

# The Rule of Law, Custom, and Civil Society in the South Pacific

## *An Overview*

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### Introduction

Western legal thought, at least as popularized in general literature, assumes the universality of certain principles contained in the “four freedoms” adopted by the membership of international organizations, treaties, and even most constitutions. The *freedoms of association, of assembly, of speech, and of religion* are taken for granted as applicable, if not always applied, in countries around the world. They form the basis of human rights campaigns, the justification for intervention (at least philosophically) in the affairs of nations, and to many, they represent the foundation of the participatory democratic form of government so idealized, even in its absence and in its shortcomings.

Yet social structures, traditions, and even laws that frame human behavior in many parts of the world, some apparently benevolent and others not, contradict some of the assumptions beneath the “four freedoms.” In particular, in those societies that place the highest value on *communal* rather than *individual* rights, the application of the “universal” freedoms has been problematic at best. The needs of the individual, in such social environments, often may be perceived as contradicting, even endangering, the health of the community, and particularly the community’s cohesion, the very life blood of the society. In such structures, the web of mutual obligations and interdependence constitutes the fabric of human life. The highest value is the maintenance of that web and the linkages that comprise it.

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A survey of the legal frameworks governing civil society and civil society organizations (CSOs) in new island nations of the South Pacific discloses this discontinuity between the “universal freedoms” and “communal traditions.” The discussion that follows is intended to raise issues arising from that survey, and looks at various ways to approach possible resolution.

To achieve this purpose, the authors have *collected as many of the written laws of the region as possible*<sup>2</sup>, *outlined and briefly analyzed the written legal framework and considered the implications of “traditional” rules and norms, identified key issues* arising from this analysis, and *suggested possible future actions and “next steps”* to take in light of the initial study.

The methodology employed included the following steps:

- Review of the "introduced or adopted" laws;<sup>3</sup>
- Extensive interviews with experts (CSO leaders, lawyers, scholars, government officials from the region) and first-hand observations -- conducted within the region and in New Zealand;
- Reflections on particularities of selected countries.

### *Importance of the Legal Framework – the “Rule of Law”*

During the past decade, in part because of the breakdown of the communist bloc and its political resonance and influence in so much of the world, significant work has been undertaken to explore the value and role of what has come to be known as "civil society." “Civil society” constitutes that element outside of government and business sectors, both organized and essentially disorganized, that represents the engagement of people among and with one another to achieve their aspirations, meet their needs, and live creative, active, healthy lives. To define the term much more precisely actually

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<sup>2</sup> Countries studied for this paper were: American Samoa, Cook Islands, Fiji, French Polynesia, Guam, Kiribati, Marshall Islands, Micronesia, Nauru, New Caledonia, Niue, N. Marianas, Palau, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, and Vanuatu.

<sup>3</sup> The term "introduced or adopted" laws refers herein to laws *introduced* during periods of dependency or *adopted* by post-dependency governments.

works to limit it, when in fact the essential characteristic of "civil society" is its *unlimited* quality.

Increasingly scholars and practitioners working in the field have come to recognize the simple fact that, while the legal framework governing civil society is not the only element in determining the sector's health, it is an essential ingredient. In addition to protecting civic order, people's free exercise of government, and ability to conduct business, the sound *rule of law* serves to safeguard and encourage "civil society."

The term "rule of law" usually refers to the observed body of international accords and treaties, state constitutions, and written laws which embody the human rights traditions accepted virtually universally (at least in form), and which protect individuals and order society in the respective nations of the world.

**Perhaps most important for civil society, the rule of law provides a "safe" legal space in which people may work and play together, organize, carry out their own activities, and express their own opinions without fear of state intrusion or interference.**

This view of the "rule of law" is founded principally and most securely on the "universal rights" summarized in those formulations popularly known as the "four freedoms" of association, speech, assembly, and religion -- in particular the first two. The way these rights are applied with respect to civil society and its organizations in many respects characterizes the degree to which they are effectively recognized in a nation.

