was not included in the final treaty.

The American Pacific islands find themselves in a catch-22 situation. The FCMA requires that tuna be managed by international agreement, yet the principal international agreement on tuna in the Pacific excludes the American tuna jurisdictions.

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[117] *Id.*

[118] SPFFA Convention, Preamble; *see supra* text accompanying note 16.

[119] South Pacific Tuna Treaty, *supra* note 5, art. 12.3.

[120] *Id.* art. 12.1.

[121] Agreement on Fisheries Between Pacific Island States and the United States of America, Draft Composite Text 19 (Apr., 1986).

[122] *Id.*

B. The Case for Direct Involvement in Regional Tuna Management

The results of federal negotiations for the South Pacific Tuna Treaty demonstrate a need for direct involvement of the island governments in regional negotiations. Although substantial federal interests were served in the treaty, the treaty failed to advance the interests of the jurisdictions most directly related to the domestic tuna resources—the American Pacific islands.

1. Disparate Federal Interests

The major U.S. interest in the tuna resource during treaty negotiations was securing access for the U.S. distant water tuna purse seine fleet. A prominent related interest was the national strategic interest in denying access to the resource—and the regional influence that would result from such access—to the Soviet Union.[123] These interests were reflected in the composition of the U.S. delegation to the negotiations. The delegation included the President of the American Tunaboat Association[124] and a senior State Department counselor[125] added to the delegation "because strategic considerations arose" when the Soviets entered into a fisheries agreement with Kiribati in August of 1985.[126]

The United States was well aware of the desire of the American Pacific islands to regulate access to and derive fees from their tuna resources. In 1984, an official of the U.S. Department of Commerce encouraged the Northern Mariana Islands to remain within the FCMA and await conclusion of the South Pacific Tuna Treaty negotiations as the most promising means of obtaining fisheries revenues for the Northern Mariana Islands.[127] Despite this awareness, and despite tuna industry support for including the American Pacific islands in the treaty,[128] the United States agreed to remove the American islands from the treaty area and to limit the treaty's provisions to access of the U.S. purse seine

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[123] Van Dyke & Nicol, *supra* note 2, at 117, 118.

[124] August Felando is the President of the American Tunaboat Association and a leading spokesman for the American tuna industry. *See* TUNA ISSUES AND PERSPECTIVES IN THE PACIFIC ISLANDS REGION 313 (D. Doulman ed. 1987).

[125] Edward Derwinski is a senior State Department Counselor who became involved in the negotiations beginning in round five. Van Dyke & Nicol, *supra* note 2, at 117.

[126] *Id.* at 116.

[127] Summary of statement of Mr. Jay S. Johnson, Assistant General Counsel for Fisheries of the National Oceanic and Atmospheric Administration to the Northern Marianas Commission on Federal Laws, summarized in Minutes of the Ninth Meeting, Santa Barbara, Cal. (July 12-13, 1984), *reprinted in* NORTHERN MARIANAS COMMISISON ON FEDERAL LAWS, WELCOMING AMERICA'S NEWEST COMMONWEALTH: THE SECOND INTERIM REPORT OF THE NORTHERN MARIANA ISLANDS COMMISSION ON FEDERAL LAWS 119 (Doc. Supp. Aug. 1985).

[128] Interviews with David G. Burney, General Counsel, United States Tuna Foundation (July 22, 1987 and Nov. 6, 1987).

fleet. Although the treaty served other important national interests, the national interest in conservation, management, and utilization of U.S. tuna resources was not well served. This article proposes that the American Pacific islands should directly participate in regional tuna discussions to protect their interest in the resource.

2. *The American Pacific Islands' Interest*

The American Pacific islands' main interest in the tuna resource is not that of a distant water fishing fleet; neither are global security interests a major concern. The people of the American Pacific islands view their interest in these resources in the same manner as do the coastal peoples throughout the world. This sentiment has been expressed as follows:

> Islanders feel toward the sea the way inhabitants of continental nations feel toward their land. According to islanders they own the sea. They own it because they live on it. They own it because they are totally dependent upon it for survival. . . . To understand the extreme resentment an islander feels at outsiders taking large quantities of his fish from his sea, one need only imagine how an American would feel if islanders came over and started cutting timber in Oregon and drilling for oil in Oklahoma without permission or compensatory payment to the land owner. . . . Most American flag islanders . . . watch with envy and irritation as independent island Nations, including the newly established Compact Nations . . . successfully regulate their tuna resource. It is hard for them to understand how they, just because they are a U.S. territory, commonwealth or state, are excluded from making management decisions regarding their most important resource.[129]

International law strongly supports the position of the inhabitants of American Samoa, Guam, and the Northern Mariana Islands that the island governments, as opposed to the federal government, should retain coastal state jurisdiction over tuna as well as other resources of the exclusive economic zone. In 1978, Professor Thomas Franck completed a comprehensive survey of the relationships between metropolitan governments and their overseas territories and associated states regarding jurisdiction of the resources of the exclusive economic zone.[130] The Franck survey analyzed the laws and practices of six nations, including the United States, New Zealand, Great Britain, France, Denmark, and the Netherlands, with respect to control of the natural resources of the exclusive economic zone of their dependent island states and territories. The survey iden-

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[129] Dieudonne, *Hawaii's Yee Wants Tuna Under the EEZ*, PAC. MAG., Sept.-Oct. 1987, at 42.

[130] T. FRANCK, CONTROL OF SEA RESOURCES BY SEMI-AUTONOMOUS STATES (Carnegie Endowment for International Peace 1978).

tified the following general rule of international legal practice on the subject:

> [M]etropolitan powers with integrated overseas territories or associated states either have given the population of the overseas territory full and equal representation in the national parliament and government or have given the *local* government of the overseas territory jurisdiction over the mineral resources and fisheries of the exclusive economic zone.[131]

The Franck survey went on to point out that:

> The sole significant exception to this rule would appear to be the United States, which, in the case of Puerto Rico, has neither accorded that commonwealth full popular participation in the national (congressional) lawmaking process nor delegated to it the jurisdiction over fisheries and mineral resources in the 200-mile zone around the island.[132]

Subsequent events reaffirm the general rule of international practice noted in the Franck survey. Recently, the British government observed this international norm in creating an exclusive economic zone around the Falkland Islands. On October 29, 1986, the government of Great Britain declared the establishment of a Falkland Islands Interim Fisheries Conservation Zone in the marginal sea surrounding the Falkland Islands.[133] The British declaration provided notice of the establishment of the zone to the international community, but the Falkland Islands government enacted legislation to implement the declaration and to provide the necessary administrative regime. The Falkland Islands government retains full administrative control of the zone, and proceeds of the licensing of fishing vessels operating in the zone will accrue to the local government.[134]

Similar events have taken place in the American Pacific islands, but in reverse order. For example, in the Commonwealth of the Northern Mariana Islands, the Commonwealth government enacted legislation to manage the exclusive economic zone in 1980,[135] well before the President's proclamation of an exclusive economic zone in 1983.

Because the Northern Mariana Islands' political association with the United States is quite recent, its experience is instructive in analyzing U.S. tuna policy

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[131] *Id.* at 5 (emphasis original).

[132] *Id.*

[133] Statement of Sir Geoffrey Howe, British Secretary of State for Foreign and Commonwealth Affairs, on South Atlantic Fisheries, made in the House of Commons, (Oct. 29, 1986) (London Press Service, Verbatim Service VS/056/86, copy provided to the author by C. Woodley, First Secretary, British Embassy, Washington, D.C.).

[134] Telephone interview with C. Woodley, First Secretary, Chancery, British Embassy, Washington, D.C. (Feb. 4, 1987).

[135] Marine Sovereignty Act of 1980, *supra* note 64 § 1114(b).

within the international context. In 1975, the Northern Mariana Islands approved a covenant with the United States whereby the islands have recently acquired Commonwealth status.[136] At the time the Covenant was approved, and until at least November 3, 1986, the Northern Mariana Islands were part of the Trust Territory of the Pacific Islands.[137] As the administering authority of the trusteeship, the United States was obligated under international law to "protect the inhabitants [of the Northern Mariana Islands] against the loss of their . . . resources."[138] It is difficult to square the FCMA assertion of federal exclusive fisheries management authority and the disclaimer of authority over highly migratory species with either the obligations of the Trusteeship Agreement or with the customary international practice of free nations described in the Franck survey.

The United States has renounced federal tuna jurisdiction, and has entered into an international management regime which ignores America's tuna resources in the Pacific islands. This unfortunate policy illustrates why dependent, insular areas, such as the American Pacific islands should retain jurisdiction over their natural resources. Without a political voice in the legislation of national resource policy, the islands cannot rely upon the federal government to protect their resource interests. The United States should empower the American Pacific island governments to initiate—and assist them to conduct—their own negotiations for regional agreements that will conserve the tuna resources found in the waters of the American Pacific.

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[136] The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, 90 Stat. 263; *reprinted in* 48 U.S.C. § 1681 note. The Covenant was negotiated by the United States and the Northern Mariana Islands between 1972 and 1975. It was signed by the Marianas Political Status Commission and the Personal Representative of the President of the United States on February 15, 1975. It was approved by a plebiscite vote of 78.8 % of the voters on June 17, 1975, and approved in 1976 by U.S. Public Law 94-241.

[137] There is some debate whether or not the Trusteeship Agreement has been terminated. On November 3, 1986, President Reagan issued Proclamation No. 5564, "[p]lacing into Full Force and Effect the Covenant with the Northern Mariana Islands. The President also determined "that the Trusteeship Agreement is no longer in effect . . . as of November 3, 1986, with respect to the Northern Mariana Islands." Proclamation No. 5564, 51 Fed. Reg. 40,399 (1986). One noted observer has suggested, however, "that the appropriate body to make such a determination that the trusteeship is terminated (or its synonyms in the proclamations, 'no longer in effect' and 'no longer applies') is the Security Council of the United Nations," not the President of the United States. Letter from Roger S. Clark to the Editor-in-Chief, 81 AM. J. INT'L L. 927, 930 (1987). The United States Claims Court has concluded that, "[t]he Trusteeship Agreement for the Trust Territory of the Pacific Islands has not been terminated. Accordingly, the Agreement remains in effect de jure at international law until the Security Council has acted." Juda v. United States, No. 172-81L, slip op. at 24 (Cl. Ct. Nov. 10, 1987) (dictum).

