THE REGULATION OF 'CUSTOMARY' ENTITLEMENTS BY STATUTE LAW: A PERSPECTIVE FROM AOTEAROA NEW ZEALND ON THE CUSTOMARY FISHERIES QOLIQOLI BILL

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Opening remarks

At the outset I should state that I claim no expertise in the law of Fiji and even less acquaintance with the norms and praxis of custom law in indigenous Fijian communities. I came to this topic as a naïve outsider who was willing to accept a request from the President of the Fiji Law Society to comment on the Qoliqoli (Customary Fisheries) Bill in a paper for his Society's 2006 annual convention.[1] I soon established that the *Qoliqoli* Bill was at the centre of intense political controversy during and after the general election in Fiji in May 2006. It has not ceased to attract controversy and it was one of the measures cited by the leaders of the military authorities for their actions in removing the government from office in December 2006. The focus of this article, however, is on the fact that the *Qoliqoli* Bill was being drafted in Fiji at the same time as a number of Bills were prepared by parliamentary counsel in New Zealand in relation to Mäori 'customary' fishing rights. The New Zealand Bills were enacted as the Foreshore and Seabed Act 2004, the Maori Commercial Aquaculture Claims Settlement Act 2004, and the Maori Fisheries Act 2004. In both Fiji and in Aotearoa New Zealand, therefore, the modern status of the customary rights of the indigenous peoples of the land, and the role of commercial fisheries in economic development for the benefit of those peoples, are the focus of legislative endeavour – though that endeavour has been thwarted in Fiji thus far. The approaches of the respective jurisdictions are very different indeed, as I will discuss in the last part of this paper.

Legal Pluralism

Although certainly not an expert in the particularities of Fiji law, cultures, and politics, I come to this topic as a disinterested but not an uninterested observer. My PhD thesis for the University of Dar es Salaam in Tanzania (East Africa) some years ago concerned colonial legal history. It was an historical and comparative study of the impact of the 'reception' of English law systems on the indigenous peoples of the British mandated territory of Tanganyika [now the larger constituent part of the United Republic of Tanzania] and the British colony of New Zealand. In my teaching career since completing that thesis I have preferred to embrace legal pluralism rather than the centralism of legal positivism. A work on legal pluralism by the respected Canadian scholar Harry Arthurs always finds a place in my class materials for Legal System courses. He wrote:[2]

> To the lawyer, the very idea of legal pluralism is a contradiction in terms: there can be no 'law' that the state does not either create or at least formally recognize; whatever law-like rules may be found elsewhere, they must be given some other name – customs, conventions, or understandings, for example, - to avoid confusion with real 'law'. But this understandable insistence upon terminological clarity has an important by-product. It preserves for 'law' in the lawyers' sense all of the evocative magic the word has acquired – majesty, mystery, authority, justice, rationality. And it relegates ''law' in the social scientists' sense to the nether world of qualifying adjectives and unnatural synonyms: Indigenous, imbricated, or informal law, systems of social control, reglementation, normative systems, or folkways. Law by any other name does not, in our culture, smell half so sweet.

In 1984 I attended the Canberra Law Workshop IV of the Research School of Social Sciences at the Australian National University on 'Legal Pluralism'.[3] Chapter 9 of the published proceedings of that

conference is a paper drawn from my doctoral thesis. Since the 1980s the main focus of my research and writing has been on Treaty of Waitangi-related legal and political developments in Aotearoa New Zealand, but throughout the years I have retained a strong commitment to the importance of a genuine recognition of the diverse forms of legal orders that can and should be able to co-exist within a nation state. I bring to my attempt at a comment on the *Qoliqoli* Bill 2004 a prejudice that recognition and enforcement of indigenous custom law systems is not incompatible with the operation of a modern national legal order catering for all citizens. I begin my commentary with a small dash of colonial legal history – my primary scholastic passion.