Laws permitting civil society organizations (CSOs) to be established as legal persons play a crucially important role in making the freedom of association, protected by international and constitutional law, real and meaningful. It is by being able to form a tenants' rights association, an organization to promote education for poor women, an environmental protection organization, or any other of the myriad of citizens' organizations that individuals most fully realize the freedom of association. Moreover, it

is also by choosing not to be associated, not being compelled to join or remain a member of an association, that the freedom of association is realized.

Further, the freedom of speech -- equally protected by international and constitutional law -- is for most individuals a freedom that has little meaning unless implemented through laws permitting interest groups to be formed. Most of us are not important enough for our individual voices to be heard, but if we can band together to form, for example, a society for the protection of the rain forest or the rights of a disadvantaged ethnic minority, then our collective voice will more likely be heard.

**Laws that permit and protect CSOs and give them broad latitude to operate give real meaning to the freedoms of association and speech. Put differently, the absence of rules permitting formal CSOs to exist and to operate freely would be inconsistent with international law.**

International Law<sup>4</sup>. Article 19 of the Universal Declaration of Human Rights of 1948<sup>5</sup> states that "[e]veryone has the right to freedom of opinion and expression," while Article 20 protects the right of individuals to "peaceful assembly and association." Although the Universal Declaration was not intended to bind states when it was unanimously adopted by the United Nations in 1948, it has come to have normative effect. In addition, many of its provisions have acquired binding legal status by being included in subsequent multilateral treaties.

For instance, the International Covenant for Civil and Political Rights (ICCPR) creates direct binding obligations for the 140 countries that have ratified it. Articles 19, 21, and 22 of the Covenant guarantee the rights of expression, peaceful assembly, and

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<sup>4</sup> This section of the paper is derived from *Guidelines for Laws Affecting Civic Organizations*, ed. Irish, L., Simon, K, and Cushen, R., Open Society Institute, NY, NY (2001), prepared for the Open Society Institute by the International Center for Not-for-Profit Law.

<sup>5</sup> G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)

association, respectively. By its terms, The ICCPR not only explicitly guarantees rights enjoyed by individuals, but also requires the States party to the Covenant to adopt laws or other measures assuring protection for these freedoms.

The European Convention for the Protection of Human Rights and Fundamental Freedoms, which entered into force in 1953, enshrines the rights of freedom of expression (Article 10), association, and peaceful assembly (Article 11).<sup>6</sup> Article 25 of the Convention establishes a complaints procedure that entertains petitions addressed to the Secretary General of the Council of Europe from "any person, nongovernmental organization or group of individuals claiming to be the victim of a violation. "Thus, juridical persons such as formal civic organizations as well as individuals may complain of violations of the rights protected in Articles 10 and 11. Article 1 of the European Convention imposes upon all state parties the obligation to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention," and the Council of Europe, a membership organization, imposes obligations on its members to respect these rights of their citizens.

Recent decisions of the European Court of Human Rights<sup>7</sup> make it clear under the European Convention that there is a right protected by international law to establish a formal civic organization and that any such organization, once formed, is fully protected from any interference or restriction by the state that would impede the rights of individuals to freedom of association.

These decisions under the ECHR have **global** significance, for Article 11 of the ECHR, protecting freedom of association, is essentially the same as Article 22 of the ICCPR. Thus, decisions of the European Court for Human Rights, which are final and not

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<sup>6</sup> Article 11, 2 states that "[n]o restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

<sup>7</sup> Sidiropoulos & Others v. Greece (1998), United Communist Party of Turkey v. Turkey (1998), and Freedom and Democracy Party (OZDEP) v. Turkey (1999). All three decisions may be found at <http://www.icnl.org/info/summs.html>.

subject to review, are directly relevant to interpreting and applying Article 22 of the ICCPR, a convention that has been ratified by 140 nations.