[138] Trusteeship Agreement for the Former Japanese Mandated Islands, art. 6(2), 61 Stat. 3301, T.I.A.S. No. 1665 (1947), *reprinted in* 2 F.S.M. Code 895, 897 (1982).

VI. Proposal for Tuna Management in the American Pacific Islands

A. Tuna Management Goals

Efforts to conserve and manage tuna resources of the islands of the American Pacific should further the interests both of the islands themselves and of the United States. Because the national security interests of the United States and the distant water fishing nation interest of the U.S. purse seine fleet have already been served in the South Pacific Tuna Treaty, U.S. tuna policy should now focus primarily on the coastal state resource interests of the American Pacific Islands. The goals of this effort should include:

1. Conservation and management of the tuna resources within the exclusive economic zones of the American Pacific islands, including:
   a. Conditioning access of foreign fishing fleets upon consent of the concerned American Pacific island government and the U.S. government;
   b. Requiring licenses of foreign tuna fishing vessels and the registration of licenses; and
   c. Requiring foreign fishing vessels to report their catch and effort statistics;
2. Development of the tuna resources of the American Pacific and generation of revenues for the benefit of the people of the American Pacific islands;
3. Promotion of Pacific regional and international cooperation in the conservation and management of tuna.

B. Tuna Management Structure

The main difficulty in providing for tuna conservation and management in the American Pacific islands is organizational. Tuna have been kept out of the United States' national fisheries management program under the FCMA, and the American Pacific islands are excluded from the South Pacific Tuna Treaty. No convenient national or international agency for tuna resource administration is available.

Many observers feel that the most serious obstacle to the ultimate goal of conservation and management of the tuna resource in the Pacific Ocean is U.S. tuna policy, and that real progress requires a change in that policy by repeal of the FCMA tuna exclusion. The United States should eventually recognize the coastal state interest of the American Pacific islands in the tuna resources and assert sovereignty on behalf of the American Pacific islands over the tuna resources in the exclusive economic zone.

Progress toward conservation and management of tuna in the American Pacific, generation of revenues for the people of the American Pacific, and promotion of Pacific regional and international cooperation in conserving and manag-

ing the tuna resource is not, however, dependent on repeal of the FCMA tuna exclusion. For the governments of the American Pacific islands there may be real advantages to creating a management structure that is independent of the FCMA. These goals can be largely achieved within the framework of existing U.S. law.

First, the United States should sponsor the American Pacific islands' participation in regional tuna management by membership in the SPFFA, or through a mutual cooperation agreement with the members of the SPFFA. Second, the United States should assist the American Pacific islands in negotiating access agreements with DWFNs, reserving the revenues from these agreements to the governments of the American Pacific islands. Finally, the federal government and the American Pacific islands should jointly develop enforcement mechanisms to discourage DWFN fishermen from taking tuna without an access agreement.

1. Mutual Cooperation Agreement with the Members of the Forum Fisheries Agency

Although the FFA is not intended to fulfill all of the functions of regional cooperation required by Article 64, it does perform functions and provide management mechanisms necessary to the requirements of the Article in the Pacific Region.[139] A related subregional alliance, the Nauru Group, has been influential in bringing more specificity to the cooperative efforts of the Forum members. The Group was organized in February, 1982, by a treaty, the Nauru Agreement.[140] The Nauru Agreement obligates the parties to "seek, without derogation of their respective sovereign rights, to coordinate and harmonize the management of fisheries with regard to common stocks within the Fisheries Zone, for the benefit of their peoples."[141]

This group has made several management innovations which have been adopted by the Forum members generally, and which make regional management efforts more effective. Most important are the Regional Registry of Fishing Vessels and the establishment of minimum terms and conditions for licensing of distant water fishing vessels.[142] These provisions have generally been incorporated into the South Pacific Tuna Treaty.[143]

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[139] *See supra* text accompanying notes 115-17.

[140] Nauru Agreement Concerning Co-operation in the Management of Fisheries of Common Interest, *done* at Nauru, Feb. 11, 1982, *reprinted in* Doulman, *Fisheries Cooperation: The Case of the Nauru Group* in TUNA ISSUES AND PERSPECTIVES IN THE PACIFIC ISLANDS REGION, 257, 271 (D. Doulman ed. 1987).

[141] *Id.* at 274.

[142] Doulman, *Fisheries Cooperation: The Case of the Nauru Group*, *supra* note 140, at 262.

[143] South Pacific Tuna Treaty, *supra* note 5, art. 3.1; Annex II, § 4(c).

The United States, on behalf of the American Pacific islands, should agree with the member states of the South Pacific Forum Fisheries Agency to exchange appropriate information, to participate in the Regional Registry of Fishing Vessels, and to abide by agreed minimum licensing provisions. An agreement with the member states of the FFA would contribute to the goal of regional cooperation under the United Nations Convention on the Law of the Sea. It would also provide the foundation for conservation and management of the U.S. tuna resource required by the FCMA. Such an agreement could be negotiated on behalf of the American Pacific islands pursuant to the authority of international fishery agreement provisions of the FCMA[144] or as authorized by Congress pursuant to the compacts and agreements clause of the U.S. Constitution.[145] This agreement should recognize and establish the competence of the governments of Hawaii, American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands to participate directly in the process, with appropriate oversight by the State Department, and to enforce and carry out the obligations of the agreement.

2. *Access Agreements with Distant Water Fishing Nations*

At the same time, the United States should approve and assist the negotiation of access agreements with those distant water fishing nations which desire to fish for tuna in the exclusive economic zones of the American Pacific islands. These agreements should conform to the commitments made by the United States to the member states of the South Pacific Forum Fisheries Agency in the mutual cooperation agreement. Foreign fishing vessels should be required to meet the same minimum terms and conditions for access to the tuna fisheries of the American Pacific as are required throughout the region. License fees should be compatible with those imposed elsewhere. These agreements could be modeled upon the South Pacific Tuna Treaty, providing access to the resource by foreign fishing vessels in exchange for a recognition of jurisdiction over the resource, the payment of license fees and development assistance, the reporting of catch and effort statistics, and other reasonable requirements.

License fees and other revenues resulting from the access agreements should be retained by the government of the American Pacific island involved. Tuna is not a "fish" subject to the FCMA, and consequently a permit is not required for tuna fishing by foreign vessels. Therefore, license fees should not be paid to

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[144] In addition to the provisions in 16 U.S.C. § 1822(a)(4), *supra* note 81 and accompanying text, the FCMA provides that the Secretary of State "may enter into such other negotiations . . . as may be necessary and appropriate to further the purposes, policy and provisions of this chapter." *Id.* § 1822(a)(4)-(5) (1982 & Supp. IV 1986).

[145] U.S. CONST., art. I, § 10, cl. 3.

the Secretary of Commerce (as authorized under Section 1824(b)(10)(A) of Title 16 of the United States Code),[146] nor should they accrue to the fisheries loan fund or to the general fund of the United States (as authorized under Section 1824(b)(10)(F)).[147] Given the historical reliance of the people of the American Pacific islands upon sea resources and the profound importance of the tuna resource to future economic development in the islands, these revenues should accrue, instead, to the island treasuries.

3. Sanction and Enforcement Agreement Between the United States and the American Pacific Islands

Negotiation of access agreements with the distant water fishing nations will be difficult without clear sanctions for failure of a DWFN to agree to a reasonable access agreement. To compel good faith negotiation by the DWFN, the United States and the American Pacific islands should agree to sanctions that will be brought to bear if negotiations break down. The parties should also determine the division of enforcement responsibility in the event that an access agreement is violated.

Although the United States does not assert sovereignty over tuna, several provisions of the FCMA could be invoked to sanction a DWFN's failure to bargain in good faith for access to the tuna resources of the American Pacific islands. The first is the nonrecognition provision (in 16 U.S.C. Section 1822(e)(2)), which states that the U.S. government will not recognize any foreign nation's Exclusive Economic Zone claim if that nation "fails to recognize and accept that highly migratory species are to be managed by applicable international fisheries agreement, whether or not such nation is a party to any such agreement."[148] This sanction could be applied to nations refusing to bargain in good faith for access to the tuna resources in the American Pacific islands.

A second possible sanction is the so-called "fish-'n'-chips" provision of the FCMA for setting the total allowable level of foreign fishing.[149] This provision permits the Secretary of State to allocate the total allowable level of foreign fishing among distant water fishing nations which apply for such allocations, based upon a variety of equitable considerations. The foreign nation receives an allocation of U.S. "fish" in exchange for collateral benefits to the U.S. fishing industry. The "chips" are accumulated according to the degree to which the nation encourages or restrains the importation of U.S. fish, the extent to which the nation cooperates with U.S. fisheries regulations, the extent to which the

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[146] 16 U.S.C. § 1824(b)(10)(A) (1982 & Supp. IV 1986).

[147] *Id.* § 1824(b)(10)(F).

[148] *Id.* § 1822(e)(2).

[149] *Id.* § 1821(e)(1)(E).

nation has traditionally exploited the fishery and requires U.S. fish for domestic consumption, the extent to which the nation "contributes to, or fosters the growth of, a sound and economic United States fishing industry,"[150] and the extent to which the nation contributes to fishery research.[151]

Finally, the Secretary of State may take into account "such other matters" as are deemed appropriate.[152] This "such other matters" provision has come to be known as the "basket clause" and has been used for a number of foreign policy purposes.[153] These "fish-'n'-chips" allocation provisions could be invoked to encourage DWFNs to bargain in good faith with the American Pacific islands for access to their tuna resource.

