**Regulating the environment for a blue-green economy in plural legal states: a view from the Pacific**

Abstract

The environments of small island states are particularly vulnerable to environmental degradation and risk, whether natural or man-made. As a result of international initiatives and growing awareness of the need to address environmental concerns, such states are being encouraged to enact legislation to protect the environment and promote sustainable futures. In the Pacific region this future is increasingly linked to the ‘blue-green’ economy: development that builds on the terrestrial and marine resources of Pacific island states. At the same time, internationally, there is an emerging acknowledgment of the value of traditional, indigenous and localised management of these resources. In the Pacific customary law is just one source of law in plural legal systems. The challenge then is how to develop environmental law which capitalises on the strength of plural approaches, promotes a ‘blue-green economy’ and meets the international and regional expectations of commitment to environmental protection?

While a regional model law has not yet been proposed this article undertakes a doctrinal examination of existing legislation across the region in order to identify different legislative provisions which might be used to develop a holistic, normatively plural approach to future efforts to provide a legal framework for translating blue-green policy into law.

Key words: Environment, Pacific islands, Pluralism, Green-blue economy

**Introduction**

The focus of this article is the approaches which might be considered in designing legislation which address the myriad of environmental concerns and challenges that confront Pacific islands which are committed to developing ‘blue-green economies’, and which draws on the strengths of different sources of law and regulation which can be found in the plural legal systems of Pacific island countries. In order to consider this issue this article looks at the scope and content of selected statutes to determine whether a) they integrate non-state laws and institutions, ie customary laws and institutions; and b) whether the legislation accommodates terrestrial and non-terrestrial development of the sort envisaged under a ‘blue-green’ agenda. In other words do they encompass land and sea resources and activities. This is essentially a doctrinal exercise not an ethnographic one, looking at the text of existing legislation, and does not attempt to examine whether or not the statutes under scrutiny are effective. Rather, the purpose of doing so is to identify provisions which might usefully inform the design of a ‘model’ law or the reform of existing laws or the drafting of new, national laws. The rational for creating a ‘m$é$tissage’,[[1]](#endnote-1) in this way is premised on two assumptions: first, that all Pacific island states face similar albeit differently experienced, environmental challenges; and second, that all Pacific island governments are keen to support the agenda of a ‘blue-green’ economy, not least because Pacific islands consist of more sea than land, so that their potential future wealth lies as much in their marine environments as their terrestrial ones. Most of the legislation examined is drawn from sovereign Pacific states which came under the influence of English common law, but there is also reference to near neighbours New Caledonia, and Wallis and Futuna, which provide interesting models of environmental law provisions, albeit one strongly influenced by superior French law. The justification for this is that if useful examples are to be found elsewhere in the region they should not be excluded just because the legal context is different.

**The broader context**

The increasing importance of environmental law in the region is symptomatic of a more general international concern with environmental matters – particularly, but not solely, climate change, which are likely to impact more severely on small island developing states (SIDS) and coastal communities. It is also the case that SIDS themselves have played an important role in the international articulation of these concerns. While the definition of SIDS is controversial (Kelman and West 2009), it is generally agreed that Pacific island states fall within the parameters identified by The Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS), which has described SIDS as ‘a distinct group of developing countries facing specific social, economic and environmental vulnerabilities (UN-OHRLLS 2011). SIDS were recognised as a special case both for their environment and development at the United Nations Conference on the Environment and Development (UNCED), also known as the Earth Summit, held in Rio de Janerio, Brazil (3-14 June 1992). The participation of Pacific island SIDS in international environmental discourse is relevant because if examples of good practice can be found in Pacific island states, these might provide models for other plural legal systems seeking to address contemporary environmental challenges. To explore whether or not this is the case, this article considers a number of pieces of legislation to see how and to what extent state and non-state law is integrated to address environmental concerns and whether there are examples which can be drawn from different jurisdictions to inform guidelines for future legislation which might both address the needs of promoting a ‘blue-green’ economy in the region and integrate a plurality of laws and institutions.

***The environmental challenges of the Pacific region***

Environments are subject to a range of risks, some natural and some man-made. In the Pacific region natural risks include cyclones and earthquakes, and linked to these tsunamis, and volcanoes. Tropical storms and torrential rain can also cause environmental damage particularly when combined with man-made environmental practices such as extensive logging, quarrying, commercial agricultural practices, dumping mining waste, and so on. There is also the natural vulnerability of low-lying atolls to storm surges and salt-water inundation, and even in high volcanic islands, tropical rainstorms may cause extensive flooding. There are also some environmental problems caused by third parties such as the dumping of hazardous waste and factory-ship fishing, and of course more generally green-house gases and climate change. While perhaps the most high-profile environmental problem confronting many small island states in recent years has been the negative consequences of coastal erosion, coral bleaching, ecosystem destruction and loss of biodiversity brought about by climate change and global-warming (UNEP 2014), environmental concerns are much more extensive. Small island states also face problems of unsustainable or poorly managed natural resource extraction - which can have environmental impact - such as coral and sand extraction, hard-wood logging, or the over-harvesting of marine resources. Economic development means more cars and vehicles on often poorly maintained roads, engine propelled boats on inland and coastal waters, imported packaged goods and a demand for more electricity, more water and more fuel to support changing life-styles. There are the problems of rubbish disposal as households move from largely bio-degradable waste to non-bio-degradable waste; while population density, especially in growing urban areas creates challenges for safe sewage and domestic effluent disposal (Briguglio 2003). However, environmental problems are not just a recent phenomenon. In Solomon Islands, for example, under the British Protectorate efforts were made to restock forests that had already been degraded by unsustainable logging (Bennett 1995), and certainly by the 1980s and 1990s there were increasing environmental concerns (Dahl and Baumgart 1982; Ferguson 1991), and national Environmental Management Strategies were prepared for a number of Pacific island countries in the 1990s, including reviews of existing natural resources legislation (Rose 2003).

The environmental vulnerability index (EVI), developed by the South Pacific Applied Geoscience Commission (SOPAC), in its report of 2004, placed Cook Islands and Kiribati in the extremely vulnerable category, with Fiji, and Marshall Islands in the highly vulnerable category. Solomon Islands and Vanuatu were in the vulnerable category (SOPAC 2004: 19, Table 4). A number of countries lacked sufficient data for valid scores, but nevertheless, within this data-thin category, the Federated States of Micronesia, Nauru, Tonga and Tuvalu were classified as extremely vulnerable; Palau, Samoa and Tokelau as highly vulnerable; with Niue and Pitcairn vulnerable (SOPAC 2004: 20, Table 5). The EVI only focusses on the natural environment and measures the extent to which this is at risk of damage and degradation. Some authors are critical of the EVI given the absence of complete sets of data for many countries (Briguglio 2003:13-14; Lambert 2002). The EVI also ignores other vulnerabilities such as economic vulnerability and social vulnerability, although of course, there may be some overlap (Rapaport 2013), including, in particular, the resources to achieve effective governance of the environment, and the fact that environmental vulnerability may impact more severely on some sectors of society than others. Nevertheless, the IPCC Third Assessment Report on Impacts, Adaptations and Vulnerability to Climate Change 2001 found that ‘communities in small island states have legitimate concerns about their future on the basis of past observational records and climate model projections’ (IPCC 2001: Chapter 17). Key environmental vulnerabilities identified included: greater vulnerability to climate change and sea-level rise – despite minimal contribution to global warming (Mimura 1999), beach and coastal changes - due to tourism and construction; damage to the biological systems of coastal reefs, mangroves and seagrass beds; threats to biodiversity of flora and fauna; the impact of climate change on water resources, agriculture and fisheries; the impact of climate change on human settlement, especially in coastal areas and flood plains; and disruption to socio-cultural aspects of society, including loss of traditional knowledge. It is important,, however, that climate change does not become the sole focus of environmental concerns in the region, not least because of scientific uncertainty (Barnett 2001), recognition of pre-existing and continuing environmental threats created by human activity (reported for example by Gay in *The Guardian* 20 November 2013),[[2]](#endnote-2) and the fact that there is not a consensus of concern about climate change despite regional assertions such as the Suva Declaration 2015,[[3]](#endnote-3) (Nunn 2009: 213; Lata and Nunn 2012). There is therefore both the issue of climate change vulnerability and effects and other environmental vulnerabilities and effects.