Under both the ECHR and the ICCPR, the freedom of association can be restricted only (i) in the interests of national security or public safety, (ii) for the prevention of disorder or crime, (iii) for the protection of health or morals, or (iv) for the protection of the rights or freedoms of others. Any restrictions must be "prescribed by law, " and they must be "necessary in a democracy" to achieve one of the four listed objectives. In both the [Sidiropoulos](#) and [Communist Party](#) cases, the Court emphasized that exceptions must be "construed strictly," that only "clear and compelling" reasons can justify restrictions, that any restrictions must be "proportional to the legitimate aim pursued," and that there must be "relevant and sufficient" evidence for "decisions based on an acceptable assessment of the relevant facts" before a restriction can be justified.<sup>8</sup>

Finally, the Court in the [Communist Party](#) and [ÖZDEP](#) cases held that the freedom of association would be largely theoretical and illusory if it were limited to the founding of an association, since the government could immediately disband it. "It follows that the protection afforded by Article 11 lasts for an association's entire life and that dissolution of an association by a country's authorities must accordingly satisfy the requirements" of Article 11 of the ECHR.<sup>9</sup>

Although many questions remain, the [Sidiropoulos](#), [Communist Party](#), and [ÖZDEP](#) cases provide strong international law protection for the right to establish legally recognized CSOs and the right of those CSOs to operate with a minimum of limitations and restrictions. They also articulate very tough rules that must be satisfied before the freedom of association can be interfered with or restricted.<sup>10</sup>

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<sup>8</sup> The right of individuals to form associations has been recently confirmed by an important resolution of the General Assembly of the United Nations: [Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms](#), G.A. res.53/144, annex, 53 U.N. GAOR Supp., U.N. Doc. U.N. Doc. A/RES/53/144 (1999).

<sup>9</sup> See [Communist Party](#) § 40.

<sup>10</sup> Many constitutions also require that their provisions be interpreted in conformity with international human rights treaties or incorporate these treaties into domestic law. Most also provide for the supremacy of international obligations in the event of a conflict with domestic law. Thus, although the domestic constitutions or laws of particular states may limit the exercise of the freedom of association to a "legitimate purpose" or some

Realization of the rights to freedom of expression, association, and peaceful assembly requires, at a minimum, that governments not impede the creation and activity of civic organizations, and additionally, that they protect them from interference. States may impose certain narrowly tailored restrictions on civic organizations exercising these rights. Furthermore, in countries where resources traditionally have been concentrated in the hands of the state, a greater obligation on those states can be inferred: they must make such resources available on a nondiscriminatory basis to civic organizations that seek them for lawful purposes.

**In sum, laws permitting CSOs to exist and operate freely are indispensable to the full and meaningful implementation of the freedoms of association and speech, and international law imposes clear and strong obligations on states to enact and implement a good enabling legal environment for civil society.**

*Application to the South Pacific*

The importance of the rule of law and its everyday, practical implications is recognized in the South Pacific, as in other parts of the world. For example, according to the Report of the 3<sup>rd</sup> PIANGO Council Meeting, held in July 1999, during discussions addressing issues affecting CSO/donor relations in the Pacific, participants expressed concern about the role of legal registration as a qualification to receive grants. They related legal status to the issue of sustainability itself. As the Report noted, participants acknowledged the presence of legislation and expressed concern about enforcement.<sup>11</sup>

However, it must be remembered that the very concept of "nation state," on which the rule of law as commonly understood is based, is extremely recent in the Pacific Islands (with a very few notable exceptions<sup>12</sup>). In fact, most of the nations in the region

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similarly discretionary standard, these restrictive laws must conform to the strictly construed limitations on the freedom of association imposed by international covenants.

<sup>11</sup> *Report*, PIANGO (1999), pp. 69, 16.