Once an access agreement is in place, the American Pacific islands government may be empowered to enforce its terms by local law. By agreement with the Secretaries of Departments of Commerce and Transportation, personnel and equipment of the island government may be used for enforcement.[154]

VII. CONCLUSION

Both the national conservation and management efforts of the United States under the FCMA and the regional management regime established under the South Pacific Tuna Treaty have left out the tuna resource of the American Pacific islands. The island governments of Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands claim strong proprietary interests in the resource under international customary law, and under the 1982 Convention on the Law of the Sea. Petitions by the American Pacific island governments and by the Western Pacific Regional Fishery Management Council to amend the FCMA to provide for the management of tuna, or to exclude the American Pacific islands, have not yet been successful. Current federal policy, however, requires that the United States cooperate in regional tuna management on behalf of the American Pacific islands. Participation may be accomplished through lawful means without derogating from the islands' beneficial interest in the resource.

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[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] These purposes include: 1) denial of Soviet allocations in response to the Soviet occupation of Afganistan, 2) denial of Polish allocations after martial law was imposed, 3) reduction of Japanese allocations, and 4) an increase in allocations to Mexico to encourage that nation to allow U.S. fishermen to fish in its waters. Letter from William L. Ball, Assistant Secretary of State for Legislative and Governmental Affairs, to Walter B. Jones, Chairman, House Committee on Merchant Marine and Fisheries, U.S. House of Representatives (May 8, 1985), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 6269.

[154] 16 U.S.C. § 1861 (1982 & Supp. IV 1986).

The Legal Status of Johnston Atoll and Its Exclusive Economic Zone*

by Jon M. Van Dyke,** Ted N. Pettit,*** Jennifer Cook Clark,**** and Allen L. Clark*****

I. INTRODUCTION

Recent discoveries of the mineral potential of cobalt-rich manganese crusts on seamounts within 200 nautical-mile exclusive economic zones (EEZs),[1] coupled with concern about the disputed legal status of the deep seabed beyond 200-miles,[2] have shifted the focus of ocean mining from the deep sea floor to the

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 The research for this article was conducted at the Resources Systems Institute of the East-West Center, under contract with the Minerals Management Service of the Department of Interior. The authors wish to thank Dale Bennett, University of Hawaii Law School class of 1989 for his help in preparing this article for publication.

** Professor of Law, William S. Richardson School of Law, University of Hawaii at Manoa; Director, University of Hawaii Institute for Peace; Adjunct Research Associate, Resource Systems Institute, East-West Center; J.D., Harvard University, 1967; B.A. Yale University, 1964.

*** Attorney, Wagner, Watson & DeBianco, Honolulu, Hawaii; J.D., William S. Richardson School of Law, University of Hawaii at Manoa, 1986; Ph.D., John A. Burns School of Medicine, University of Hawaii at Manoa, 1980; M.S., University of Missouri-Columbia, 1977; B.A., University of Missouri-Columbia, 1972.

**** Law Clerk to the Honorable Alan C. Kay, U.S. District Court, Honolulu; East-West Center Fellow 1983-87, Honolulu; J.D., William S. Richardson School of Law, University of Hawaii at Manoa, 1987; B.S., Washington State University, 1977.

***** Assistant Director, Resource Systems Institute and Program Leader, Minerals Policy Program, East-West Center, Honolulu, Hawaii; Ph.D, University of Idaho, 1967; M.S., University of Idaho, 1963; B.S., Iowa State University, 1961.

[1] The exclusive economic zone (EEZ) is a zone extending not more than 200 nautical miles from the point from which the breadth of the territorial sea is measured. The 1982 U.N. Convention on the Law of the Sea, arts. 55, 57, *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter 1982 Convention]. In the exclusive economic zone, a coastal state has sovereign rights over the natural resources, living or nonliving, of the seabed, subsoil, and superadjacent waters. *Id.* art. 56.

[2] *See, e.g.*, CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION 36-49, 224-280, 550-60 (J. Van Dyke ed. 1985) [hereinafter CONSENSUS AND CONFRONTATION]; Van Dyke & Yuen, *"Common Heritage" v. "Freedom of the High Seas": Which*

crust deposits within the EEZs of the United States and other Pacific nations.

This article examines the history and legal status of Johnston Atoll in order to assist in evaluating the issues raised by the possibility of exploiting the mineral resources on the seamounts in the EEZ surrounding Johnston Atoll, where some promising discoveries have already been made.

Part II provides a brief background of Johnston Atoll, including its geography, ecology, and existing resources. Part III examines the history of Johnston in some detail to focus on how the island became part of the United States. Although it appears clear that Johnston is now part of the United States, questions remain about whether Hawaii's claim to Johnston was still viable as of 1898 and, therefore, whether native Hawaiians and the State of Hawaii may have residual claims to the proceeds of Johnston's resources. This issue is discussed in Part IV. Part V examines a related question, the legal status of Johnston Atoll's EEZ under international law, particularly the ability of a relatively remote and uninhabited island to support an EEZ. Part VI concludes the article and raises several additional issues that need to be resolved before marine mining could be undertaken in the waters surrounding Johnston Atoll.

II. SUMMARY OF BACKGROUND FACTORS

Johnston Atoll is an U.S. possession located 717 nautical miles (1,328 kilometers)[3] southwest of Honolulu (Figure 1). Its classification as a possession means simply that it is not destined to become a state or to evolve toward a "commonwealth" or "free associated" status.[4] It has no permanent residents and no self government. It is now under the primary authority of the U.S. Defense Department and is used principally for the stor-

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Governs the Seabed?, 19 SAN DIEGO L. REV. 493 (1982) (also published in THE LAW OF THE SEA AND OCEAN DEVELOPMENT ISSUES IN THE PACIFIC BASIN, 15 L. SEA INST. PROC. 206 (E. Miles & S. Allen eds. 1983)).

[3] E. BRYAN, AMERICAN POLYNESIA AND THE HAWAIIAN CHAIN 35 (1942).

[4] A "commonwealth," in this context, is an incorporated territory of the United States. Puerto Rico and the Commonwealth of the Northern Marianas are two examples of such status. Incorporation was once considered to be an important step prior to becoming a state. A "free associated" state is one with close links with another nation, in which the other nation frequently has responsibility for defense and security matters. The Cook Islands and Tuvalu are "freely associated" with New Zealand, and the Federated States of Micronesia and the Republic of the Marshall Islands are "freely associated" with the United States. In a "free association" arrangement, either state can unilaterally terminate the arrangement. *See generally* PACIFIC BASIN DEVELOPMENT COUNCIL, THE NONCONTIGUOUS U.S. AFFILIATED PACIFIC AREAS: A POLICY PAPER 3.1.1-13 (1983); Leibowitz, *The Applicability of Federal Law to Guam*, 16 VA. J. INT'L L. 21 (1975); M. REISMAN, PUERTO RICO AND THE INTERNATIONAL PROCESS: NEW ROLES IN ASSOCIATION (1975); D. MCHENRY, MICRONESIA: TRUST BETRAYED 37 (1975) (citing U.N.G.A. Res. 1541 (Dec. 21, 1960)).

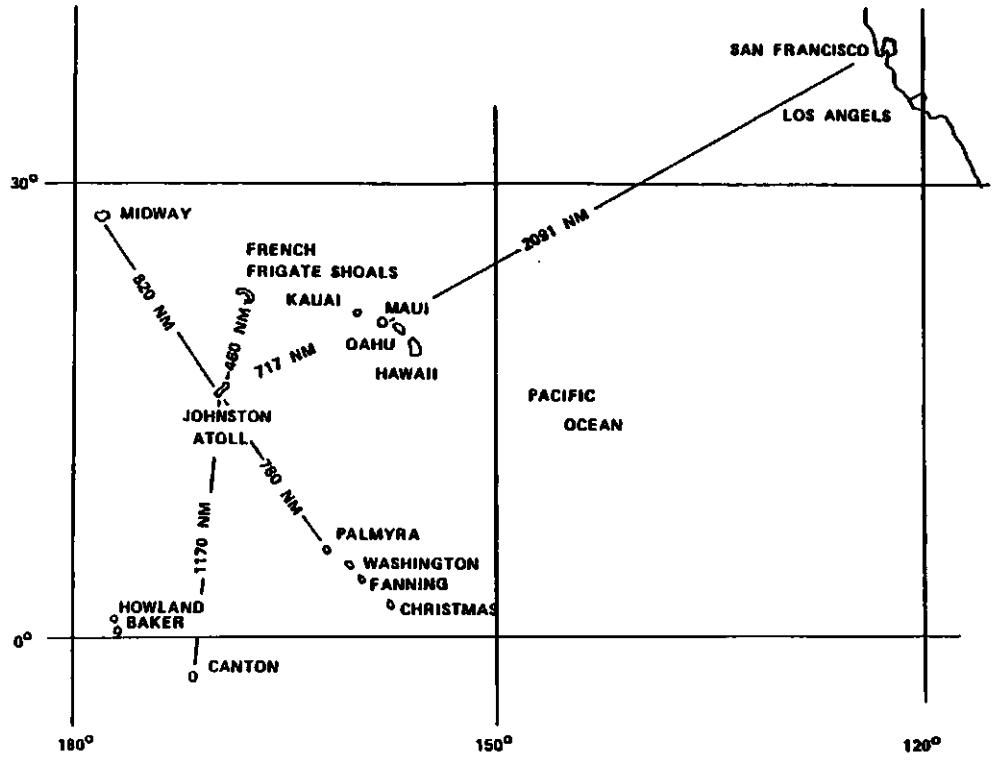

FIGURE 1 LOCATION — JOHNSTON ATOLL

age and disposal of nerve gas and other highly toxic agents.[5] Facilities are now being prepared for the Johnston Atoll Chemical Agent Disposal System (JACADS), which will permit substantial destruction of chemical agents during the coming decade,[6] and a draft environmental impact statement has also been recently prepared for a deep ocean disposal site near Johnston Atoll for brine and solid waste that would be generated by the chemical destruction facility.[7]

These military uses co-exist with the "Johnston Island National Wildlife Refuge" which was established in 1926 to provide sanctuary for sea birds.[8] The Fish and Wildlife Service of the U.S. Department of Interior plays a continuing role in monitoring the aquatic life in and around the atoll.[9]

A. Geography, Size, and Climate

Johnston Atoll is one of the most isolated atolls in the Pacific.[10] It is now composed of four small islets enclosed in an egg-shaped reef and lagoon complex on a relatively flat, shallow platform approximately twenty-one miles in circumference[11] (Figure 2). The total area of the lagoon is about thirteen square

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[5] *See generally* PACIFIC OCEAN DIV., U.S. ARMY CORPS OF ENGINEERS, DRAFT ENVTL. IMPACT STATEMENT FOR THE DESIGNATION OF A DEEP OCEAN DISPOSAL SITE NEAR JOHNSTON ATOLL FOR BRINE AND SOLID WASTE (Sept. 3, 1985) [hereinafter OCEAN DISPOSAL SITE EIS].

