

## **The Coastal Zone of Islands: Comparative Reflections from the North and South**

*Sue Farran*

*Senior Lecturer, University of Dundee, Scotland, United Kingdom*

*&*

*Visiting Lecturer, University of the South Pacific, Emalus Campus, Vanuatu.*

[s.e.farran@dundee.ac.uk](mailto:s.e.farran@dundee.ac.uk)

### **Abstract**

Islanders tend to develop rules and methods for regulating the use of the marine environment and its accessible resources. Where islands have been subject to the influence or domination of external political forces, and such resources have become the subject of increased demand, then differences of approach, of understanding and of patterns of use can come into conflict. This is especially so where there is increased emphasis on coastal development, pressures to privatize and register coastal land and to regulate the commercial exploitation of marine resources. This article considers the Shetland & Orkney Islands from the north and Fiji, Vanuatu and the Solomon Islands from the south, drawing out similarities and differences of legal approaches to key issues relevant to the foreshore and the coastal zone.

*Keywords:* foreshore, claims of the Crown, fishing rights, udal law, Scottish islands, South Pacific.

Copyright © 2006 Institute of Island Studies, University of Prince Edward Island, Canada.

---

### **Introduction**

Islands are defined by their coasts. In the case of small islands, their seas exceed their land mass. For this reason access to the sea and its resources has always been important to islanders and laws have evolved over the centuries to determine rights, to regulate disputes and to manage resources. Yet, in many cases, island people have also been subject to the domination and control of other, stronger, powers. As the coastal zone has become more crucial to development and more vulnerable to exploitation, so too it has become the subject of conflict between different legal approaches. This experience has occurred in a number of islands. In some, it is now a matter of history; in others, it is a contemporary and pressing issue. This article considers legal questions which, while not solely limited to islands, are particularly relevant to them. In particular it focuses on certain small islands in the Northern and Southern hemispheres, which, despite their geographical separation, experience similar concerns. The islands under consideration are the Orkney and Shetland Islands off the mainland coast of Scotland, and those of the South West Pacific region, including in particular, Fiji Islands, Vanuatu and Solomon Islands. Reference is also made to the much larger island country of New Zealand.

These islands from the northern and southern hemispheres are different in many respects, especially as regards their history, social structure, political status and climate. All however share the features with which this article is concerned: sea, coastline and

foreshore.<sup>1</sup> In particular there are four interrelated aspects which are common: firstly, the fact that more than one system of law governs property interests with the consequence of different approaches to the determination of the coast and foreshore; secondly, the question of interests and rights to land, especially the question of the extent to which metropolitan powers ever acquired dominium or beneficial ownership over the foreshore when they took political control of the islands; thirdly, the historical and present significance of fishing rights as private rights, Crown rights, public rights and customary rights; and finally, the shift from unregistered title to registered title and consequences for foreshore ownership and management.

The islands under consideration have all been subject to the dominant influence of another power. As long as there was no competition for the exploitation of resources, differences of approach were probably not an issue. However increasingly it is evident that there may be confusion, disagreement and potential conflict in respect of the above issues which can have consequences for the development and management of the seashore and coastal area. Claims to the foreshore, seabed and marine resources are not just claims for the recognition of customary rights or traditional practices. They are central to issues of development, sustainability and management of all islands but especially those which are vulnerable to a variety of risks such as: global warming and rising sea levels; the depletion of fish stocks; pollution of the ocean waters through dumping and silting; tourism development of coastal resorts; the exploitation of coastal resources such as sand and coral; the interference with coastal boundaries caused by coastal construction such as wharves and jetties and coastal land drainage and reclamation.

Clarity over the fundamental legal parameters is essential if present and future management policies concerning coastal and marine resources are to be implemented successfully. This article considers the contemporary relevance of comparative experiences of islands from the north and south and the extent to which different legal perspectives have consequences which may determine present and future rights and policies in respect of coastal zones.

### **Plural Legal Systems and the Determination of the Foreshore**

Where there is the possibility that more than one system of laws will be applicable to a given question, there may inevitably be room for conflict and uncertainty. All the legal systems of South Pacific island states are plural owing to the co-existence of various sources of applicable law. For example, there is colonial law introduced prior to independence: often for the benefit of, or to govern, non-indigenous people rather than indigenous people; customary law which preceded western contact and either survived during the post-colonial period or has been subsequently resurrected and continues today; and post-independence national law: including international law where incorporated into domestic law, and residual colonial law which has not yet been replaced or repealed. This pluralism is not limited to the Pacific region. It comes as a surprise to many to learn that the United Kingdom, despite the name, does not have a uniform system of law. Notably, the law in Scotland is different from that of England

---

<sup>1</sup> The 'foreshore' is the coastal area between land and sea which is regularly or occasionally covered by salt water. This may be familiar to American readers as 'tidelands' or 'submerged lands'.

and Wales, and within Scotland certain outer islands in the far north have a further different system of law, influenced by ancient ties with Norway.

The legal system of Scotland is distinct from that of England and Wales because it was strongly influenced by Roman, Roman Dutch and civil law through its historical and political ties with the Continent. These gradually mixed with English common law introduced after the Act of Union between Scotland and England in 1707.<sup>2</sup> After this date, Scotland lost the ability to make laws for itself with all legislative power being vested in the Parliament at Westminster – henceforth known as the Parliament of Great Britain. However Scots law was allowed to remain in force; although inevitably legislation was increasingly influenced by the composition of the new Parliament (Walker, 2001). Consequently, most of the Scots civil law and the Scots legal system of courts, lawyers and judges continued to exist. Today Scotland has recouped a wide range of law making powers under authority devolved from Westminster under the Scotland Act 1998.

Prior to, during and after Union, part of Scotland fell outside the ambit of either Scots or English law. Although they were not politically independent, the Orkney and Shetland Islands to the far north east of Scotland were – and theoretically, still are - governed by a legal system based on Norse law. This is udal or odal law,<sup>3</sup> which is the customary law of the islands of Orkney and Shetland.<sup>4</sup> This law existed in oral and written form, the latter being found in Law Books. Although udal law prevailed up until the early fifteenth century,<sup>5</sup> Scots law became increasingly influential.<sup>6</sup> Moreover, because there was more than one co-existing system, it became necessary to determine which prevailed in the case of conflict. In 1567, an Act of the (still independent) Parliament of Scotland stated that the Norse laws of Orkney and Shetland prevailed over Scots common law. By the late sixteenth and early seventeenth century, it seems that both systems of law were being administered in the islands (Smith, 1989).<sup>7</sup> Despite the 1567 legislation, in 1611 it was held by the Privy Council that udal laws were foreign and that land claimed in reliance on them had been taken illegally,<sup>8</sup> suggesting thereby that in certain circumstances this form of local or customary law would not be recognised.<sup>9</sup>

---

<sup>2</sup> Although the succession of James VI of Scotland to the English throne in 1603 meant that the two countries came under the same monarch from that date, England and Scotland retained separate sovereign parliaments until the Act of Union.

<sup>3</sup> Both terms are used. Here 'udal' is preferred.

<sup>4</sup> These islands off the north coast of Scotland were part of Norway for about six centuries, but in 1471 were annexed to Scotland as security for unpaid monies owed by Christian I of Denmark, Norway and Sweden as dowry payment agreed in 1468 for his daughter Princess Margaret on her marriage to James III of Scotland. As the monies were never paid, the islands remained part of Scotland (Dobie, 1931:115). Previously other islands off Scotland, the Hebrides, had been ceded to Scotland by Norway under the Treaty of Perth in 1266.

<sup>5</sup> Norse language for legal documents gradually gave way to Scots. The last Norse document in Orkney was in 1426, while that in Shetland is dated 1607 (Smith, 1989:para. 317).

<sup>6</sup> Through the late 16<sup>th</sup> and 17<sup>th</sup> centuries, the Scots language replaced Norse; over time, the law books were lost. Thus, it became necessary to rely on oral tradition, so that udal law reverted to a customary law which was seen to be engrafted onto Scots law, rather than the other way round.

<sup>7</sup> Dobie (1931:117) points out that "the odaller held under God alone (*de Deo et sole*), by right of primal occupancy, complete without written title and subject to neither homage, rent, or service".

<sup>8</sup> Register of the Privy Council of Scotland, ix, p. 181-182.

<sup>9</sup> However Smith (1989:para 317) suggests that the decision of the Privy Council did not specifically relate to land law and therefore did not bring udal tenure to an end.

Although udal law may never have been repealed in whole or in part, or supplemented by new laws, it was nevertheless gradually eroded by the expanding political influence of Scotland. So, if a litigant sought to rely on udal law, this had to be proved sufficiently to displace the presumption that Scots law applied. In fact, this approach to udal law was contrary to the fundamental general principles established in English law in the case of *Campbell v Hall*,<sup>10</sup> which were that the laws of a country remain in place where another state acquired sovereignty over that country, until those laws were altered. This legal approach had been accepted in Scotland in *Bruce v Smith*.<sup>11</sup>

Despite this, in a later case which concerned a dispute over the law governing treasure trove found on the foreshore - *Lord Advocate v Aberdeen University and Budge* - the court held that the ordinary statute and municipal law of Scotland operated except where there was some udal speciality which modified it.<sup>12</sup> The Court rejected the argument that the dispute should be governed by the udal law to be found in the 1274 General Law Book of King Magnus of Norway. In effect this meant that introduced law was to prevail over traditional law, despite the latter never having been repealed.

The example of udal law in the Orkney and Shetland Islands illustrates the way in which traditional laws can be gradually eroded or replaced. Although the status of customary laws in the plural legal systems of the islands of the South Pacific may be more secure, they have not been immune from the influence of the laws of the colonising metropolitan powers, notably Britain and France (Corrin-Care *et al.*, 1999). British law was imposed on the islands considered in this article, either by way of statute law or by judicial reference to general principles of law and equity. Significantly however, unlike the situation in Australia or even in New Zealand, the colonial administrators of the South Pacific islands generally recognised the existence of customary law and in particular the various forms of native land tenure, so that in the main these were left undisturbed.

