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and the Marshalls became self-governing in 1979. In addition to the Nitijela, an elected unicameral legislature that elects the president of the Marshalls, the Constitution provides for an advisory council of chiefs (the Council of Iroij).

Although self-governing by 1979, the Marshalls did not become independent until 1986. Many Marshallese desired full political independence by the 1970s, but they also recognized that economic underdevelopment (in large part caused by the United States' Trusteeship policies) would require continuing financial reliance on the United States. Nor was the United States willing entirely to sever its relationship with Micronesia, believing that U.S. national security interests necessitated a continuing presence. Thus, independence negotiations proceeded slowly, even after the concept of free association as the basis for a continuing relationship between the United States and an independent Marshallese republic was adopted at meetings between the United States and representatives of the Trust Territory governments in Hilo, Hawaii, in 1978.

Under the Compact of Free Association, which took effect in 1986, the Marshalls attained autonomous political status and continuing economic support from the United States, but the United States retained authority over national defense and, to a limited extent, foreign affairs (see VI International Obligations). Independence for the Marshalls was approved by the United Nations Trusteeship Council in 1986, but the Security Council, whose approval was also required, did not formally take up the matter until 1990. In the interim, a number of nations, including the United Kingdom and the Soviet Union, did not recognize the Marshalls as fully sovereign and independent. However, with the vote of the Security Council in 1990 to end the Trusteeship, the independence of the Marshalls is now internationally accepted.

During negotiations with the United States for an end to the Trusteeship, the peoples of the Trust Territory were determining whether they would form one or several nations and what the governing structure of such nations would be. The impetus toward separatism came from several sources. First, the cultural diversity of the peoples of the Trust Territory and the vast geographical distances separating the islands militated against the creation of a unitary state. Moreover, the differential treatment the districts had received from the United States under the Trusteeship—and were likely to receive after independence—deprived them of a sense of common purpose. Most importantly, Micronesia's long experience of colonialism has left its peoples with a deep distrust of centralized power and a consequent bias in favor of decentralization. As a result, the former Trusteeship has divided itself into three independent nations and a commonwealth—the Republic of the Marshall Islands, the Republic of Palau, the Federated States of Micronesia, and the Commonwealth of the Northern Marianas.

III. SOURCES OF LAW

A. Constitution

The Marshall Islands Constitution is by its terms the "supreme law of the Marshall Islands" (Article I, Section 1). At Article I, Sections 1 and 2, the Constitution provides that all judges and other public officers are bound by the Constitution, that all legislative and executive instruments, as well as court or agency decisions, have the force of law only if made pursuant to it, and that any law inconsistent with it is void.

The Constitution recognizes other sources of law subsidiary to it, including legislation, treaties and compacts, customary law, and the decisional law of Marshall Islands courts. Article I, Section 3 of the Constitution provides that responsibility for interpreting the Constitution re-

sides ultimately with the judiciary. In interpreting and applying the Constitution, courts may consider but are not bound by decisions of courts of other countries having constitutional provisions similar to those under review. The courts are to adapt these decisions "to the needs of the Marshall Islands, taking into account the Constitution as a whole and the circumstances in the Marshall Islands from time to time" (Article I, Section 3(1)). The Constitution is to be construed "to achieve the aims of fair and democratic government, in the light of reason and experience" (Article I, Section 3(2)). In carrying out this constitutional responsibility, the courts will be making new law for the Marshalls, whether they intend to or not.

Many of the provisions of the Constitution may be amended by a vote of two-thirds of the total membership of the Nitijela (the legislature) followed by a majority of the votes cast in a referendum open to all qualified voters (Constitution, Article XII). However, certain provisions (the Supremacy Clause; the Bill of Rights; the provisions protecting traditional rights; the principles underlying the makeup of the Nitijela; or any change in the composition, method of selection, or tenure of any of the governmental institutions or officers that are established by the Constitution) may be amended only if submitted to the people by a constitutional convention and approved by two thirds of the votes cast in a referendum open to all qualified voters. The Nitijela is also required to report every ten years on the advisability of amending the Constitution or of calling a referendum on that issue.¹

B. Legislation

Legislation is of three kinds: provisions of the Trust Territory Code; laws enacted by the Nitijela when it was the Marshall Islands district legislature prior to May 1, 1979 (the effective date of the Constitution); and laws of the Nitijela enacted after the effective date.

