REVISITING GRASSROOTS BIODIVERSITY CONSERVATION IN PACIFIC ISLAND COUNTRIES

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INTRODUCTION

This essay revisits and reinforces an argument this author first presented in 2006: sustainably managing the Pacific Island region's terrestrial and inshore biological resources requires approaches in law and governance that are responsive to the unique cultural, social, economic and ecological circumstances in each country and locality. [1]

It is nearly impossible to overemphasize the significance to Pacific islanders of maintaining healthy island ecosystems. In the simplest terms, island environments sustain the life of island people; the health and vitality of the former translates directly to that of the latter. In rural populations between 50 and 90 percent of animal protein comes from fish, the great majority of which are harvested from local inshore marine environments, which also provide either primary or secondary income for up to half of all households.[2]

Terrestrial environments also deliver a range of ecosystem goods and services; intact catchment forests, for example, help to maintain water quality, stabilize soils and ensure their fertility, mitigate droughts and floods, assist the cycling and movement of nutrients and help stabilize local climates.[3] Ecosystem goods from forests include game species, timber, fuel, fiber and medicine. Pacific island ecosystems are also significant in global terms, with terrestrial endemism among the highest in the world.[4] On the

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1 Justin Rose 'Community-Based Biodiversity Conservation in the Pacific: Cautionary Lessons in "Regionalising" Environmental Governance' in Michael Jeffery et al (ed), *Biodiversity Conservation, Law + Livelihoods: Bridging the North-South Divide* (2006). See also Shankar Aswani, Simon Albert and Mark Love 'One size does not fit all: Critical insights for effective community-based resource management in Melanesia' (2017) *Marine Policy* 381-391.

2 Secretariat of the Pacific Community, *A New Song for Coastal Fisheries – Pathways to Change: The Noumea Strategy* (2015) 1; Johann Bell et al 'Optimising the use of nearshore fish aggregating devices for food security in the Pacific Islands' (2015) 56 *Marine Policy* 98–105, see table at 99.

3 See generally Gretchen Daily et al, 'Ecosystem Services: Benefits Supplied to Human Societies by Natural Ecosystems' (1997) 2 *Issues in Ecology*, 2. For island-specific discussions see Mario Balzan, Marion Potschin-Young & Roy Haines-Young, 'Island ecosystem services: insights from a literature review on case-study island ecosystem services and future prospects' (2018) 14 *International Journal of Biodiversity Science, Ecosystem Services & Management* 71-90; Takuro Furusawa et al 'Interaction between forest biodiversity and people's use of forest resources in Roviana, Solomon Islands: implications for biocultural conservation under socioeconomic changes' (2014) 10 *Journal of Ethnobiology and Ethnomedicine*, 10. Pohnpei Watershed Project Team, *Pohnpei's Watershed Management Strategy 1996-2000: Building a Sustainable and Prosperous Future* (1996) 1.

4 Rashid Hassan, Robert Scholes, Neville Ash (eds) *Millennium Ecosystem Assessment. Ecosystems and human well-being: current state and trends* (2005) 667.

Micronesian island of Pohnpei for example, of the 767 plant species recorded 111 are found only there.[5]

Major threatening processes driving biodiversity decline in the region include habitat loss and degradation, invasive species, climate change, overexploitation, pollution and implementation capacity.[6] In terms of legal and policy responses to these threats, those relating to climate change and pollution responses are not dealt with herein. Preventing the introduction of invasive species requires effective biosecurity systems, consideration of which is also beyond the present scope.

The present focus is on law and governance arrangements aiming to conserve ecosystems and habitat, and prevent overexploitation of biodiversity. As described in section two below, this field involves not only international, national and subnational law, but also customary or traditional laws. The cases examined go beyond those implemented solely by government and include various types of 'co-management' or 'community-based' approaches, combining different forms of law.

The notion that local polities (who variously describe themselves as landowners, communities, villagers, etc) rather than governments, should in most instances be the primary stewards and custodians of Pacific ecosystems has now been well accepted for more than 30 years.[7] But success in this form ecosystem governance requires innovative legal arrangements, with many experiments in law having been attempted since PNG enacted the *Fauna (Protection and Control) Act* in 1966. This law, still actively implemented, enables the creation of 'Wildlife Management Areas' as a cooperatively with landowners and local governments.[8] Since that time, stakeholders in many Pacific jurisdictions have sought to address these issues via law reform, with varying degrees of success. Others are still grappling with them.

Section two provides the necessary social and historical context to ecosystem governance in the region; section three describes a selection of case studies from Samoa, Palau, the Federated States of Micronesia, and Fiji; section four discusses themes and lessons arising from the cases; and section five concludes.

HISTORICAL TRANSFORMATIONS AND PACIFIC-SPECIFIC APPROACHES TO ECOSYSTEM GOVERNANCE

Many areas of Pacific Island law, and, indeed, many areas of Pacific environmental law, are of recent origin and are entirely products of modern forms of government.

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5 The Nature Conservancy, 'The Federated States of Micronesia: Jewel of Pacific Biodiversity' in Federated States of Micronesia *Proceedings of the Second FSM Economic Summit* (2000) 166.

6 Richard Kingsford et al, 'Major Conservation Policy Issues for Biodiversity in Oceania' (2009) *Conservation Biology* 23, 4, 834–840,

7 Secretariat of the Pacific Community above n2, 8. Stacy Jupiter et al, 'Locally-managed marine areas: multiple objectives and diverse strategies' (2014) 20 *Pacific Conservation Biology* 165-179, 165. Pacific Island Roundtable on Nature Conservation *Framework for Nature Conservation and Protected Areas in the Pacific Islands Region* (PIRT, SPREP, 2013).

8 *Fauna (Protection and Control) Act 1966* (Papua New Guinea), see especially Part VI.

Others, including those relating to managing ecosystems and conserving biodiversity, have much older histories. For example, it is well-established, if rarely acknowledged, that pre-colonial Pacific islanders practiced virtually all modern inshore fisheries management techniques.[9]

There is a well-researched historical trajectory of legal development in the field of Pacific Island biodiversity conservation and management. For centuries, prior to European colonisation, Pacific islanders applied rules of customary resource management founded in systems of communal tenure and understandings of the natural environment combining spirituality with individual and group identity. As Govan describes it:

> The relationship between people and their land and sea may define among other things the duty of care that people have to each other, the future generations as well as the environment. Such is the case of the *vanua,* in Fiji and similar concepts are to be found in most of the traditional Pacific societies such as *fenua* (Tuvalu), *enua* (Cook Islands), and the *puava* (Marovo, Solomon Islands). These cultural beliefs affect resource allocations and the potential for responsible environmental stewardship. [10]

The advent of centralised government and command-and-control regulatory mechanisms during the colonial period in many places undermined customary natural resource management. [11] This was experienced differently on different islands, depending upon factors such as idiosyncratic influences of early Missionaries, the degree of depopulation due to disease and the degree of effective control exercised by colonial administrations over a particular island or locality. Historical dietary shifts and colonial-era evaluations of 'good' and 'bad' foods are illustrative of the ways in which colonization disrupted the direct connection and interdependence between people and environments in the region.[12]

Following independence, a renaissance of locally-based natural resource management took place, sometimes in collaboration or with the support of government agencies or non-governmental organisations (NGOs). [13] Reasons underpinning this shift are broadly consistent with other regions of the world where rural populations are collaboratively engaged in conservation and natural resource governance, and may be

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9 Robert Johannes, 'Traditional Marine Conservation Methods in Oceania and their Demise' 9 *Annual Review of Ecology and Systematics* (1978) 349-364.

10 Hugh Govan et al, *Status and potential of locally-managed marine areas in the South Pacific: meeting nature conservation and sustainable livelihood targets through wide-spread implementation of LMMAs* (2009) 23-26.

11 Hugh Govan above n 15. This phenomena is widespread in the developing world: T Dietz et al, 'Introduction: The Drama of the Commons' in Elinor Ostrom et al (eds), *The Drama of the Commons* (2002) 11.

12 Nancy Pollock 'Diversification of Foods and their Values: Pacific Foodscapes' in Elisabetta Gnecchi-Ruscone and Anna Paini *Tides of Innovation in Oceania: Value, materiality and place* (2017) 273-276.