[6] *Id.* at 1.

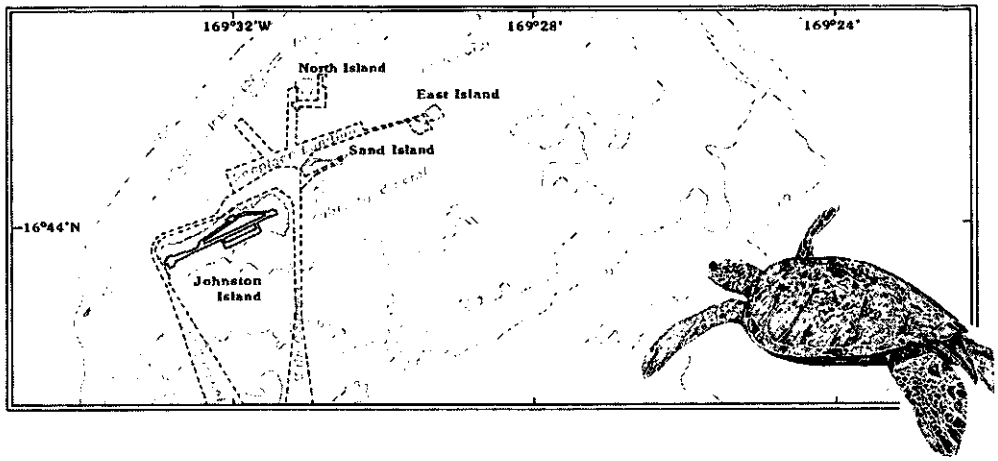
[7] *Id.*

[8] Exec. Order No. 4467 (June 1926), *reprinted in* Logistics Planning Group, Holmes & Narver, Inc., Historical Report of Johnston Atoll 21, fig. 3 (1974) [hereinafter Holmes & Narver] (available in the Pacific Collection, Hamilton Library, University of Hawaii at Manoa).

[9] OCEAN DISPOSAL SITE EIS, *supra* note 5, at 10.

[10] *Id.* at 10. It is 717 nautical miles southwest of Honolulu, at 16 degrees 44'N, 169 degrees 31'W, and is 460 nautical miles from the nearest land in French Frigate Shoals in the Northwestern Hawaiian Islands. Palmyra Island is about 780 miles to the southeast, the Marshall Islands are 1300 miles to the southwest, and the Phoenix Islands in Kiribati are 1300 miles to the south. *Id.* A "nautical" or "geographic" mile is the length of a minute of longitude at the equator and in international practice is equal to 6,076.103333 feet or 1,852 meters. 1 A. SHALOWITZ, SHORE AND SEA BOUNDARIES WITH SPECIAL REFERENCE TO THE INTERPRETATION AND USE OF COAST AND GEODETIC SURVEY DATE 25 n.6 (1962).

[11] Ocean Disposal Site EIS, *supra* note 5, at 10. Johnston Atoll originally consisted of two islets, Johnston and Sand. Johnston Island was expanded from 46 acres to 625 acres by dredge and fill operations. Today, the island is two miles long and one-half mile wide with an average elevation of eight feet above sea level. Sand Island, a barbell-shaped island lying one-half mile east of Johnston, was increased from 10 to 22 acres in area. An extensive dredge program completed in 1964 added two new islands—Akau (Hawaiian for "north") and Hikina ("east")—that are 25 acres and 18 acres, respectively. The fill material was obtained from dredging seaplane landing areas, the harbor area, and a ship channel. U.S. DEP'T OF INTERIOR FISH & WILDLIFE SERV., JOHNSTON ATOLL NAT'L WILDLIFE REFUGE (No. RF12510, Feb. 1986) [hereinafter FISH & WILDLIFE SERV.]


169°32'W
169°28'
169°24'
North Island
East Island
Sand Island
16°44'N
Johnston
Island

miles. The main outer reef rim is typical of other low-lying Pacific islands and includes surge channels, an algal ridge, and a reef flat with coral heads that rise abruptly in deep water, especially to the south and east of the main reefs.[12] The weather on Johnston Atoll is an excellent tropical marine climate all year long with little seasonal variation.[13]

The seamounts near Johnston are being examined now for their mineral potential. An area about fifty miles south of the atoll has been identified as having one of the best crust resource potentials of the locations in the Pacific that have been explored thus far.[14]

B. Population and Existing Resources

Some 300 to 600 people live and work on Johnston Atoll.[15] Many are assigned to the U.S. Army's 276th Chemical Company, which handles the storage, maintenance, and security of chemical stockpiles on the island.[16] The population of civilian and military workers doubled during peak periods of construction of the Johnston Atoll Chemical Agent Disposal System (JACADS) during 1987.[17]

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[12] Ocean Disposal Site EIS, *supra* note 5, at 10.

[13] Weather records extending back to 1931 indicate that trade winds blow 80 percent or more of the time, averaging 15 miles per hour. The mean annual temperature is about 79 degrees Fahrenheit, with a range from 62 degrees to 89 degrees. Annual rainfall is 26 inches per year with large variations from year to year. U.S. CORPS OF ENGINEERS, PACIFIC OCEAN DIV., DRAFT ENVTL. IMPACT STATEMENT FOR THE JOHNSTON ATOLL CHEMICAL AGENT DISPOSAL SYSTEM (JACADS) 35 (June 2, 1983) [hereinafter JACADS EIS]. Occasional hurricanes pass through this region and tsunamis (tidal waves) can hit Johnston. During the 1960 tsunami from Chile, flood elevations of 7.2 feet were measured. The tide range is normally two feet, and the absolute range during the year is 3.4 feet. A westerly current prevails at a velocity of one-half knot. In August 1972, tropical storm Celeste hit Johnston Atoll with 100 knot winds, gusting to 130 knots, and all personnel were evacuated to Hickam Air Force Base in Honolulu for several days. *Id.* at 39.

[14] *See generally* U.S. DEP'T INTERIOR MINERALS MANAGEMENT SERV., COBALT RICH MANGANESE CRUST POTENTIAL, EXCLUSIVE ECONOMIC ZONES: U.S. TRUST AND AFFILIATED TERRITORITIES IN THE PACIFIC (prepared by A. Clark, P. Humphrey, C. Johnson, & D. Pak, 1985).

[15] Holmes & Narver, *supra* note 8, at 77; Grover, *Life on a Desert Island*, AIRMAN 4 (Mar. 1975).

[16] Holmes & Narver, *supra* note 8, at 79.

[17] Interview with Stewart Fefer, U.S. Fish & Wildlife Serv., Dep't of the Interior, Honolulu, Hawaii (April 26, 1988). Facilities were built to accommodate over 2,000 persons with office space, barracks, apartments, cottages, an extensive dining hall, and a medical clinic. The Joint Operations Center, a four-floor steel-framed structure, serves as the headquarters for military and private contractor operations. It also houses the island's chapel, library, and base exchange. Recreational facilities include a theater, bowling alley, swimming pool, and indoor and outdoor racket courts. A number of missile and rocket support facilities are maintained on inactive status. JACADS EIS, *supra* note 13, at 40.

Complete utilities provide water, electricity, telephone, and sewage. Fresh water is produced

A new dump site outside the lagoon is under evaluation by the Army Corps of Engineers and the Environmental Protection Agency.[18] It will receive liquid brine waste generated by the destruction of obsolete chemical agents and munitions in the JACADS program and solid wastes generated by a variety of activities. The liquid waste, primarily scrubber brine derived from the pollution abatement controls of JACADS, will constitute more than two million gallons over a five-year period. The current proposal is to discharge the brine into the propeller wash of a self-propelled barge while underway in the dump site to maximize instantaneous dilution. The solid wastes will be dumped from the deck of the barge.[19]

Johnston Harbor is located just north of Johnston and Sand Islands. It is a shallow draft harbor with a 300-foot-wide channel that connects to deep water. The principal bulkhead pier on the north side of Johnston Island supplies fresh water, electricity, fuel, cranes, floodlights, and fire protection. A small boat pier and wharf located nearby provide comparable services.[20] The airstrip on Johnston Island is operated by the U.S. Air Force. A rather large air passenger and freight terminal is located adjacent to the southern end of the runway. A major commercial airline, as well as the Military Airlift Command, schedules flights to the atoll on a regular basis.[21]

The two major ecosystems on Johnston Atoll are the extensive coral reefs in shallow waters and the terrestrial habitats on the four islands.[22] Large-scale

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locally by desalination of sea water at an operating capacity of 150,000 gallons per day. Fresh water is stored in a 500,000 gallon reservoir. Filtered saltwater from the lagoon is used for sanitary facilities, fire protection, and cooling water whenever feasible. Electricity is generated by diesel power. The communications system includes world-wide telecommunications, navigational aids, and a submarine telephone cable to Honolulu. Raw sanitary sewage is discharged through ocean outfall at a depth of 26 feet, 520 feet offshore. Domestic refuse is burned in an open pit on the islands, and kitchen refuse is dumped into the lagoon. *Id.* at 59. *See also* letter from Frank S. Lisell, Center for Disease Control, Atlanta, to U.S. Army Engineers Div., Honolulu (Aug. 29, 1983).