On independence, there was provision for existing laws to remain applicable until such time as they were replaced or abolished by the legislatures of the new independent states. At the same time, the role of customary law was secured either by express provisions for custom or customary law in the Constitutions or in statutes.<sup>13</sup> However, customary law does not necessarily apply to all matters, but may be limited to specific areas such as land and family law. Moreover, as with udal law, in Pacific legal systems proof of customary law is necessary.<sup>14</sup> This means that evidence must be produced in court by witnesses who are knowledgeable and capable of being objective (Corrin-Care *et al.*, 1999:37). In the absence of strong guidelines and incentives to utilise custom, courts tend to adopt a piecemeal approach influenced by the personal knowledge of the judge or magistrate, the nature of the case and the ability of lawyers to present arguments based on customary law (Lunabeck, 2004). Increasingly however, even where custom or

---

<sup>10</sup> (1774) 1 Cowp 204, 20 State Tr 239.

<sup>11</sup> (1890) 17 R 1000.

<sup>12</sup> *Lord Advocate v Aberdeen University and Budge* 1963 SC 533 (*Budge*). Under udal law, treasure found on the foreshore would have belonged in part to the udaller who owned the foreshore. For comment, see Carey Miller & Sheridan (1996).

<sup>13</sup> For a detailed review of the applicability of customary law in the region, see Powles (1997).

<sup>14</sup> Although laws in Kiribati and Tuvalu specifically state that a court should take judicial notice of customary law without being bound by strict legal procedure or technical rules of evidence.

customary law might apply, it is being eroded either because it appears to be in conflict with or repugnant to fundamental principles – particularly human rights provisions in the constitutions,<sup>15</sup> or because it is not seen as being applicable to modern situations.<sup>16</sup> It may also be the case that where legislation is introduced, the relevance of customary law may have simply been ignored. This appears to have happened in the determination of the boundary of the foreshore.

### **The Determination of the ‘Foreshore’**

One of the fundamental problems raised by plural systems or by the uncritical introduction of foreign laws is that key concepts may be unclear or confused. Although it might be thought that the meaning of ‘the seashore or foreshore’ is clear, this is not always the case. Different legal systems have different ways of marking and measuring the seashore and this in turn can have consequences for its ownership and management, as well as influence the measurement and extent of territorial waters. For example, in the United Kingdom, not only is the law of England and Wales different from that of Scotland, but the way in which the foreshore is measured is different. In Scotland, there is a further distinction between Scots law and udal law on this point. In the Pacific region, there are similarly differences between introduced colonial law – which itself may have inconsistencies – and customary law.

The foreshore is the land between marks determined by measurements based on high and low tides. However the imaginary high and low water marks can vary depending on which tides are chosen. In Scotland, the seaward extent of the foreshore is determined by the mean low-water spring tide mark,<sup>17</sup> while the landward extent of the foreshore is measured by the mean high-water spring tides.<sup>18</sup> In England and Wales however, the landward extent of the foreshore is determined by reference to the mean high-water mark (across all tides) and the mean low-water mark.<sup>19</sup> Under udal law, ownership of coastal land extends down to the lowest low water mark<sup>20</sup> – which may be the lowest astronomical tide (McGlashan, 2002:254). As under udal law the foreshore is private land and not Crown or state land, the landward extent of the foreshore has not needed to be determined. On the mainland, although both Scots law and English law recognise Crown ownership of the foreshore, where Scottish foreshores meet those of England at the border between England and Scotland there is a difference in measurement in both the landward and seaward measurement.

The consequence of this difference in measurement is that the foreshore in Orkney and Shetland is more extensive than on mainland Scotland, because the lowest low water mark – which is the udal law measurement – is lower than the mean lowest spring tide

---

<sup>15</sup> See *Noel v Toto* (1995) VUSC 3, [www.pacii.org](http://www.pacii.org); *Mose v Masame* (1930-49) WSLR 140 (Samoa); *Ubuk v Darius* (1994) PNGLR 279 (Papua New Guinea).

<sup>16</sup> See *Pentecost Pacific Ltd and Phillipe Pentecost v Palene Hnaloane* (1993) 2 Van LR 661 – a contract of employment.

<sup>17</sup> *Fisherrow Harbour Commissioners v Musselburgh Real Estate Co. Ltd.* (1903) 5 F 387.

<sup>18</sup> Spring tides occur twice a month, when the sun and moon align with the earth. The spring tides are the most extreme tides (both high and low) of the fortnightly cycle of tides.

<sup>19</sup> Moore (1988:449-50) refers to cases in which the measurement of the seashore is determined by the ‘ordinary’ high and low-water marks (presumably excluding spring and neap tides).

<sup>20</sup> *Smith v Lerwick Harbour Trustees* (1903) 5 F 680 at 681.

mark. In terms of the difference in land measurement this can be significant, especially where coasts are shallow.<sup>21</sup>

In the Pacific region, there are many small island countries where there is considerably more sea than land, so matters relating to the seashore or foreshore are particularly important, especially as these island countries are subject to climatic and natural events which can change high and low water marks, the shape of coastal areas and the pattern of the seabed.<sup>22</sup> Access to the seashore gives access to reef resources, places to launch small fishing and trading craft such as canoes, and places for leisure, bathing and picnicking. Access to safe harbours means access to the sea and land, the ability to navigate between islands, to trade and exchange news, people and goods with other places. At the same time, prime coastal land is attractive to developers, especially those interested in development for the tourism sector. Consequently, hotels and resorts tend to be built on land leased from indigenous owners or - where freehold is available - purchased as freehold land. Flat coastal land is also important for infrastructure such as roads and airports and indeed on a number of islands may be the only place where there are sealed roads. Although it is possible to preserve coastal access for non-owners/occupiers by way of legal rights or restrictions such as easements or covenants, access is being increasingly denied to protect the privacy and security of developers or their clients. Alternatively, clan or group rights are being denied by claims of public benefit by the State. The issue then arises as to how far boundaries of coastal land extend to the seashore or seabed. This in turn raises the question of ownership and how the different areas under consideration are determined.

Given the influence of colonial common law in the region, the English law determination of the foreshore has tended to prevail in the insular Pacific. For example, under the Samoan Constitution, all land lying below the line of the "high water mark" is public land.<sup>23</sup> The expression "high water mark" is defined to mean the line of median high tide between the spring and neap tides. However the concept of "foreshore" is broader as under the definition section of the Land, Surveys and Environment Act 1989, the "foreshore" includes rivers, lakes and streams.<sup>24</sup>

In Tonga, there is greater precision. Under the Land Act:

"foreshore" means the land adjacent to the sea alternately covered and left dry by the ordinary flow and ebb of the tides and all land adjoining thereunto lying within 15.24 metres of the high water mark of the ordinary tides;<sup>25</sup>

while in Vanuatu under the Foreshore Development Act:

---

<sup>21</sup> Research in Orkney by McGlashan (2002:258 fn 57) indicated that a one metre vertical difference could translate into a 10-23 metre horizontal difference.

<sup>22</sup> Earthquakes, volcanic eruptions, cyclones, tsunamis and rising sea levels are all experienced in the region. In low lying islands, differences in the measurement of the foreshore could be significant, especially where rising sea levels threaten to engulf islands, as in Tuvalu. See Mathlein (2005).

<sup>23</sup> Constitution of the Independent State of Western Samoa 1960, Article 104.

<sup>24</sup> This is encountered elsewhere, such as in Tuvalu Foreshore and Land Reclamation Act Cap. 26, s. 2 and in Kiribati Foreshore and Land Reclamation Act Cap. 35, s. 2. 'Foreshore' includes reclaimed land as well as natural foreshore.

<sup>25</sup> Tonga Land Act Cap. 132, Amended by Acts 11 of 1980 and 21 of 1984, s. 3.

‘(F)oreshore’ means the land below mean high water mark and the bed of the sea within the territorial waters of Vanuatu (including the ports and harbours thereof) and includes land below mean high water mark in any lagoon having direct access to the open sea.<sup>26</sup>

Elsewhere however, the legislation is less clear. For example, in the case of Fiji Islands, the Crown (now State) Lands Act 1946 does not define the foreshore or how it is to be measured.<sup>27</sup> The Rivers and Streams Act includes tidal and non-tidal navigable rivers and vests ownership of these and the soil under them in the Crown subject to the enjoyment of public rights, but does not refer to the foreshore.<sup>28</sup> Similarly, while the Fisheries Act exempts line and spear fishing from the shore from licence requirements, it does not indicate the extent of the shore.<sup>29</sup> Even new legislation proposed under the Customary Fisheries Act 2004 (discussed below) does not give a definition of foreshore despite the fact that the Act vests such land in the Native Land Trust Board and prohibits any dealings in such land without the consent of the Board.<sup>30</sup>

If there is a failure to consider that there may be different approaches to determining foreshore boundaries – for example for the purposes of drawing up maps or land surveys - then the potential for conflict is considerable. In the United Kingdom differences have been accommodated by ordnance survey maps indicating the lower boundary of the foreshore for England and Wales by the mean low-water mark (MLW) but for Scotland by the mean low-water spring mark (MLWS).<sup>31</sup> Ordnance survey maps are not however to be relied on for exact measurements of boundaries and so it is still possible to have discrepancies, some of which may be considerable. In the Pacific region the possibility of there being different approaches does even seem to have been addressed and it might be wondered whether the marks chosen are simply accidents of legislative drafting.

Indeed a point that has received insufficient consideration is how indigenous or customary law determines the foreshore and whether this is or is not the same as introduced law. The point is not insignificant especially where official surveys of land are required for the purposes of registration, division and boundary demarcation. If customary law has its own different definition and measurement of the foreshore, then in those countries in which the Constitution specifies that land matters are to be determined by custom, or that introduced law is to be applied taking into account custom, legislation which suggests a different definition or which is interpreted according to English law principles of interpretation may be in conflict with the Constitution.