<sup>12</sup> Tonga was never under Western sovereignty, while Fiji, Niue, and Samoa all had written laws and even constitutions before becoming European dependencies in the late 19<sup>th</sup> century. (See Care, J.C., Newton, T., and Paterson, D., *Introduction to South Pacific Law*, 1999, Cavendish, London, pp. 1-2.)

achieved political independence only within the past thirty years.<sup>13</sup> Much of the introduced law in those states has been carried over from laws enacted during the time of political dependency and either replicated or modeled after the "Western" laws of one or more of the colonial powers. While these nations have subsequently adopted laws of their own, in many instances these adopted laws have been built on existent structures imposed by colonial rule.

Accordingly, though the legal framework governing and affecting civil society in the Pacific Island nations does play a significant role in determining the health of the sector, the role of the written laws is more limited than in other countries because they often have not emerged from the culture in which they exist. Rather laws were frequently imposed or adapted from foreign models. Moreover, in more remote areas, further away from the urban centers, the written laws affect daily life only rarely, if at all.<sup>14</sup>

Moreover, the normative value of the "rule of law," or of the laws that are in force in a particular jurisdiction, may be significant as a measure of the society's goals and expectations. At the same time, as spelled out below, the relationship between effective *power* and *law* may be less definitive in terms of the *written* laws in communities in which tradition better reflects the actuality of relationships. For example, ownership of land, with the appurtenant bundle of rights and power, is largely determined by tradition and custom in the South Pacific, not by property law as commonly understood in the West.<sup>15</sup> Similarly, in the South Pacific traditional practices encourage disputants to settle their differences through a process of "acknowledgement and forgiveness" rather than through a legal remedy or sentence, and often no offence is recognized even under criminal law without a willing complainant.

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<sup>13</sup> *Regional Synthesis: Pacific Voices of the Pacific Tide*, 1999, Civil Society in the New Millennium Project, The Commonwealth Foundation, London, p. 5.

<sup>14</sup> This phenomenon was noted repeatedly in interviews with citizens of the region, as well as with outside experts. See the discussion of "Customary" or "Traditional Law," below.

<sup>15</sup> Care, J.C., et al, *Introduction to South Pacific Law*, pp. 28-29, 231 ff.

**In fact, civil society organizations, in all degrees of formality and legal status, represent an essential power function – the right of people to assemble, organize, and act collectively, participating in the matters that affect their lives. Written laws governing CSOs provide mechanisms through governance provisions whereby such collective action can be carried out in an orderly fashion. Similarly, custom and tradition in many societies provide much the same function. In either case, rights conferred by law/tradition recognize power, and confer the ability to act.**

*Knowledge of the Law*

The absence of any clear common understanding of introduced or adopted law or its purposes is an unfortunate consequence of both the widely dispersed lands that comprise most of the nations in the region, and the complex and segmented population groupings within and among them.<sup>16</sup> Even a significant legal development in a country, such as Fiji’s 1997 Constitution, is often never even translated into local languages or meaningfully explained to the public, even when the public at large is empowered to accept or reject it. Accordingly, the utility and *de facto* applicability of the laws is questionable at best, and at worst may be viewed by the public as something mysterious, dangerous, or even conspiratorial (all views assumed by various elements of the Fiji public with respect to the 1997 Constitution).

Such a state of distrust or even ignorance of the written law reinforces the tendency in the region to rely on “customary” or “traditional” law to ensure order in social transactions.

*"Customary" or "Traditional Law"*<sup>17</sup>

As noted above, in the Pacific written law (whether introduced or adopted) does not operate in a cultural vacuum. Rather, it applies in tandem with or parallel to a more pervasive and ancient structure of governance, rules, and societal norms. This structure,

<sup>16</sup> For example, there are over 800 languages spoken in Papua New Guinea.

<sup>17</sup> On “customary” or “traditional” law in the South Pacific generally, see Care, J.C., et al, *Introduction to South Pacific Law*, op. cit. pp.24-47.

often called "customary" or "traditional," constitutes much more than informal practice or a charming anachronism. On the contrary, custom and tradition (and customary law) govern much of the daily commerce, land ownership, and civil life in the islands. Its power, often imposed through highly structured and formalized processes, lies primarily in the villages and the rural communities. However, it can reach to the very top of national life as well, as seen most dramatically during the recent political events in Fiji, when the Council of Chiefs assumed authority at a critical time.