Some of these problems can be directly linked to economic development, including, the shift from subsistence economies to monetary economies with a related increase in the consumption of manufactured and packaged foodstuffs, more fossil fuel powered vehicles, more consumer spending. The negative consequences of changing life styles may also be more significant in small island states because of the geographical constraints of size, geographical distance and availability of resources – both human, in terms of expertise, and money, and economies of scale. For example, most Pacific SIDS suffer from an absence of recycling facilities, limited waste and sewage disposal systems and inadequate landfill sites for household garbage (Fickling 2004; Richards and Haynes 2014). On the other hand, economies of scale may mean that small island states can adopt environmentally positive measures which might be more difficult to achieve where there are larger economies of scale. These possibilities are facilitated by close-knit communities which may be geographically discreet, the influence of traditional leaders and perhaps greater consensus on concerns about the environment. For example Tuvalu, a Pacific island state with a population of 10,782 in its 2012 census,[[4]](#endnote-4) is committed to 100% renewable energy by 2020 (World Bank 2015), while Tokelau – with a population of 1,411 (2011 National Census),[[5]](#endnote-5) already has 100% of its electricity supplied from solar panels (Clean Technica 2013; BBC News 2012). Recently Vanuatu announced a ban on non-reusable plastic bottles and bags (Roberts 2017), and Fiji imposed a nation- wide charge of 10 cents on all plastic bags in August 2017 through its *Environment and Climate Adaptation Levy (ECAL) Act* (Fiji Sun 2017). These initiatives reflect a ‘command and control’ approach to specific environmental problems (Farrier 2003), which may work where there are few competing interests – for example an absence of a manufacturing lobby for plastic bottles or plastic bags, but may be less successful where there clearly are competing interests, often between environmentalists and commercial interests. In the Pacific this conflict may arise between environmental protection and tourism (Levett and McNally 2003), or commercial agricultural practices, or the extractive industries (Dauvergne 2001; UNEP 2000).

***The relevance of small island developing states (SIDS) in the international sphere***

Pacific islands along with other SIDS are increasingly significant in international politics because of their combined numbers particularly in international fora focussed on environmental risk and degradation and the impact of climate change (UNFCC 2005). There are fifty-two SIDS, thirty-eight of which are UN member states, the remainder being non-UN member or associate member states. The combined population of SIDS is around 65 million people (UN-OHRLLS 2015). Forty-one SIDS are parties to the United Nations Framework Convention on Climate Change, twenty-nine are signatories to the Kyoto Protocol, and the thirty-eight UN member states are members of the Alliance of Small Island States (AOSIS). This latter has been particularly important in providing a collective voice for members (Climate Policy Watcher 2016).

In September 2014, the UN Conference on Small Island Developing States (SIDS) held its third international conference in Samoa. The main aim of the conference (which is held every ten years) is to establish partnerships for the sustainable development of SIDS. The resulting SAMOA Pathway document (Small Island Developing States Accelerated Modalities of Action),[[6]](#endnote-6) indicated both shared and distinctive priorities for attending countries. The Pathway reaffirms previous environmental commitments (among others) such as those found in the Rio Declaration on Environment and Development,[[7]](#endnote-7) including – perhaps significantly for Pacific island states, “the principle of common but differentiated responsibilities”.[[8]](#endnote-8) While the Pathway document skirted around direct reference to environment under its calls for action, focusing instead primarily on climate change, it did emphasise the need for action on sustainable energy systems, the sustainable use and management of the oceans, forests and biodiversity resources, and the need to recognise vulnerabilities while moving towards building resilience. In particular, it made “linkages between commitments focussed on sustainable energy, natural resource management, an ocean based and green economy approach and partnerships” (Commonwealth Foundation 2015:2).

In September 2014 the United Nations adopted the SAMOA Pathway as a reaffirmation of the international community’s commitment to sustainable development in small island states (UN 2014). On 14 November 2014 the UN General Assembly adopted resolution A/69/PV.48 (GA/11585) the SIDS Accelerated Modalities of Action (SAMOA) Pathway, without a vote and an implementation resolution was adopted by the UN General Assembly on 5 December 2014.

The advocacy of small states was also seen at the Paris UN Climate Conference 2015, which culminated in the Paris Climate Agreement, which came into force in 2016. As at 8 May 2017. Thirty-two of the thirty-eight UN member state SIDS are parties to the Paris Agreement (UN-OHRLLS 2017). Although small states are frequently ‘outgunned’ in terms of people on the ground and availability of resources at these big international meetings - in Paris for example, China had 70 delegates and the Bahamas four (Hannam 2015) - collectively small states can strategise to negotiate for outcomes which are favourable to them and which represent their particular needs, either through coming together under umbrellas such AOSIS, or through finding a common voice. Small states may also form collaborative alliances with bigger states to strengthen their negotiating position on particular issues. In Paris, for example, St Lucia joined with the South African delegation to confront Australia over deforestation (Hannam 2015). Although the Paris Agreement has been met with mixed responses (Hoad 2016), there are three specific references to SIDS: Articles 9, 13 and 15, and Hoad has suggested that “It appears to give small island states easier access to funding and to newly invigorated clean development mechanisms, and acknowledges the need for global funding to support … adaptation and mitigation plans …” (Hoad 2016: 319). While the focus on this paper is not climate change or the Paris Agreement, it is suggested that effective use of international funding to support environmental management – including funding to adapt to and mitigate the effects of climate change, requires effective legal frameworks, not only to support positive initiatives but to prevent abuses of inflowing aid to assist with these (Transparency International 2017). The challenge is therefore, how policy translates into law in countries where there are limited resources, and more particularly, plural legal systems. It is suggested that one approach may be the development of a regional ‘model’ law, which could be adopted and adapted by national legislatures. This paper considers what might inform the content of such a law.

***Traditional knowledge, customs and indigenous ways of doing***

The Paris Agreement is not the only evidence of a growing international awareness of island states and their people. Although not relevant solely to small states, nor to all small states, there is a growing recognition that traditional knowledge and customary management systems are valuable and relevant to environmental protection and sustainable development. In particular, international law and policy makers recognise the value of customary laws and practices in contributing to the conservation of the environment and its bio-diversity, the sustainable use of natural resources and promotion of inter-generational equity in respect of the environment - see for example: the Rio Declaration Principle 22; the Johannesburg Plan of Implementation; the Convention on Biological Diversity 1992 Article 8(j); and the Draft Declaration of Principles on Human Rights and the Environment 1994. International rights instruments that include environmental rights also draw attention to the importance of indigenous knowledge and culture, of which customary law is an integral part - see for example, the Preamble to International Labour Organisation (ILO) Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries and Article 8(1) and (2); the Declaration on the Rights of Indigenous Peoples (adopted by the UN in 2007), the Preamble and Articles 11 and 27.