Colonial history and today

A feature of British imperial policy was that colonies were governed by a small number of men who moved from post to post around the Empire. Often they were younger sons of the British nobility who were educated at Oxford or Cambridge and then sent to serve in the colonial service. One such man was The Right Honourable Sir Arthur Charles Hamilton-Gordon. The youngest son of George Hamilton-Gordon, 4th Earl of Aberdeen, he was educated privately and then at Trinity College, Cambridge, where he was President of the Cambridge Union Society in 1849. After graduating in 1851, he worked as Assistant Private Secretary to the British Prime Minister (his own father) between 1852 and 1855. He was Lieutenant-Governor of New Brunswick between 1861 and 1866, Governor of Trinidad from 1866 to 1870, Governor of Mauritius from 1871 to 1874, Governor of Fiji from 1875 to 1880, Governor of New Zealand from 1880 to 1883, and finally Governor of Ceylon from 1883 to 1890. After retirement he was created 1st Baron Stanmore, of Great Stanmore, Middlesex in 1893 and he lived until 1912. His stint in Fiji is best known for his policy of ‘Fiji for the Fijians’ and the formal establishment of the Great Council of Chiefs and also for the importation of indentured labourers from India. Having set in place the key elements of socio-political structures that remain contested features of Fijian national life to this day, Gordon moved on to the colony of New Zealand. The major political issue during his stint in New Zealand concerned the Government’s determination to break up the solidarity of the resistance to land confiscations from Mäori led by the prophets Te Whiti o Rongomai and Tohu Kakahi at Parihaka in Taranaki province on the North Island west coast. Gordon was able as an autocratic ruler in the Crown Colony of Fiji to implement the policies of his choice. The 1852 constitution of the colony of New Zealand, however, provided for a legislature and an executive representative of the settlers. It is apparent that Gordon did not personally favour the suspension of *Magna Carta* and *habeas corpus* – described by the Native Minister of the time as ‘mere legal technicalities’ - nor did he happily embrace the detention without trial of hundreds of Mäori who in a non-violent manner resisted the colonial confiscations of their land. Nevertheless, it was his vice-regal signature that provided the royal assent in 1880 to the discriminatory and repressive Maori Prisoners’ Trials Acts, Maori Prisoners’ Detention Act, and the West Coast Settlement (North Island) Act. He was the Governor at the time of the military expedition against a peaceful multi-tribal assembly of Mäori at Parihaka village on 5th November 1881, the subsequent dispersal of thousands of people and the indefinite detention without trial of hundreds of Mäori.[4] So Gordon’s governorship in New Zealand is remembered, if at all, mainly for the fact that he represented the Crown and acquiesced in the actions of the colonial government during what is widely recognised as the most shameful singular episode of New Zealand colonial history.[5]

Two further pieces of orally transmitted information that relate to the Parihaka incidents may be of interest to readers of this journal. First, in his old age around the turn of the 20th century, Te Whiti o Rongomai corresponded with a young Indian lawyer who wished to learn from him something about the reasons for the successes and failures of the Parihaka non-violent resistance to colonialism. That young Indian lawyer later became known to the whole world as Mahatma Gandhi. Secondly, one of the major supporters of the Parihaka resistance was a chief, Titokowaru, who had fought valiantly against British military might in the 1860s and then turned to non-violent resistance in the 1870s and 1880s. One of Titokowaru’s descendants was the first person of Mäori descent to become the Governor-General of New Zealand in 1985: the Most Rev. Sir Paul Reeves. Later Sir Paul was appointed chairman of the Constitutional Review Commission whose 1996 report provided the basis for the Constitution of Fiji 1997.[6] In the late 20th century, therefore, just as in the late 19th century, the peoples and politics of Fiji and New Zealand were not a little intertwined.