[18] This deep ocean dumping site is located 13 to 19 miles south of Johnston Atoll at a depth of 3,600 meters. OCEAN DISPOSAL SITE EIS, *supra* note 5, at 6, 26, 31.

[19] *Id.* at 26.

[20] Its minimum depth is 35 feet. *See* JACADS EIS, *supra* note 13, at 40, 43.

[21] *See id.* at 43.

[22] The aquatic resources of Johnston Atoll are diverse and abundant but have not been thoroughly investigated. The varied coral fauna are similar to Hawaiian reefs but have been studied only in the northwest quadrant of the atoll. JACADS EIS, *supra* note 13, at 45. Heavy wave action generated by constant tradewinds and periodic storms exposes much of the reef environment to ocean waters forced over the reefs into the deeper lagoon areas. Some areas are thus constantly replenished with clean waters while some downstream coral reefs are exposed to turbid waters. *Id.* at 45-46. Johnston Atoll is biologically isolated and upstream from most of the tropical southwest Pacific islands. It does, however, share biological affinities with the Hawaiian Islands as evidenced by its similar terrestrial and aquatic resources. *Id.*

dredging during 1963 and 1964 destroyed much of the reef near three of the islands, but the coral in this area appears to be recovering and growing rapidly. In contrast, some dredging areas remain poor habitat for coral and are now the home for large patches of green algae. Over 200 species of inshore and reef fish inhabit the waters of Johnston Atoll.[23]

The predominant land-based resource is a sizeable population of colonial seabirds, breeding and resting on the islands.[24] In addition, a number of endangered species visit or live in waters of the atoll. The Hawaiian green turtle, the hawksbill turtle, the Hawaiian monk seal, and the humpback whale have all been sighted in recent years. The National Marine Fisheries Service has an ongoing program to transfer monk seals from Laysan Island in the Northwestern Hawaiian Islands to Johnston, and thirty bachelor seals have been moved thus far.[25] The impact of ocean mining on a safe haven for endangered species raises important issues that need to be addressed in the context of applicable federal laws.[26]

III. History of Johnston Atoll

The modern history of Johnston Atoll can be divided into two distinct periods. The discovery, guano mining claims, and a series of scientific explorations constitute its early history. This relatively passive period of events contrasts with

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[23] *Id.* at 53.

[24] The heavy land clearing and paving of the islands since 1942 has diminished the numbers of some species and increased those species that benefit from human manipulation of the environment. For example, surface-nesting albatross no longer breed on Johnston, whereas some terns and noddies have taken advantage of trees and large shrubs that did not exist on the original islands. A steady increase of plant species, including beach shrubs and mature ironwood trees, provide nest sites and ground cover for nesting or perching birds. In the spring and summer, some 500,000 seabirds utilize the limited land areas to nest and raise their young. The total population of seabirds may exceed 1,000,000 birds. *See id.* at 47; Fish & Wildlife Serv., *supra* note 11; Grover, *supra* note 15, at 7.

[25] File Memorandum from William G. Gordon, U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Marine Fisheries Serv., Supplemental Biological Opinion Under Section 7 of the Endangered Species Act Concerning the Translocation of Hawaiian Monk Seals to Johnston Atoll Under Permit No. 482, *reprinted in* Ocean Disposal Site EIS, *supra* note 5, at F-42 (Nov. 6, 1984).

[26] Among the federal laws that may be implicated by such activities are the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451-64 (1982); the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-56 (1982); the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-70 (1982); the Endangered Species Act, 16 U.S.C. §§ 1531-43 (1982); the Marine Protection, Research and Sanctuaries Act of 1972 (MPRSA), 16 U.S.C. §§ 1431-34 (1982); the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1982); the Fish and Wildlife Coordination Act of 1958, 16 U.S.C. §§ 661-666c (1982); and the National Wildlife Refuge Administration Act, 16 U.S.C. § 668dd, 668ee (1982).

the more recent military history which was dictated by Johnston's strategic position in World War II, the nuclear testing in the 1950s, and the apparent comparative advantage that the remote atoll now presents as a disposal site for chemical agents.

A. Discovery, Exploration, and Inhabitation

1. Early discoveries

On September 2, 1796, the American brig *Sally* of Boston grounded on a shoal some 717 miles west southwest of Honolulu.[27] Her skipper, Captain Joseph Pierpont, reported a rough circular reef about eight miles across with two large guano-covered patches of sand above the coral-studded reef. The largest island was 1,000 yards long and 200 yards wide, reaching a height of forty-four feet at its northern end. Captain Pierpont left without making a landing on the atoll.[28]

On December 14, 1807, the islands were sighted by Captain Charles James Johnston of the British frigate *HMS Cornwallis* who gave the atoll his name.[29] The description of Johnston Atoll in the log of the *Cornwallis* is brief: "Two very low islands having a dangerous reef to the eastward of them, and the whole not exceeding four miles in extent."[30] In 1840, the islands were described by Commodore Wilkes as a "lagoon surrounded by an extensive reef, extending northeast and southwest ten miles and five miles broad; on the northwest side are two islets; the western most . . . is covered with bushes but no trees; the other only a sand bank."[31] During this period, the atoll was viewed primarily as a menace to navigation.

2. Guano claimants

In 1856, the United States Congress passed the Guano Islands Act,[32] which enabled United States citizens to take over uninhabited and unclaimed islands under the protection of the United States flag in order to remove the guano for its use as fertilizer. The Act stated that if certain development and habitation

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[27] *See* Holmes & Narver, *supra* note 8, at 3; BRYAN, *supra* note 3, at 31; Votaw, *Johnston Island*, 69 U.S. NAVAL INST. PROC. 1177 (1943).

[28] Holmes & Narver, *supra* note 8, at 3; *see also* BRYAN, *supra* note 3, at 35.

[29] BRYAN, *supra* note 3, at 36.

[30] Holmes & Narver, *supra* note 8, at 3.

[31] *Id.* (citing WILKES, 5 NARRATIVE OF THE UNITED STATES EXPLORING EXPEDITION 266 (1845)).

[32] Guano Islands Act, 48 U.S.C. §§ 1411-19 (1982).

conditions were met, the President could declare the guano island as appertaining to the United States.[33] Over forty-five islands, including Johnston Atoll, were eventually claimed under this statute.[34]

Upon hearing of the Act, two men from San Francisco, William H. Parker and a Mr. Ryan, formed a partnership and petitioned the U.S. government for authorization to explore and exploit the guano on Johnston.[35] Their petition was initially refused because Parker and Ryan had not yet set foot on the island or assembled the necessary financial support. Eventually, they formed a working agreement with the owners of the schooner *Palestine*, which arrived at Johnston in March 1858.[36] The crew of the vessel found a large amount of guano but no wood, water, or soil. They planted a United States flag on both Johnston and Sand Islands, along with crosses bearing the inscription that the entire area was claimed for the United States and the owners and charterers of the *Palestine*.[37] Guano samples were sent to the Department of State, which apparently acknowledged them, and Parker and Ryan incorporated in California with their financial backers in 1858 as the Pacific Guano Company.[38]

Meanwhile, another group of San Franciscans, under the leadership of Samuel Clessen Allen, were also scheming to profit from guano mining on Johnston.[39] They persuaded King Kamehameha IV to claim the islands as part of the Kingdom of Hawaii. Three months after the *Palestine*'s voyage, the Hawaiian schooner *Kalama*, commanded by Captain Watson with Allen aboard, visited the atoll from June 14 through 19, 1858. They replaced the United States flag with that of Hawaii, and named the larger island Kalama and the smaller one Cornwallis.[40]

The *Palestine* returned to the atoll on July 22, 1858, reasserted the rights of the United States, and left two men on the main island with water and supplies to gather guano.[41] On July 27, 1858, apparently without knowing that these United States guano miners were back on the island, King Kamehameha IV proclaimed the annexation of the atoll to Hawaii, with the Attorney General of Hawaii stating that it was "derelict and abandoned."[42] Allen's group representing the Kingdom of Hawaii, then sent Captain Borland in the *Guantlet* to the

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[33] *Id.* § 1411.

[34] 1 J.B. MOORE, DIGEST OF INT'L LAW 567-68 (1906); The Friend (Honolulu), Apr. 1859, at 30, col. 2.

[35] Votaw, *supra* note 27, at 1177.

[36] *Id.*

[37] Johnson's [sic] Islands, 9 Op. Att'y Gen. 364-65 (1859).

[38] *Id.* at 365.

[39] Holmes & Narver, *supra* note 8, at 4.

[40] BRYAN, *supra* note 3, at 36.

[41] *Id. See also* 9 Op. Att'y Gen., at 366.