The Barbados Programme of Action for the Sustainable Development of Small Island Developing States (BPOA) which emerged from the first UN Global Conference on the Sustainable Development of Small Island Developing States in 1994, also proposed that: ‘New legislation should be developed and existing legislation revised, where appropriate, to support sustainable development, incorporating customary and traditional legal principles where appropriate ….[[9]](#endnote-9)

The contextual issues outlined above are all relevant to Pacific island states, but there is also one further consideration: the plural legal systems of Pacific island states. The question is how these states can best use this plurality to build the necessary legal architecture to support environmental management which in turn supports a blue-green economy?

**The legal systems of Pacific island states**

A number of legal scholars have elaborated on the plural legal systems of the region (Corrin

2009; 2010; Techera 2010). Suffice it therefore to state that Pacific island states have plural legal systems in which “two or more legal systems co-exist in the same social field” (Engle Merry 1988; Griffiths 1986), partly as a result of colonial influences and legacies and partly as a result of the survival and in some cases revival of customary law. This is particularly true of access to and management of natural resources. The translation of policy into law – whether this is international obligations arising under treaties (Farrier 2003), or responses to national or regional policies - requires the intervention of Parliament to create enabling legislation. This may not be an end in itself, in so far as legislation may confer considerable discretion on relevant government ministers or departments and/or require further regulations to give it teeth - something which has been identified as a particular problem in the Pacific region (Wilson 2017). While there is the possibility of judicial activism in this field (Wald 1992; Dias 1994; Lord Carnworth 2014) especially through linking environment and human rights, this not only requires a strong, independent judiciary or specialist courts – such as, for example, the Land and Environment Court of New South Wales, Australia, but also specific judicial training for judges and magistrates to foreground environmental concerns in their judgments (Rose 2003).[[10]](#endnote-10) At present there are no specialist environmental tribunals or courts or judicial staff dedicated to environmental litigation in Pacific island countries.

Although few constitutions address environmental issues, an exception is the 2013 *Constitution of the Republic of Fiji*, which provides under its Bill of Rights, that:

Every person has the right to a clean and healthy environment, which includes the right to have the natural world protected for the benefit of present and future generations through legislation and other measures.[[11]](#endnote-11)

And in Palau, Article VI of the *Constitution* imposes a responsibility on the national government to, inter alia: “take positive action to attain these national objectives and implement these national policies: conservation of a beautiful, healthful and resourceful natural environment ...”

Some of the constitutions do, however, give a sense of the geographical and physical location of Pacific island people. For example, the preamble to the *Constitution of the Republic of the Marshall Islands*, refers to the “forefathers who boldly ventured across the unknown waters of the vast Pacific Ocean” and to the “the islands within the traditional boundaries of this archipelago”, and that of Tokelau reminds its citizens that “Since the days of Maui and Tui Tokelau the land, sea and air have nurtured our people …”.[[12]](#endnote-12)

In these plural legal systems many of the constitutions also indicate the status of customary law and the role of customs within the legal system as a whole. The *Constitution of Solomon Islands* for example, provides that “Parliament shall make provision for the application of laws. Including customary laws” and “… Parliament shall have particular regard to the customs, values and aspirations of Solomon Islands”.[[13]](#endnote-13) Customary law is listed as a recognised source of law,[[14]](#endnote-14) and it would seem that customary law may trump the principles and rules of the common law introduced into the country if they are inconsistent with customary law [[15]](#endnote-15) – although there is some uncertainty over this (Corrin and Zorn 2005: 150). Customary law may also apply to specific matters, either uniquely or alongside other laws. For example, the *Constitution of the Republic Vanuatu* not only refers to the importance of Melanesian values in its preamble, but also makes explicit reference to: the role of customary leaders in Chapter 5, which establishes the National Council of Chiefs; recourse to custom by the judiciary where there is no applicable rule of law;[[16]](#endnote-16) the ascertainment of rules of custom;[[17]](#endnote-17) the rules of custom to determine land rights;[[18]](#endnote-18) and the place of custom and customary law in respect of the sources of law applicable.[[19]](#endnote-19) It is beyond the scope of this paper to venture into the debate of what constitutes customary law - as opposed to custom (see however, Powles 1997). It should be noted, however, that Pacific legal systems use a number of different terms to refer to traditional ways of doing and regulating,[[20]](#endnote-20) and that these are not fixed but modify over time, are often unwritten or unrecorded,[[21]](#endnote-21) may not be homogenous, and are frequently disputed, especially in litigation. The point is that given the importance of customary law and the many forms of customary management of natural resources any proposed environmental legislation should include custom and customary law within its ambit, and if this is to be done, then custodians of that custom and law need to be consulted and integrated into the operation of the law.

It is not only the substance of the law that is plural. The administration of justice is also often plural with several different forms of courts and/or tribunals observing different rules of procedure and evidence. Sometimes these exist in parallel, sometimes they merge at the appeal stage, or jurisdiction may be determined by the status of the litigants (Powles and Pulea 1998; Corrin 2010). Different courts may have jurisdiction over issues which may in fact be interrelated. For example in Vanuatu, land held under customary land tenure is subject to custom laws administered predominantly by those versed in custom,[[22]](#endnote-22) while land leases fall within the jurisdiction of the formal courts. In Solomon Islands, logging licences are determined separately from the land on which the trees grow and the rights of custom owners (Farran 2014; Foukona and Timmer 2016). This procedural and jurisdictional plurality can cause considerable difficulty and delay (Corrin 2009; Farran 2014). In some cases plurality gives way to mixedness or hybridity, for example where judges or magistrates sit alongside assessors knowledgeable in customary law or drawn from traditional leaders. Similarly, traditional councils of chiefs, acknowledged in written constitutions, may have powers of oversight in respect of legislation passed in respect of certain matters: for example, the Council of Chiefs in Vanuatu, the House of Ariki in Cook Islands and the Council of Iroij in Marshall Islands. In each of these forums there may be different perceptions of environmental risk and/or harm, and divergencies of approach to issues of evidence, expert opinion and the interpretation of the law.

It is also the case that while all Pacific island States have centralised government, with varying degrees of power devolved to provincial government, authority is often exercised at a more local level by chiefs, heads of families or persons of status, including religious leaders. In some cases this is formalised, as with the *Village Fono Act* 1990, in Samoa, which confers considerable power on local authorities. Consequently, regardless of any centralised formal legal systems, for many Pacific islanders the regulation of their lives is determined by the social environment in which they live. In a formal sense therefore, while the legal pluralism of Pacific island countries could be described as “a stratified dualism with one source dominant and the other subservient” (Brown 1993), in which the constitution and formal, state legislation are dominant, or as examples of “classic legal pluralism” where there is a dual system as a result of the colonial encounter (Merry 1988), the reality is that for many, especially in rural areas, the inverse is true. This is significant for addressing environmental concerns because if the focus is solely on the undertakings and policy statements of central government it is unlikely to be particularly effective or to become rooted in the everyday practices of local people. There is therefore the argument that a ‘bottom-up’/ ‘grass-roots’ or more hybrid approach is required to given practical effect to more centralised policies, plans or frameworks. This is not to suggest that the lives of more rural Pacific islanders are untouched by state law or developments in legal discourse. Corrin (2009) for example, argues that dichotomies between formal and informal law, state and customary law or traditional and modern law are becoming things of the past as a result of increasing interaction between the different elements of legal systems, and, one might add, the impact of globalisation and internationalism. Even so, there may be difficulties. Techera (2010), for example, has drawn attention to the challenges that legal pluralism poses for the integration of international law in domestic legal systems in small islands with limited resources, not least because in order to be effective and embedded, the implementation of any international undertakings has to be culturally appropriate. Given the international context in which concern for environmental protection is being articulated this is particularly relevant for environmental law.