13 Robert Johannes, 'The Renaissance of Community-Based Marine Resource Management in Oceania' (2002) 33 *Annual Review of Ecological Systems* 317-40.

grouped into two broad categories.[14] First, the responsible government agencies often have limited technical and other capacity to coercively regulate citizens' everyday resource use. While governments in the Pacific generally hold formal power to exercise jurisdiction over natural resource use their *effective* control over such use 'ranges from deficient in the more developed countries in the east to practically negligible in western Melanesia'[15]. Second, the economic, geographic, cultural, and historical context is of widespread reliance upon subsistence livelihoods, highly-valued and contested communal land tenure arrangements, and continued recognition and respect of customary authority and institutions. In the Pacific as elsewhere, the presence of these combined factors indicates that participatory and collaborative conservation and natural resource governance approaches are likely to be more successful than centralized regulation by government alone.[16]

Governments in the region were among the first to experiment with cooperative conservation approaches. For example, in 1966 Papua New Guinea enacted the *Fauna (Protection and Control) Act* including provisions allowing the establishment of Wildlife Management Areas upon the request and with the involvement of customary landowners. Since that time, many Pacific Island Country (PIC) environmental stakeholders have embraced policies and programmes aiming to achieve sustainable natural resource governance objectives through 'community-based' or 'bottom-up' and 'participatory' approaches.[17]

Local-level management of Pacific Island biodiversity is not a panacea, and will not be appropriate for every situation. The question then arises, how can a student of Pacific Island law, or a government officer, assess optimal governance approaches to particular biodiversity conservation or ecosystem management issues?

Section 4 below discusses six findings considered central to understanding the challenges associated with the legal aspects of community-based or collaborative natural resource governance in PICs:

1. Recognizing and accepting legal plurality.
2. Re-assessing the necessity for state legal intervention.
3. Recognizing the limits of legal intervention.
4. Understanding the reliance on mediating institutions.
5. Understanding the role of law in providing flexibility for local stakeholders.

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14 Justin Rose above n 1, 196-202.

15 Hugh Govan above n1 5 19.

16 This is a core theme and well-established foundational finding of many studies in the multi-disciplinary field of common property studies, e.g. Jean-Marie Baland & Jean-Philippe Platteau, *Halting Degradation of Natural Resources: Is There a Role for Local Communities?* (1996), 284-345. Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (1990); Adcharaporn Pagdee, Yeon-su Kim and PJ Daugherty "What Makes Community Forest Management Successful: A Meta-Study From Community Forests Throughout the World" (2006) 19 *Society and Natural Resources* 33-52.

17 *Fauna (Protection and Control) Act 1966* (Papua New Guinea). For discussions of terminology see: Justin Rose above n 1 196-198, Secretariat of the Pacific Community above n 2 at 2.

6. Understanding the role of law in providing security for local stakeholders.

This follows the four case studies (Samoa, Palau, Pohnpei and Fiji) presented in section three.

CASE STUDIES OF LOCAL-LEVEL MARINE AND TERRESTRIAL PROTECTED AREAS

Inshore marine protected areas are the most numerous and significant category of protected area in the Pacific Island region.[18] Inshore marine resources are both central to the subsistence and economic livelihoods of many Pacific peoples, as well as typically being (*de jure* or *de facto*) common property resources subject to group management.[19] Accordingly, the overwhelming majority of protected areas in this category are established using 'community-based' or 'co-management' approaches. There are now more than 500 of these throughout the region.[20] With land being so scarce in many localities, terrestrial protected areas are considerably less numerous.

As Govan suggests, if the region is to meet the food security, biodiversity conservation and climate change adaptation challenges it faces, many of these protected areas need to achieve their goals. The importance of this cannot be overstated: 'increased pressure on natural resources leading to erosion of biodiversity and livelihood opportunities [will cause] conflict and law and order problems.'[21] This is particularly true for Melanesia, where there is an absence of alternatives, and the gap between projected food requirements and the capacity of inshore marine and coastal environments to provide food 'seems likely to spark a crisis of considerable proportions' at least 'without significant improvements in [resource] management and productivity.'[22]

Specific examples addressed in this section include Samoa's inshore fisheries program, the Palau Protected Area Network, Pohnpeian watershed and marine protection, and the Fiji Locally Managed Marine Area Network (FLMMA).

Samoa

Samoa's program of local level inshore fisheries governance has been undertaken as a close collaboration between local communities and fisheries extension officers of the Ministry of Agriculture, Forests and Fisheries (MAFF) since its inception in 1995.[23] In

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18 Stacy Jupiter above n 8, Hugh Govan et al above n 10.

19 Edvard Hviding E 'Contextual flexibility: present status and future of customary marine tenure in Solomon Islands' (1998) *Ocean & Coastal Management* 40 (2-3): 253-269, 254-256.

20 Hugh Govan et al above n 10.

21 Hugh Govan et al above n 10, 21.

22 Hugh Govan et al above n 10, 5.

23 Ueta Fa'asili and Iuliaa Kelekolo, *The Use of Village By-laws in Marine Conservation and Fisheries Management* (1999) 11 *Traditional Marine Resource Management and Knowledge* 7-10. Michael King and Ueta Fa'asili, 'A Network of Small, Community-Owned Village Fish Reserves in Samoa' (1999) 11 *Traditional Marine Resource Management and Knowledge* 2-6. Ueta Fa'asili and Autalavou Taua, *Review of the Village Fisheries Management Plans of the Extension Programme in*

Samoa, as in much of the region, the subsistence inshore fishery provides the main source of protein for Samoans.[24] While Samoa has an active commercial fishing industry, the annual subsistence catch exceeds the commercial catch.[25] From the 1980s, it became evident that over harvesting and destructive practices were threatening to severely reduce the supply of ecosystem goods from Samoa's inshore fishery.[26]

In common with much of the region, marine tenure in Samoa was radically altered during the colonial period, with the newly independent state largely retaining the *de jure* arrangements inherited from colonial administrators. Whereas in the pre-colonial period access to inshore marine areas was controlled by people living adjacent to those areas, Article 104 of the Samoan Constitution provides that land below the mean high water mark is public land. The practical effect of this provision can at times be one of conflict and uncertainty because the law fails to reflect common practice wherein 'villages have de facto control of adjacent fishing areas'.[27] Most people using coastal and inshore marine resources in Samoa respect the traditional claims of local residents to their marine areas and where this is not the case, extra-legal enforcement measures are sometimes imposed by community residents.[28] Prior to the reforms discussed below, problems were often encountered in enforcing rules against people from outside the affected *fono*.[29]

The challenge of inshore marine degradation in Samoa was not one of the customary owners acting sustainably yet being unable to control 'outsiders' who had no respect for the resource. Instead, there was widespread over-harvesting of marine resources by both customary owners *and* outsiders.[30] Resolving legal uncertainty and conflict was important, but the core challenge was gaining stakeholder support and engagement for ongoing sustainable ecosystem management. This was done through an active fishery extension program undertaken by the (then) Ministry of Agriculture, Fisheries and Forestry initially as a donor funded project, but today continuing as a core element of the work of the Ministry of Agriculture and Fisheries (MAF).[31]

Samoa Field Report No. 7, 2001, Michael King, Kelvin Passfield, Etuati Ropeti *Management of village fisheries; Samoa's community-based management strategy* (2001), Graeme Macfadyen, Philippe Cacaud and Blaise Kuemlangan *An overview of legal issues and broad legislative considerations for community-based fisheries management* (2005) 21-24. Blaise Kuemlangan *Creating Legal Space for Community-Based Fisheries and Customary Marine Tenure in the Pacific: issues and opportunities* (2004).

24 Ueta Fa'asili and Autalavou Taua above n 22.

25 Food and Agriculture Organisation of the United Nations, *National Fishery Sector Overview – Samoa* (2009) 2.

26 Ueta Fa'asili and Iuliaa Kelekolo above n 22.

27 Michael King and Ueta Fa'asili 'Village Fisheries Management and Community-owned Marine Protected Areas in Samoa' (2001) *Naga The ICLARM Quarterly* 34-38, 36. Cf Erika Techera 'Samoa: Law, Custom and Conservation' (2006) 10 *New Zealand Journal of Environmental Law* 361, 374: 'the Fono remains powerless to control residents of other villages and outsiders.'

28 Ueta Fa'asili and Autalavou Taua above n 22, 19.

29 Ueta Fa'asili and Iuliaa Kelekolo above n 22.

30 Michael King, Ueta Fa'asili and Antonio Mulipola *Community-based management of subsistence fisheries in Samoa* (Government of Samoa, 2001), 1. Cf Erika Techera above n 26.