---

<sup>26</sup> Cap. 90, s. 1. In Kiribati, the ‘foreshore’ “means the shore of the sea ... that is alternatively covered and uncovered by the sea at the highest and lowest tides” – s. 2 Foreshore and Land Reclamation Act Cap 35 Laws of the Gilbert Islands Revised Edition, 1977.

<sup>27</sup> Cap. 132, s. 2. Similarly, while it does provide for the payment of compensation to a land owner whose land ‘abuts’ the foreshore, there is no indication of where this line is to be drawn - s. 22(3).

<sup>28</sup> Rivers and Streams Act Cap. 136, s. 2. The Native Lands Act Cap. 133 similarly makes no reference to the foreshore, although this may be included by implication under s. 3 which states that native title to land is evidenced by tradition and usage.

<sup>29</sup> Cap. 158, s. 5.

<sup>30</sup> Sections 4(1), 4(4) and (5)(a).

<sup>31</sup> Admiralty charts however refer instead to Lowest Astronomical Tide which appears to have no explicit link to a definition of low-water mark. Aurrocochea & Pethwick (1986:39, 41) indicate that most authorities agree that low-water mark should be defined as MLWS (mean low-water spring tides) rather than MLW (mean low-water)

The approach of customary law to ownership of the foreshore is not clearly articulated in formal sources but may be gleaned from the exercise of customary controls and prohibitions over the foreshore and its resources and in the customary perception of foreshore rights. For example, in Fiji native customary fishing rights on any reef or shellfish bed are protected under legislation,<sup>32</sup> and although the statute does not state the extent of the reef or the location of shellfish beds, it has been claimed that customary ownership of fishing grounds extends to the outer reef slope – which may be some distance from land and permanently covered by water (Veitayaki, 2000:118). Customary owners have the right to regulate the use and exploitation of these fishing grounds, to place restrictions on their use or grant permission to others to fish them. Indeed the exercise of ownership rights over fishing grounds has been essential to the traditional management of marine resources because it has prevented open access to inshore areas.

By its very nature, the approach of customary law to ownership of the foreshore in the Pacific region is rarely articulated in legislation – compare this to the Law Books of udal law in the Orkney and Shetland Islands - but must instead be gleaned from the exercise of customary controls over the foreshore and its resources. Kabui (1997:124) states that “the general attitude of Solomon Islanders is that land includes the foreshore and reefs”. In Tuvalu, Hunt (1996) argued that the conservation ethic enforced by tradition remained strong, with a variety of methods used to mark out and manage marine resources including secrecy about the location of species and techniques for securing them, seasonal taboos or bans either on species or areas, restrictions on consumption of certain species, fines and penalties for abuse, and clan tenure or limited access to reef and lagoon areas. This suggests that, in Tuvalu, customary law governs the foreshore, sea and related resources. In Vanuatu, coastal land owners control the rights to take sand and coral and occasionally create toll gates on coastal roads to control access to the foreshore and beach. In Fiji, traditionally coastal people traded marine resources with those brought down from the hills by inland people, suggesting that coastal people regulated the exploitation of the reef and seashore for their own advantage. Recognition of the rights of clan ownership of marine resources is found in the Fisheries Act.<sup>33</sup>

In some cases, traditional rules which controlled the exploitation of marine resources have been replaced by devolved powers to local government or taken over by central government.<sup>34</sup> In such cases, there may be some confusion and overlap between rights and obligations arising under legislation and those still claimed in custom. Elsewhere the two systems may complement each other for example in Fiji the government has surveyed and registered several hundred customary fishing grounds and involved the customary owners in licensing arrangements of their grounds.<sup>35</sup>

If matters relating to coastal areas are not to be determined by custom, and if legislation is not clearly drafted, the definition of the foreshore may depend on interpretative

---

<sup>32</sup> Fisheries Act Cap. 158, s. 13.

<sup>33</sup> Cap. 158, s. 13.

<sup>34</sup> This has occurred in Kiribati (Hunt, 1996). See also Johannes (1978) and Muller (2000:113).

<sup>35</sup> These rights are registered with the Native Fisheries Commission in the Register of Native Customary Fishing Rights. See also Veitayaki (2000:121-2).

principles introduced through general principles of common law and equity.<sup>36</sup> But, does this mean the principles of the law of England and Wales, the principles of the law of Scotland, or a mixture of these? Most of the countries of the Pacific region refer to “the law of England”,<sup>37</sup> but often more generally to the “the common law” and “rules (or doctrines) of equity”.<sup>38</sup> In Vanuatu however, the 1980 Constitution refers to “British laws”,<sup>39</sup> although the earlier Western Pacific (Court) Order 1961 which applied to British subjects from 1961 to 1975 referred to “statutes in force in England” and “the substance of the English common law and doctrines of equity”. Even where introduced colonial law remains applicable, it is usually subject to a compatibility test with the independent status of the country and with custom and customary law. For example, in Vanuatu, the Constitution states:

(U)ntil otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom.<sup>40</sup>

Within English law itself, there is lack of clarity over the determination of coastal areas. In some circumstances, English law uses the measure of the Ordnance Survey – which is concerned with land. In other circumstances it uses the measure of the Admiralty, which is concerned with sea – especially territorial sea.<sup>41</sup> For example, the Territorial Waters Orders-in-Council, 1964 uses the “mean high-water spring tides” as the determining mark,<sup>42</sup> whereas the usual English law mark is the “mean high water mark”. Further inconsistencies are found in various statutes, for example, the Thames Conservancy Act 1932, refers to “the shores of the Thames so far as the tide flows and reflows between high and low water marks at ordinary tides”<sup>43</sup>, as did the 1894 Thames Conservancy Act,<sup>44</sup> whereas the Control of Pollution Act 1974 and the Environmental Protection Act 1990 adopt the Scots law measurement. Consequently, any cross-reference in Pacific island legislation to ‘English law’ leaves us no wiser.

The determination of the foreshore is important to indicate the seaward extent of land. It is also used to mark the baseline from which coastal and territorial waters are calculated. Most Pacific islands claim 12 nautical miles (20km) of territorial sea and 200 nautical miles (320km) of exclusive economic zone. Changes to the vertical movement of the sea can have a horizontal impact on the measurement of the coastal baseline from which

---

<sup>36</sup> Most of the constitutions of the region provide for this as an interim solution in the transition period between colonial rule and the emergence of a comprehensive body of national law.

<sup>37</sup> See the Niue Act 1966 (NZ) s. 672; The Tokelau Act 1948 (NZ) s. 4A; Cook Islands Act 1915 (NZ) s. 615; the Civil Law Act 1966 Tonga ss. 3 and 4.

<sup>38</sup> See s. 35 Supreme Court Ordinance 1875 Fiji; s. 6(1) Laws of Kiribati Act 1989.

<sup>39</sup> Section 95(2).

<sup>40</sup> *Ibid.*

<sup>41</sup> The inconsistency between the two was illustrated by the case of *Post Office v Estuary Radio* (1968) 2 QB 740 CA.

<sup>42</sup> Article 5(1).

<sup>43</sup> Section 5.

<sup>44</sup> Section 3.

these other measurements are drawn.<sup>45</sup> In countries with islands experiencing rising sea levels – such as Kiribati, Tokelau, Tonga & Tuvalu – this is a real (and not merely theoretical) concern. The United Nations Convention on the Law of the Sea, Article 5, takes as its normal base-line the “low-water line along the coast.”<sup>46</sup> It is not specified which low-water line this is, so this can vary depending on what is accepted by the coastal state. Thus it may be a mean mark, or the lowest low-water mark or the low-water mark of the mean spring tide, or the mean low-water neap tide. Baseline charts are deposited with the United Nations, but whether there is any acknowledgment of the different measuring approaches or the fact that changes can occur to alter that mark and consequently the extent of the territorial waters and exclusive economic zone – sometimes quite rapidly - is unclear. Indeed, it may be the case that there is considerable discrepancy between baseline charts and reality.

### **Land Tenure and Crown Dominion**

One of the issues that have arisen in these northern and southern islands is the question of the rights of the Crown – of Scotland and later England in the case of Orkney and Shetlands, and of Britain in the case of the islands of the Pacific region – over the seashore or coastal area. While it was generally accepted that the Crown had the right to regulate and control the sea, it was not so clear whether this royal power also conferred ownership or proprietary rights on the Crown and, even if it did, to what extent.

For example, in England and Wales it was accepted early on that the Crown had rights over the sea which included rights of use of the water and the exercise of maritime jurisdiction. Furthermore, it was stated that: “(A)ll the soil under the salt-water between high-water mark and low-water mark” was the property of the Crown.<sup>47</sup> However the law distinguished between the Crown’s private right over the foreshore and its public right. The latter was not part of the beneficial interests of the Crown but was held by the Crown in order to secure to the public certain privileges over the foreshore, notably the right to navigate and to pass and re-pass along the seashore, to fish and to exercise certain local customary rights, such as the right to hang out nets to dry. These common rights were recognised by the ‘custom of the realm’ and were therefore ‘the common law’ (Hall, 1988:672). Thus the Crown’s interest in the foreshore was an interest limited by the rights of the public.<sup>48</sup> Because the Crown acted as trustee of public rights, it could only grant away its private rights; it could never alienate its public rights.<sup>49</sup>

Similarly, under Scots law and the system of land tenure which applied in Scotland the Crown had territorial sovereignty. The Crown could therefore retain a right of property over the foreshore or grant it to a subject. However, as in England and Wales, the Crown could not grant or transfer to a subject those rights which, as sovereign, it was guardian

---

<sup>45</sup> Aurrocoechea & Pethick (1986:30). In the Pacific, this is being monitored by the South Pacific Sea Level and Climate Monitoring Project.

<sup>46</sup> See also Article 3 the Geneva Convention on the Territorial Sea and the Contiguous Zone 1958.