Reeves’ Te Atiawa tribe, and other Taranaki tribal kin connected with Parihaka, suffered severely from the plundering and confiscatory policies of the Crown from 1860 to the present day which they name as *muru me te raupatu*. The Waitangi Tribunal described Crown policies in Taranaki as perhaps the most grievous and ongoing breaches of the Treaty of Waitangi to have occurred anywhere in the history of Aotearoa New Zealand.[7] Former Governor-General he may be, but Reeves is in the position of supplicant and claimant as he continues to play a leadership role with Taranaki tribes seeking settlements from the Office of Treaty Settlements for Crown policies of the past that might perhaps be described as ‘New Zealand for the Europeans’! The Reeves Report in Fiji led to enactment of the national constitution of 1997 in which Gordon’s ‘Fiji for the Fijians’ policy has been modified but nevertheless retains provisions such as section 116 bolstering the powers of the Great Council of Chiefs or *Bose Levu Vakaturaga*, and section 186 requiring Parliament to make provision for the application of customary laws and for dispute resolution in accordance with traditional Fijian processes, having regard for Fijian customs, traditions, usages, values and aspirations. For some, this continuing recognition of ‘customary’ indigenous rights may not have gone far enough. For example, the constitutional equality of three official languages – English, Fijian and Hindi, but without acknowledging the paramountcy of the indigenous Fijian – was regarded by Taufa Vakatale, Deputy Prime Minister and Minister of Education at the time, as unwarranted. She said:[8]

> With unequal income distribution and the global reach of the English and Hindi culture, the denial of cultural rights of the Fijian by giving the language equality of treatment with other languages means the reinforcement of the relative positions of the strong and the weak. It erodes the Fijian and accentuates the Indian and immigrant character of the islands. This is a form of cultural imperialism and it should not be acceptable.

I can only observe that the declaration of Mäori as an official language of Aotearoa since 1987 has ensured some degree of official encouragement for use of the language, but it is a very long way from equality with English, let alone having any paramountcy. Indeed, even with respect to the nations’s founding Treaty – *Te Tiriti o Waitangi* – it is well nigh impossible to convince decision-makers to even look at the original Mäori text of the document instead of focussing solely on the English draft that was granted equal legal status under the Treaty of Waitangi Act 1975.[9]

‘Customary’ statutory entitlements?

I turn now more specifically to my topic of the regulation of ‘customary’ entitlements by statute law. I have chosen deliberately to put inverted commas around the word ‘customary’. In doing so I draw on a paper by Mere Pulea (now Chief Judge of the Family Court in Fiji) in which she quoted from Ron Crocombe as follows:[10]

> [When people write about customary or traditional tenure] they often imply that these were forms of tenure practiced by islanders of those localities before contact with industrialized societies. In that sense, there are no customary or traditional tenures in the Pacific islands ... what is called customary or traditional tenure in many parts of the Pacific today may be more accurately called ‘colonial tenure’; a diverse mixture of varying degrees of colonial law, policy, and practice with varying elements of customary practices as they were in the late nineteenth century after many significant changes have been wrought on the pre-contact tenures.

That viewpoint is congruent with the work of other respected scholars of imperial history such as Hobsbawn and Ranger who edited an acclaimed collection of essays entitled *The Invention of Tradition*.[11] I note that a University of the South Pacific Property Law course includes a paper by Tony Chapelle in which it is argued that: ‘The time has come to expose, or at least modify, “the middle-aged myth” of Gordonian infallibility as the champion of Fijian culture.’[12] Occasionally members of the judiciary acknowledge the fact of ‘custom’ being a state legal system invention. Thus in the context of Aotearoa New Zealand, Chapman J, a judge of the Supreme Court [as it was then known - now the High Court], wrote in *Willoughby v Waihopi* (1910) 29 NZLR 1123 about the rules of Native custom or Mäori custom administered in the Native Land Court. My paper at the Canberra Law Workshop quoted from his judgment (which employed the sort of racialist language usual among European settler of that era):[13]

> [A] body of custom has been recognised and created in that Court which represents the sense of justice of its Judges in dealing with a people in the course of transition from a state of tribal communism to a state in which property may be owned in severalty or in a shape approaching severalty represented by tenancy in common. Many of the customs of that Court must have been found with but slight regard for the ideas which prevailed in savage times.