31 Samoa Ministry of Agriculture and Fisheries, *Ministry of Agriculture and Fisheries Annual Report 2013-2014*, (2016) 24.

The program aims to establish and maintain community-centered 'co-management' of the nation's inshore fishery. The initial catalyst for the program were the actions of specific *fono* – those particularly concerned about degradation of their marine resources - in enacting village-level rules regarding fishing within their local marine space and proactively advertising these rules to neighboring villages and the public.[32] This self-mobilisation by Samoa's local polities inspired governmental staff to commence a co-management fisheries program carefully designed in accordance with the prevailing social, cultural and economic context.

The initiative was based upon four principles: 'a) maximum community participation; b) motivation rather than education; c) a demand-based extension system; and d) the development of alternative sources of seafood.'[33] In each locality, problems were identified, solutions discussed and agreed upon, and management plans produced by local-level committees with the assistance of the government.

Those involved in the program emphasized the fundamental need to ensure that the local polities felt a sense of ownership over the management plans and any associated rules. As Fa'asili and Kelekolo write:

> Regardless of legislation or enforcement, the responsible management of marine resources will only be achieved when fishing communities themselves see it as their responsibility.[34]

The institutional and legal framework supporting Samoan local level fisheries governance was not modeled on a foreign example, but, instead, it developed over time in response to needs identified by stakeholders. Until amendments in 2002, the (then) *Fisheries Act 1988* (Samoa) did not mention village fono or empower them to make by-laws. This highlights an important issue: in situations of genuine trust and cooperation, government agencies and local polities can often flexibly apply existing laws to support local level environmental governance even where those provisions were not designed for that purpose.

The original source of the village fono's power to make rules is of course Samoan custom. Limited recognition of that authority is provided in the *Village Fono Act 1990*. Section 3 (2)–(4) provides:

> (2) Every Village Fono in the exercise of any power or authority shall exercise the same in accordance with the custom and usage of that village.
>
> (3) The past and future exercise of power and authority by every Village Fono with respect to the affairs of its village in accordance with the custom and usage of that village is hereby validated and empowered.

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32 Ueta Fa'asili and Iuliaa Kelekolo above n 22, 7.

33 Michael King, Ueta Fa'asili and Antonio Mulipola above n 29, 2.

34 Ueta Fa'asili and Iuliaa Kelekolo above n 22, 10.

(4) In addition to the power and authority granted under this Act, every Village Fono shall have other powers, authorities and functions as may be provided in any other Act.

Controlling inshore marine resources falls within matters of custom, thus, fono are empowered to make rules regarding inshore fisheries. Importantly, however, section 9 of the *Village Fono Act 1990* limits the exercise of this power to people residing in the village concerned. After passage of the Act, fono were empowered to make and enforce rules on inshore fisheries, enforceable against village residents, but not otherwise. The mere availability of this power, however, did not ensure sustainable use of inshore fishery resources. Until the extension program commenced, only a few villages made and enforced rules relating to fisheries.

Following the commencement of the extension program, many villages developed fisheries management plans and the associated rules.[35] Importantly, some of those villages saw the need for a robust legal mechanism whereby those rules could be enforced against non-residents. To that end, innovative departmental officers recognised that village rules could be made generally enforceable if drafted in a manner consistent with national legislation, and adopted by government decision-makers under the Fisheries Act. As Kuemlangan recounts:

> the ingenious use of this provision, in connection with the *Village Fono Act* and the underlying relevance of indigenous socio-political and decision-making institutions has allowed community-based fisheries co-management to become well established in Samoa.[36]

Moreover, fono deal with infractions by individuals from the village by using local by-laws, whereas breaches by outsiders are handled through the formal court system.[37]

Amendments to the Fisheries Act in 2002 provide additional clarity: 'Village Fono may impose a penalty on every person who commits a breach of any by-law made under this [Act]'. The same amendment increased the penalties that fono were able to impose, but did not empower fono to enforce by-laws against non-residents.[38] Subsequent amendments resulting in passage of the (current) Fisheries Management Act 2016 further enhanced and clarified the legislative basis of the program; the new law includes 'Part 8 – Village Fisheries By-Laws.'[39]

The Samoan inshore fisheries extension program commenced more than 20 years ago and has become an integral part of the work of MAF's Fisheries Division. In 2014 there were 99 villages that had developed and approved local-level fisheries management plans. The majority of these include reserves wherein all fishing is prohibited.[40] As a result of the combined efforts of local stakeholders and government officers, the

35 Ueta Fa'asili and Iuliaa Kelekolo above n 22.
36 Blaise Kuemlangan above n 22, 22.
37 Blaise Kuemlangan above n 22, 25.
38 *Fisheries Act* (Samoa) section 3(6) and (8).
39 *Fisheries Management Act 2016* (Samoa) sections 86-89.
40 Samoa Ministry of Agriculture and Fisheries above n 30, 24.

initiative is regarded as highly successful. Samoa's local level inshore fisheries governance experience offers lessons, if not models, for other jurisdictions in the region.

Palau Protected Areas Network

For some decades, Palau has been seen as a leader in marine conservation among the island countries of the Micronesian sub-region. More recently, Palau's achievements are being recognized on the global stage.[41] As outstanding an achievement as the Palau National Marine Sanctuary undoubtedly is, the present case study reminds readers that this long journey recognizably commenced at village-level in the 1980s, although its roots reach into antiquity.

In pre-colonial Palau, customary marine tenure was vested in traditional leaders and kin groups. Under Japanese and United States administrations, these communal management arrangements deteriorated, ultimately leading to *de facto* open access to fisheries and subsequent resource decline.[42] Palau has a population of around 21,000 people divided into 16 states.[43] Accordingly, the state governments operate at a level not far removed from community-level institutions.

The Constitution of Palau is in most respects closely modeled upon that of the United States including provisions establishing "Fundamental Rights" in Article IV. Article V, titled "Traditional Rights", is uniquely Palauan and provides protections for traditional authority. Possible conflict between these legal forms is addressed in section 2 of Article V: "Statutes and traditional law shall be equally authoritative. In case of conflict between a statute and a traditional law, the statute shall prevail only to the extent it is not in conflict with the underlying principles of the traditional law." [44] Conflict between Constitutional rights guaranteeing individual freedoms provided by centralized governments, and traditional laws which are 'unwritten and based on titled elitism and highly decentralized decision-making' - is not uncommon in the region.[45] As Gruby and Basturto write:

> Inconsistencies between dual democratic-egalitarian and customary systems are many, and underwrite ongoing power struggles among Palau's traditional and elected leaders and also between state and national governments, given the role of traditional leaders in state governments. These struggles extend to

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41 Pew Trusts 'Palau National Marine Sanctuary Goes Into Effect' https://www.pewtrusts.org/en/research-and-analysis/articles/2020/01/01/palau-national-marine-sanctuary-goes-into-effect (accessed 14/6/2021).

42 Tom Graham and Noah Idechong 'Reconciling customary and constitutional law: managing marine resources in Palau, Micronesia' (1998) 40 *Ocean and Coastal Management* 143-164, 144-146, Rebecca Gruby and Xavier Basurto 'Multi-level governance for large marine commons: Politics and polycentricity in Palau's protected area network' (2013) 33 *Environmental Science and Policy* 260-272, 264.

43 Palau Ministry of Finance *2015 Census of Population, Housing and Agriculture* (Government of Palau, Koror, 2015) 10.

44 *Constitution of Palau*, Article V, section 2.