<sup>47</sup> Moore (1988:434). Hall in Moore (1988:671, 668 fn f), referring to Selden points out that there was nothing on the face of it to suggest that the Crown has title to the foreshore as such.

<sup>48</sup> *Blundell v Caterall* 5 B & Ald 268 (1821). See also Hall (1988:671).

<sup>49</sup> Rights could also be acquired by evidence of 60 or more years of use and by royal charter. Notable rights were those to wrecks and to take soil/sand.

of for the benefit of the public: namely, rights of navigation, fishing and other public uses.<sup>50</sup>

In the Orkney and Shetland Islands, the law was different. One of the major distinctions between udal and Scottish law is that udal law is a form of landholding, which vests the absolute title in the land in the estate holder (McGlashan, 2002). Udal tenure was not feudal,<sup>51</sup> whereas in England and in other systems derived from common law, the original or underlying proprietary title belongs to the Crown and all interests in land are derived from grants by the Crown. The udaller therefore held his land free from any superior claim and was beholden to no one.

Although udal title was recognised by the Scots authorities, this did not prevent Crown claims of sovereignty or *imperium* over the islands as illustrated by the case of *Smith v Lerwick Harbour Trustees* 1903 5F.680 in which the Crown's right as Sovereign was successfully asserted and later used to support a claim to treasure.<sup>52</sup> In the Shetland and Orkney Islands therefore, it was clear that while a claim by the Crown to a superior feudal title would fail; one based on the principle that the Crown was Sovereign, would be upheld.

This distinction has remained relevant for former colonies. Under British law where territory was acquired as a colony or protectorate and the Crown thereby exerted sovereignty or *imperium* over it, this did not necessarily mean that title to the land or *dominium* also vested in the British Crown. The latter would only vest in the Crown by formal transfer or by statute, such as Orders in Council or Ordinances.<sup>53</sup> A consequence of this was that, in countries brought under colonial administration, there could be confusion as to whether the Crown was both sovereign and universal landlord or simply sovereign. This is a question which has arisen in the Pacific, notably in Australia,<sup>54</sup> and is also of considerable relevance to the current debate in New Zealand regarding the rights of Maori to the foreshore, where the possibility of Maori claims has led to legislative intervention,<sup>55</sup> directed at protecting public rights and open access and use to the foreshore by expressly and specifically vesting the foreshore and seabed in the Crown. This measure erodes the possibility of Maori seeking to establish claims to the foreshore on the basis that the Crown did not automatically acquire ownership of the foreshore or seabed, as had been held in the 2003 Court of Appeal decision in the

---

<sup>50</sup> In the case of *Agnew v Lord Advocate* 1873, 11 M. 309, it was held that such uses might include the gathering of seaweed for manure, taking boulders and stone for building, taking sand and gravel and the boring for coal.

<sup>51</sup> The odal consisted of the homestead (which was enjoyed individually and passed from one heir to another); the common lands which were held communally and never distributed or alienated; and the land let, which was the odalsman's and could be rented to a stranger (Drever, 1933:323). Dobie (1931:118) indicates that it was a patriarchal system centred on family, not the individual.

<sup>52</sup> *Lord Advocate v University of Aberdeen* (1963) S.C. 533.

<sup>53</sup> Roberts-Wray (1966:625). See: *R v The Earl of Crew, ex parte Sekgome* (1910) 2 KB 576.

<sup>54</sup> Although an assertion that the Crown was politically sovereign was not necessarily the same as asserting that the Crown had a superior title to land – a dichotomy raised closer to the Pacific in the case of *Mabo v Queensland* (No. 2) (1992) 175 CLR 1.

<sup>55</sup> Under the 1840 Treaty of Waitangi, the Chiefs ceded to the Crown 'all their rights and powers of Sovereignty'. She in return confirmed and guaranteed to them 'the full exclusive and undisturbed possession' of their land but acquired an exclusive right of pre-emption over any lands they were disposed to alienate.

Marlborough Sounds case.<sup>56</sup> However neither the legislation nor the consultation papers which preceded it indicate that customary rights (short of claims to the freehold) are to be extinguished.<sup>57</sup> How they are to be accommodated remains to be seen particularly if, as Boast (2004:10) suggests, the Maori Land Court retains jurisdiction to resolve Maori land claims in other ways including making a declaration as to the customary land status of land thereby bringing it under the scope of the Waitangi Treaty.

One of the central issues in the debate in New Zealand has been the interpretation of terms such as 'title' and 'rights'. The difficulty is aggravated by crossing the legal boundaries between claims in custom and those based on the common law. Claims to the foreshore and seabed by the local *iwi* (tribes) were based on claims of 'customary title'. Under the general principles of common law and the provisions of the Treaty of Waitangi, the customary rights of Maori are recognised. Such rights can be extinguished by consent or by express statutory provision, failing which such rights will not be extinguished.<sup>58</sup> In custom such rights may be characterised by ancestral connection with a particular area or geographical feature, rights of use and passage, and rights of control and management of natural resources. Even in custom, claims to the foreshore and seabed may be lacking in exclusivity, as understood in 'private ownership'.<sup>59</sup> In common law, ownership – except in the case of the Crown – can never be absolute and, as indicated above, even the Crown's rights to the foreshore were subject to the interests and rights of the general public. The use of the terms 'customary title' versus 'Crown ownership' were both therefore misleading.

The issues raised by the controversies in New Zealand are also relevant in the smaller Pacific island states. Although the notions of the Crown and Crown land were introduced under colonialism, arguably this was grounded primarily on the idea of political sovereignty rather than feudal forms of land tenure. Indeed, by the time Europeans were making contact with Pacific islanders, most forms of feudal tenure had fallen into disuse or been abolished in England under the Tenures Abolition Act of 1660. Even if this were not the case the very fact that in England customary usage was held to be the common law of the realm which modified the Crown's rights over the sea and foreshore, could have meant that the public in Pacific island countries who were brought under colonial administration, retained rights which the public had formerly enjoyed such as the right to fish (and the right to access the seashore to fish), to pass and re-pass along the seashore.

Importantly, and similarly to the situation with udal law, it was recognised throughout the Pacific by colonial administrators that there were customary tenure systems which determined the rights of indigenous persons to land.<sup>60</sup> Thus, where customary rights of

---

<sup>56</sup> *Ngati Apa, Ngati Koata, and Others v Ki Tauihu Trusts and Others*, NZCA 117, [www.nzlii.org](http://www.nzlii.org).

<sup>57</sup> 'Government Proposals for Consultation' (August 2003) and 'Foreshore and Seabed: A Framework' (December 2003).

<sup>58</sup> See comments by Williams (2004) on the failure of the Territorial Sea and Exclusive Zone Act 1977 (NZ) to extinguish Maori customary fishing rights, and extracts for the report of the Waitangi Tribunal on the matter cited in Boast (2004:8-9). What is not clear is whether the failure of a statute to refer to customary rights leaves them undisturbed to act as a 'gloss' on the statute or not.

<sup>59</sup> Indeed, Boast (2004) indicates that it is by no means certain that Maori would exclude the public from such areas.

<sup>60</sup> Roberts-Wray (1966:626) holds that, even if the existence of feudal law in England meant that Crown sovereignty included title to land, where English law was introduced into a colony or protectorate it was to be applied 'subject to local circumstances'.

access to the seashore for fishing, gathering marine resources, accessing rights of navigation or passing and re-passing along the seashore existed in custom, acceptance of this concept was not incompatible with concepts which had been recognised in English common law.

Moreover, the island countries of the South Pacific were not unclaimed land or *terra nullius* – as was claimed in Australia,<sup>61</sup> so that from outset it was recognised that other land interests existed. Even in Australia it has been argued that the:

foundational concept of tenure as understood and defined in English law was inappropriate and inadequate to describe the legal nature of landholding in all Australian jurisdictions from the earliest days of settlement.<sup>62</sup>

If a feudal based land holding system in which the Crown held ultimate beneficial title or allodial title, was inappropriate for the colonies of Australia, arguably it was even less appropriate for the Pacific islands where contact came much later and where in most cases the pattern of land-holding by indigenous people remained governed by customary law. In the *Mabo* case in Australia, the High Court held that while the Crown could acquire sovereignty and radical title over land in a general sense, it could not acquire beneficial or allodial title to land which was occupied by Aboriginal people under native title at the date of annexation. In much of the Pacific region the same could be argued. Where land had been granted or ceded to the Crown by native title holders, then it could be argued that that native title had been extinguished or assigned.<sup>63</sup> Where this had not been the case however, then native title existing at the time of annexation or colonisation remained intact. Indeed the point made in *Mabo* that:

If there were lands within a settled colony in relation to which there was some pre-existing native interest, the effect of an applicable assumption that that interest was respected and protected under the domestic law of the colony would not be to preclude the vesting of radical title in the Crown. It would be to reduce... qualify... or burden... the proprietary estate in land which would otherwise have vested in the Crown, to the extent which was necessary to recognize and protect the pre-existing native interest.<sup>64</sup>

This approach would seem to accommodate the possibility of native land rights in Pacific island states co-existing with Crown rights. Where an island did not become a colony then this statement might be subject to some modification. For example, the New Hebrides – now Vanuatu – never became a colony of Britain, nor did Tonga. Other island countries became colonies of other powers, for example Nauru became a colony of Germany, as did Samoa – previously Western Samoa. Yet other island countries were

---

<sup>61</sup> Established in *Cooper v Stuart* (1889) 14 App. Cas. 286. Until the *Mabo* decision it was presumed that ownership was coextensive with sovereignty. The *Mabo* decision rejected the *terra nullius* doctrine, and, as had happened some time before in udal law, severed the question of sovereignty from land ownership.

<sup>62</sup> Edgeworth (1994:398). Note that early case law did not support this idea. See, for example, *Attorney General of New South Wales v Brown* 2 SCR App. 30 and *Milirrpum v Nabalco* (1971) FLR 171, where it had been held that the Crown not only acquired sovereignty over the colony but also absolute beneficial ownership of the land.