**The current legal framework**

The South Pacific Regional Environmental Program (SPREP) has led initiatives at a regional level to “promote co-operation in the South Pacific region and to provide assistance in order to protect and improve its environment and to ensure sustainable development for present and future generations.”[[23]](#endnote-23) In 2014 SPREP developed a State of the Environment Toolkit for assisting in the collection of data to inform reports and policies, as well as providing a template for such reports. Currently, however, there has been no regional model law developed to provide for environmental protection in the face of development. Consequently, each Pacific island country has distinct legislation to deal with environmental impact and related concerns. Examples of such laws can be seen in Table 1.[[24]](#endnote-24)

Table 1: Environmental Acts across the region

|  |  |  |
| --- | --- | --- |
| Country | Legislation | Date |
| Cook Islands | *Environment Act* *Marae Moana Act* | 20032017 |
| Fiji | *Environment Management Act*  | 2005 |
| Kiribati | *Environment Act*  | 1999 |
| Nauru[[25]](#endnote-25) | - |  |
| Papua New Guinea | *Environment Act**Conservation and Environment Protection Authority Act* | 20002014 |
| Samoa | *Lands, Surveys and Environment Act**Marine Pollution Prevention Act*  | 19892008 |
| Solomon Islands | *Environment Act*  | 1998 |
| Tonga | *Environment Management Act* *Environmental Impact Assessment Act* | 20102003 |
| Tuvalu | *Environmental Protection Act* | 2008 |
| Vanuatu | *Environmental Management and Conservation Act* | 2002 |

While the Convention on Biodiversity (CBD), places responsibility on each party to the Convention to put in place national legislation to address environmental impacts and minimise adverse consequences,[[26]](#endnote-26) as is evident from Table 1, not all Pacific island countries have yet done this and some of these laws are quite dated. The scope of existing legislation is also variable, as illustrated in Table 2, which compares the Environment Acts of Cook Islands, Papua New Guinea and Solomon Islands.

Table 2: Comparative Scope

|  |  |  |
| --- | --- | --- |
| Cook Islands*Environment Act 2003* | Papua New Guinea*Environment Act 2000*(amended 2002, 2010, 2012, 2015) and now supplemented by the *Conservation and Environment Protection Authority Act 2014* | Solomon Islands*Environment Act 1998* |
| Establishes an administrative machinery including island authorities | Establishes an administrative machinery including provincial committees | Establishes an administrative machinery including an advisory committee |
| Includes Environmental Impact Assessment | Includes Environmental Impact Assessment | Includes Environmental Impact Assessment |
| Provides for management of protected areas | Provides for making of protection orders | No provision for declaration or management of protected areas |
| Includes control of litter | Includes litter | Does not cover litter |
| Covers water pollution (marine pollution is covered by the *Prevention of Marine Pollution Act 1998*) | Includes contaminants  | Covers pollution from discharge of waste, or emissions of noise, odour or radiation |
| Includes marine and terrestrial environment and species | Includes all natural resources | Broadly in definition of land and pollution |
| Is supported by regulations | Is supported by regulations | Is supported by regulations |

A cursory examination of these three pieces of legislation suggest that there is some common ground. For the purpose of this article however, the questions are: a) does the legislation prima facie integrate non-state laws and institutions, ie customary laws and institutions; and b) does the legislation accommodate terrestrial and non-terrestrial development and related environmental concerns so as to provide a legal framework for regulation environmental issues which might be raised in the context of a blue-green economy?

***Integrating custom and customary law in environmental legislation***

In the Cook Islands *Environment Act* , although there is no reference to traditional knowledge or practice in outlining the powers and functions of the National Environment Service, the Act does stipulate that in respect of the Island Environment authorities established under the Act, these may take into account “relevant traditional resource management practices and standards on island”.[[27]](#endnote-27) Impliedly the power to co-opt or draw on experts might also include those knowledgeable in traditional resource management,[[28]](#endnote-28) although this is not explicit. Similarly, in preparing management of protected area plans, regard is to be had to “environmentally sound traditional resource management practices and standards”.[[29]](#endnote-29) The Cook Islands Act is also mindful of the role played by the Aronga Mana, composed of those acquiring titles according to native custom,[[30]](#endnote-30) and of the need to correctly identify those holding land under customary tenure when proposing to designate protected areas.[[31]](#endnote-31) Therefore, while the Cook Islands Act includes limited references to custom and customary law, there is some potential for expansive inclusion though including traditional knowledge and customary practices through the co-opting of advisors and experts. The Papua New Guinea legislation states within the “Matters of National Importance” the “preservation of Papua New Guinea traditional social structures; and … the maintenance of sources of clean water and subsistence food sources to enable those Papua New Guineas who depend upon them to maintain their traditional lifestyles ...”.[[32]](#endnote-32) These appear to be underpinning aims rather than legal principles, but there is little reference to tradition or custom in the rest of the Act. For example, neither the membership of the Environmental Council nor the Environment Consultative Group says anything about traditional leaders, nor does reference to environmental policies suggest that traditional knowledge or management practices might be taken into account.

In Solomon Islands although the definition section indicates that “environment includes all natural and social systems and their constituent parts, and the interactions of their constituent parts, including people communities and economic, aesthetic, culture and social factors”,[[33]](#endnote-33) which could be taken to refer to customs and customary institutions, and there is acknowledgment of customary land owners, the Act is singularly lacking in any reference to traditional management practices, local environmental knowledge, or prior sustainable development practices. This maybe because of the date of the Act, its focus, or the manner of its drafting. Whatever the reason, however, engagement with the pluralities of Solomon Islands’ legal system is disappointing.

In some legislation, there is more specific reference to traditional or customary law and conduct. For example, Fiji’s *Environment Management Act 2005*, which has been extensively reviewed by Sutton (2005), includes among landowners who might have been adversely affected by development, those who hold interests in land under custom, and the environment includes aesthetic properties, cultural resources; and “traditional land-use activities” and “traditional or customary structure” are in the list of subjects which may be adversely affected. Any person whose activities fall within the ambit of the Act has to regard a number of matters deemed to be of “national importance” including “the relationship of indigenous Fijians with their ancestral lands, waters, sites, sacred areas and other treasures”,[[34]](#endnote-34) and must have regard to “the traditional owners or guardians of resources”.[[35]](#endnote-35) Further, the list of exempted development proposals that do not need an environmental impact assessment or report include “the construction of traditional or customary structures … made from traditional or natural materials”,[[36]](#endnote-36) reflecting the need to balance control with cultural sensitivity, and a degree of pragmatism.

There is also scope under the Fijian legislation, for environmental management units to be established by “local (non-statutory) authorities”, which has the potential for establishing such units at village level and involving local stakeholders.[[37]](#endnote-37) Local authorities responsible for the management of any natural resources are also expected to conduct environmental audits.[[38]](#endnote-38) The Act appears to envisage multi-level management systems and in doing so could facilitate both top-down and bottom-up engagement with environmental protection initiatives thereby promoting a more socially integrated approach to addressing environmental concerns. Less positively, it might be argued, that this legislation is resource intensive and too closely aligned with “state of the art strategies copied from developed countries” (Farrier 2003) to be either administratively workable or sustainable.