45 Tom Graham and Noah Idechong above n 41, Rebecca Gruby and Xavier Basurto above n 41.

marine resources.[46]

Unfortunately, the Constitution of Palau adopted upon independence did not provide full clarity regarding the rights and responsibilities of the national and sub-national levels of government. Article I (section 2) grants each state the right to 'exclusive ownership of all living and non-living resources, except highly migratory fish, from the land to twelve nautical miles seaward from the traditional baselines; provided, however, that traditional fishing rights and practices shall not be impaired.'.[47] Yet, Article IX, section 5(12) grants the National Congress (Olbiil Era Kelulau) power to 'regulate the ownership, exploration and exploitation of natural resources'. This uncertainty led to conflict between traditional leaders, state governments, and the national government during the 1990s, with courts ultimately upholding the powers of the state governments to legislate for marine resource management.[48]

Commencing in the 1980s, state governments and traditional leaders in Palau began addressing the decline of inshore marine environments by imposing both *buls* (traditional moratoria on resource use in a specified place for a specified time) and legislated marine protected areas (MPAs).[49] By the 2000s, virtually every state in Palau had done this, initially with assistance from United States-based NGO the Nature Conservancy, and later the Palau Conservation Society. [50]

In 2003, the Government of Palau decided to support the conservation efforts of the state governments by enacting the *Protected Areas Network Act* (PAN Act) The following excerpt from the 'legislative findings' included in the law explain it well:

> The Olbiil Era Kelulau (Palau National Legislature) finds that Palau is in critical need of a nationwide system to support the states' efforts in protecting these natural resources. . . . This legislation, the Protected Areas Network Act, will encourage and support the states in the designation of new protected areas. Until now states have designated protected areas but there has been no system by which the national government recognized these areas or assisted the states . . . . A nationwide approach is necessary to ensure that examples of the full range of biodiversity are preserved in protected areas across Palau. . . The national system will also facilitate cooperation among the states where areas of high biodiversity and unique habitats cross state boundaries.[51]

Subchapter 1 creates the Protected Areas Network (PAN), defining key terms and requiring the development of protected area categories and management plans for the

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46 Rebecca Gruby and Xavier Basurto above n 41, 264.

47 *Constitution of Palau*, Article I, Section 2.

48 Tom Graham and Noah Idechong above n 41, 147-153, Rebecca Gruby and Xavier Basurto above n 41, 264.

49 Rebecca Gruby and Xavier Basurto above n 41, 264-266.

50 Rebecca Gruby and Xavier Basurto above n 41, 266-268.

51 The text of the legislative findings from the sixth Olbiil Era Kelaulau (tenth Special Session) May 2002 can be retrieved online: http://palau.chm-cbd.net/micronesia-challenge/protected-areas-network-legislation/download/en/1/protected-areas-network-legislation.pdf (accessed 14 June, 2021). The law supporting Palau's Protected Area Network is incorporated in the Palau National Code as Chapter 34 of Title 24, originally enacted as RPPL 6-39 in 2003, and amended by RPPL 7-32 in 2007.

whole system and for each site. Much of the detail is left to the PAN Regulations, promulgated in April 2007. The PAN Act clarifies the powers and duties of the national and state governments in relation to the PAN. States are not compelled by the law into adding their sites to the network, but may voluntarily apply to have their site or sites accepted into the PAN, with the incentive being a share of funding and other forms of assistance from the Government of Palau.

The PAN Act further requires the establishment of a PAN Management Committee and a PAN Technical Committee, and the Regulations add a PAN Steering Committee. The Management Committee includes representatives of the relevant Ministers, representatives from each state hosting a PAN site, one representative each from the Council of Traditional Chiefs, the Governors' Association and the Public Lands Authority, as well as two citizens. For complex reasons relating to the states' initial reluctance to accept the PAN, these committees took some years to come into being, but are all now operating as prescribed in the law.[52] The PAN now represents a substantial network of marine and terrestrial protected areas

> [By] 2015, there were 46 discrete marine and terrestrial protected areas, 34 of which were PAN sites. This included 1,331 km2 of nearshore marine habitat (46% of Palau's total), 22 km2 of mangrove (approximately 46% of Palau's total), and 90 km2 of terrestrial habitat (approximately 22% of Palau's total).[53]

An important element of the PAN is Palau's ability to rely upon its burgeoning tourist industry to ensure their conservation efforts receive adequate levels of funding.

Many years of conservation effort by Palau's local resource owners, at first in conflict with the national government, and, then cooperatively, prepared the political and legal ground for President Remengesau to ultimately champion globally-significant conservation initiatives such as the Micronesia Challenge and the Palau National Marine Sanctuary.[54] Other Micronesian jurisdictions including Pohnpei, Kosrae, Chuuk and the Marshall Islands have established their own networks of protected areas and enacted their own protected area network laws. These jurisdictions drew inspiration and practical lessons from Palau, but readers should note that *each law was negotiated and carefully designed in accordance with local legal, social and ecological circumstances*.[55]

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52 Rebecca Gruby and Xavier Basurto above n 41, 266-270.

53 Palau Ministry of Natural Resources Environment and Tourism *Protected Areas Network Status Report 2003-2015* (2015) 11.

54 Pew Trusts 'Palau National Marine Sanctuary Building Palau's Future and Honoring its Past' https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2015/09/palau-national-marine-sanctuary (accessed 14/6/2021).

55 Kosrae State Code Title 19, Chapter 8, known as the *Protected Area Act (2010)*, Chuuk State Law 14-17-05 *Chuuk Protected Areas Network Act (2017)*, Republic of the Marshall Islands Code Title 35, Chapter 5, Protected Areas Network.

Pohnpei Watershed Forest Management

Land is scarce and highly-valued in all Pacific Island countries, and the great majority of it is held either privately or under customary group tenure, not by government.[56] These elements combine to complicate the challenges of terrestrial ecosystem management and establishing protected areas covering terrestrial resources. For more than 20 years, this author has researched the transition of governance, from conflict and degradation to cooperation and conservation, of the watershed forests of Pohnpei.[57] This transition was accompanied by a series of legal reforms following a familiar historical arc that commenced centuries ago. The transition could be described in five stages: (1) effective traditional management; (2) de facto open access to resource use; (3) ineffective command and control approaches imposed by colonial governments; (4) trials in co-management; and (5) effective collaborative multi-stakeholder management.

Pohnpei is the most populous of the four states of the Federated States of Micronesia (FSM). Its main island has a population of around 30,000 people, located in five municipalities whose boundaries mirror those of the *wehi* (traditional kingdoms). From the mid-1970s to 2002, around 66 per cent of Pohnpei's watershed forest was degraded, causing severe downstream impacts: erosion, sedimentation of mangroves and reefs, contamination of water supplies, loss of habitat for endemic species and threats to biodiversity.[58] The primary cause of forest disturbance and clearing was the increase in sakau (kava) production.[59] From the 1960s sakau consumption expanded beyond ceremonial uses and is now a popular recreational substance.[60]

Pohnpei's five wehi are divided into 200 *kousapw* (villages). Customary authority resides with the island's traditional titleholders, whose responsibilities are allocated and organized within complex hierarchical systems that operate in each kousapw and wehi. While the *nahmwarki* (paramount chief) is the symbolic owner of all land within a wehi, the kousapw is the centre of social organisation and culture.[61] Traditional titles, while earmarked for men of particular matrilineages, are earned through community service, displays of traditional skills, and accumulation of traditional knowledge.[62] Titleholders are notionally accountable to their constituents and titles can be removed if the holders

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56 Gerard Ward, 'Land Tenure', in Donald Denoon et al (eds) *The Cambridge History of Pacific Islanders* (1997).

57 Justin Rose, *The Village and the Leviathan: Law, Environmental Governance and the Local Polity in the Federated States of Micronesia* PhD Thesis, Macquarie University (2007) 201-238.

58 Pohnpei Watershed Project Team, *Pohnpei's Watershed Management Strategy 1996-2000: Building a Sustainable and Prosperous Future* (1996) 3. For 2002 figures see Newsome and Page, *Vegetation State and Change, 1975-2002 Pohnpei, Federated States of Micronesia* (2003).

59 Justin Rose above 56, 212-213.

60 Christopher Dahl and William Raynor, 'Watershed Planning and Management: Pohnpei, Federated States of Micronesia' (1996) 37 *Asia Pacific Viewpoint* 235, 241-243. William Raynor, *The Pohnpei Community Natural Resource Management Program* (A Case Study Report for the World Bank Community-Based Natural Resource Management Initiative) 2.