[42] BRYAN, *supra* note 3, at 36.

atoll, where he met the two workers from the United States claimants and their guano. This meeting apparently led to an armed standoff, and while the *Gauntlet* was still at the atoll, the *Radiant*, chartered by the U.S. claimants' Pacific Guano Company and under the supervision of A.D. Piper, arrived.[43] The two parties squabbled for a time, but they both decided that the guano could not be removed with the facilities on the atoll. Both ships eventually sailed away, leaving Piper with eleven men and their arms on the atoll.[44]

Several other ships came to Johnston in late 1858 and early 1859, including the mysterious sloop *Splendid*, which may have been scouting for the Hawaiian interests.[45] In March 1859, however, the U.S. claim was reinforced by the arrival of the U.S. Naval schooner *Fenimore Cooper*, which helped Piper and his men blast a ship channel through the reef and build an anchorage, wharf, and railway to handle the guano.[46] Many ships participated in the efforts to remove the guano, including the previously competitive *Kalama*.[47] Within a few years, they had removed all the nitrites, and all the workers departed with their equipment, leaving only a few huts on the atoll.[48] The Hawaiian government apparently made no serious attempt to challenge the activities of the U.S. claimants during this period. One report states, in fact, that the agreement between the Hawaiian Kingdom and Allen was rescinded in late 1858 when the Hawaiian government was embarrassed to learn that the island had previously been annexed by the United States.[49]

In 1859, the United States Attorney General denounced the Allen-*Kalama* expedition as "a sharp scheme of Americans, under cover of the Sandwich Islands sovereignty," concluding that their "empty ceremonies could vest no jurisdiction over the islands in the Hawaiian government."[50] The Hawaiian government continued to assert its claim from time to time, however, and sovereignty over the atoll remained uncertain after the completion of the guano operation, because no humans were in fact "occupying" the barren land areas.

3. *Abandonment*

In 1872, Parker's widow sued for the title to the island, based upon her husband's development work and her dower rights. Mrs. Parker asserted her rights in a military court but the United States Attorney General denied the

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[43] Votaw, *supra* note 27, at 1177.

[44] *Id.* at 1177-78.

[45] *Id.* at 1178.

[46] *Id.*; Holmes & Narver, *supra* note 8, at 5.

[47] Votaw, *supra* note 27, at 1178.

[48] *Id.*, Holmes & Narver, *supra* note 8, at 5.

[49] *See* United States v. Fullard-Leo, 133 F.2d 743, 744 (9th Cir. 1943).

[50] 9 Op. Att'y Gen. 364, 368 (1859).

claim on the grounds that Parker had sold his interest several years before and that the island had been voluntarily abandoned since that time.[51]

In 1892, Britain made a claim to Johnston Atoll as a potential site for a cable station. The corvette *Champion* made a brief landing on the uninhabited atoll and planted an annexation notice on the highest dune.[52] The British entered into negotiations with the Hawaiian monarchy in early 1893 but these discussions ended when the British decided to run the Pacific cable via Fanning Island[53] and the Hawaiian queen was overthrown by Westerners who favored annexation with the United States.[54] The British claim was, however, mentioned as late as 1898, when Commodore George W. Melville, Chief Engineer of the United States Navy, observed in his argument in favor of U.S. annexation of Hawaii that the British "flag . . . is seen as far north as Johnston Island, 600 miles from Hawaii."[55]

4. Hawaii's annexation

In 1898, Hawaii was annexed by the United States. As is discussed below, the sovereignty over Johnston Atoll was in dispute as of that date, but the territorial government of Hawaii subsequently acted as if it had jurisdiction over the atoll. In 1909, the territorial government leased Johnston to a private citizen, Max Schlemmer of Honolulu, for twenty-five dollars annual rent, in hopes that he could revive the guano industry.[56] The lease required the lessee to plant 500 coconut trees per year, prohibited the use of explosives for killing fish, and banned the destruction of birds from the islands or adjacent waters.[57]

The quality or quantity of guano was apparently insufficient to pay for gathering it, however, and the abundant fish could not be transported to market economically. In 1917, an affidavit filed with the Commission of Public Lands reported that the two islands were uninhabited, unimproved, and contained no evidence of cultivation of coconut trees.[58] The following year, the lease was

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[51] Votaw, *supra* note 27, at 1178.

[52] Holmes & Narver, *supra* note 8, at 5. One respected legal scholar wrote in a book published in 1906 that: "It seems that Johnson [sic] Island was formally annexed to Great Britain by H.B.M.S. Champion in 1892, and that no representations were made to the British Government on the subject at the time." 1 MOORE, *supra* note 34, at 575 (citing letter from Mr. Hay, Secretary of State to the Secretary of the Navy, 235 MS Dom. Let. 44 (Feb. 17, 1899)).

[53] *Id.*

[54] *See generally* Blondin, *A Case for Reparations for Native Hawaiians*, 16 HAW. B. J. 13 (1981).

[55] S. Doc. No. 188, 55th Cong., 2d Sess., at 7 (1898) (views of G.W. Melville as to future control of Pacific Ocean).

[56] Holmes & Narver, *supra* note 8, at 5.

[57] *Id.* at 5-6.

[58] *Id.* at 6.

assigned to C.K. Ai of Honolulu for $370. C.K. Ai and Company planned to establish a fishing station on Johnston and soon dispatched a sampan with a party of Chinese and suitable equipment. These men landed and built a crude shack, but after a day and a half they apparently mutinied and returned to Honolulu.[59]

Later, a series of scientific surveys visited Johnston Atoll, leading to federal protection of the islands as a refuge for native birds. The most significant study was conducted by a team sponsored by the Biological Survey of the U.S. Department of Agriculture, the Bernice Pauahi Bishop Museum of Honolulu, and the U.S. Navy.[60] In July 1923, this survey party, headed by Dr. Alexander Wetmore, camped on Johnston Island. When Wetmore returned to Hawaii, he filed a report to the Territorial Commissioner of Lands stating that the lease stipulations for tree planting and occupation had not been fulfilled.[61]

In 1926, as a result of a memorandum submitted by Dr. Wetmore describing the atoll's bird population, sea life, and limited flora, and because of a concern about large scale feather gathering operations by Japanese and others, President Coolidge signed an executive order creating the Johnston Island Reservation for the Protection of Native Birds and placing the atoll under the control and jurisdiction of the Department of Agriculture.[62] This little known executive order remains in effect today, although subsequent executive orders have placed the atoll under the jurisdiction "for administrative purposes" of the Department of Defense.[63]

On July 25, 1940, President Franklin D. Roosevelt signed a presidential proclamation transferring jurisdiction of the bird reservation from the Department of Agriculture to the Department of the Interior.[64] The name was then changed to the Johnston Island National Wildlife Refuge, and its administration was assigned to the Department of Interior's Fish and Wildlife Service.[65]

B. Military History

Japanese aggression in the Pacific during the 1930s made defense preparations imperative for Hawaii's security.[66] On December 15, 1941, soon after the

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[59] *Id.*

[60] *Id.*

[61] *Id.* at 7.

[62] Exec. Order No. 4467, *supra* note 8.

[63] *See* Holmes & Narver, *supra* note 8, at 11.

[64] Proclamation No. 2416 (July 25, 1940), *reprinted in* 54 Stat. 2717-19.

[65] National Wildlife Refuge Administration Act of 1966, Pub. L. No. 89-669, 80 Stat. 927, codified at 16 U.S.C. §§ 668dd-668ee (1982).

[66] Holmes & Narver, *supra* note 8, at 7. On December 29, 1934, President Roosevelt placed Johnston Island under the Navy Department by Executive Order No. 6935. Units of the Pacific

Japanese attacked Pearl Harbor, surface ships of the Japanese Navy shelled Johnston Island. Within two weeks, both islands were shelled three more times, causing considerable damage to various facilities and demoralizing civilian workers who feared a Japanese landing. The civilians were then evacuated and military personnel remained to complete the construction.[67]

During the remainder of the war, Johnston Island's importance shifted from a defense outpost to a major midpoint communications center for tactical aircraft and submarines ferried to the advancing Pacific battle fronts. It became the busiest air transport terminal in the Pacific.[68]

After the war, operations were drastically curtailed. In 1948, the Navy transferred operational control to the Air Force but retained technical jurisidiction. During the Korean War (especially 1951-52), Johnston Atoll resumed military importance as a midpoint for the transport of troops, critical cargo, medical evacuees, and priority passengers. Again, the airstrip was enlarged and new facilities were added to the base.[69]

In January 1957, the Coast Guard established a LORAN (Long Range Aid to Navigation) transmitter station on Johnston.[70] And in September 1957, the Department of Commerce received a five-year permit to operate a weather station on the atoll.[71]

Strategic utilization of Johnston Island occurred again in 1958 with Operation Hardtack, consisting of a series of atomic tests in the atmosphere. The first megaton devices were launched from Johnston Island and detonated in the stratosphere.[72] In 1962, the Atomic Energy Commission and Joint Task Force Eight assumed joint command of the atoll for additional high altitude nuclear tests. That year, three aborted test missile shots contaminated portions of the

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fleet made infrequent visits to the atoll from 1934 to 1939. In 1939, the Navy awarded a contract for the construction of a small naval base. A seaplane loading area was quickly dredged and limited base facilities were constructed on Sand Island. Executive Order No. 8682 (Feb. 14, 1941) designated the airspace and the water within the three-mile boundary as the Johnston Island Naval Airspace Reservation and the Johnston Island Naval Defense Sea Area, respectively. *Id.*

[67] Holmes & Narver, *supra* note 8, at 8-9; *see also* OCEAN DISPOSAL SITE EIS, *supra* note 5, at 13.

[68] Holmes & Narver, *supra* note 8, at 9-11. To keep abreast of the increased air traffic, the main runway was extended to 6,100 feet, and a new administration building and control tower were built. *Id.* at 11.

[69] *Id.* at 11-12. *See also* OCEAN DISPOSAL SITE EIS, *supra* note 5, at 13.

[70] Dep't of the Army, Office of the Chief of Engineers Real Estate, Dep't of the Air Force Permit to Other Fed. Gov't Agency to Use Property On Johnston Island, Permit HONEA-214 (Jan. 25, 1957), *reprinted in* Holmes & Narver, *supra* note 8, at 30-32.

[71] Dep't of the Army, Office of the Chief of Engineers Real Estate, Dep't of the Air Force Permit to Other Fed. Gov't Dep't Or Agency to Use Property On Johnston Island Air Force Base, No. HONDE-17 (Sept. 13, 1957), *reprinted in* Holmes & Narver, *supra* note 8, at 33-36.