In recent times a similar point was made by Norbert Rouland with respect especially, but not solely, to the Francophone Pacific. He wrote of 'the construction of customary identity':[14]

> The dynamic school, ethnohistory, has shown that traditional societies were not immutable entities, closed off in themselves. Instead it insists on the irreversibility of acculturation initiated by colonialism, and on the fact that the political independencies of the new states have not hindered these acculturations.
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> He then went on to argue:
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> In fact, we would do well to substitute the term custom, a word that is encumbered with too many abusive uses and representations, with that of 'a customary mode of the production of law'. In that way, custom would denote autonomous modes of engendering the law, allowing for the recuperation, reinterpretation, and/or combination of ancient elements (traditions) with new elements, rather than their partial, or total, elimination. Custom is not necessarily restrained by the past.

If one follows Rouland's viewpoint, then clearly a Bill before the Fijian Parliament, representative (imperfectly perhaps) of all citizens is not an example of 'a customary mode of the production of law'. However much support the Customary Fisheries Bill may have from members of the indigenous Fijian communities, it can hardly be argued that a law enacted by Parliament in accordance with the national constitution is 'customary'. It is a reworking of the colonial laws on Native Affairs and Native Lands by Parliament to provide for the modern context of fisheries and their exploitation for commercial and other uses. It may be a very good law in the opinion of many, even if is controversial, but it is hardly a 'customary' law. That is the first major point of comment that I wish to make in this paper.

Static conceptions of indigenous societies

According to what I have read, indigenous Fijian society was and is arranged on collective principles in groups known as *yavusa, mataqali*, and *i tokatoka*. Colonial law and policy enshrined land ownership rights in *mataqali* and, in line with that, the *Qoliqoli* Bill's clause 2 definitions state that "owner" means 'a *mataqali* or other division or subdivision of indigenous Fijians or Rotumans which owns a customary fisheries ground'. I note a degree of flexibility in the wording 'other division or subdivision' but I see no explicit reference to *yavusa* or *i tokatoka*. I have a specific reason for being put onto inquiry as to how the state deals with the various elements or groups within indigenous collectivities. In Aotearoa New Zealand, Mäori society is said by way of generalisation to comprise *iwi* (large groupings, sometimes called confederations of *hapü* – usually translated in English as 'tribe'), *hapü* (usually translated as 'sub-tribe', but often *hapü* claim to act as independent entities and assert that they are a 'tribe' in their own right), and *whänau* (usually translated as 'extended family' - the usual everyday unit of social action).

Superficially there appears to be a similar symmetry of larger to smaller units of society in *yavusa, mataqali*, and *i tokatoka* as in *iwi, hapü*, and *whänau*. The New Zealand government, however, has a set of Treaty settlements policies for the settlement of historical grievances of Mäori concerning laws and Crown policies in breach of the Treaty of Waitangi that focus solely on *iwi*, not on *hapü*. A key settlement policy insisted on by the Office of Treaty Settlements is that: 'The Crown strongly prefers to negotiate claims with large natural groupings rather than individual whänau and hapü.'[15] This policy causes many Mäori anguish and deep irritation: How is that Crown ministers and officials now insist on the right unilaterally to define how and with whom they will negotiate over breaches of the Treaty committed by their predecessors? Can the thief prescribe how he should be dealt with after his crimes have been detected?

So my questions to a South Pacific readership include:

1) Are *mataqali* indeed the appropriate division of indigenous society to whom benefits of fisheries should

be distributed?
2) Is the concept of "ownership" a relevant concept of Fijian custom law?
3) Are indigenous Fijian communities by and large happy to have the state prescribe how 'customary' fisheries should be owned and managed through the Native Land Trust Board and the Customary Fisheries Commission to be established by clause 6 of the *Qoliqoli* Bill, with disputes dealt with by a Customary Fisheries Appeals Tribunal appointed by the Minister?