61 Christopher Dahl and William Raynor above n 59, 239.

62 Glenn Petersen, 'Not without the Past, But Not about the Past: Some Pohnpeian Analyses of Pohnpeian Custom (Tiahk en Pohnpei' (Paper presented at the Custom Today Conference, Victoria University, New Zealand, 1991) 3-4.

fail to perform their duties adequately.[63] Historically, specific titleholders were responsible for management of natural resources (for example, *Sou Madau* -'Master of the Ocean', and *Souwel Lapalap* - 'Great Master of the Forest').[64]

In the early 1980s, the Pohnpei State Government took over governance from the Trust Territory administration. Early attempts of the young government to mark out watershed boundaries failed. When surveyors sought to place boundary markers as required by the *Pohnpei Watershed Forest Reserve and Mangrove Protection Act of 1987*, they were 'welcomed' by villagers with guns and machetes, who ultimately perceived it as 'a government land grab in direct conflict with traditional Pohnpei resource use and authority'.[65]

There followed a reoriented process of consultation and participatory planning for catchment management, founded upon government/community collaboration. All stakeholders contributed to and approved the Pohnpei Watershed Management Strategy 1996-2000, followed by the Pohnpei Community Conservation and Compatible Management Project 2000-2004, funded by Global Environment Facility (GEF) and facilitated by The Nature Conservancy (TNC).[66]

In 2001, a co-management law was passed by one of Pohnpei's municipalities, modeled on reports of the Samoan legislation described above.[67] The Samoan law however, relied on Samoan institutions and contexts. In Pohnpei, the local law worked when TNC guided and facilitated the listing process, but more generally it was judged to be too complex for municipal-level institutions with limited capacity.[68]

While the experiment with co-management at the municipal level was abandoned, with the agreement of traditional leaders the watershed boundary line marking commenced in 2002 and sakau planting above the line was quickly eliminated in three of the five wehi.[69] In U, for example, monitoring in 2001 indicated there were 1,741 new forest clearances for sakau plantings, while in 2004, there were fewer than 10 new clearings.[70] This is an improved outcome with which any environmental governance agency would be satisfied.

The turning point in watershed conservation in U Municipality occurred when the Nahnmwarki made it known throughout the municipality in 2003 that 'any man who plants sakau above the watershed boundary line will lose his title, or if he has no title the father will lose his title, or if the father has no title, the soumas [local chief] will lose his title'.[71] This edict resulted in a 99 per cent reduction in forest clearing.

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63 Francis Hezel, 'A Hibiscus in the Wind: The Micronesian Chief and His People' (1997) 20 *Micronesian Counselor* 1, 4.

64 Christopher Dahl and William Raynor above n 59, 239-240.

65 William Raynor above n 59, 2.

66 William Raynor above n 59.

67 *Protected Areas Act 2002* (Madolenihmw Municipality)

68 Justin Rose above n 56, 227-229.

69 Interview with William Kostka, Director, Conservation Society of Pohnpei (Kolonia, Pohnpei, 2005). Statistics evidenced by CSP monitoring. Rose above n 55, 220-226.

70 William Kostka above n 68.

71 William Kostka above n 68.

The title removal edict in U represents reconciliation – a coming together – between state law and traditional authority on the issue of sakau planting in the upland forests. By issuing the ban under threat of title removal, the nahnmwarki of U brought these alternate sources of authority into agreement upon this basic yet important issue. This act both removed any suggestion of legitimacy (customary or legal) from future clearings, and reinforced the nahnmwarki's position as sovereign over the watershed forests of his wehi.

Just as the opposition of traditional leaders severely handicapped the 1987 Act, mentioned above, the eventual support of traditional leaders for the watershed boundary marking has proven vital. The willingness of the traditional leaders to accept this partnership has assisted in reversing the deterioration not only of the island's resource base, but also of Pohnpeian traditional authority itself.[72] Lessons drawn from experiences of negotiating effective cooperative governance of Pohnpei's watershed forest were subsequently transferred to the island's inshore fishery, wherein eleven community-supported MPAs have been established since 1999.[73]

Fiji Locally Managed Marine Areas

The Fiji Locally Managed Marine Area (FLMMA) network, ongoing since 1998, is the largest local level environmental governance initiative in the Pacific island region in both numbers of local polities and cooperating partners as well as the area covered by active management regimes.[74]

Fiji's diverse traditional systems of land and marine tenure were standardised during the colonial era. The following traditional hierarchy emerged from this transformative homogenizing process: The largest social grouping is the *vanua*, being the patrilineal descendants of a common ancestor. Vanua are comprised of one or more *yavusa* (tribes), themselves comprising several *mataqali* (clans). Extended family groups are termed *tokatoka*, of which there may be several in each *mataqali.*[75]

Kuemlangan summarises the institutional arrangements for Fiji's traditional marine fishing areas (*qoliqoli*):

> Customary fishing areas and the right to regulate use and exploitation in that area belong to different, but closely related social groups, namely the *vanua*, and the *yavusa*. The *vanua* is said to be embodied in the village or traditional Chief which is one of the principal aspects of the Fijian way of life. The *yavusa* comprises the people of the same village divided into *mataqali* and *tokatoka*. People within these groups are expected to use their

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72 William Raynor and Mark Kostka, 'Back to the Future: Using Traditional Knowledge to Strengthen Biodiversity Conservation in Pohnpei, FSM' (Paper presented at the Building Bridges with Traditional Knowledge Conference, Honolulu, June 2001) 22.

73 United Nations Development Programme, *Conservation Society of Pohnpei, Federated States of Micronesia*. (2012) 6.

74 Hugh Govan et al above 10, 6.

75 Shankar Aswani, Simon Albert and Mark Love above n 1, 383.

> own customary fishing area location. Those from outside the group who wish to use the customary fishing area of another group must obtain permission of the owners. Owners of customary fishing area may, from time to time, establish closed areas to preserve the resources for an intended purpose.[76]

Customary marine management measures included temporary closures, limits on the number of fishers, restricted catches and prohibitions of the taking of certain species.[77]

As in the case of Palau and Pohnpei, discussed above, colonial administrators claimed state ownership of areas previously governed under traditional common property arrangements, and these claims in turn passed to the new sovereign state after independence. In relation to inshore marine areas in Fiji, this originally occurred under the *Rivers and Streams Ordinance 1880*. Key provisions of this law were subsequently re-enacted in the *Rivers and Streams Act 1882*.

Despite state ownership of inshore marine areas, Fiji law also recognizes customary fishing rights through section 13 of the *Fisheries Act 1942* 'Protection of native customary rights'. This provision recognises the power of customary fishing rights holders to exclude others from fishing within their qoliqoli, with the significant exception that people fishing with a spear, small fish trap or hook and line, and who are doing so non-commercially, may not be excluded. The *Fisheries Act* also ensures that customary rights holders are consulted prior to the granting of fishing licenses within their qoliqoli.[78] A provision of the *Fisheries Act* centrally important to local-level governance of inshore marine resources is section 3, enabling the appointment of 'honorary fish wardens' to prevent and detect offences under the Act and enforce its provisions.[79]

As in Samoa and elsewhere, a *de jure* inability of Fijian customary resource owners to exclude outsiders from undertaking non-commercial fishing within their qoliqoli is in many areas matched with a *de facto* ability to do so.[80] Nevertheless, there are instances where these traditional rights are not observed.[81]

There are many factors contributing to the success of the FLMMA network, but among the primary reasons for this success is that Fiji's local polities have comparatively uninterrupted tenure of their customary marine areas.[82] At the same historical moment

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76 Blaise Kuemlangan above n 22, 16.

77 William Aalbersberg, Alifereti Tawake and Toni Parras 'Village by Village: Recovering Fiji's Coastal Fisheries' in *World Resources 2005: The Wealth of the Poor—Managing Ecosystems to Fight Poverty* (2005) 145.

78 Fisheries Act (1942) s 13(2).

79 Blaise Kuemlangan above n 22, 14-17 provides an extended summary of these matters.

80 Blaise Kuemlangan above n 22, 16.

81 Pepe Clarke and Stacey Jupiter, 'Law, custom and community-based natural resource management in Kubulau District (Fiji)' 2010 *Environmental Conservation* 37 (1): 98–106, 104. These authors report non-state sanctions for breaching community rules are 'largely ineffectual'.