[72] *Id.*, *See also* JACADS EIS, *supra* note 13, at 37-38.

atoll with plutonium debris.[73] Decontamination was performed following these incidents and on later occasions as new techniques became available.[74] The 1962 incidents, and the other environmental insults described below that Johnston has received in recent decades, may be relevant in evaluating the appropriateness of ocean mining operations that may also have environmental consequences.

In 1980, an extensive radiological survey revealed high levels of contamination in the missile launch emplacement on Johnston Island.[75] Some low level contamination was found on Johnston and Sand Island, but none on Akau or Hikina islands.[76] In 1982, a survey of the marine environment indicated relatively high plutonium concentrations in Johnston Atoll lagoon water samples and sediments. Plutonium concentrations in drinking water, derived from desalination of lagoon seawater, were found to be safe, apparently because the desalination process effectively removes the plutonium.[77]

During the Vietnam conflict, air traffic to Southeast Asia was supported by Johnston Atoll.[78] In 1973, the Department of Defense allowed the Civil Aeronautics Board to authorize commercial aircraft to make refueling stops at Johnston because of the increasing demand for commercial routes to the various Pacific islands.[79]

In 1970, the Japanese government requested the United States to remove all U.S. chemical munitions from Okinawa, and in Operation Red Hat (1971) these chemical agents were moved to Johnston Atoll.[80] Political pressure and public reaction led to federal legislation prohibiting the transfer of nerve gas, mustard gas, agent orange, and other chemical munitions to the fifty U.S. states.[81] Consequently, these chemical warfare agents remained on Johnston Island, stored in specially constructed bunkers. In 1977, one million gallons of the herbicide agent orange were incinerated aboard the Dutch vessel *Vulcanus* in an area fifty to sixty miles from normal shipping lanes in the open sea downwind of Johnston Atoll.[82] Mishandling of drums of agent orange on the island, however, resulted in ground contamination with dioxin in several areas of the atoll which are now off limits to all personnel. Since 1979, the contaminated

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[73] JACADS EIS, *supra* note 13, at 38.

[74] *Id.*

[75] EG & G Energy Measurements Group, A Radiological Survey of Johnston Atoll, Apr.-Aug. 1980 (Report No. DNA-8114, Nov. 1981), *reprinted in* JACADS EIS, *supra* note 13, § L.

[76] JACADS EIS, *supra* note 13, at 38, L-1. *See also supra* note 11.

[77] JACADS EIS, *supra* note 13, at 38, L-1.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] Foreign Military Sales Act Amendments, Pub. L. 91-672, § 13, 84 Stat. 2053, 2055 (1971).

[82] JACADS EIS, *supra* note 13, at 39.

areas have been monitored and the results suggest that degradation of dioxin continues.[83]

In May of 1976, the Departments of Defense and Interior entered into a Memorandum of Understanding in which the Defense Department was recognized as having "responsibility and jurisdiction over the Atoll and its human residents and vistors," with the Interior Department's Fish and Wildlife Service having "primary responsibility and jurisdiction for the protection and preservation of the Atoll's natural resources, fish and wildlife."[84] The two departments pledged to work together cooperatively. Since 1976, Defense Nuclear Agency facilities have been in a caretaker status, with base support functions provided by Holmes and Narver, a private contractor with the Energy Department, and military personnel.[85]

Recent activities at Johnston have focused on its role as a storage and disposal facility for chemical agents, and it can be expected that Johnston Atoll will continue to play an important U.S. defense role. A large part of the atoll's land area—forty-one acres—is now used to store 58,410 M-55 rockets containing the nerve agent GB, another 13,899 M-55 rockets containing the nerve agent VX, and substantial amounts of mustard gas. These outmoded munitions are among those scheduled to be processed in the forthcoming Johnston Atoll Chemical Agent Disposal System, and other agents may be brought from other locations to be disposed of at Johnston.[86]

This mission presents a continuing conflict with Johnston's status as a wildlife refuge; and in February 1986, the Fish and Wildlife Service identified Johnston Atoll as one of ten national wildlife refuges in the United States needing immediate cleanup.[87]

IV. The Legal Status of Johnston Atoll

As explained above, Johnston Atoll became part of the United States either through the claims made by Parker and Ryan under the Guano Islands Act of 1846, or through the annexation of Hawaii in 1898. Neither Hawaii nor the United States was pressing its claim very vigorously in the 1890s, and Great

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[83] *Id.* The November 1, 1983, JACADS Final Environmental Impact Statement stated on L-1 that the "ground in the former Herbicide Orange storage and operations areas is heavily contaminated with Herbicide Orange and dioxin to a depth of at least 12 inches." *Id.*

[84] *Id.* at app. I (citing Memorandum of Understanding between the Department of Defense and the Department of the Interior Relating to Johnston Atoll 2 (May 1976)).

[85] JACADS EIS, *supra* note 13, at 39.

[86] *See generally id.*; Lipman, *Hawaii's Nearest Neighbor*, HONOLULU 48 (June 1984).

[87] Associated Press, Wildlife Refuges Threatened (Feb. 4, 1986) (press release). The announcement by the Service focused on the nerve and mustard gases on Johnston as well as the dioxin and plutonium contamination.

Britain had been the latest nation to assert a claim with its landing in 1892 and declaration of annexation.[88] The Hawaiian monarchy's representative in London discussed the matter inconclusively with the British in early 1893 (shortly before Queen Liliuokalani's government was overthrown by Westerners in Honolulu) and the U.S. government made no representations whatsoever to the British about the Johnston claim.[89]

Although the law of territorial sovereignty is somewhat nebulous—especially for remote and uninhabited areas—mere discovery is usually not sufficient and actual occupation is required to confirm ownership.[90] In fact, the United States rotated young native-Hawaiian men (mostly between the ages of nineteen and twenty-six) onto the remote and uninhabited Pacific islands of Canton, Enderbury, Jarvis, Howland, and Baker for varying lengths of time in the 1930s to confirm U.S. sovereignty over these outposts against competing British claims.[91]

The means of acquiring territory through the Guano Islands Act has been ruled valid and constitutional by the U.S. Supreme Court.[92] Although the U.S. government accepted a bond from Parker in 1859 and acknowledged the validity of his claim,[93] the U.S. Attorney General subsequently ruled in 1872 that Johnston Atoll had been abandoned, in rejecting the claim for dower by Parker's widow.[94] The United States' Guano Islands Act claim is further weakened by the 1892 actions of Britain in negotiating with the Kingdom of Hawaii rather than the United States to use Johnston as a cable station, and by the 1898 statement by Commodore Melville that the British flag was flying over Johnston.[95]

Several semi-official U.S. historians reviewing Johnston's history have stated that, as of 1898, the claims of both Hawaii and the United States were alive

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[88] *See supra* notes 51-55 and accompanying text.

[89] *See* MOORE, *supra* note 34, at 575.

[90] *See generally* Van Dyke & Brooks, *Uninhabited Islands and the Ocean's Resources: The Clipperton Island Case*, in LAW OF THE SEA: STATE PRACTICE IN ZONES OF SPECIAL JURISDICTION, 13 L. SEA INST. PROC. 351 (T. Clingan ed. 1982).

[91] Telephone interview with Abraham Pi'ianai'a, Professor of Hawaiian Studies, University of Hawaii at Manoa, Honolulu (Apr. 25, 1988). Mr. Pi'iania'a was recruited to be a "Line Island colonist" one year after graduating from high school when he was 19 years old. Hawaiians and part-Hawaiians were selected because it was thought that they were better suited to withstand the loneliness of living on a remote Pacific island. *Id. See also* E. BRYAN, PANALAAU MEMOIRS (1974) (available in the Hawaiian Pacific Collection, Hamilton Library, University of Hawaii at Manoa, Honolulu).

[92] Jones v. United States, 137 U.S. 202 (1891).

[93] 9 Op Att'y Gen. 364 (1859).

[94] Votaw, *supra* note 27, at 1178.

[95] *See supra* notes 52-55 and accompanying text.

and that ownership of the island was in dispute at that time.[96] Johnston was not listed by the Hawaiian Commission in 1898 in the list of islands forming the Hawaiian Islands, but the Territory of Hawaii did issue leases, as described above, for Johnston in the first two decades of this century, and seemed to be exercising jurisdiction over the atoll.[97]

The 1898 annexation resolution contains language that refers to "the Hawaiian Islands and their dependencies," indicating that certain territories other than the Hawaiian Islands were ceded to the U.S. government.[98] The granting of leases by the Territorial government may have constituted a recognition that Johnston was a "dependency" of Hawaii.

After about 1920, however, the U.S. government increasingly asserted direct control over Johnston, and no further records can be found of jurisdiction being asserted through the Territory of Hawaii. The 1959 Admissions Act,[99] admitting Hawaii as a state, specifically provides that Johnston and its neighbor Sand Island are not part of the State of Hawaii. The language of the governing provision may be significant:

> The State of Hawaii shall consist of all the islands, together with their appurtenant reefs and territorial waters, included in the Territory of Hawaii on the date of enactment of this Act, except the atoll known as Palmyra Island, together with its appurtenant reefs and territorial waters, but said State shall not be deemed to include the Midway Islands, Johnston Island, Sand Island (off-shore from Johnston Island), or Kingman Reef, together with their appurtenant reefs and territorial waters.[100]

This phrasing appears designed to treat Johnston and Midway and Kingman Reef differently from Palmyra Island, and to indicate that Palmyra was "included in the Territory of Hawaii" as of 1959 while Johnston (and Midway and Kingman Reef) were not.

Additional historical research may shed more light on how precisely Johnston became part of the United States. This question ultimately may have to be resolved if the seabed resources around Johnston are exploited, because the native Hawaiians, through the Office of Hawaiian Affairs, could claim twenty percent of the proceeds if Johnston was included in the lands ceded to the

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[96] *See, e.g.*, Votaw, *supra* note 27, at 1179; Naval Intelligence Div., 2 *Pacific Islands: Eastern Pacific* 450 (unpublished-declassified 1943); R. King, Index to the Islands of the Territory of Hawaii 22 (1931) (unpublished manuscript prepared for the Naval Intelligence Div.).