Laws of the Trust Territory and laws enacted by the Nitijela prior to the effective date, to the extent that they are consistent with the Constitution, continue to be in force until repealed or revoked (Constitution, Article XIII).

The Marshall Islands Revised Code (MIRC), published in 1988, contains all such legislation still in effect, as well as laws enacted by the Nitijela subsequent to the effective date. Each act is given a chapter in the Code, and related chapters are grouped into titles. Acts are referred to here by name, title number, and chapter number.

C. Treaties and Compacts

Article V of the Constitution makes the Cabinet responsible for conducting the foreign affairs of the Marshalls, whether by treaty or otherwise, but treaties must be approved by the Nitijela, and no treaty has the force of law in the Marshalls until so approved. The government of the Marshalls has entered into a number of international agreements, but the Compact of Free Association remains its most significant treaty obligation (see VI International Obligations).

D. Custom

The Constitution not only makes a place in the new political system for the customary norms of the people of the Marshall Islands, but to some extent also brings traditional political leaders into the new system (see IV, C (1) National Government). However, both the norms and the institutions are changed by their presence in a new legal entity.

Under the Constitution, substantive customary law is defined at Article XIV as "any custom having the force of law in the Marshall Islands." Customary law enters the formal legal system

in two ways, through court decisions and through legislation. First, Articles X and XIII provide that all law (including customary law) existing on the effective date remains in force, unless amended or repealed. These provisions, in essence, require the courts to apply custom whenever applicable. The Constitution suggests, however, that custom will not apply if a contrary statute exists, since amendment and repeal can occur indirectly or implicitly, as well as directly and explicitly. It also implies that custom is frozen at the effective date of the Constitution and that the courts may not take later unofficial modifications to custom into account. The Marshall Islands High Court, however, has held that the Court can take judicial notice of new local custom when it is firmly established, generally known, and peacefully and fairly uniformly acquiesced in by those whose rights are affected.²

Second, Article X of the Constitution empowers the Nitijela to declare by act the customary law. Such declarations may "supplement the established rules of customary law," a provision that suggests that, in declaring custom, the Nitijela may modify it or take into account that custom changes to meet changing social needs and circumstances. Prior to the second reading of any bill that declares custom, the Nitijela must establish with the Council of Iroij (a council of traditional leaders) a joint committee and must afford the committee a reasonable opportunity to report on the bill. The Nitijela has scarcely used this declaratory power, although an interest in utilizing and supporting traditional practices is evident in a number of acts. An example is the provision of the Local Government Act (4 MIRC, Chapter 1) regarding consensus elections (see IV, C, 2 *Legislature*), but that legislation was not designated as a bill to declare custom and a joint committee did not meet on it.

The Constitution leaves somewhat uncertain the relation between customary law and the Bill of Rights. Article X provides that "Nothing in Article II [the Bill of Rights] shall be construed to invalidate the customary law or any traditional practice concerning land tenure or any related matter." This may mean that customary law generally overrides the Bill of Rights or that only those customs and traditional practices relating to land tenure do so.

E. Common Law

Neither the Constitution nor the Judiciary Act 1983 (27 MIRC, Chapter 2) gives explicit guidance to the courts on the development of the common law. One could argue by analogy to the Article I provisions on constitutional interpretation (see III, A *Constitution*), that, in the development of the common law as well, the courts should treat the decisions of foreign courts (including those of the United States and the Trust Territory) as persuasive but not binding, and that the common law should be adapted to the needs and circumstances of the Marshall Islands. In addition, as discussed earlier (III, B *Legislation*), Articles X and XIII of the Constitution suggest that the courts should apply customary law whenever applicable.