82 Importance of recognizing tenure well is established in relevant literature, recently re-emphasized in Don Gourley et al, 'Performing 'A New Song': Suggested Considerations for Drafting Effective Coastal Fisheries Legislation Under Climate Change' (2018) 88 *Marine Policy* 343-349, 344.

when the state sought to claim ownership of the inshore marine zone, it also acknowledged some exclusive harvesting rights of the customary owners of those areas. This is significant, as Kuemlangan points out:

> because exclusivity, as a characteristic of rights-based regimes, if implemented, guarded and enforced vigorously, allows the benefactor of the right to enjoy benefits that may be as good as those derived from ownership'.[83]

Furthermore, legal registration of customary fishing areas has cemented the claims of particular *vanua* or *yavusa* to specific *qoliqoli* despite decades of legal and cultural change.[84]

The FLMMA network originated when people in a few villages, in response to perceived reductions in the productivity of their marine resources, began taking localized management measures. These communities and 'partner organisations' – including outreach staff from the University of the South Pacific (USP) – commenced implementing one or more local level marine resource management projects, applying participatory methods that respected local decision-making institutions and prioritized the concerns, interests and values of local resource-users. [85]

Aalbersberg and others have described how collaboration between USP and Ucunivanua village commenced in the mid-1990s with the aim of reversing the decline of local stocks of the *kaikoso clam*, a species highly valued in the area for cultural, economic and food security reasons:

> This collaboration began when the son of the high chief of Verata, the district in which Ucunivanua is located, studied land management at USP and asked his teachers there to help address some of the problems in his village. At the end of two years of workshops and training in environmental education and community planning, the community decided to set up a 24-hectare *tabu* area on the mudflat and seagrass bed directly in front of the Ucunivanua village as an experiment. The hope was that as the clam population recovered in the *tabu* area, more clam larvae would settle in adjacent fishing areas as well, eventually leading to increased clam harvests in these areas.[86]

The actions described above were subsequently considered highly successful in increasing the stocks of *kaikoso*. These and similar localized initiatives attracted media attention, which in turn generated the interest of other villages that were experiencing declines in inshore fishery resources.[87]

The international Locally Managed Marine Areas (LMMA) network had been launched the previous year after a period of preparatory discussion among practitioners and

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83 Blaise Kuemlangan above n 22, 15.

84 Blaise Kuemlangan above n 22, 14-15.

85 William Aalbersberg, Alifereti Tawake and Toni Parras above n76, 145, United Nations Development Programme, *Fiji Locally-Managed Marine Area Network, Fiji* (2012) 4-5.

86 William Aalbersberg, Alifereti Tawake and Toni Parras above n76,145.

87 William Aalbersberg, Alifereti Tawake and Toni Parras above n76, 145.

stakeholders from several countries in Asia and the Pacific.[88] The aims of both the FLMMA and the LMMA networks are, in essence, to share experiences and information among network members, with the aim of achieving consistent success in local-level marine management leading to both healthy inshore marine ecosystems and benefits for the coastal communities that depend upon them.[89] As the LMMA Network reported in 2003:

> [The network] is collectively trying to determine the conditions under which a locally-managed marine area strategy works best and why.'[90]

The coming together of three sites in 2001 was the genesis of FLMMA, but its success can be gauged by the fact that in 2009, 'the network had increased to include some 250 LMMAs, covering some 10,745 square kilometres of coastal fisheries, or more than 25% of Fiji's inshore area'.[91]

Most locally-managed marine areas in Fiji are principally reliant upon institutions of customary law. The reason for this was described above: Fiji law, while recognizing customary fishing rights, does not give the owners of those rights the legal power to exclude non-commercial fishers from their *qoliqoli*. Villages involved in FLMMA projects are able to have some of their members appointed as honorary fish wardens, enabling them to enforce the provisions of the *Fisheries Act* against commercial fishers who breach their license conditions.[92] This does not, however, assist in protecting locally-declared tabu areas or no-take zones unless those sites have also been gazetted as a restricted area by the Minister for Fisheries. While a few communities have taken this step, it isn't a widely preferred option because the procedure is onerous and inflexible, and there is also evidence that local stakeholders perceive it to equate to an extinguishment of customary marine rights.[93]

There is much variation in the effectiveness of customary rule-setting and enforcement in Fiji. In some areas, local norms retain great respect and are rarely if ever subject to breach. In other circumstances, factors such as migration, the growing influence and accessibility of the cash economy, perceptions of inequity relating to the marine governance measures adopted, or other local-level conflicts, have undermined customary institutions. As Clark and Jupiter report:

> Perceptions of inequity, exclusion from decision-making processes or failure to respect customary resource rights may result in challenges to traditional authority. Customary institutions, already undermined by a range of historical factors, may be further eroded by access to new markets for natural

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88 LMMA website: http://lmmanetwork.org/who-we-are/vision/ [accessed 14/6/2021]

89 LMMA website: http://lmmanetwork.org/who-we-are/vision/ [accessed 14/6/2021], UNDP above n 84, 6.

90 The Locally-Managed Marine Area Network (2003) *Learning Framework for the Locally-Managed Marine Area Network.* LMMA Network, Suva, Fiji, 1-3. Full paper available online: http://www.reefbase.org/pacific/pub_A0000003395.aspx

91 UNDP (n84) 3.

92 Blaise Kuemlangan above n 22, 17.

93 Pepe Clark and Stacey Jupiter above n 80, 102.

> resources. . . . In Fiji, enforcement of community management rules is constrained by the national legal system: local communities have no formal authority to enforce management rules, and certain community-imposed sanctions may breach national criminal laws. . . . Resource owners who take the law into their own hands may face criminal prosecution.[94]

This last point was borne out when the paramount chief of Macuata Province, Ratu Aisea Katonivere, was arrested in 2008 following complaints that had been made regarding the seizing of fishing boats and their catches at Naduri Village. He was charged with larceny but ultimately not prosecuted.[95]

This indicates a need for legal reform in Fiji if the efforts of FLMMA communities are to be supported by effective institutional arrangements. Discussions of reform in this area have been ongoing for at least fifteen years, and remain ongoing.[96]

ANALYSIS

This section revisits the six findings noted in section 2 in analysing lessons from the cases reported above, as well as from literature in the fields of common property governance, legal pluralism and Pacific Island natural resource conservation and management.[97]

Recognizing and accepting legal plurality.

In the legal context of biodiversity governance in PICs, various forms of law, founded upon different traditions and values, interact in a single social realm. The interactions may be harmonious and productive, or characterised by conflict and waste. They give rise to positive or negative outcomes for people and the environment, or more usually a complex web of these. The legal orders impacting upon a given 'site' or 'project' or 'community' may not be limited to government law and custom law, but frequently include determinations of international donors or civil society organisations whose financial contributions enable them to prescribe their own norms in what is known by

94 Pepe Clark and Stacey Jupiter above n 80, 102.

95 'Chief Arrested' *Fiji Sun* 12/10/2008.

96 This author attended a 2006 workshop held in Townsville, Australia where FLMMA representatives expressly confirmed this.

97 This section is in some senses an adaptation of the analytical framework presented by John Lindsay *Designing legal space: Law as an enabling tool in community-based management* (1998). An alternative framework examining similar issues is that presented by Don Gourley et al above n81.

some as 'project law'.[98] International treaties and their attendant institutions and agencies add a further plane of legal obligation and activity.[99]

There is substantial literature addressing the subject of co-existing legal orders, both generally and with regard to PICs specifically. Some of this could be characterised as 'positivist' in perspective, which holds that a commitment to unifying sovereignty requires customary law to be regarded as operating only to the extent determined by the state. Alternate perspectives recognise the empirical reality of plural co-existing legal orders and apply broader understandings of 'law' – in this school of thought, discovering law-as-practice is more enlightening than seeking only an understanding of law-as-text.[100]

Conflict and contested claims of sovereignty and tenure tend to assist those who would seek to use legal uncertainty to obtain open access to natural resources for personal profit, resulting in their rapid degradation.[101] It is therefore concluded that legal interventions supporting collaborative natural resource governance initiatives in PICs should typically seek to reconcile customary and state law and authority. The precise nature through which such 'reconciliation' takes place is less important than achieving the necessary outcome; that the agreed norms are ultimately accepted as being legitimately established by the regulated community of resource users, and are enforceable against recalcitrants.

Recognising that each instance of local-level biodiversity governance in PICs is a complex interplay of formal, customary and other legal forms brings another issue into focus. Each jurisdiction displays a distinctly unique mosaic of legal claims and institutions acting, reacting and interacting in the field of biodiversity governance. From island to island and country to country, the socio-legal roles played by institutions such as custom, law, donors, churches and civil society organisations are variable. Also variable are the ways in which locality-specific custom has adapted in response to influences such as depopulation, urbanisation, Christianity, and the political and legal institutions introduced by colonial and post-colonial government.