Although the Fiji example demonstrates the possibility of engaging with legal pluralism there are lacunae. In particular, customary structures and practices are left to operate largely outside the Act and subject to local control. While this remains feasible with activities and actors traditionally governed by custom, there may be problems with novel activities. For example “traditional land-use activities” does not include activities requiring the substantial use of machinery or other more modern technologies or materials, although a “traditional or customary structure” may incorporate traditional and modern materials provided the structure is not significantly larger than “those built historically”. Customary structures and practices may also be either not understood or not observed by non-indigenous actors, such as commercial companies seeking to engage with indigenous actors. The legislation seems to assume that all customary practices, or practices which are controlled by traditional powers, are environmentally friendly – which may not always be the case. There is also, as pointed out by Sutton (2005), an omission to integrate the role of the Native Land Trust Board (now renamed the iTaukei Land Trust Board) which is responsible for the management of most of the land in Fiji, into the operation of the law, although the General Manager of the Board is listed as a member of the National Environment Council.

The legislation in Fiji would appear, however, to adopt more of a plural approach than the more recent legislation of Vanuatu. The *Vanuatu Meteorology, Geological Hazards and Climate Change Act 2016*, is innovative insofar as it includes climate change as a subject for legislation, but disappointing in its engagement with customary law or customary institutions. While clearly there is a need to draw on scientific and technical skills and sophisticated data in addressing meteorological and geological hazards and consequences of climate change, there is also, as recognised by SPREP and other organizations (UNESCO 2013), a large body of valuable traditional ecological and environmental knowledge and practice, developed over centuries of living with the natural world, which remains relevant despite climate change and environmental degradation.[[39]](#endnote-39) Potentially this omission could be addressed under the Vanuatu legislation by construing “climate change science” and “climate change mitigation” to include traditional knowledge. Indeed, one of the functions of the Director of Climate Change, is “to promote the understanding and recognition of traditional practices and knowledge relating to weather and climate through the observation of weather indicators and by other means”.[[40]](#endnote-40) The Act also omits to include representatives from the Council of Chiefs or customary land owners. The nearest it comes is to confer potential observer status on the director of the Vanuatu Cultural Centre.[[41]](#endnote-41) The Board envisaged under the Act does, however, have the power “to encourage and support” research into “climate change and disaster risk reduction”, so again there might be the opportunity to create an inventory of traditional practices in much the same way as a Natural Resource inventory is being created in Fiji under the *Environment Management Act*.[[42]](#endnote-42) Given that the Vanuatu Act confers powers on the Director of Climate Change (and all other directors appointed under the Act) to take steps to implement international convention obligations,[[43]](#endnote-43) there may also be further scope to strengthen the role of custom and customary law taking into account the shifts (mentioned above) in international treaties and conventions which recognise the value of indigenous ways of doing and knowing. There are therefore possibilities, especially in the judiciary can be engaged, to realise the legally plural possibilities of this Act.

**Advocating and legislating for a green economy**

One of the observations made about the Fiji *Environment Management Act* referred to above, is that it is people focussed rather than solely the environment (Sutton 2005), recognising that there needs to be a constant balancing act between meeting the resource needs of people and protecting the environment.[[44]](#endnote-44) Similarly, in Kiribati, the *Environment (Amendment) Act 2007* recognises the need to “endeavour to minimise, where appropriate, any adverse effects upon those persons who engage in a subsistence lifestyle” and “be mindful of the technical capacity constraints prevailing in Kiribati” (Section 4B (b) and (d)). In Papua New Guinea the *Environment Act* 2000 states as a matter of national importance in Section 5: “(a) the Preservation of Papua New Guinea traditional social structures; and (b) the maintenance of sources of clean water and subsistence food sources to enable those Papua New Guineans who depend upon them to maintain their traditional lifestyles … “. While all countries face the dilemmas of balancing the right to development with environmental protection and intergenerational equity, this may be particularly acute in small island developing countries where the choices for development may be limited (see for example the case of Nauru – Nazzal (2005)).

Tradition, customs and culture are not, however, static. Life styles change as do the aspirations of Pacific island people, and there is inevitably a tension between different forms of development and the environmental consequences. A number of countries include exceptions to controls in their legislation or confer considerable discretion on the relevant minister to waive compliance or to approve of licences to undertake conduct which has an environmental impact. Incorporated into statute these flexibilities reflect the difficulties for policy and government to balance development with sustainability and to accommodate different values or priorities, and these priorities themselves change.

In line with international thinking more generally, in the Pacific there is a shift in the discourse surrounding development in line with the three pillars now recognised for sustainable development: economic, environment and social.[[45]](#endnote-45) At the 2014 Pacific Islands Development Forum it was suggested that the Pacific could develop “a distinctive Pacific model of ‘green growth in blue economies’” aligned to these sustainable development principles, and that this could be achieved by not only championing green/blue growth but also by adopting innovative approaches and “revisiting traditional practices” (Pacific Islands Development Forum Secretariat 2014).

International support for a green economy approach – a term coined when the UN Environment Programme launched a Green Economy Initiative in 2008, can be found in the outcome of the Rio+20 summit document: “The future we want”, and is integral to balancing the environmental, economic and social pillars of sustainable development. The tools to do this are: enabling policies, legal, regulatory and institutional frameworks (Pacific Institute of Public Policy 2012). Green Growth Leaders in the Pacific recognise that past policies, which focussed solely on economic growth, are no longer either suitable or sustainable (IUCN 2015).[[46]](#endnote-46) The Secretariat of the Pacific Regional Environment Programme (SPREP) commenced Pacific discussions on moving to green growth in 2011 (SPREP 2011), and in 2012 the Melanesian Spearhead Group (consisting of Papua New Guinea, Fiji, Vanuatu and Solomon Islands) agreed a Declaration of Environment and Climate Change endorsing the adoption of a Green Growth Development Framework. As reported on the IUCN web site on 23 June 2014, MSG entered into a three-year MOU with the International Union for the Conservation of Nature (IUCN) to promote this (IUCN 2014). Nevertheless, the problem of addressing potential conflict between economic growth and poverty reduction versus environmental risk persists and has been recently acknowledged by research being undertaken by a team of Australian and Pacific Researchers looking at definitions and understandings of “Green Growth” in the Pacific, and how trade-offs between economic growth and environmental and social sustainability are managed (Pacific Leadership Programme Briefing Note 2017). This initial research suggests that understandings of this concept of green-growth are diverse and that some Pacific island countries prefer a blue-green policy approach or what has been termed “Green Economy in a Blue World”, recognising the close inter-relationship of terrestrial and marine resources (WWF Global 2014; PIDF 2014). Similarly, the head of the UN Framework Convention on Climate Change stated at the SIDS conference in Samoa in 2014 (referred to above) that “the blue green economy concept was the only option for small atoll nations” (emphasis added) (PIDF 2014). Indeed, it has been suggested by the Director-General of the FAO that “There can be no truly ‘green economy’ without a ‘blue economy’, one that makes the sustainable development of oceans and fishery resources a priority” (da Silva 2013). In a region where island states have far more sea than land, the emphasis on the oceans is understandable but the focus on marine resources should not be at the expense of terrestrial concerns. In the case of both it is also clear that to achieve sustainable futures, socio-economic development cannot be “de-coupled” from environmental degradation (Bozzato 2017). It is also clear that if the way forward is an integrated “blue-green” approach then the pluralities which environmental laws need to embrace increase.

***Does the legislation have a blue-green scope?***

Given that environmental harm may impact on terrestrial and marine resources, and that causes of such harm may be similar, such as pollution, hazardous waste, environmental impact arising from development, unsustainable resource extraction and so on, then ideally any legislation should be sufficiently broadly worded and interpreted so as to apply to all environments impacted by the agenda for a blue-green economy.