There may be other broader set of questions, not considered in this article, as to how the Customary Fisheries Bill, with its local custom-based focus, fits in with the international multilateral developments such as Fisheries Partnership Agreements between Pacific nations, including Fiji, and the European Union, and compatibility of all of this with the norms of the World Trade Organisation.

Essentially my inquiries come down to this: there is a difficulty in defining customary rights in a statute, especially if disputes are to be resolved by courts or tribunals also established by statute, because that process takes the development and application of custom away from the direct local input of the indigenous people themselves. In fact, when the custom of indigenous peoples is regulated by statute over a long period of time the likelihood, it would seem to me, is that an extra layer of legal pluralism will emerge. There will be statutes (colonial ordinances and modern Acts of Parliament), common law and equity (as 'received' from English law and developed by national courts) and custom-derived norms recognised by state law. In addition, there will be developed - below the radar of the state legal system - local modifications and manipulations of custom rules in a manner that may or may not fit well with the 'traditional' rules and processes enshrined in statutes. This further layering of legal pluralism within the nation may be quite fluid and the indigenous participants themselves may switch as they deem appropriate between statute-sanctioned customary procedures and unrecognised customs evolved by 'a customary mode of the production of law'. This may or may not be socially desirable, depending one supposes on how disruptive it is to have potentially, or actually, competing versions of indigenous customs being implemented at the same time in the same place. Certainly change is an inevitable feature of custom law as of any other human mode of organisation, even if changes in statutory versions of custom fall behind social, cultural and economic changes.

Ron Crocombe in 1994 identified 12 trends that are likely to affect customary land tenure systems in the Pacific: tenure adapts to population numbers but very slowly and often painfully; people are becoming concentrated in towns; most 'land-owners' are 'absentee land-lords'; the value of gender in relation to land rights is changing; accident of birth is growing as a determinant of land rights; the land rights and benefits of chiefs are being revised; ethnicity is a continuing factor in access to land; political power is reviving as a factor in access; financial power is growing as a criterion of access; land is reducing as a factor in production; technology continues to influence tenures; public rights to land seem likely to decline further.[16] Moving from Crocombe's generalisations about trends affecting customary tenures, I was intrigued by a paper by John Overton published in the same collection of essays. Overton suggested that informal, largely illegal, land tenure arrangements have arisen as a result of the rigidities in the Native Lands Trust Board and the Agricultural Landlord and Tenant Act systems:[17]

> The practices involved are many and varied and often involve a reversion to customary vakavanua relations. The key feature of vakavanua tenure is the direct negotiation between the prospective tenant and the real 'controllers' of the land in question, usually the i tokatoka members resident in the village.

Overton went on to suggest that a law reform to recognise such *vakavanua* agreements would be desirable, albeit unlikely. I note that according to Overton the 'real' control of land lay with the *i tokatoka* rather than the *mataqali*.

Incorporation of custom-derived values in state law

The views expressed above that the Customary Fisheries Bill can hardly be a Fijian custom law, and the questions posed as to how widely accepted the Bill's proposals might be for indigenous communities, do not mean that I object in principle to the idea of incorporating custom-derived values into state law. On the

contrary I have contributed to two projects of the New Zealand Law Commission that have carefully explored ways and means to acknowledge *tikanga Mäori* within the parameters of a single national legal system. Despite the prejudices of many schools of anthropology and jurisprudence articulated in the past, indigenous custom law systems are neither primitive nor static systems of law. I agree with Rouland as quoted above on that. He mentioned, among other possibilities, the ‘recuperation’ and ‘reinterpretation’ of custom laws. There have been important steps towards the ‘recuperation’ of *tikanga Mäori* as the Mäori cultural renaissance of the last 30 years has unfolded. A paper written by Chief Judge Durie as Chairperson of the Waitangi Tribunal in 1994 on ‘Custom Law’ is a good example. He was frustrated with the continuing reliance of his Land Court judicial colleagues on the rigid notions of Mäori custom set out in the 1960 text of Judge Smith on *Maori Land Law*.[18] The Native Land Court – renamed the Mäori Land Court in 1947 - purported to apply Mäori customs and usages in title investigations from its inception in 1864, but generally applied standard formula versions of ‘custom’ as laid down by the Land Court judges in the nineteenth century (few of whom were lawyers, and none of whom were Mäori).[19] After taking advice from his Mäori elders, Durie argued that *tikanga Mäori* was properly based in a flexible manner on some underlying conceptual regulators:[20]