Consequently, *general statements or conclusions* about the specific role of law, custom, the state, donors, or civil society should be made with much caution in this field of governance. Different legal forms display variable 'strengths' and 'weaknesses' in different places and moments in time. Furthermore, labels such as 'strong' and 'weak' are inevitably laden with the political and cultural values of those who ascribe them.

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98 Franz von Benda-Beckmann 'The Multiple Edges of Law: Dealing with Legal Pluralism in Development Practice' 2 *World Bank Legal Review* 51 (2006), 60-62. Marcus Weilenmann, 'Project law – a power instrument of development agencies. A case study from Burundi' in Franz von Benda-Beckmann and, Keebet von Benda-Beckmann and Anne Griffiths (eds) *Law, Power and Control* (2008).

99 The obvious example in this regard in this regard is the *Convention on Biological Diversity* 1760 UNTS 79.

100 Franz von Benda-Beckmann 'Who's Afraid of Legal Pluralism?', (2002) *The Journal of Legal Pluralism and Unofficial Law*, 34:47, 37-82,

101 For a general statement see Jean-Marie Baland & Jean-Philippe Platteau above n 16, 286-289, for a Pacific example see Justin Rose above n 56, 265-266.

Ultimately, this author suggests legal scholarship addressing Pacific terrestrial and inshore marine biodiversity governance should be guided by attitudes such as that of Sack:

> [Legal pluralism] is not blind to the strengths of state law and the weakness of people's law. It merely insists that all forms of law have their limitations and that none has advantages which are so overwhelming that it would be justified to grant it a monopoly or a position of hegemony. The aim . . . is not the elimination of some forms of law and the fostering of others but a situation where different forms of law cooperate, each performing the task or tasks for which it is best suited and in a way which maximises potential.[102]

Questioning the necessity for legal intervention.

A threshold issue in considering the drafting of law for PIC terrestrial and inshore marine biodiversity governance is deciding whether new legislation is actually required. The potential of state law in this field should be neither overestimated nor underestimated. Research by this author, as well as others such as Lynch and Lindsay, suggests that local-level biological resource governance often, but not always, benefits from some form of enabling framework within state law:

> As in any area of human endeavour, community management can take place in blissful ignorance of its legal environment, provided that (by design or indifference) the policy, social and economic conditions are favourable. Some community management systems have existed for centuries, and may continue to operate with no legal underpinning as far as state law is concerned, and perhaps even in direct contradiction to what is written on the law books or administered in the courts. And there are of course many political, social, economic and ecological variables that play a part in the success or failure of any given effort, many of which state laws and legal institutions may affect only marginally. *Where community-based management efforts are subject to growing threats from outside or within, and to the tugs and pulls of national and international economies, the formal legal environment, for better or worse, becomes increasingly relevant*.[103]

Two conflicting attitudes to state law are common among participants in these initiatives. First, engagement with state law may be viewed negatively or shunned by participants in community-based conservation due to a variety of factors, including local peoples' mistrust of government based upon past negative experiences; donor- or expert-determined strategies of 'peripheralising' an inefficient or possibly corrupt public sector; or a simple incapacity on the part of key participants to engage with the

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[102] Peter Sack, 'Legal Pluralism: Introductory Comments', in Peter Sack and Elizabeth Minchin, *Legal Pluralism: Proceedings of the Canberra Law Workshop VII* (1986) 3.

[103] John Lindsay above n 96, 4. Emphasis added.

complex and burdensome mechanisms of legislative reform.[104] Alternatively, those accustomed to regarding legislated norms as irresistible determinants of citizens' behaviour may imagine that the passage of a well-designed law will make community-based biodiversity governance legitimate, workable and sustainable even where the context is of acutely adverse social, economic and ecological circumstances.[105]

The following five categories are identified as areas wherein state law may be required to achieve objectives that are beyond the jurisdiction or capacity of local laws and institutions in the field of terrestrial and inshore marine biodiversity governance:

1. To provide security and clarity of tenure of the resource in question.
2. To define the rules by which local institutions interact with outsiders.
3. To define the limits of state power and the extent to which the state must respect local autonomy.
4. To provide basic constitutional protections for individuals against abuse of local power and authority.
5. To provide basic standards or guidelines for the protection of broader public interests.[106]

Recognizing the limits of legal intervention.

The third finding suggests that while a sound legal and institutional basis may be necessary, this will not of itself be sufficient for effective and resilient community-based biological resource governance in PICs. An illustration of this is Tomtavala's Vanuatu research, which reveals a complex interplay of economic, social and legal influences upon the establishment, operation and future outlook of the Vatthe Conservation Area in Vanuatu.[107] This and other reported cases suggest that in practice, especially at village level, legal and governance issues are intertwined and in some ways inseparable from the economic, religious, social and cultural elements of individual, family and community life.[108]

Providing sound legal and institutional foundations is not the only, and perhaps not even the greatest, challenge facing those who would seek to achieve effective

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104 The author has observed all of these dynamics, in Micronesia and elsewhere. Jean-Marie Baland & Jean-Philippe Platteau above n 16 write of the effects the 'culture of distrust' that frequently characterizes relations between the state and local resource users, 385.

105 Arun Agrawal 'Sustainable Governance of Common Pool Resources: Context, Methods and Politics' *Annual Review of Anthropology* (2003) 243-62; and Adcharaporn Pagdee, Yeon-su Kim and PJ Daugherty above n 21.

106 John Lindsay above n 96, 4-5. With regard to the third point, this is a complex issue, discussed at length in a New Zealand Law Commission report: *Converging Currents: Custom and Human Rights in the Pacific* (2006) and Iutisone Salevao, *Rule of Law, Legitimate Governance and Development in the Pacific* (2005) 110-147, Don Gourley et al above n 81.

107 Yoli Tomtavala *Report on the Vatthe Conservation Area, Vanuatu* (2007).

108 Graham Baines et al, *South Pacific Biodiversity Conservation Programme Terminal Evaluation* (2002).

community-based biological resource governance. The paradoxes resulting from Vanuatu's *Environmental Management and Conservation Act 2002* are revealing. The EMCA provisions for the recognition of Community Conservation Areas could be described as a recent example of best practice in this area of law. Nevertheless, the Vatthe Conservation Area, the only site registered as a Community Conservation Area under the EMCA during the law's initial decade of operation, received no recognisable legal or practical benefit or impact as a result of the June 2004 registration.[109] It is also noted that the Vanuatu Environment Department has continued to work with local stakeholders at the Vatthe Conservation Area, in 2013 finalising the Vatthe Conservation Area Management Plan.[110] A contrasting illustration is provided by Pohnpeian inshore marine resource governance, wherein the law describes a centralised regulatory framework for marine sanctuaries, but the key to success is the multi-stakeholder collaboration, driven by local polities and civil society.[111]

Understanding the reliance on mediating institutions.

Protected areas in PICs are more typically project-based than jurisdiction-wide, with sites connected through networks such as Fiji's FLMMA and Palau's PAN. Moreover, these projects are often catalysed or facilitated by external organisations such as non-governmental environmental organisations or supranational agencies such as the Secretariat of the Pacific Regional Environment Program (SPREP). With the exception of the Samoa fisheries program, each of the cases examined above were either originated by, or substantially influenced by, non-domestic NGOs.[112] Government agencies and local communities seem rarely to find themselves at the table alone in these contexts. Ideally, over time the role of government agencies will transform from an emphasis on regulation to an emphasis on facilitation and education, which may, in turn, reduce the need for civil society to play a central role in this field.

Notwithstanding changes in stakeholder roles over time, NGOs today frequently act as mediators and interpreters assisting conservation dialogues within and between local polities, with government agencies at various levels, and with other stakeholders including potential private and public donors. Each of these stakeholders bring their own expectations, values and language.

Examples of this mediating role are provided in the points below:

- Mediators between customary institutions and concepts, and governmental institutions and concepts.

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109 Yoli Tomtavala above n 106. This author visited the site with Tomtavala in 2006, at which time no conservation or ecotourism activities were taking place. Nari describes the process of preparing the *Environmental Management and Conservation Act 2002*: Russell Nari, 'Merging Traditional Resource Management Approaches and Practices with the Formal Legal System in Vanuatu' (2004) 17 *Traditional Marine Resource Management and Knowledge* 15-16.