<sup>63</sup> The difficulty, as will become evident in the case of Fiji, was that those who ceded the land in the first place may not have had the authority to do so, thereby raising challenges about the initial cession or grant.

<sup>64</sup> See comments of Judges Dean and Gaudron at 86-87.

protectorates when first brought under British control, rather than colonies. These included Cook Islands, Kiribati, Niue, Solomon Islands and Tokelau. Others were never colonies but became trust territories under the trusteeship of the United Nations as a result of enemy occupation during the early part of the twentieth century. These included the Marshall Islands, the Caroline Islands (part of which are now the Federated States of Micronesia) and the Northern Mariana Islands.

Although specific authority relating to the island countries of the Pacific is sparse, elsewhere where there were treaties with the native or indigenous people under which native people acknowledged the sovereignty of the colonial power, it has been held that the colonial power stood in a fiduciary relationship to the native people as regards their land. Where, as part of the treaty, traditional lands were ceded to the colonial power, then it has been held that this was on the understanding that the colonising power would protect the possession and use of the colonised people (Mason, 1997:820).

Where countries were not brought under the control of the colonial powers either by cession, conquest or discovery then it is questionable whether, under international law, sovereignty over the land in the form of ownership (*dominium*) – as opposed to political sovereignty (*imperium*) – could be claimed. Even where a new colony was established it seems that under common law the principle was that interests in property which existed prior to the establishment of the colony remained unless there was some form of conveyance, express confiscation or expropriating legislation.<sup>65</sup>

Legal principles, however, have not always been clearly applied. For example, in *Williams v Attorney General for New South Wales* it was held that, from 1786, the “whole of the lands of Australia were the property of the King of England”.<sup>66</sup> Similarly, in 1847 in New Zealand, it was held that the Queen became the owner of the whole of the land,<sup>67</sup> although native possession and title continued until title was lawfully extinguished.<sup>68</sup>

Whatever their status prior to independence, it is clear that the new constitutions of most Pacific island countries tended to limit the scope of introduced law if it was incompatible with local custom or the independent status of the country.<sup>69</sup> This has led in some

---

<sup>65</sup> *In Re Southern Rhodesia* (1919) A.C. 211, 233. One of the difficulties that occurred where common law collided with native law was that the common law had very narrow conceptions of private property rights in land, and had problems in grasping communal rights or rights linking people with the land in any spiritual way – as was the case with aboriginal people in Australia. Compare *Attorney-General (NSW) v Brown* (1847) 1 Legge 312 with *Amodu Tijani v Secretary, Southern Nigeria* (1921) 2 AC 403.

<sup>66</sup> (1913) 16 CLR 404, 439.

<sup>67</sup> *R v Symonds* N.Z.P.C. 1840-1932, 387. See also *Re the Bed of Wangunui River* (1962) N.Z.L.R. 461.

<sup>68</sup> *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* (1941) AC 308. This was upheld and enlarged much later in *Re the Ninety Mile Beach* (1963) N.Z.L.R. 461, where it was held that Maoris only held their land by grace and favour of the Crown and that the Crown had the right to disregard native title.

<sup>69</sup> A typical example is that found in the Cook Islands Constitution 1965, section 77. Acts of the British Parliament which were in force in New Zealand on 1 April 1916 remained applicable except insofar as they were inconsistent with the Cook Islands Act 1915 (NZ) or inapplicable to the circumstances of the country. Also principles of English common law and equity continued to apply except in so far as they were inconsistent with the Cook Islands Act 1915 (NZ) or inappropriate to the circumstances of the country, or inconsistent with the constitution.

instances to inconsistencies.<sup>70</sup> Nevertheless, it appears that the notion that the Crown acquired all the land in the island countries of the region persisted, except in those countries which are today, Papua New Guinea, Nauru and Vanuatu (Farran & Paterson, 2004: 34). In the protectorate of Solomon Islands, the situation was unclear prior to independence but it would seem that the Crown did not acquire ownership of land. In a number of countries where the prerogative of Crown ownership was originally recognised, it was modified by the recognition of land held under freehold title and customary land rights.<sup>71</sup> So, for example, land held under freehold title was excluded from ownership of the Crown in Cook Islands, Niue and Tokelau. This marked a departure from ordinary English common law principles under which the underlying or allodial title of freehold land still vests in the Crown and goes back to the Crown if there are no successors in title. Elsewhere, it was clear that indigenous rights could not be adversely affected by the exercise of claim of Crown prerogative rights.<sup>72</sup> Today the only country where it can be said with certainty that all land vests in the Crown is Tonga, where not only is there Crown sovereignty over the land but also allodial title in a feudal sense, grants of land lying in the King's power under the Constitution.<sup>73</sup> This however is the Crown of Tonga and not a metropolitan power.

Despite the introduction of the idea of Crown rights to land, the application of customary law to land tenure was recognised, has continued and is reflected in the national constitutions of most island countries.<sup>74</sup> In some cases land owned under customary tenure has been specifically excluded from Crown ownership,<sup>75</sup> while elsewhere legislation made it clear that the ultimate ownership of the Crown was subject to the ownership rights of indigenous owners of customary land,<sup>76</sup> So that the Crown could only claim such land by default.

In some countries however, the relationship between Crown and native title has been less clear, partly because the indications historically associated with the common law feudal tenure system have not been evident.<sup>77</sup> Nor is it always clear to what extent Crown grants of land included or excluded certain benefits – notably to mines and minerals.<sup>78</sup>

---

<sup>70</sup> For example, in Vanuatu the Foreshore Development Act (Cap. 90) - a Joint Regulation (No 31) passed by the Condominium government prior to independence - permits the development of the foreshore with the require consent of the Minister. However the foreshore is customary land - *Brown v Bastien* (2002) VUSC 2 - and under Article 74 of the Constitution "(T)he rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu".

<sup>71</sup> Cook Islands, Niue and Tokelau were attached to the British colony (later Dominion) of New Zealand.

<sup>72</sup> As in the Gilbert & Ellice Islands, which became Kiribati and Tuvalu. Similarly in Samoa, which was not a British colony but a League of Nations mandate and then a United Nations trusteeship territory.

<sup>73</sup> CI 111, Constitution of Tonga, read with ss. 30 and 41 Land Act, Cap. 132.

<sup>74</sup> See Art. 101, Constitution of Samoa.

<sup>75</sup> Section 7 Land Act 1962 Papua New Guinea.

<sup>76</sup> Cook Islands – s. 354 Cook Islands Act 1915 (NZ); Niue – s. 323 Niue Act 1966 (NZ); Tokelau – s. 20 Tokelau Amendment Act 1967 (NZ).

<sup>77</sup> For example, the payment of rents and fines to the Crown, or the reversion of title to the land back to the Crown where there are no heirs or successors in title (escheat).

<sup>78</sup> This is partly because, under the feudal system, Crown grants of land were based on the inter-personal relationship between King and grantee and were grants of use and occupation of the land for a period of time rather than grants of physical substance of the land. Also, it is conceptually possible that the Crown retained title only to the surface and subsoil: this is found in civil law systems.

<sup>79</sup> Fiji Islands are a case in point.

Consequently there remains controversy over the extent of Crown – now more usually State – rights.<sup>79</sup>

In Fiji, early ordinances indicated that native rights to land were to be treated as being equivalent to freehold estates.<sup>80</sup> In 1907 however the previous law was repealed and replaced with legislation which stated that “native lands shall be held by native Fijians according to native customs as evidenced by usage and tradition”.<sup>81</sup> This suggests that Fijians hold as absolute owners and not subject to any superior claim of the Crown. So that whereas until 1907 it seems that Fijians held the land under tenurial title, from 1907 it appears that this was not the case. Sovereignty of Fiji however continued to rest with the British Crown until independence. The result was that native title was recognised alongside Crown title. What was not clear was the scope of the Crown’s title and – as had been raised in the Orkney and Shetland Islands – the extent to which other rights flowed from the Crown’s prerogative. For example, in Fiji under the Crown (now State) Lands Act, 1946, it is stated in Section 2:

“Crown land” means all public lands in Fiji, including foreshores and the soil under the waters of Fiji, which are for the time being subject to the control of Her Majesty by virtue of any treaty, cession or agreement, and all lands which have been or may be hereafter acquired by or on behalf of Her Majesty for any public purpose.

The implication here is that the foreshore vests absolutely in the Crown; not that the Crown retains simply the underlying or allodial title in a feudal sense. The Act further states that a lease or a grant of land cannot confer any right to the “foreshore or waters under the soil”,<sup>82</sup> suggesting that this right is inalienable and does not ‘lie in grant’ even by the Crown. However, the next section allows leases of the foreshore to be made with the consent of the minister and subject to certain procedural safeguards and provided such leases or grants do not create a “substantial infringement” of public rights.<sup>83</sup> In such a case, the Crown would only hold a reversionary title. This takes us back to the point noted earlier that the Crown can only grant interests from its private beneficial interest. An amendment made in 1967 suggests that infringements may be made if this is necessary for the carrying out of the purpose of the lease or the grant.<sup>84</sup> What is not clear is whether these ‘public rights’ mean the rights of the Crown/State – held by the Crown on behalf of and for the public at large, or the rights of the public at large for example, rights of passage along the foreshore and the coastal water, or rights of fishing in tidal waters.<sup>85</sup> The matter is further complicated in Fiji because native rights and public rights are not synonymous. The Native Lands Act recognises the customary rights of native owners to occupy and use native lands. These in turn are determined by evidence of customary use and tradition.<sup>86</sup> Crown Grants of land only included land up to the high water mark, so that even where there may have been a purported grant of land prior to cession which included the foreshore, this was superseded by the Deed of Cession which

---

<sup>80</sup> Section II, Native Lands Ordinance of 1880 and s. 3 Native Lands Ordinance 1892.