The Trust Territory Code provided that American common law, as expressed in the American Law Institute's *Restatements* or as generally understood and applied in the United States, would be the common law of the Trust Territory (1980 1 TTC 103). The *Restatements* are attempts by American legal scholars to codify the common law. Since the common law of each American state differs, the *Restatements* contain either the rule adopted by the majority of the states or the rule that the scholars drafting the *Restatements* prefer. If the Trust Territory courts used the *Restatements*, they were in effect deciding cases by applying a civil code rather than by common law. This provision does not appear in the Marshall Islands Revised Code, suggesting that it has been repealed and that the courts of the Marshall Islands are free to develop an indigenous common law.

E. Human Rights

Article II of the Marshall Islands Constitution (the Bill of Rights) protects the civil rights of individuals as against their government. Article II includes detailed explanations of each right, most of which summarize the long history of decisions of American courts interpreting the U.S. Constitution's Bill of Rights. Although these explanations were probably intended to clarify the constitutional grant of rights (and some of them do), many of them are understandable only in the light of a full reading of the relevant U.S. judicial decisions and applicable only in the American context. Article II provides that no right (either those enumerated or any other right retained by the people) may be denied or abridged and that any provision of the Bill of Rights may be invoked in litigation either as a defense or as a basis for obtaining relief.

The rights addressed in the Marshall Islands Constitution are as follows:

1. freedom of thought, speech, press, religion, assembly, association, and petition;
2. freedom from slavery and involuntary servitude;
3. freedom from unreasonable search and seizure;
4. right to due process and fair trial;
5. freedom from government takings of land rights or private property, unless for just compensation and for a public use;
6. freedom from cruel and unusual punishment;
7. right to habeas corpus;
8. freedom from ex post facto laws and bills of attainder;
9. no quartering of soldiers without consent;
10. no imprisonment for debt;
11. no conscription except in time of war and right to conscientious objection;
12. right to equal protection under the law;
13. right to personal autonomy and privacy;
14. right to invoke the judicial process and right to vote;
15. right to health, education, and legal services; and
16. right to responsible and ethical government.

The first fourteen of the enumerated rights are in the U.S. Constitution, either expressly or by judicial interpretation. As such, they reflect the individualistic values of a free market society; they are all limitations on governmental power. Except for Article II, Section 5, relating to the government's power of eminent domain (see XII *Land and National Resources*), they tend to follow American models closely, with no particular modifications to make them applicable to the special circumstances and culture of the Marshalls. Experience and the people of the Marshall Islands will determine whether they are appropriate to a society in which government's major role will be to provide services rather than to order the market, in which kin group relations take precedence over individualism and in which deference to rank carries its own dignity. In this connection, it should be noted that Article X of the Constitution seems to permit the Bill of Rights to be abridged by customary law and traditional practices relating to land tenure, but perhaps not by customary law and traditional practices relating to other matters (see III, D *Customs*).

The last two of the enumerated rights do differ significantly from the Bill of Rights in the American Constitution. Rather than limitations on the power of government, they are aspirations for the government to use its power for the public good. Article II states that the government is not required immediately to offer the services promised in Sections 15 and 16, but "to

the zone, taking into account both conservation of the coastline and preservation of cultural sites. The plan was to include guidelines to be used in determining the suitability of particular development activities (defined as any activity likely to alter the physical nature of the coast in any way). Thereafter, no person may engage in any development activity in the zone unless he or she has obtained a permit from the director. The director may attach conditions to any permit, and may require any applicant for a permit to submit an environmental impact assessment.

Culture is a natural resource, and a number of acts, including the Natural Environmental Protection Act and the Coast Conservation Act, call for its protection. In particular, the Language Commission Act 1983 (39 MIRC, Chapter 1) establishes a commission to investigate and recommend to the government methods of preserving and encouraging the use of the Marshallese language. The commission is composed of persons appointed by the Cabinet with the concurrence of the Nitijela. The commissioners must be well versed in the Marshallese language and culture or have specialized knowledge of linguistics.