Furthermore, customary law is even recognized and included within the purview of the introduced and adopted law. While "(d)uring colonial times indigenous customs were tolerated and even encouraged as a means of social control,"<sup>18</sup> today most of the countries have explicitly recognized customary law within their constitutions and even in some instances in statutes.<sup>19</sup>

For example, in Kiribati "In addition to the constitution, the Laws of Kiribati comprise ... (b) customary law..." and the courts must take into account customary law when considering specified matters in criminal and civil proceedings.<sup>20</sup> The Constitution of the Solomon Islands provides that "Subject to this paragraph, customary law shall have effect as part of the law of Solomon Islands."<sup>21</sup> Similarly, the Samoan Constitution defines "law" as "any custom or usage which has acquired the force of law in Samoa, or any part thereof, under the provisions of any Act or under a judgment of a court of competent jurisdiction."<sup>22</sup>

Most important, "there is ample evidence that customary law is still the most relevant law for the indigenous population. The legal norms comprised by customary law

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<sup>18</sup> Care, J.C., "Conflict Between Customary Law and human Rights in the South Pacific," Butterworths, Hong Kong, 1999, p. 6 (presented at the 12<sup>th</sup> Commonwealth Law Conference, Kuala Lumpur, September 1999).

<sup>19</sup> Ibid. For constitutional provisions, *see* chart on p. 6. Fiji, notably, has included custom within the body of its statutory regime (p.7), as have Kiribati, Nauru, Samoa, Solomon Islands, Tuvalu, and Vanuatu more recently (p. 8).

<sup>20</sup> Laws of Kiribati Act 1989, s 4 (2), and Sched. 1, paras. 3 and 4, cited in Care, J.C., et al, *Introduction to South Pacific Law*, op. cit., p.26.

<sup>21</sup> Constitution of Solomon Islands, Sched. 3, para. 3.

<sup>22</sup> Constitution of Samoa 1962, Art. 111(1)

are the general rules and principles governing the activity of communal life in a traditional society."<sup>23</sup> Throughout the Pacific Islands, customary law affects relationships among people in ways more direct and more constant than introduced or adopted statutory law, certainly on an everyday basis. While customary law varies from nation to nation, and frequently within nations,<sup>24</sup> its force is directed to ensure the sustenance of community values and structures, status and rank within the community. Most important of all, customary law works to assure community stability.

Civil society organizations by any reasonable definition must include not only *legal entities* recognized by introduced or adopted law, but also *community organizations* that function primarily within the context of customary law. Accordingly, as they choose local partners, those seeking to work with civil society in the South Pacific must take into account both the written terms and conditions of introduced and adopted law *and* the impact of traditional and customary law, in its variations throughout the region and even within particular countries in the region. They must find ways of determining how to gain access to credible local community organizations whose "status" (by Western standards) may be dubious, but who are validated by the custom and tradition of the communities in which they operate.

An important concern that must be emphasized is the apparent inconsistency between the weight placed on *individual rights* in the various declarations, treaties, and international understandings (most of which have been adopted in the constitutions of countries in the region), and the countervailing emphasis on "*communal*," or "*community*," rights in "customary" or "traditional" law. The primary object of customary law is the health and preservation of the community, not individual protection as commonly understood in the West.

This distinction is especially evident in criminal law – where the written law may provide for punishment, while the traditional law seeks reconciliation. Such

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<sup>23</sup> Ibid., p. 8. The distinction between "customary practices" (simply what people do - as in house design or cooking) and *enforced* customary practices ("customary laws") that govern social order and lives in community, is noted in Care, J.C., et al, *Introduction to South Pacific Law*, op. cit., pp. 24-25.