> Accordingly, while custom has usually been posited as finite law that has always existed, in reality customary policy was dynamic and receptive to change, but change was effected with adherence to those fundamental principles and beliefs that Mäori considered appropriate to govern the relationships between persons, peoples and the environment.

The Law Commission’s conclusions, after considerable work on the Custom Law project and a separate inquiry into Mäori and laws of succession, were as follows:[21]

> If society is truly to give effect to the promise of the Treaty of Waitangi to provide a secure place for Mäori values within New Zealand society, then the commitment must be total. It must involve a real endeavour to understand what tikanga Mäori is, how it is practised and applied, and how integral it is to the social, economic, cultural and political development of Mäori, still encapsulated within a dominant culture in New Zealand society.
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> However, it is critical that Mäori also develop proposals which do not only identify the differences between tikanga and the existing legal system, but also seek to find some common ground so that Mäori development is not isolated from the rest of society.

The Commission then quoted and translated an old customary saying:

> Tungia te ururoa, kia tupu whakaritorito
> Te Tupu a te harakeke.
> Burn off the overgrowth, so that new shoots of flax bush may grow.

I am not in a position to know one way or another whether the place of indigenous Fijians and Fijian customary values are considered ‘secure’ in the multicultural nation of Fiji. I suspect that if I ask, the answer will depend on whom I talk to. Nevertheless I think that the general thrust of the New Zealand Law Commission Study Paper’s conclusion may be pertinent in Fiji.

Comparison of 2004 New Zealand Acts with the Fijian Bill

The fact that I have referred to the ‘invention of tradition’ and noted that manipulations of custom may serve the purposes of colonial and post-colonial governments does not mean that I am ill-disposed to measures such as the *Qoliqoli* Bill. On the contrary, in the light of the legislative record of the New Zealand Parliament in 2004, I can only marvel at the extensive recognition of use-rights and of commercial opportunities for the benefit of the indigenous people that are contemplated by the *Qoliqoli* Bill. I was in the midst of the 30,000 or more people, overwhelmingly Mäori, who descended on Parliament in the 2004 *Hikoi* to oppose the Foreshore and Seabed Bill. Majoritarian politics ensured that our voices were disregarded and indigenous customary rights were tightly circumscribed by Parliament’s invention and definition of ‘customary rights orders’. These definitions were decided upon without the benefit of a single shred of proven evidence as to the actual tribal and location-specific nature of *tikanga Mäori* entitlements over those areas of land. There was no evidence because the Government used

parliamentary sovereignty to interrupt due process in the courts, which had thus far only dealt with preliminary issues of law. Parliament thus prevented substantive cases based on evidence as to *tikanga Mäori* (rather than its own version of ‘Mäori custom’) being heard in the Mäori Land Court.

Thus clause 4(1) of the Fiji draft Bill reads ‘the legal ownership of all land, soil, sea-bed and reefs in customary fisheries areas within Fiji’s fisheries waters shall vest in and be held by the [Native Land Trust] Board for the benefit of customary fisheries owners.’ The prospect of a clash between informal custom and custom-derived statute, that I discussed earlier, is clearly a distinct possibility as subsection (5) stipulates that ‘No legal interests or rights in respect of any land in the seabed within any customary fisheries area may be alienated or dealt with by the owners without the approval of the Board.’ New Zealand’s Foreshore and Seabed Act has a very different paradigm. Section 13(1) proclaims that ‘the full legal and beneficial ownership of the public foreshore and seabed is vested in the Crown, so that the public foreshore and seabed is held by the Crown as its absolute property. Subsection (4) further specifies that ‘The Crown does not owe any fiduciary obligation, or any obligation of a similar nature to any person in respect of the public foreshore and seabed.’