110 Vanuatu Ministry of Climate Change and Adaptation *Annual Report* (2014), 153.

111 Justin Rose n 56, 230-236.

112 The Nature Conservancy in Pohnpei and Palau, later joined by the Conservation Society of Pohnpei and the Palau Conservation Society; USP and WWF in Fiji.

- Mediators between the everyday concerns and applied knowledge of local stakeholders, and the abstract objectives and technical knowledge of external stakeholders.
- Mediators between external donors' need to be assured of appropriate uses of money provided, and participating communities with limited capacity to comply with technical reporting requirements.

While the first of the above is of most interest in present contexts, the second is also crucially important. An illustration is the increasingly serious problem of waste management; there is no traditional knowledge regarding the best manner to dispose of inorganic or hazardous postconsumer wastes. Environmentally sound waste management is a necessary competent of maintaining healthy natural resource systems, the principles of which must be learned. Civil society can be of much assistance in ensuring that this kind of knowledge of disseminated throughout society. An example of this is the work of Wan Smolbag Theatre in Vanuatu.[113]

In terms of mediating between institutions, the transforming role of TNC in Pohnpei is an instructive example. Originally engaged closely in the 200 village meetings that informed the Pohnpei Watershed Management Plan 1996-2000 and with winning and administering a GEF grant for Pohnpei watershed conservation from 1999-2003, TNC Micronesia subsequently re-focused towards performing strategic, mentoring and network-building roles. TNC was instrumental in the 1998 establishment of the Conservation Society of Pohnpei, now a substantial organisation in its own right that has been pivotal in establishing a system of community-based marine protected areas in Pohnpei.[114] TNC Micronesia has expanded this role to mentor other NGOs in the region, and has also facilitated the establishment of the Micronesia Conservation Trust, which is proving effective in attracting and administering necessary financial resources to community-level sustainable natural resource governance in Micronesia.[115]

Understanding the role of law in providing flexibility for local stakeholders.

The most significant conclusion of this essay is that, in this field of governance, law should wherever appropriate be conceptualised as a tool that enables and makes space for local initiative, decision-making, and action. [116] Policies supporting community-based biodiversity governance are founded upon recognising the benefits of local people applying local institutions to local problems.[117] Whatever is required of state law in these

[113] Wan Smol Bag Theatre: https://www.wansmolbag.org/environment/ (accessed 14/6/2021)
[114] UNDP above n 72.
[115] Justin Rose 'Pohnpei Watershed Management – A Case Study of Legal and Institutional Reform for Co-Management in the Pacific Islands' 17 *Traditional Marine Resource Management and Knowledge* (2004).
[116] The concept of creating legal space is Linday's: Bruce Lindsay above n 96.
[117] A classic statement is Elinor Ostrom 'Coping with Tragedies of the Commons' (1999) 2 *Annual Review of Political Science* 2, 493-535, 526.

contexts it is not about 'providing an elaborate set of rules that prescribe or dictate solutions to local problems'.[118]

The reported case studies above indicate that even some of the best-intentioned new laws supporting community-based governance maintain core decision-making functions for government. The risk is that complex legal requirements – such as those for preparing management plans, establishing representative management committees, applying various international standards of 'best practice', and complying with detailed financial accounting and auditing rules – can alienate and disenfranchise participants, thereby stultifying local initiative and action.[119]

Conversely, some remarkable environmental achievements have been gained in instances where state and customary law have come together in a way that provides space for the latter to operate *upon its own terms.* The best illustration of this is the 2001 edict issued by the Nahmwarki banning forest clearing in U's watershed.

Lindsay identifies the following aspects of flexibility:[120]

- Deciding what the objectives of management should be, and the rules that will be used to achieve those objectives.
- Mechanisms available for recognising local groups in state law.
- Defining the boundaries and members of management groups and areas of jurisdiction.
- Allowing participating communities to self-select, particularly in the initial stages of a novel program.

Success or failure in community-based ecosystem governance will often be determined by the degree to which its attendant institutions - whether these are ancient or new or new versions of ancient ones - are considered legitimate by local stakeholders: are they *owned* by local people?

A final observation is that providing these forms of flexibility is typically a compromise requiring a balancing with competing concerns for elements of certainty, as described below.

Understanding the role of law in providing security for local stakeholders.

In this context, security and flexibility are two sides of a coin – an equation requiring a balanced resolution. Resource and tenure security are complex topics in themselves, but as a general statement it is established that local participants need confidence that their

118 Bruce Lindsay above n 96,11.

119 Best example is the *Solomon Islands Protected Areas Act 2010.* Rebecca Gruby and Xavier Basturto above n 41) 268-269 deal with this theme in some depth in the Palau context, as does Marc Leopold et al 'Community-based management of near-shore fisheries in Vanuatu: What works?' 42 Marine Policy (2013) 167-176.

120 Bruce Lindsay above n 96, 10-13.

rights to govern their biological resources are sufficiently secure against all parties including the state, for them to plan, conserve and cooperate for the future.[121]

> Security is, of course, in part a state of mind. Where relations have traditionally been good between community and government, local people might feel secure enough to participate simply on the basis of a promise from local officials. Sometimes a sense of security is derived from the fact that a particular management arrangement is part of a donor-funded project, thus unlikely to be derailed as long as the flow of funds is assured. In other situations, communities may not feel secure no matter how carefully and strongly their rights are set forth in legal documents.[122]

The following categories of security are often relevant for laws of this kind:

- Clarity as to what rights are recognised in state law.
- A guarantee that rights cannot be taken away or changed unilaterally and unfairly.
- A permanent or near-permanent duration of rights; long enough for the benefits of participation to be fully realized.
- Effective mechanisms to make rights enforceable against the state and, where appropriate, against non-state actors.
- Clarity regarding the boundaries of the resources to which the rights apply.
- Legal recognition or personality for rights holders.
- Accessible, affordable and fair avenues for seeking protection of the rights, for solving disputes, and for appealing decisions of government officials.[123]

Examples reported herein where state law has provided all of these forms of security are the Palau PAN and the Samoa inshore fisheries program.

CONCLUSION

This essay reviewed and discussed a selection of legal and governance challenges confronting PICs seeking to sustainably manage inshore marine and terrestrial ecosystems. While emphasizing the uniqueness of each jurisdiction, it is typical that multiple forms of law, or law-like authority - including the state, custom and tradition, donor-determined norms and international treaties – together occupy this field. An initial conclusion is that concerned stakeholders are continually challenged to reconcile these forms of law; if they are not in harmony, they are likely to be in conflict. Conflict of this nature almost always works to the detriment of both ecosystems and the people who depend upon them.

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121 This is a recommendation in Don Gourley et al above n 81, 344.
122 Bruce Lindsay above n 96, 8.
123 Bruce Lindsay above n 96, 8-10.

There is universal acknowledgement among stakeholders in the region that local communities should be the primary custodians of their islands inshore marine and terrestrial ecosystems. This is reflected in sub-national, national and regional plans and policies commencing in the 1980s, as well as in academic literature across disciplines. Yet in many places the legal challenge remains either unaddressed or ineffectively resolved. If a single conclusion were to be drawn from this analysis it would be that in these contexts law is best conceptualised as a tool that enables local initiative, decision-making, and action. Here it is necessary to at least question, perhaps even resist, the tendency of state law to accrue authority to state institutions thereby controlling and stultifying, rather than enabling, local initiative.

Finally, legal development of this kind will remain an ongoing challenge since laws and institutions will need to adapt to changes in societies, ecosystems and climates. They will also adapt in response to lessons learned, both within and between the jurisdictions of the region. To take a single current example, as this book goes to press the Republic of Vanuatu is engaging in a process of legislative reform to institutionalize their National Ocean Policy.[124] A key element of this is to 'recognise and support traditional marine resource management, use and governance systems' within formal legal arrangements.[125] Vanuatu's will be a particularly interesting endeavor because the Constitution of Vanuatu guarantees customary ownership and use rights over all of their lands and waters extending to the coral reefs.[126] The analysis presented in section 4, particularly the discussion on the role of law in providing necessary elements of certainty, suggests that in this respect Vanuatu may be better positioned than any other PIC to fully explore its objective of supporting traditional ecosystem governance systems.

124 Government of Vanuatu, *Vanuatu's National Ocean Policy*, Government of Vanuatu, Port Vila, 2016.

125 Government of Vanuatu above n 121, 11.

126 Constitution of Vanuatu Art 73 and 74. Also *Custom Land Management Act 2013* (Vanuatu), section 3.