<sup>24</sup> e.g., Vanuatu and Solomon Islands. Ibid., p. 25.

reconciliation between disputants, or between an aggrieved party and a perpetrator may consist of more than simple forgiveness. The practice of giving and receiving of a gift or payment to make whole the person aggrieved itself may appear to run contrary to our sense of justice and even appear to be a form of “bribe” or “buying off” a complainant. For example, the gift of a pig or other live-stock in order to discharge a moral debt or obligation arising out of a complaint of physical or sexual abuse may well constitute questionable practice from the perspective of other cultures governed by a more “Western” sense of the rule of law.

Thus, in considering the impact of traditional law on CSOs, one must keep in mind the fact that such organizations in a village may have difficulty in terms of advocacy of individual human rights, for example, or the distinctive rights of any particular class or group within the community. In fact, the very presence of an organization in a community may be permitted or even tolerated only if the community leadership perceives such an organization as benefiting the community as a whole and preserving or enhancing the status of that leadership. Moreover, “family” and “tribal” linkages are central to the sense of the *collective* in relationships between organizations and individuals within the community – even when they have moved far away. (This aspect of tradition flies in the face of a legal concern like “conflict of interest.”)

For example, even in a mature democracy such as New Zealand the conflict between individual and collective or communal rights continues to be a live issue in charity law. In general, in a Western context giving to the “unknown” other indicates a higher level of altruism than giving to (or sharing with) members of the extended family (or tribe). Charity legislation acknowledges this perspective. Western charitable practice also often involves the more formal practice of giving through an organization that acts as a filter or mediator between the funder and the recipient. This practice emphasizes legally recognized rather than informal organizations and distinguishes between sharing with related people and giving to unknown others (public benefit).

However, Pacific people (including Maori) tend to confine giving or sharing of resources to members of the extended tribal group. This practice has caused difficulties in implementing legislation affecting charitable organizations in New Zealand where the issue is whether the members of a Maori tribe and their descendents are a sufficient section of the community to qualify the purposes of Maori Trust Boards as charitable. In *Arawa Trust Board v. The Commissioner of Inland Revenue*,<sup>25</sup> the court held that the beneficiaries were a “fluctuating body of private individuals,” and the trust was not charitable.

On the other hand, viewed from the perspective of “both .. and” rather than “either ... or,” it could well be argued that both written and traditional laws, held in tension, produce a salutary balance, by recognizing the value of the individual within the collective. As this balance emerges during the maturing of the new nations of the South Pacific in a global community, it may point the way for open interaction between laws and traditions in other emerging democracies. Further, as in the Western United States, Canada, even Australia and New Zealand, for example, this perspective may result in new and effective development in the relationships between dominant and indigenous cultures within developed nations.

### Religious Bodies

While not strictly considered “CSOs,” the “Church” (whether Roman Catholic or Protestant) and other religious groups like the Muslims represent an extremely powerful independent force, at both national and community levels. In fact, even village leaders generally exercise little or no direct influence over the Church and its governance. Churches provide numerous essential public services, often staffing and even housing schools, furnishing training programs for youth, medical and emergency care facilities, and many other activities in addition to their pastoral and religious functions.

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<sup>25</sup> (1961) 10 MCD 399, cited in “The Public Benefit Test,” issues paper No. 4 (IRRUIP4), Inland Revenue Dept., Wellington, January, 2000

Throughout the region, written law, usually a simple registration process, governs the establishment and operation of churches. At both local and national levels, in addition to providing social services, religious bodies may take positions on critical issues affecting the welfare of the community, and their influence as independent agencies can be decisive.