Some Pacific island legislation already encompasses terrestrial and marine environments, although to variable extents. Solomon Islands legislation, for example, states that land includes land covered by water “including the territorial sea”,[[47]](#endnote-47) and pollution includes that of “air, water or land”,[[48]](#endnote-48) While in Papua New Guinea the aim of the Act as stated in the preamble is “to regulate the environment impacts of development activities in order to promote sustainable development of the environment and the economic, social and physical well-being of people by safeguarding the life-supporting capacity of air, water, soil and ecosystems for present and future generations …”. Moreover the interpretation section defines water as “all water in the country, including … coastal waters comprising the internal waters, territorial sea and the offshore seas … and other waters over which Papua New Guinea exercises of claims jurisdiction or sovereign rights, including the seabed and subsoil under those waters”. [[49]](#endnote-49) In Cook Islands the *Environment Act* includes marine and terrestrial animals, internal waters and the territorial sea, and impact on all aspects of the environment including “land, water, air, animals, plants and other features of human habitat …”[[50]](#endnote-50) It does therefore seem possible to bring terrestrial and marine resources under the umbrella of one Act.

**Looking forward**

The first objective of the Pacific Islands Forum Secretariat’s Framework for Pacific Regionalism is “sustainable development that combines economic, social and cultural development in ways that improve livelihoods and well-being and use the environment sustainably”. (Pacific Islands Forum Secretariat 2014:3). The Framework proposes “agreeing to common rules. Standards and institutions …” and establishing legally binding arrangements between the Pacific island forum member states. Such arrangements are important, particularly, when it comes to marine resources and indeed there is a long tradition of co-operative multi-partner agreements regarding marine resources as well as more recently the articulation of a 2030 Pacific Ocean Partnership, resulting from the Pacific Ocean Summit and IUCN World Conservation congress in September 2016, as well as the Noumea (marine pollution) and Waigani (transboundary movement of hazardous waste) Conventions, which are multilateral environmental agreements. Whether new “blue economy” initiatives will be brought to the Forum under the Framework remains to be seen (for a critical assessment of the Framework see Slater [2015]). Similarly, it remains to be seen whether the new framework avoids the criticism levelled at its predecessor, the Pacific Plan, that this was little more than a poorly disguised facilitator for free trade (Slatter and Underhill-Sem 2009), and did little to support sustainable development (although climate change was added to the plan when it was reviewed in 2009). Certainly many of the submission to the Forum prior to the articulation of the Framework argued for a move away from neoliberal economics and towards a more human centred development agenda (see for example submissions by civil society [PIANGO 2013]). World Vision in particular called for “sustainable management of natural resources, including protection of biodiversity; security of land rights of communities and indigenous peoples, especially in the face of extractive industries and infrastructure projects; and ensuring lands and vital resources of communities are free from security risks” (Slatter 2015:54). However, the continuing dilemma of how to achieve a balanced approach was illustrated by the agenda for the 2017 Pacific Update conference. The blue-green economy - including climate change and risk resilience - was one of the three themes to be addressed but alongside this was trade and infrastructure, job creation and labour market development (University of the South Pacific 2017). The potential incompatibilities are obvious.

Regionalism does not however feature strongly when it comes to the terrestrial environment. Here, although SPREP is available to assist with the review and drafting of environmental laws, national laws and institutions predominate. While there is no doubt that threats to bio-diversity, climate change and environmental protection are being discussed and Pacific islands are developing a number of policies and frameworks to address these, such as: National Biodiversity Strategy and Action Plans, as required under the CBD, National Environment Management Strategies, as well as pathways to green growth, the translation of identified needs and priorities into law is slow. In particular, although there is consultation and awareness raising with communities, civil society as well as different government departments and ministries (see for example media coverage of a stakeholders’ meeting which brought together Forestry, Fisheries, Agriculture, Biosecurity, Tourism and Community Conservation [Vanuatu Daily Post October 29, 2016]), there have been limited attempts to capitalise on the plural legal systems of the region to develop holistic approaches to regulating the protection and management of the environment. As has been indicated in considering the legislation initiatives of Fiji and Vanuatu, this is not an easy task.

***A model law?***

SPREP has developed some model laws for use by Pacific island countries to deal with specific issues (for example for Marine Prevention Pollution 2014, and for Protection of Traditional Ecological Knowledge 2015). The use of model laws in the region is not unknown – see for example, the Model Law on Traditional Knowledge and Expressions of Culture which was completed in 2002 and endorsed for adoption the following year - and while it may take some time for such models to be adopted at the national level, there is some evidence to suggest that when there is sufficient awareness of the problems addressed in the model law, the template which is offered may be useful and resource efficient. Another advantage of drafting a model law is that it provides an opportunity for a number of stakeholders to get together to identify existing strengths and strategies and build on these while being mindful of the realities of the resources available. This aligns with the increasing shift towards regionalism noted by UNESCO in 2017 (UNESCO 2017) in respect of dialogue around SDGs, and the establishment of a Pacific Climate Change Centre at SPREP headquarters in Samoa.[[51]](#endnote-51) If a model law is one possibility, what considerations might inform such a law? Drawing on some of the examples already referred to, the following suggestions are made.

Firstly the values upon which legislation is founded should be agreed and stated. One such example is the *Environment Act* of Papua New Guinea. The Papua New Guinea legislation links clearly to the National Goals and directive Principles of the Constitution and opens by stating that this Act is

(*a*) to provide for protection of the environment in accordance with the Fourth National Goal and Directive Principle (National Resources and Environment) of the Constitution; and
(*b*) to regulate the environment impacts of development activities in order to promote sustainable development of the environment and the economic, social and physical well-being of people by safeguarding the life-supporting capacity of air, water, soil and ecosystems for present and future generations and avoiding, remedying and mitigating any adverse effects of activities on the environment; and
(*c*) to provide for the protection of the environment from environmental harm;
(*d*) to provide for the management of national water resources and the responsibility for their management; and
(*e*) to repeal various Acts,

and for other related purposes …

Should legislators be prepared to look further afield, the Preamble of the *Environment Cod*e of Wallis and Futuna locates the law within the context of human impact on the environment and emphasises the collective and individual responsibility of all people and organisations for damage to and preservation of the unique and vulnerable environment in which they live.[[52]](#endnote-52) It also recognises and acknowledges the need to balance economic, social and environmental considerations and the importance of intergenerational equity. The Code is therefore founded on the basic premise that concern for the environment must be a prime consideration and that all forms of activity must be environmentally sustainable drawing on the best available research, knowledge and technology.[[53]](#endnote-53)

Secondly, the legislation needs to be clearly linked to the apex of legal sources in the region: the constitution. This is done in Fiji (see above) and in Papua New Guinea the *Environment Act 2000* states the compliance of the legislation with section 53(1) of the *Constitution of the Independent State of Papua New Guinea*, namely that the purposes and reason for the Act are “public purposes and further required for a reason that is reasonably justified in a democratic society that has a proper regard for the rights and dignity of mankind” (section 1(3)). The *Environment Act* also links to the Fourth National Goal and Directive Principle of the Constitution which is “for Papua New Guinea’s natural resources and environment to be conserved and used for collective benefit of us all, and be replenished for the benefit of future generations.” This calls for “(1) wise use to be made of our natural resources and the environment in and on the land or seabed, in the sea, under the land, and in the air, in the interests of our development and in trust for future generations; and (2) the conservation and replenishment, for the benefit of ourselves and posterity, of the environment and its sacred, scenic and historical qualities; and (3) all necessary steps to be taken to give adequate protection to our valued birds animals, fish, insects, plants and trees.”

Where constitutions make no reference to the environment then it may be that the basic right to life – which is found more broadly, has to be either judicially interpreted to include the environment – perhaps in line with international convention and treaty obligations, or constitutions have to be amended to reflect contemporary concerns.