As to commercial fisheries rights, clause 10(1) of the Fiji Bill bestows on customary owners ‘exclusive possession of their customary fisheries grounds’ and as to non-commercial purposes clause 12(2) allows that ‘the owners of customary fisheries areas may, without a permit, take whatever amount of any kind of fish or fisheries resources within their customary fisheries areas required for traditional and customary purposes. In Aotearoa New Zealand, however, the apparently unambiguous protection of *tino rangatiratanga* and exclusive possession in relation to fisheries specified in the Treaty of Waitangi has never amounted in domestic law to anything like the resources proposed to be protected in the Fiji Bill.

It is true that the Treaty of Waitangi fisheries guarantee was specifically referred to in an 1877 Act and that, in slightly different wording, a recognition of existing Mäori fishing rights remained in the statute book right through until 1992. Nevertheless Mäori were almost totally excluded from the Quota Management Scheme for fisheries created in 1986. It took 10 court cases in 1987 and 1988 to force the Government to come up with 10% of commercial quota for Mäori in the Maori Fisheries Act 1989; two carefully researched Waitangi Tribunal reports on the extensive nature of Mäori commercial and customary fisheries interests – though not exclusive in respect of offshore fisheries - from prior to 1840 right up to the present in the far north (Muriwhenua) and the south (Ngai Tahu); and very difficult negotiations to somewhat increase the quota available to Mäori through the Crown’s purchase of shares in a significant fishing company (Sealords) that then led to the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.[22] It then took over a decade of internecine warfare in the form of litigation on a grand scale over a wide range of issues (much of it intra-Mäori) to finally reach the Maori Fisheries Act 2004 so that fisheries entitlements can now actually be allocated to *iwi* entities.

The defeat of Mäori interests in the Foreshore and Seabed legislation was somewhat moderated by the little commented upon Maori Commercial Aquaculture Claims Settlement Act 2004. This Act made no allowance for the virtual exclusion of Mäori from the aquaculture industry in the past – the issue, incidentally, that provoked the *iwi* of *Te Tau Ihu* [the north of the South Island] to launch the foreshore and seabed customary rights claims that resulted in the political dramas of 2003-4 on customary claims to marine space lands. However, it allocated 20% of new aquaculture space in coastal marine areas to Te Ohu Kai Moana Trustee Limited, a company established in accordance with the Maori Fisheries Act 2004.

By various commercial dealings, in addition to the Treaty settlement arrangements, Mäori interests now control between 40-50% of commercial fisheries in Aotearoa New Zealand. This is a long way short of the proposed application of exclusive ‘customary’ entitlements administered by the Native Land Trust Board in respect of the entirety of ‘Fiji’s fisheries waters’ as broadly defined in clause 2 of the Fiji draft Bill. I conceive that tourism enterprises will wish to make submissions on the *Qoliqoli* Bill, if it ever comes before Parliament for consideration, as many resorts speak of ‘our lagoon’ in their promotional literature and charge tourists for activities undertaken in those inshore areas. Clearly there will be issues to be resolved as between the interests of tourism operators and the putative ‘customary’ rights of *mataqali*. I also note that whilst the Fiji Bill preserves public access to foreshores for navigation and for non-commercial recreational activities, as the New Zealand legislation does, there appears thus far to be no

explicit provision for recreational fishing activities by members of the public who are not members of the relevant *mataqali*. That would be a hugely controversial omission in a New Zealand Bill – political dynamite, in fact - because of many non-indigenous New Zealander’s perceptions that they have, or ought to have, a virtually sacrosanct ‘right to fish’. I would have a question of the Fijian draft Bill as to whether specific provision needs to be made for non-customary recreational fishing opportunities.