XIII. PERSONS AND ENTITIES

The age of majority is eighteen (Domestic Relations Act, 26 MIRC, Chapter 1), although a woman may be married at sixteen with her parents' consent (see XIV, A Marriages), and a criminal defendant who is sixteen or over may be treated as an adult "if, in the opinion of the court, his physical and mental maturity so justifies" (Juvenile Procedure Act, 26 MIRC, Chapter 3, Section 2). The term *person* is not defined in the Code, but corporations, business associations, and partnerships seem to be able to sue and be sued and to hold and deal in property.

XIV. FAMILY LAW

Registers of births, marriages, and deaths are maintained throughout the Marshall Islands. The birth of every child must be registered by the registrar for the atoll on which the child is born. If a child is born out of wedlock, whether statutory or customary, no person may be required to give information as to its father, and the registrar may not enter in the register the father's name except at the joint request of the mother and the person acknowledging himself to be the father. The death of every person and the cause of death must be registered by the registrar for the atoll in which the death occurred. All statutory marriages must be registered by the registrar of the atoll where the marriage took place, but marriages contracted between citizens according to recognized customary practice need not be registered (Births, Deaths and Marriages Registration Act 1988, 26 MIRC, Chapter 4).

A. Marriage

The Code recognizes as valid both marriages contracted between citizens in accordance with recognized customs and marriages contracted pursuant to statute (Births, Deaths and Marriages Registration Act). In order to contract a valid statutory marriage, the male must be eighteen or older and the female sixteen or older (and, if between sixteen and eighteen, her parents' approval is necessary), the marriage may not be between two parties within the prohibited degrees of kinship by statute or customary law, and the parties may not be married to anyone else at the

D. Adoption

Children may be adopted in accordance with either local custom or the Domestic Relations Act. When an adoption has been effected in accordance with custom and its validity is disputed by anyone, the act entitles any party to bring an action in the High Court for a decree confirming the adoption. The High Court will enter this decree on a finding that the adoption is valid in accordance with recognized custom.

XV. PERSONAL PROPERTY

Questions of the ownership of personal property are matters of customary or common law. The Real and Personal Property Act (24 MIRC, Chapter 1) applies to agreements intending to give rights in personal property as security for the performance of obligations. It obliges both the debtor and the creditor to exercise their rights in the property in good faith and limits the creditor's power to foreclose. The creditor may foreclose after the debtor has been in default for twenty days, if the agreement so provides, but only after forty days if the agreement contains no twenty-day provision, and in any case only after notice to the debtor and an opportunity to cure. Creditors may take possession of foreclosed property without judicial intervention unless this would occasion a breach of the peace.

XVI. WILLS AND SUCCESSION

To be enforceable, a will must have been made in conformity either with the Probate Code (25 MIRC, Chapter 1) or with customary law. Presumably, customary law alone governs in cases of intestacy, since the code contains no intestacy provisions. Under customary law, a person may choose to bequeath items of personal property to named beneficiaries, and a father may grant parcels of land to his children, but most land would, subject to approval of the iroij laplap (the chief of the landholding lineage), remain in the matrilineal household, under the ultimate responsibility of the matrilineage.

Wills made under the Probate Code must be made by persons of sound mind, eighteen years or older. A written will must be executed by the testator and at least two witnesses. If a witness is interested, the will is not invalidated, but the witness cannot take any property left to him or her under the will, unless at least two disinterested witnesses also signed. A holographic will may be made without any witness, but the handwriting must be that of the testator and must be proven by two witnesses. An oral will may be made only by a person in imminent peril of death and is valid only if the maker does then die of the peril. An oral will must be made in the presence of two disinterested witnesses, can dispose only of personal property worth no more than US \$1,000, and cannot displace an existing written will.

XVII. CONTRACTS

Contracts, other than those relating to the sales of goods or real property, are matters of customary or common law. Cases involving contract disputes will probably be decided by the courts