Thirdly, in its definitions, interpretation sections or declarations of scope, any legislation needs to encompass marine and terrestrial environments and damage to these and there are already several examples in the region of how this can be done which have been referred to above. Indeed, there is no reason why basic environmental protections such as rules against pollution, dumping of waste, or assessment of environmental impact cannot apply to land, sea and air.

Fourthly, the precautionary principle, iterated as Principle 15 in the Rio Declaration, should be adopted because most Pacific islands do not have the resources to undo environmental damage once it has occurred. It is also too easy for those in a more powerful positon to argue or present expert evidence suggesting that there will be no adverse environmental impacts from a development. Cameron and Abouchar (1991:3) have argued that “The appeal of the precautionary principle is that it forces a debate about the types and quantities of human-induced harm to the environment that are acceptable. The legal process attached to the application of the principle institutionalizes caution: when there is sufficient evidence that an activity is likely to cause unacceptable harm to the environment, the precautionary principle requires that responsible public and private powerholders prevent or terminate the activity.” This principle has been incorporated into Tuvalu’s *Environment Protection Act* 2008,[[54]](#endnote-54) and confers on all those persons or agencies with responsibility under the Act to “apply the precautionary approach when discharging their responsibilities and functions, or exercising their powers”. The section goes on to clarify: “the precautionary approach is applied if, in the event of a threat of damage to Tuvalu’s natural resources or to the environment of Tuvalu, or a risk to human health in Tuvalu, a lack of full scientific certainty regarding the extent of adverse effects is not used as a reason for not acting to prevent or minimise the potential adverse effects or risks arising in any way from a mater or thing regulated under any law”. A further example can be found in the 2017 Cook Islands *Marae Moana Act*, the purpose of which is “to protect and conserve the ecological, biodiversity, and heritage values of the Cook Islands marine environment”.[[55]](#endnote-55) The Act expressly adopts the precautionary principle of the Rio Declaration, stating that this should be applied “where there are threats of serious or irreversible damage, and that a lack of full scientific certainty should not be used as a reason for postponing cost effective measures to prevent environmental degradation in accordance with the Cook Islands’ capabilities in the implementation of the marae moana”.[[56]](#endnote-56)

Fifthly, any reference to scientific or other knowledge base should be expanded to include traditional and local knowledge (Finucane 2009; Janif et al 2016). The Secretariat of the Pacific Regional Environment Programme (SPREP) is a strong advocate of combining modern science with traditional knowledge, particularly in the context of climate change adaptation (SPREP 2013). The International Council for Science has also recognised the importance of linking science and traditional knowledge (ICSU 2002), and in Canada the federal government has given equal standing to traditional environmental knowledge and western science in the context of environmental impact assessment processes (See Tsuji and Ho 2002; Martines 2010; McMillen and Others 2014). Although finding common ground may pose challenges there are already initiatives in the Pacific bringing together traditional knowledge and science in respect of weather and climate (Chambers and Others 2017), fisheries, medicine and flora and fauna (see the series of publications by Morrison, Geraghty and Crowl 1994). There is also extensive research on the value of traditional marine resource management in the region (Johannes 1982; 2002; Clarke and Jupiter 2010).

Sixthly, any legislation must encompass all forms of potential environmental damage. A good example can be found in Kiribati where the *Environment Act* covers such matters as all forms of pollution – including noise pollution, all forms of waste collection and disposal; as well as seeking to give effect to Kiribati’s international treaty obligations relating to the environment. This rationalisation of environmental legislation is in keeping with developments in the United Nations to consolidate and streamline the administration of certain environmental treaties – see for example developments regarding the transboundary movement of hazardous waste and proposals to promote CITES-CBD cooperation and synergy.[[57]](#endnote-57)

Finally, any administrative structure established should extend beyond formal government and ministries to encompass communities, local and traditional leaders and, civic society. Consideration also needs to be given to the extent to which detail in legislation is left vague and subject to the need to pass regulations, which may never materialise; or the legislation is more detailed but may become dated. Much will depend on the existing integration of traditional institutions and customary law into formal law, for example reference to customary land tenure, councils or chiefs, customary dispute settlement, and so on. Work might also be undertaken to inventory customary environmental management practices – along the lines of natural resource/flora and fauna inventories, in order to capitalise on the wealth of plural approaches to environmental regulation.

There is also the issue of whether administration should be devolved to provinces, or islands within states, especially where the concerns of those islands are distinct. While this may lead to some disparities, it recognises the autonomy of the regions and if not directly, at least implicitly, the problems of locating the machinery of legislation in capital cities, which may be remote from the sites of real environmental harm and/or impact. Many Pacific islands already have local units of administration, for example *fono* in Samoa, Island councils of chiefs in Vanuatu, or councils of elders. This may make sense in terms of consensus of priorities and enforcement but may create false environmental boundaries which are counter-productive to trans-boundary environmental concerns.

**Conclusion**

There is currently a wealth of material being produced by academics, consultants and national and international organisations on climate change effects, adaptations and strategies. This is in addition to commentary on various aspects of environmental degradation and harm in the Pacific region. Although rather less attention has been paid to the role of law in this area there is clearly a role for SREP to play here through its Pacific Regional Centre. In this article it has been suggested that any legislation has to engage with the pluralities at play here, not only in terms of subject matter but also the regulatory frameworks which need to be taken into account. Looking across the region it is clear that there are examples of good practice and that holistic approaches are beginning to be developed. While more needs to be done, it is suggested that certain basic considerations can be identified and that these could form the building blocks for future developments. At the same time it is accepted that legislation is only one tool in an armoury that might include a number of non-state tools, including current and traditional environmental management practices and knowledge, voluntary codes of practice such as the certification of sourcing foods and other products from sustainable resources,39 community initiatives, and private enterprise projects.

1. This term is used deliberately to suggest the taking of different elements closely linked to culture and society to create a new being, a mixture, intermingling or a hybrid. [↑](#endnote-ref-1)
2. Dan Gay. 2013. “The untold story of the Pacific Islands” *The Guardian*. 20 November 2013.

<https://www.theguardian.com/global-development-professionals-network/2013/nov/20/pacific-islands-energy-environmental-problems> [↑](#endnote-ref-2)
3. The Suva Declaration 2015 is a statement of climate change issued by the Pacific Island Development Forum Secretariat. See