<sup>81</sup> Section 2, Native Lands Ordinance 1907, now s. 4 Native Lands Act Cap. 133.

<sup>82</sup> Section 20.

<sup>83</sup> Section 21.

<sup>84</sup> Section 22.

<sup>85</sup> Once the State has the power to grant such leases there is a very real danger that public and customary rights are imperilled. See the Tonga case of *Fukofuka v Peacock* (2001), TOSC 17, [www.pacii.org](http://www.pacii.org).

<sup>86</sup> Sections 2 and 3 Native Lands Act Cap. 133.

vested the foreshore in the Crown. It has been held that, unless there is clear evidence to the contrary, the foreshores are public land vested in the state.<sup>87</sup> Under the Fisheries Act, recognition of native customary rights and the exemption from licensing requirements of certain customary right holders suggests however, that not all indigenous rights are subject to state regulation.

This lack of clear distinction between ownership rights, use rights, and regulating or controlling powers leaves open the possibility of boundaries being moved. In the case of Fiji, proposed legislation intends to do just that, as will be considered below.

A further problem which arises and which is not limited to the post-independence period is the co-existence of introduced notions of private property and traditional concepts of communal property which may not be dependent on possession or residence or contract. Where there is explicit constitutional recognition of customary land tenure, then private land ownership concepts may have to give way to the former. An interesting case from Hawaii illustrates the dilemma. In *Public Access Shoreline Hawaii and Angel Pilagro v Hawaii County Commission and Nansay*<sup>88</sup> there was a conflict between the development of a tourist resort and the right of native Hawaiians to observe traditional gathering rights over undeveloped land. Under the Hawaii State Constitution, rights which are traditionally exercised for subsistence are protected,<sup>89</sup> and this has been judicially recognised in a number of cases. Moreover in exercising powers under the coastal Zone Management Act,<sup>90</sup> consideration must be given to such cultural interests. The Hawaii Supreme Court upheld the duty of the Country Planning Commission to “require protection of traditional and customary Hawaiian rights”<sup>91</sup> This can be contrasted with the Australian situation illustrated by the *Wik* case,<sup>92</sup> where lack of established and entrenched indigenous gathering rights meant that it was much easier to deny the co-existence of introduced land law – notably here pastoral leases – with customary or native title rights (Poynton, 1997).

The confusion may also be aggravated by inconsistent legislative provisions. In the Solomon Islands, the extent of the Crown’s right to the foreshore and coast was unclear. While it was recognised early on that certain land was held under customary title,<sup>93</sup> it also appeared to colonial administrators – often mistakenly – that land was lying idle and unused. Under the Lands and Titles Ordinance 1959 there was provision for a Commissioner of Lands and a Crown Surveyor to sit on a Trust Board which was empowered to bring “vacant” or “waste” land under public control and use it for the benefit of the people. Vacant or waste land was land which the metropolitan power considered to be neither customary nor public land, was not registered and did not appear to have been used or occupied by anyone for 25 years before 1958. Under this Ordinance

---

<sup>87</sup> *Tokyo Corporation v Mago Island Estate Limited & James Borron* (1982) 38 FLR 28.

<sup>88</sup> 79 Haw 425, 903 P 2d 1246 (1995).

<sup>89</sup> Article XII, section 7 (1978).

<sup>90</sup> Cap. 205A Hawaii Revised Statutes.

<sup>91</sup> Page 1249.

<sup>92</sup> *Wik Peoples v Queensland* (1996) 141 ALR 129.

<sup>93</sup> Indeed, legislation was passed to try and prevent the wholesale alienation of customary land by indigenous Solomon Islanders to Europeans in 1896 under the Queen’s Regulation No 4.

and a later amendment in 1964, the foreshore vested in the Board as public land.<sup>94</sup> Under the amended legislation the Commissioner of Lands – on behalf of the government - had the right to apply to be registered as the owner of the land lying below mean low water and between the points of mean high water and mean low water.<sup>95</sup> This was only a right of application and not of registration, so it could be refused. However, earlier legislation had vested the seabed<sup>96</sup> and the foreshore<sup>97</sup> in the Commission of Lands as public land for which registration was unnecessary. Land which was “native customary land” was excluded from the vesting provisions so that any seabed or foreshore which was customary land did not become public land. What was not clear was whether in fact, the foreshore or seabed could be customary land. In the case of *Allardyce Lumber Company Limited v Laore*,<sup>98</sup> customary owners claimed damages caused by the lumber company’s logging activities to the coastline – including the reef – and a declaration of ownership of the reef. The claim was rejected on the grounds that the existence of customary rights over the area in dispute had not been established – the burden of proof lay with the defendant. Further, the court held that the seabed<sup>99</sup> – including the reefs – were not land and therefore could not be customary land. In particular “land covered by water”, as defined by legislation,<sup>100</sup> did not include the seabed. However, in the later case of *Combined Fera Group v Attorney-General*, it was held that “land” could include “land covered by water” – in particular the seabed.<sup>101</sup> If such land was capable of being claimed as public land – not by virtue of any common law principles but by virtue of statute - it was also capable of being claimed as native land. All that was then required was evidence of customary ownership, use and occupation prior to January 1969.<sup>102</sup> Similarly, it was held that if there was evidence of use and occupation of the foreshore then this too might be held to be customary land and would prevent the vesting of the foreshore in the Commissioner or the Solomon Islands Land Trust Board. It followed that the Crown did not automatically acquire the foreshore or the seabed (Kabui, 1997).

---

<sup>94</sup> “There shall vest in the Board as public land, by virtue of this sub-section – (a) the subsoil of every road and the bed of every river, (b) the foreshore between the points of mean high water and mean low-water (c) all land adjoining the sea coast within sixty feet of mean high water mark and (d) all land within sixty six feet on each side of every road and every tide” s. 47(1) Land and Titles Ordinance Cap 56. This legislation seems to have ignored the fact that there had been successful claims in custom to the reef based particularly on rights to dive for trochus shell – *Hanasaki v OJ Symes* (unreported) Honiara 17 August 1951.

<sup>95</sup> Saved in s. 10(4) Land and Titles Act Cap. 93, 1968. The wording of this section suggests that Crown ownership of foreshores and seabed is absolute, and, being an Act of Parliament, would take precedence over customary law under para. 3(2), Section 3, Constitution of Solomon Islands.

<sup>96</sup> Land and Titles Ordinance Section 47(1)(a) all land below mean low-water. This was not included in the original section but added in 1964 by the Land and Titles (Amendment) Act No 22, so that originally only the foreshore vested in the Commissioner as public land.

<sup>97</sup> Section 47(1)(b) all land between the points of mean high water and mean low-water.

<sup>98</sup> (1990) SILR 174.

<sup>99</sup> That is land covered by the sea at mean low-water.

<sup>100</sup> Land and Titles Act Cap. 56 which as the Land and Titles Ordinance replaced the Kings Regulation Cap. 49 in 1963. The latter had been more broadly worded and defined “native land” as “land owned by natives or subject to the exercise by natives of customary rights of occupation, cultivation or other uses”. Arguably the last might have included rights to harvest from the reef or rights to the seabed and foreshore.

<sup>101</sup> (1997) SBHC 55, [www.paclii.org](http://www.paclii.org). This was on the grounds that the provision allowing the Commissioner to apply to register such land under s. 10(4) of the LTA Cap 93 would otherwise be superfluous, and also because s. 47(1) as amended in 1964 recognised the seabed as land which could vest in the Commissioner as public land.

<sup>102</sup> The date that the Land and Titles Act Cap 93 came into effect and under which the Commissioner could apply to have the land registered for the government.

This decision establishes that the Crown did not have absolute ownership of the foreshores and seabed in Solomon Islands: the common law of England did not take away customary rights of ownership of the foreshores and reefs, but – as indeed had been held in the *Budge* case – that the burden of proof of the existence of these lies with the plaintiff customary claimant.

As occurred in the case of udal law, these Solomon Island cases raise issues met elsewhere: the hierarchy of sources of law and the relationship between customary law and written law; the difficulties of establishing claims in custom; conflicts in concepts and language in plural systems. Also pivotal to the issue in Solomon Islands were questions of interpretation which are fundamental in determining legal rights to the coast and foreshore and also reflect practical difficulties.

### **Fishing Rights**

Access to the foreshore and the coast is not only about access to land and sea but also access to marine resources including fish and shell fish. This is not just of importance to subsistence economies but also, as the capacity for commercial fishing expands – to developing economies. But it is also more than that. In custom and mythology island people may have spiritual and sacred links with the sea and its resources, including whales, turtles, dolphin and fish.<sup>103</sup>

In Scotland and under udal law, certain fishing rights have historically been treated separately. In Shetland and the Orkney Islands the sovereign rights of the Crown excluded rights to salmon, which, it appeared, had never been ceded to the Crown of Norway and therefore did not transfer to the Crown – either of Scotland or after union, England, Wales and Scotland. Fishing rights under udal law remained vested in the udaller.<sup>104</sup> Indeed it was held that udal law prevailed over feudal law in respect of salmon fishing, and it is still acknowledged today that under udal law other rights pertinent to the foreshore may pass under udal title.<sup>105</sup> However even where udal law governed salmon fishing rights, a Crown grant or licence might be required to carry out these rights where they encroached on the Crown's ownership of the seabed. So, while salmon fishing might be determined by udal law, the right to place fish cages for salmon farming required a Crown licence. Increasingly the regulation of fishing of all types through licensing has restrained both private and public rights – not only in Scotland but in the Pacific region as well.

In the rest of Scotland, it remains the case that, under Scots law, rights to fish for salmon, and to harvest oysters and mussels are separate legal interests and can be transferred separately from the ownership of the land.<sup>106</sup> Although the right to take salmon originally vested in the Crown, it could be owned by a subject either by express grant or by

---

<sup>103</sup> Veitayaki (2000:119) gives several examples of the respect accorded to 'sacred' fishing grounds and of the close association between the living and the dead, the present and the past through the observance of rituals and taboos in respect of such sites.