[97] BRYAN, *supra* note 3, at 36.

[98] Res. No. 55, 55th Cong., 2d Sess., 30 Stat. 750 (1898) (Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States).

[99] Admissions Act of 1959, Pub. L. 86-3, 73 Stat. 4.

[100] *Id.* at § 2.

United States in 1898,[101] and the State of Hawaii may also have certain residual claims. It might be argued, of course, that even if these historical claims to Johnston are valid, they need not justify a claim to hard minerals from the sea floor far beyond the territorial sea. The claims cannot be altogether dismissed, however, because the State of Hawaii continues to assert rights to the waters between its islands,[102] and the Office of Hawaiian Affairs is currently engaged in litigation and negotiations to determine the full extent of ceded areas that form the corpus of its trust assets.[103]

However this dispute is ultimately resolved, it is clear that Johnston is now an unincorporated U.S. territory, subject to the U.S. Constitution and laws, as appropriate, but without any local laws or local government. No record after 1898 provides any indication of any foreign nation disputing U.S. sovereignty,[104] and at least implicit recognition of the U.S. claim can be found in the migratory bird treaties the United States has with other nations[105] and the agreements for military cooperation that involve the use of Johnston Atoll.[106] The United States has occupied and used the atoll continuously since 1939, and the acquiescence of other nations serves to confirm the U.S. claim to the atoll.

V. THE LEGAL STATUS OF JOHNSTON ATOLL'S EXCLUSIVE ECONOMIC ZONE

President Reagan's March 10, 1983, Exclusive Economic Zone Proclamation stated that the "Exclusive Economic Zone of the United States" included the waters extending 200 nautical miles from the "United States overseas territories and possessions."[107] The concept of the exclusive economic zone was legitimized by the international community in the 1982 Law of the Sea Convention which recognizes this zone and describes it in substantial detail.[108] Although the United States decided not to sign the 1982 Convention because of disagreement over the provisions on deep seabed mining,[109] U.S. officials have stated that they consider the rest of the Convention to correspond generally with cus-

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[101] HAW. REV. STAT. § 10-13.5 (1985).

[102] *See, e.g.*, letter from Christopher Cobb, Chair, Hawaii Bd. of Land and Natural Resources to Maui Divers of Hawaii, Ltd. (Feb. 4, 1977).

[103] *See* Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. ____, 737 P.2d 446 (1987).

[104] Except for the Japanese bombardment in 1941.

[105] *See, e.g.*, migratory bird treaties with Great Britain (1916), Mexico (1937), Japan (1974), and the Soviet Union (1976) as implemented by the Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-12 (1982).

[106] JACADS EIS, *supra* note 13, at 41, table 9.

[107] Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983).

[108] *See* CONSENSUS AND CONFRONTATION, *supra* note 2.

[109] *Id.* at 39.

tomary international law, and that the United States will act in accordance with the balance of interests codified therein.[110] Two recent opinions of the International Court of Justice contain language stating that the concept of the exclusive economic zone is now part of customary international law.[111] The United States has, therefore, a sound legal basis for declaring an exclusive economic zone around its land territories.

Article 121 of the Law of the Sea Convention specifically addresses the regime of islands.[112] This article states that islands are entitled to exclusive economic zones, except for those islands that are "[r]ocks which cannot sustain human habitation or economic life of their own . . . ."[113] Although not literally a "rock," Johnston might fit the definition offered in some dictionaries for this word of "a barren island."[114] Except for the few years following 1858 when guano was removed from it, Johnston was certainly in the category of being unable to sustain human habitation or an economic life of its own until 1939, when it began to be used for military purposes. The atoll has been inhabited continuously since then, however, and has an important military mission that is likely to continue into the indefinite future.[115] The only way to argue that Johnston should not be entitled to an EEZ would be to say that this military mission does not provide the atoll with an "economic life of [its] own," because it is based on the disposal of wastes generated in distant lands.

It is important to interpret Article 121(3) so that land formations that are truly uninhabited and uninhabitable do not generate EEZs, because such an interpretation will limit excessive coastal state claims and ensure that some ocean space is left for the common heritage of humankind. Johnston Island, however, has been used productively since 1939 and several hundred people have been living there in recent years. Indeed, its population is likely to expand during the coming years because of the proposal to build a chemical disposal facility on the atoll.[116] The claim for an EEZ around Johnston Atoll appears,

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[110] *Id.* at 45.

[111] Concerning the Continental Shelf (Tunisia v. Libya), 1982 I.C.J. 18, 74 (judgment) and 115 (separate opinion of Judge Jimenez Arechaga); Concerning the Boundary (United States v. Canada), 1984 I.C.J. 246, 294.

[112] 1982 Convention, *supra* note 1, art. 121.

[113] *Id.* art. 121(3). *See also* Van Dyke & Brooks, *Uninhabited Islands: Their Impact on the Ownership of the Ocean's Resources*, 12 OCEAN DEV. & INT'L L.J. 265, 266-68 (1983).

[114] *See generally* Van Dyke, Morgan & Gurish, *The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate EEZs?*, SAN DIEGO L. REV. (forthcoming 1988).

[115] *See supra* notes 66-87 and accompanying text.

[116] *See supra* note 86 and accompanying text. The food and supplies for Johnston are brought in from elsewhere, it is true, but if this argument were to prevail it would prove too much because many thriving communities are heavily dependent on imports and would have significant difficulties in supporting their populations without food and supplies from elsewhere. (The island

therefore, to meet the criteria of Article 121 of the 1982 Law of the Sea Convention, and the United States is unlikely to receive any challenge to its claim to exclusive access to the resources in this zone.

VI. Conclusion and Topics For Further Analysis

The legal status of Johnston Atoll has become relevant because of the minerals that are being explored on seamounts within 200 nautical miles of the atoll. As this legal history indicates,[117] it is difficult to say precisely how Johnston became part of the United States. Both Hawaii and the United States had claimed the atoll in earlier years but neither showed great interest in it during the 1890s. Great Britain had some interest in using Johnston as a cable station and was discussing the interest with representatives of the Kingdom of Hawaii in January 1893, just before the Kingdom was overthrown by Westerners in Hawaii who acted with U.S. support. Johnston was not specifically mentioned in any of the annexation documents prepared in 1898 when the United States formally annexed Hawaii, but the Territory of Hawaii began to assert jurisdiction over Johnston shortly thereafter. Since the 1920s, Johnston has been governed directly from Washington, D.C., usually through one of the military branches. If Johnston is seen as part of the public lands ceded by Hawaii to the federal government in 1898, then the State of Hawaii and the native Hawaiian community may have residual claims to the atoll and the resources in its surrounding waters.

A number of other significant legal issues also need to be resolved before marine mining could be undertaken in the waters surrounding Johnston Atoll. No regulatory regime is now in place to govern cobalt crust resources, and the new regulations that are developed must reflect the unique nature of these resources.

The existing federal legislation regulating ocean mining activities does not expressly cover the submerged lands adjacent to Johnston Atoll, or those adjacent to any other U.S. territory in the Pacific for that matter. A 1985 opinion of the Solicitor to the Interior Department implied in a footnote that the 1953 Outer Continental Shelf Lands Act (OCSLA)[118] regulates only areas of the con-

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of Oahu in Hawaii is one of the many examples that could be suggested.)

One other argument that could be raised against Johnston's ability to generate an EEZ would be that it is essentially an "artificial island" because its land area has been increased so dramatically by dredge and fill operations from 46 to 625 acres. *See supra* note 11. Under the Law of the Sea Convention, *supra* note 1, art. 60(8), artificial islands do not have the capacity to generate maritime zones.

[117] *See supra* notes 88-106 and accompanying text.

[118] 43 U.S.C. §§ 1301-56 (1982).

tinental shelf adjacent to the fifty states.[119] The statutory definition of "outer continental shelf" is based on "jurisdiction and control" over submerged lands by the United States, but the governing statute refers directly to waters off the coasts of *states* in the United States.[120] Accordingly, the OCSLA does not literally apply to Johnston Atoll.

It could be argued, however, that Congress adopted an expanding definition of the outer continental shelf (OCS) when it used the terms "jurisdiction and control." Under this interpretation, federal jurisdiction over the EEZ of U.S. territories is sufficient to bring these submerged lands within the regulatory scheme of the OCSLA. If the more expansive interpretation is adopted, some executive order would nonetheless have to be issued to clarify the legal status of the Johnston Atoll EEZ before mining leases could be issued.

If the President declares such ocean areas open for mining by an executive order without any new legislative authority, the leasing procedures would have to conform to the OCSLA regulatory scheme. The OCSLA framework may not be the best mechanism for governing ocean mining, because these procedures were developed primarily to govern oil and gas leasing, which present different economic and practical problems. Congress may wish, therefore, to enact new legislation to regulate ocean mining of hard minerals. Whichever approach is ultimately adopted, the mining will have to comply with the many federal laws and regulations that are designed to protect the environment and marine wild life.

Even though the OCSLA procedures for oil and gas leasing are not suitable for the economic and technological problems presented by marine mining, other provisions of the OCSLA do address important concerns. For example, if mining activities directly affect the State of Hawaii, the cooperation between the state and federal government is mandated under the OCSLA and the Coastal Zone Management Act.[121] The environmental provisions of the OCSLA are appropriate as well to address the need to safeguard Johnston Atoll's wildlife refuge. The potential adverse effects on the marine environment and the nearby State of Hawaii must be carefully considered whether ocean mining proceeds under the OCSLA or some other regulatory scheme.

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[119] Dep't of Interior Authority to Lease Polymetallic Sulfides in the Gorda Ridge Area, No. MMS.ER.0057 Op. Sol. 3 n.10 (May 30, 1985).

[120] 43 U.S.C. § 1331(a) (1982).

[121] Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464 (1982).