<http://pacificidf.org/wp-content/uploads/2013/06/PACIFIC-ISLAND-DEVELOPMENT-FORUM-SUVA-DECLARATION-ON-CLIMATE-CHANGE.v2.pdf> [↑](#endnote-ref-3)
4. Down to 10,100 in the mid-2016 estimate given by Prism, the Pacific Community Statistic of Pacific Island Countries and Territories. <https://prism.spc.int/regional-data-and-tools/population-statistics> accessed 28/08/2017. [↑](#endnote-ref-4)
5. Mid-2016 estimate remains about the same. See Prism note 1. [↑](#endnote-ref-5)
6. Adopted by the UN A/RES/69/15. [↑](#endnote-ref-6)
7. Paras 2, 3 and 10. [↑](#endnote-ref-7)
8. Para 7 of the Rio Declaration. [↑](#endnote-ref-8)
9. BPOA UN 1994 para 79. The BPOA emphasised the importance of regional and sub-regional legislation, institutions and technical development and was further strengthened by the Mauritius Declaration (2005). [↑](#endnote-ref-9)
10. UNEP has initiated and supported a number of judicial workshops on this theme including one in 2002 for Pacific island judges. At that time it appeared that there were few cases coming before Pacific courts which offered opportunity for judicial activism in the ways discussed at the Symposium. [↑](#endnote-ref-10)
11. Section 40(1) *Constitution of the Republic of Fiji*. The second part of this section goes on to provide that “a law or an administrative action taken under law may limit, or may authorise the limitation of, the rights set out in this section.” The *Constitution of the Republic of Vanuatu* has a non-justiciable fundamental duty imposed on every person “to protect the Republic of Vanuatu and to safeguard the national wealth, resources and environment in the interests of the present generation and of future generations.” (Section 7(d)). [↑](#endnote-ref-11)
12. *Constitution of Tokelau*, Preamble. [↑](#endnote-ref-12)
13. Section 75. [↑](#endnote-ref-13)
14. Section 76. [↑](#endnote-ref-14)
15. Schedule 3 Section 2. [↑](#endnote-ref-15)
16. Section 47(1). [↑](#endnote-ref-16)
17. Section 47(1). [↑](#endnote-ref-17)
18. Chapter 12. [↑](#endnote-ref-18)
19. Section 95 (2) and (3). [↑](#endnote-ref-19)
20. The *Tuvalu Constitution*, for example refers to “Tuvaluan custom and tradition” and “Tuvaluan values, culture and tradition”; in Tokelau there is reference to “our culture and customs” and “the custom of Tokelau”; while in Samoa the preamble to the Constitution refers to “Samoan custom and tradition”. [↑](#endnote-ref-20)
21. There are exceptions, for example in both Kiribati and Tuvalu there is a statutory Lands Code governing customary land tenure, and there are a number of semi-formal written statements of customary law such as the “Custom Policy of the Malvatumauri National Council of Chiefs” in Vanuatu (1983). [↑](#endnote-ref-21)
22. See the *Custom Land Management Act* No 33 of 2013 in Vanuatu and Village Courts in Papua New Guinea, Land and Titles Courts in Samoa, and the Customary Land Courts in Solomon Islands. [↑](#endnote-ref-22)
23. South Pacific Regional Environment Programme (SREP). <http://sidsnet.org/pacific/srep/whatsprep_htm> accessed 3/09/2017. [↑](#endnote-ref-23)
24. This table was created using the search term ‘environment’ and the resources available on PacLII.org. The findings exclude laws relating to shipping, fishing, biosecurity, seabed mining and town planning although of course these may all be relevant to environmental harm. [↑](#endnote-ref-24)
25. There appears to be no environment legislation in place in Nauru. [↑](#endnote-ref-25)
26. Article 14(A). [↑](#endnote-ref-26)
27. Part 2 section 12(2)(s)(iii). [↑](#endnote-ref-27)
28. Part 2 section 12(3-4). [↑](#endnote-ref-28)
29. Part 6, section 37(5)(d). [↑](#endnote-ref-29)
30. See for example Part 6 section 37(3)(c); section 41(3)(b); section 41(5)(a); Section 42. [↑](#endnote-ref-30)
31. Section 41. Land held under native title is subject to a shared resource management agreement (section 41(3)-4)), thereby recognising the communal use and ownership of such land. [↑](#endnote-ref-31)
32. Section 5(a) and (b). [↑](#endnote-ref-32)
33. Section 2. [↑](#endnote-ref-33)
34. Section 3(d). [↑](#endnote-ref-34)
35. Section 4(a). [↑](#endnote-ref-35)
36. Schedule 2, Part 3, Section 1(c). [↑](#endnote-ref-36)
37. Section 15. [↑](#endnote-ref-37)
38. Section 22. [↑](#endnote-ref-38)
39. See for example, Secretariat of the Pacific Regional Environment Programme, “Q and A: the role of traditional Knowledge in Pacific meteorology with Siosina Lui of SPREP” 3 August 2017. [↑](#endnote-ref-39)
40. Section 23(l). [↑](#endnote-ref-40)
41. Section 8(2)(a). [↑](#endnote-ref-41)
42. This is required under s13 of the *Environment Management Act 2005*. The first volume of the report was completed in 2011. Fiji Government Online Portal ‘Fiji’s First Ever Natural Resource Inventory’ 25/8/2011. [↑](#endnote-ref-42)
43. Part 7, sections 25-27. [↑](#endnote-ref-43)
44. This is of course recognised in Principle 3 of the Rio Declaration on Environment and Development 1992. [↑](#endnote-ref-44)
45. The Melbourne Principles adopted at the Earth Summit 2002 refer to four principles: cultural vibrancy, economic prosperity, environmental responsibility and social justice. [↑](#endnote-ref-45)
46. The Coalition is supported by the Australian government through its Pacific Leadership program and annual meetings are convened with the assistance of the IUCN Pacific Centre for Environmental Governance, based in Suva, Fiji. [↑](#endnote-ref-46)
47. Section 2(f). [↑](#endnote-ref-47)
48. Section 3(c)(i). [↑](#endnote-ref-48)
49. Section 2. [↑](#endnote-ref-49)
50. Section 2. The protection and management of the marine environment in Cook Islands is substantially expanded by the 2017 *Marae Moana Act*. [↑](#endnote-ref-50)
51. Reported by STREP on 31 January 2017. “Pacific-UK marine science partnership to promote environmental research and collaboration”

<http://www.sprep.org/biodiversity-ecosystems-management/pacific-uk-marine-science-partnership-to-promote-environmental-research-and-collaboration> [↑](#endnote-ref-51)
52. *Considérant que l’homme exerce une influence croissante et potentiellement irréversible sur son environnement artificiel et naturel, par des effets directs ou indirects pouvant demeurer insoupçonnés;*

*Considérant que les Îles Wallis et Futuna jouissent d’un environnement d’une qualité et*

*d’une générosité exceptionnelles, mais particulièrement vulnérable, au vu de ses*

*particularités hydrologiques, géologiques et écologiques;*

*Considérant qu’une utilisation raisonnable des ressources naturelles du Territoire visant à éviter leur dégradation, voire leur épuisement, en garantissant au contraire leur*

*renouvellement permanent, est de nature à contribuer fortement à son équilibre économique,*

*social et environnemental, et qu’il est de l’intérêt, du devoir et de la responsabilité de chacun*

*d’y veiller;*

*Considérant que la préservation effective et constante de l’environnement du Territoire est*

*illusoire sans la prise de conscience individuelle et collective qu’il s’agit d’une nécessité*

*vitale, ce qui suppose une information, une sensibilisation et une concertation soutenues*

*auprès de toutes les populations;*

*Considérant que chaque individu a le droit de vivre dans un environnement sain et non*

*dégradé, seul susceptible de respecter sa santé, d’assurer son développement harmonieux*

*dans la paix sociale, la solidarité et la fraternité.* [↑](#endnote-ref-52)
53. *Le Territoire de Wallis et Futuna vise un niveau de protection élevé de son environnement,*

*notamment par la promotion de modes de vie, de production, de consommation et d’activité*

*viables à long terme;*

*Le Territoire de Wallis et Futuna, à des conditions économiques acceptables, utilise les*

*meilleures techniques disponibles issues de la recherche et de l’innovation pour assurer la*

*protection et la mise en valeur de son environnement …* [↑](#endnote-ref-53)
54. Section 29. See similarly the *Environmental Management and Conservation (Amendment) Act 2010* in Vanuatu, which inserts a new section 5A to integrate the precautionary principle. [↑](#endnote-ref-54)
55. Section 3(1). [↑](#endnote-ref-55)
56. Section 5(c). [↑](#endnote-ref-56)
57. CITES is The Convention on International Trade in Endangered Species of Wild Fauna and Flora. CBD is the Convention on Biological Diversity.

39 See for example the Marine Stewardship Council which has been involved in certification of tuna caught by member countries of the Nauru Agreement 1982.

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