<sup>104</sup> *Lord Advocate v Balfour* 1907 S.C 1360. This followed reasoning in *Smith v Lerwick Harbour Trustees* (1903) 5 F. 680.

<sup>105</sup> Law Reform Commission Report No. 190 (2003) para 4.12.

<sup>106</sup> A third separate type of interest in land – the right of port and of ferry – also exists.

prescription. Holders of fishing rights also had rights to make reasonable use of the bank and foreshore in order to exercise their fishing or gathering rights. Apart from salmon, oysters and mussels, the public in Scotland have a right to gather other shell fish and to fish for ‘white fish’<sup>107</sup> in the sea and public rivers.<sup>108</sup> Fishing rights include the rights to fish by rod and line, or by net, or boat; however, rights of coastal fishing do not usually confer ownership of the sea or the soil under the sea.

Even if title over the sea is vested in the Crown, it is arguable whether the Crown can possess a resource which is constantly moving and changing.<sup>109</sup> Thus Crown dominium generally means the power to control or regulate fisheries and passage of sea craft for the benefit of the State as a whole. Indeed Chief Justice Hale stated “by Magna Carta and other Statutes every one hath a liberty to go and come upon the sea without impediment”.<sup>110</sup>

In the Pacific region, as in Scotland, traditional fishing rights have remained important as public rights.<sup>111</sup> For example, by the Torres Straits Treaty (1978), Australia and Papua New Guinea recognised the need to preserve the traditional way of life of indigenous people, including traditional fishing. However it has been held that the meaning of ownership in the case of native custom does not go beyond “the right to use this area for such purposes as the community would then envisage”.<sup>112</sup> In the Fijian case of *Tokyo Corporation v Mago Island Estate Limited & James Borron*, expert evidence indicated that fishing rights could not belong to the Crown nor could they be held by non-native Fijians. Fishing rights were not therefore ‘public rights’ in so far as a considerable proportion of the public in Fiji are not indigenous Fijians.<sup>113</sup> Further, in this case it was stated that: “proprietary rights and fishing rights are two concepts; Native Fisheries Commission is only concerned with fishing rights; it has nothing to do with ownership”.<sup>114</sup> Impliedly, customary fishing rights envisaged subsistence fishing and not commercial fishing – just as the right to collect seaweed in Scotland was originally directed at enabling crofters to fertilise their fields. The use of motorised boats and the commercial exploitation of marine resources have strained these notions of public rights. This, combined with growing concern about the depletion of such resources and conversely, a desire to partake in the economic spoils of such exploitation, has led to increasing intervention either by the state or interested parties. A clear example is evident in Fiji where new legislation is being proposed which will have a major impact on foreshore and seabed resources.

---

<sup>107</sup> All fish other than salmon, *Lennox v Keith* 1993 GWD 30-1913.

<sup>108</sup> Private rivers are those which are non-tidal.

<sup>109</sup> Indeed, fish themselves belong to no one until caught so that fishing rights relate only to the right to fish, not a general right to the fish. In custom however there are rights to certain species such as turtle or large fish, so that whoever catches them may be required to hand them over to those who are rightful entitled to such ownership.

<sup>110</sup> *Warren v Prideaux* (1673) 1 Mod 105 ER Vol. 86, 766. Magna Carta – which was a formal agreement between the King and his people - did not extend to Scotland.

<sup>111</sup> Although exclusive use might be secured either by agreement or force – see Judge Wood in *Ene Land Group Inc v Fonsen Logging (PNG) Pty Ltd and GR Logging Ltd* (1998) PGNC 9, [www.paclii.org](http://www.paclii.org).

<sup>112</sup> *Tolain and others v The Administration of the Territory of Papua and New Guinea; in re Vulcan Land* (1965-66) PNGLR 232, cross referring to *Amodu Tijani v The Secretary South Nigeria* (1921) AC 399.

<sup>113</sup> Just under half the population is non-Fijian the greatest number being Indo-Fijian.

<sup>114</sup> See comments of Vataliai Navunisaravi – Minister of Fijian Affairs (1982) 38 FLR 28 at 27. See similarly in the same case the evidence from the Acting Chairman of the Native Fisheries Commission that “fishing rights to fish in the aforeshore area are not proprietary rights; they are customary rights”.

This legislation is based on fishing rights.<sup>115</sup> A note to the Bill recognises that at present fishing rights in Fiji are usage rights but that the new Act will employ the term ‘fisheries’ to include both beneficial ownership and usage rights in the customary fisheries owners.<sup>116</sup> This will be done by bringing ‘fisheries’ under the control of the Native Lands Trust Board established under the Native Land Trust Act (Cap. 134) and a Customary Fisheries Commission – which will replace the current Native Fisheries Commission established under the Fisheries Act (Cap. 158).

What is interesting about the Fiji example is that customary fishing rights are being used as a springboard for claiming considerably enlarged rights including rights to benefit from mineral extraction from land under the sea, and that customary fishing ground is enlarged to include not only the area of sea over which fishing might take place or access to the sea – whether by boat or rod or the casting of land nets - but the ground itself including foreshore land and the reef.<sup>117</sup> Once enacted, this legislation will give the Native Land Trust Board extensive powers to control all fishing and seabed exploitation, use of the seashore for ports, harbours and development, and control of rights of passage along the seashore and coastal waters. This legislation will favour native Fijians and not the public at large so it remains to be seen how ‘public’ rights and ‘public interest’ will be accommodated by the State.<sup>118</sup> Indeed, similar concerns may lead the New Zealand government to review its use of the term ‘title’ when recognising Maori claims of customary rights over foreshore and seabed.<sup>119</sup>

### **The Registration of Title**

A further factor which in Scotland distinguished udal law from feudal law and which is also found to a greater or lesser extent in the Pacific region, is that udal land ownership was based on possession and not written title – which was required for Scottish feudal claims. The question has arisen as to whether udal title converted to feudal title through compliance with feudal forms. It has been held however that it does not. Indeed, where land in the Orkney and Shetland Islands now falls to be registered under compulsory registration provisions, a special note must be entered on the register drawing attention to the differential measurement for land with a sea boundary.<sup>120</sup> In order to preserve the

---

<sup>115</sup> The proposed legislation is not yet law. It has been sent out to the Provinces and to the Great Council of Chiefs for comment and consultation.

<sup>116</sup> Footnote 2 to the Bill for an Act to regulate the ownership of custom fisheries areas and the control management and administration of customary fisheries and for related matters (long title).

<sup>117</sup> Under the proposed s. 2 of the Bill “customary fisheries grounds” means “any areas of foreshore land, reef, fishing ground, mangrove swamp, river, stream or wetland, and includes any other area recognised and confirmed as customary fishing areas under the fisheries Act or under this Act”. The legislation is intended to confer both usage and ownership rights.

<sup>118</sup> In particular, it seems that local tribes will be enabled to both control and participate in the exploitation of tourist-rich coastal areas: *Vanuatu Daily Post*, January 3, 2004.

<sup>119</sup> *New Zealand Herald* 11 March 2004. It has already been held in New Zealand that the Territorial Sea and Exclusive Zone Act 1977, which vests the seabed and subsoil of submarine areas in the Crown, does not affect existing customary fishing rights; and the Court of Appeal has recognised the jurisdiction of the Maori Land Court as extending to the foreshore and seabed. The concern is that this will lead to claims of private title by Maori to the foreshore and seabed.

<sup>120</sup> The move to make Orkney and Shetland Land Register operational areas in 2003 necessitated a fresh appraisal of the significance of udal tenure - Ramage (2002, 2003).

distinction between udal title and feudal title, a note will have to be entered on the land plan of the register indicating that any sea boundary indicated by a low water mark means the lowest low water mark in the case of udal title.

Only if udal title has expressly passed to the Crown from the udaller and subsequently been disposed of through the feudal system can it be feudal. This reasoning extends to the foreshore. Conversion from one system to the other has repercussions: it changes the ownership of the foreshore, its measurement and claims to related rights such as fishing.

This reasoning raises the question to what extent compliance with the forms of other, introduced systems, can change the underlying fundamental principles? This is of relevance where very different formal systems from those encountered under indigenous or customary law are introduced. For example, could the registration of customary land change the nature of interests in the land?

In the case of the conversion of Maori customary land to freehold land in New Zealand, this has also been an issue. While the Maori Land Court has the power to ascertain the status of land and declare it to be customary land, as indicated above, it also has the power to translate these interests into freehold title – a concept unknown in Maori law. Once this is done then a certificate of title is issued and the land becomes freehold title under the Land Transfer Act 1952 and subject to registration. By this translation one form of land holding is changed to a completely different one. It is this possibility that led to the Court of Appeal decision in *Ngati Api* case discussed above and reflects an ‘all or nothing’ approach driven by the desire to ensure that title to land is registered. In fact, it could have been possible to agree to the registration of other forms of interests such as easements, separate estates of fishing – as in Scotland – or the registration of discrete areas such as sandbanks, reefs or mud flats.<sup>121</sup> Provided of course that there was agreement on how these were to be measured or defined.

Not only does registration ‘shoe-horn’ customary land tenure interests into a foreign mould, but it extinguishes the flexibility and variety of interests that may be inherent to and desirable in customary forms of tenure and enjoyment of marine resources. This is evident in the Pacific where, if land title is registered, then unless there is a fraud or rectifiable mistake the paper title will prevail over unwritten claims. Registration is intended to provide an indefeasible title, although it has been suggested that this should not be the case in Pacific island countries where such indefeasibility is anathema to customary patterns of land tenure.<sup>122</sup> In some countries of the region, almost all land is registered.<sup>123</sup> Elsewhere, very little land or only certain forms of land holding – such as leases – is registered.<sup>124</sup> And, in a number of other countries, title to land held under

---

<sup>121</sup> Boast (2004) mentions some of the historical, and often more enlightened, cases which have been heard in New Zealand.