Some indigenous Fijians and many of their elected representatives appear to have doubts about the secure protection of their customary rights in fisheries under existing law. Even if the *Qoliqoli* Bill were to be enacted, questions might remain as to the reality of the purported control by indigenous Fijians of Fiji’s seabed areas and fisheries waters. Even without the enactment of that Bill, however, the position of indigenous Fijians in relation to fisheries would appear to be nowhere near as precarious as that of indigenous Mäori of Aotearoa. The status of Mäori customary rights will always be marginalised so long as Mäori comprise no more than about 15% of the population, so long as the Treaty of Waitangi remains without constitutional protection, and so long as parliamentary sovereignty allows a bare majority of the House of Representatives to enact whatever laws they please.

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[1] The draft of the Qoliqoli Bill supplied to me was Draft 05, dated 7 September 2004. I am aware that there have been further re-drafts of the Bill but they have not been supplied to me and my comments are based on the 2004 version.

[2] Harry W Arthurs, Without the Law: Administrative Justice and Legal Pluralism in Nineteenth Century England (Toronto, 1985) 3.

[3] Peter Sack & Elizabeth Minchin (eds), *Legal Pluralism* (Canberra, 1985).

[4] W P N Tyler, “Gordon, Arthur Hamilton - 1829 – 1912, Colonial governor”, *Dictionary of New Zealand Biography*: http://www.dnzb.govt.nz/dnzb/ (Accessed 5 January 2007).

[5] Hazel Riseborough, *Days of Darkness: Taranaki 1878-1884* (Wellington, 1989).

[6] *Towards a United Future: Report of the Fiji Constitutional Review Commission*, Parliamentary Paper No. 34 (1996).

[7] Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington, 1996).

[8] Taufa Vakatale, ‘Multiculturalism vs Indigenous Cultural Rights’ in Margaret Wilson & Paul Hunt (eds) *Culture, Rights, and Cultural Rights: Perspectives from the South Pacific* (Wellington, 2000) 79.

[9] David Williams, ‘Unique Treaty-based Relationships Remain Elusive’ in Michael Belgrave, Merata Kawharu & David Williams (eds), *Waitangi Revisited* (Melbourne, 2005) 369-370.

[10] Mere Pulea, ‘Customary Law and the Management of the Environment in the Pacific Islands’ in Sack & Minchin, above n 3, 164-5.

[11] Eric Hobsbawm & Terence Ranger (eds), *The Invention of Tradition* (Cambridge, 1992).

[12] Tony Chapelle, ‘Customary Land Tenure in Fiji: Old Truths and Middle- Aged Myths’: http://cow.vanuatu.usp.ac.fj/courses/LA300_Property_Law_1/Readings/ (Accessed 5 January 2007).

[13] David Williams, ‘The Recognition of “Native Custom” in Tanganyika and New Zealand – Legal Pluralism or Monocultural Imposition?’ in Sack & Minchin, above n 3, 145.

[14] P de Deckker & J-Y Faberon (eds) *Custom and the Law* (Canberra, 2001) 14-15.

[15] Office of Treaty Settlements *Healing the past, building a future* (2nd ed) (Wellington, 2002), 32.

[16] Ron Crocombe & Malama Meleisea (eds), *Land Issues in the Pacific* (Suva, 1994) 3-16.

[17] John Overton, ‘Land Tenure and Cash Cropping in Fiji’ in Crocombe & Meleisa, above n 15, 121, 129.

[18] Norman Smith, *Maori Land Law* (Wellington, 1960).

[19] David Williams, *‘Te Kooti tango whenua’: The Native Land Court 1864-1909* (Wellington, 1999).

[20] New Zealand Law Commission, *Mäori Custom and Values in New Zealand Law*, Study Paper 9 (Wellington, 2001) 3-4.

[21] New Zealand Law Commission, above n 19, 95-6.

[22] Waitangi Tribunal, *Muriwhenua Fishing Claim Report* (Wellington, 1988); Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report* (Wellington, 1992).

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