<sup>122</sup> See Mugambwa (2001) and the Kiribati case of *The Family of the Former High Chief of Butaritari v The Old Men of Butaritari* Civil Appeal No 1, 1975, KIH 1, [www.pacii.org](http://www.pacii.org).

<sup>123</sup> For example, all land held under native title is registered in Cook Islands under the Land (Facilitation of Dealings) Act 1970, and in Fiji under the Native Lands Act Cap 133.

<sup>124</sup> See Land Transfer Act Cap. 131 – Fiji; Land and Titles Act Cap. 133 – Solomon Islands; Land Act Cap 133 – Tonga; Land Leases Act Cap. 163 – Vanuatu.

customary land tenure remains unregistered (as in Vanuatu), or only partly registered: (as in Solomon Islands).<sup>125</sup>

Registration may affect not just land but also interests in land which exist separately from the land itself such as the right to take something from the land of another - such as timber or fish. As has been indicated the right to take fish can exist as a separate legal interest in Scots law and as a *profit a prendre* in English law.<sup>126</sup> In England and Wales, registration of such rights has only recently become compulsory under the 2002 Land Registration Act. Prior to this such rights were capable of existing as legal interests off the register which could bind third parties (Jackson, 2004). As fishing rights may be an increasingly valuable asset and can exist separately from the land from which access to such fishing is provided, registration offers significant protection and promotes the commercial exploitation of such rights by facilitating transactions affecting them.

In Scotland, where salmon fishing rights exist as a separate legal estate and where many interests are not yet registered, it is necessary to trace title to such rights back to the original Crown Charters or to establish rights by prescription where no direct link to the Crown can be found. This is a cumbersome and not always watertight process.

Similarly, if customary fishing rights are claimed it may be necessary to establish long usage or custom since 'time immemorial'. This in turn will require the court to be satisfied by the evidence of custom and invariably shifts the burden of proof on to the customary owner claimant. Alternatively, strongly argued claims to customary rights which exist off any register may open the door to establishing claims which may in fact be spurious or of recent invention – perhaps because their commercial potential has only recently been recognised. If these are then registered they become indefeasible. The question of registration also raises once more the problem of definition and determination of the scope and extent of rights.

## **Conclusion**

As indicated in the introduction, claims to the foreshore are not just claims for the recognition of customary rights or traditional practices. They are central to issues of development, sustainability and management in island countries in the North and the South. Not only are long sighted policies required as well as political will, but also clear legal parameters, particularly as regards who makes decisions regarding the development of the foreshore, and the distribution of benefits arising from its exploitation.<sup>127</sup> Confusion over who owns what and to what extent makes it very difficult to ensure that the right owners or users are consulted and involved in planning and management. Before solutions to many of these issues can be found, it is necessary to answer some of the fundamental legal questions raised in this article. If the goodwill and support of those whose relationship with the foreshore, coast and seabed is determined by custom is to be secured, then it is important to ensure that those rights are recognised – perhaps, but not necessarily, by registration – and that the holders of such rights are consulted in the

---

<sup>125</sup> The registration of land held under customary title remains voluntary under the Customary Lands Records Act, Cap. 132.

<sup>126</sup> It is not necessary for the owner of these interests to have any land of their own.

<sup>127</sup> This has been recognised as a major issue in the Pacific region. See papers in Hooper (2000).

management and development of coastal areas. The island countries under consideration in this article have responded in different ways to claims made on the basis of tradition or custom. For some, the challenge of customary claims has been weakened either by the overwhelming force of introduced laws and practices or by making it much harder to discharge the burden of proof that such custom exists. Elsewhere, the narrowing or enlarging of jurisdiction over marine resources may be used. Everywhere, increasing legislation impinges on non-statutory regulation but the consequences of that legislation depend very much on who holds political power and which interests they represent. Whether the focus is on islands in the North or in the South, it is evident that there are a number of possible legal approaches to addressing potentially conflictual issues pertaining to the seabed and foreshore which should be considered if the development and protection of these resources is to thrive in islands and elsewhere.

## References

- Aurrocochea, I. & Pethwick, J.S. (1986) 'The Coastline: its Physical and Legal Definition', *International Journal of Estuarine & Coastal Law*, Vol. 1, No 1, pp. 29-42.
- Boast, R. (2004) 'Maori Proprietary Claims to the Foreshore and Seabed after *Ngati Apa*', *New Zealand Universities Law Review*, Vol. 21, No. 1, pp. 1-25.
- Carey Miller, D. & Sheridan, A. (1996) 'Treasure Trove in Scots Law', *Journal of Art Antiquity and Law*, Vol. 1, No. 4, pp. 393-406.
- Corrin Care, J., Newton, T. & Paterson, D. (1999) *Introduction to South Pacific Law*, London, Cavendish.
- Dobie, W.J. (1931) 'Udal and Feudal', *Juridical Review*, No. 43, pp. 115-126.
- Drever, W.P. (1933) 'Udal Law' in J.L. Wark & A.C. Black, eds., *Green's Encyclopaedia of the Laws of Scotland*, Edinburgh, Green, Vol. 15, pp. 321-336.
- Edgeworth, B. (1994) 'Tenure, Allodialism and Indigenous Rights at Common Law: English, United States and Australian Land Law Compared after *Mabo v Queensland*' *Anglo-American Law Review*, Vol. 23, pp. 397-434.
- Farran, S. & Paterson, D. (2004) *South Pacific Property Law*, London, Cavendish.
- Hall, R.G. (1875/1988) 'The Rights of the Crown and the Privileges of the Subject in the Seashores of the Realm', in S.A. Moore, ed., *History and Law of the Foreshore and Seashore*, 3<sup>rd</sup> edition, London, Stevens & Haynes, pp. 667-892.
- Hooper, A. ed. (2000) *Culture and Sustainable Development in the Pacific*, Canberra, Asia Pacific Press.
- Howarth, W. (1988) 'A Norse Saga: the Salmon, the Crown Estate and Udal Law', *Juridical Review*, No. 1, pp. 91-116.

- Hunt, C. (1996) 'Property rights and environmental management on Pacific atolls', *International Journal of Social Economics*, Vol. 23, Nos. 4-6, pp. 221-234.
- Jackson, S. (2004) 'Registration of Fishing Rights in England and Wales' *Water Law*, Vol. 15, No. 5, pp. 192-194.
- Johannes, R. (1978) 'Traditional marine conservation methods in Oceania and their demise', *Annual Review of Ecological Systems*, Vol. 9, pp. 349-364.
- Kabui, F. (1997) 'Crown ownership of foreshores and seabeds in Solomon Islands', *The Journal of Pacific Studies*, Vol. 21, No. 1, pp. 123-144.
- Lunabeck, V. (2004) 'Adjudication of Customary Law in the Pacific', *Commonwealth Judicial Journal*, Vol. 15, No. 1, pp 25-35.
- Mason, A. (1997) 'The rights of indigenous peoples in lands once part of the old dominions of the crown', *International and Comparative Law Quarterly*, Vol. 46, No. 4, pp. 812-830.
- Mathlein, A. (2005) 'Wondering, Waiting on Tenuous Tuvalu', *Pacific Islands Report*, December, [www.pireport.org](http://www.pireport.org).
- McGlashan, D.J. (2002) 'Udal Law and Coastal Land Ownership', *Juridical Review*, No. 5, pp. 251-260.
- Moore, S.A. (1988) *History and Law of the Foreshore and Seashore* 3<sup>rd</sup> ed. London, Stevens & Haynes.
- Mugambwa, J. (2001) 'Judicial assault on the citadel of indefeasibility of title under the Papua New Guinean Torrens System of Conveyance', *Journal of South Pacific Law*, Vol. 5, online journal, <http://law.vanuatu.usp.ac.fj/jspl>.
- Muller, P. (2000) 'Culture and sustainable marine resource development in the Pacific' in A. Hooper (ed.) *Culture and Sustainable Development in the Pacific*, Canberra, Asia Pacific Press, pp. 111-115.
- Norris, J. (2005) 'UN Criticises foreshore law', *New Zealand Herald*, 14 March, [www.nzherald.co.nz/](http://www.nzherald.co.nz/).
- Powles, G. (1997) 'Common law at bay? The scope and status of customary law regimes in the Pacific', *The Journal of Pacific Studies*, Vol. 21, No. 1, pp. 61-82.
- Poynton, P. (1997) 'The Co-existence of Native Title and Common Law Proprietary Interests: the Hawaiian Style: Public Access shoreline Hawaii and Angel Pilagro v Hawaii County Planning Commission and Nansay', *James Cook University Law Review*, Vol. 4, pp. 101-103.
- Ramage, A. (2002) 'Udal Law', *Journal of the Law Society of Scotland*, Vol. 47, No. 7, pp. 32-33.

Ramage, A. (2003) 'Pragmatic Solutions to Udal Law', *Journal of the Law Society of Scotland*, Vol. 48, No. 1, pp. 28-29.

Roberts-Wray, K. (1966) *Commonwealth and Colonial Law*, London, Stevens & Sons.

Scott Robinson, S. (1991) 'The Law of Salmon Fishing in Scotland', *Water Law*, Vol. 2, No. 3, pp. 94-100.

Smith, Sir T. (1989) 'Editorial Excursus', *Stair Memorial Encyclopaedia of the Laws of Scotland*, Vol. 24, pp. 219-230.

Veitayaki, J. (2000) 'Fisheries resource-use culture in Fiji and its implications' in A. Hooper (ed.) *Culture and Sustainable Development in the Pacific*, Canberra, Asia Pacific Press, pp. 116-130.

Walker, D.M. (2001) *The Scottish Legal System*, Edinburgh, Green.

Williams, D. (2004) 'Controversial legislation needs further discussion' *New Zealand Herald*, 6<sup>th</sup> May, [www.nzherald.co.nz/](http://www.nzherald.co.nz/).