*Categories of Laws Applicable to Civil Society Organizations*

The following categories of laws are among the most significant that affect CSOs globally:

- Constitutional provisions on *freedom of speech, peaceful assembly, association*;
- Laws and regulations governing *establishment and legal status* of CSOs, domestic and foreign, as well as international NGOs -- registration, reporting/supervision, transparency;
- Laws governing *taxation of CSOs* – company profits/income taxes, VAT, property, excise, customs, etc.;
- Laws governing *taxation of donors* – individual profits/income taxes, gift taxes, testamentary taxes, etc.;
- Laws governing *economic activities of CSOs* – consent, taxation, etc.
- Licensing laws for providing *public services* – education, health, science, sports, culture;
- Laws governing *endowments*;
- Laws or regulations on *assemblies*;
- Laws governing *fundraising* activities;
- Laws governing *ownership of property* by CSOs.

In the Pacific, some or all of these laws and regulations may apply, notably the first four categories. The legal framework for civil society in most of the nations in the region is characterized by relative simplicity (as compared with other parts of the world), and written laws that apply are mainly derived from the former colonial powers or

influential neighbors (notably New Zealand). In fact, foreign experts have drafted even recently adopted laws in several of the countries in the region, using models from their home countries or principles developed within foreign legal contexts.

In addition, most of the independent countries have expressly “saved” existing colonial laws, in various ways, depending on specific provisions of constituent law in the country.<sup>26</sup> In some of the countries, the existing laws, as of a date certain, are “swallowed whole” (adopted through the force of the constitution or otherwise, without amendment); in others, they are adopted subject to localization, or to the degree they are “not inconsistent with” locally adopted law.

The practical effect of this practice has been the existence on the statute books of various regulatory systems and procedures that conformed to the needs of other societies (often at quite distant times) but which may or may not have contemporary relevance to the island communities in which they are in force. “Saving” the laws was initially intended as a short-term solution to a larger problem, namely, the need to have a legal structure in place upon independence. It was anticipated that the legal systems of each country would soon be adapted through acts of their own legislatures.<sup>27</sup> While such adaptation has occurred, it is far from universal, and a systematic, formal law review and reform process has never been undertaken in the region, except to a limited extent in Fiji.

It should be noted at the outset that virtually all the Anglophone countries in the region (with historical relationships with the British Commonwealth or the United States) have at least fairly comprehensive legal structures in place governing and affecting CSOs that are legal entities. In particular, these laws may include *Incorporated Societies Acts*, *Charitable Trust Acts*, *Nonprofit Associations laws*, *Associations Incorporation Acts*, *Charitable Associations laws*, *Incorporation laws* -- all governing establishment, registration, dissolution, and governance of CSOs.

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<sup>26</sup> Care, Newton, & Paterson, *op. cit.*, pp. 49-55.

<sup>27</sup> *Ibid.* p.49.

In addition, tax provisions apply to CSOs as legal entities: exemptions from income taxes, real and personal property taxes, in some cases customs duties, and deductions or exemptions for contributions to CSOs, particularly those with charitable or public benefit purposes.<sup>28</sup> In most countries, special laws apply to the registration of religious bodies. In French jurisdictions in the region (notably in French Polynesia), French domestic law continues to govern CSO establishment and registration, while local tax provisions may apply.

Specific examples of approaches to establishment and taxation of CSOs in selected countries within the region follow. Brief synopses are provided for each of the selected countries.

#### Papua New Guinea (PNG).

Like corporations, *associations* in PNG are incorporated through an elaborate process of pre-registration publication of notice, with opportunity for objection, ruling by the Registrar of Companies, and opportunity to appeal; filing with the Registrar a formal application that contains the name of the organization, its purposes, its location, and the applicant's name and address, together with certain certifications. The effect of incorporation is to create a legal entity, with the power to contract, hold a bank account, own property, like any other entity.<sup>29</sup>

The *income tax laws* limit taxation on non-profit companies,<sup>30</sup> and exempt from tax income derived by any "society or organization established for educational, scientific, religious, or philanthropic purposes."<sup>31</sup> Also exempt is the income of a "religious, scientific, charitable or public educational institution, a public hospital or a hospital that is carried on by a society or association otherwise than for the purposes of profit or gain ...," or "an organization carried on otherwise than for the purposes of profit or gain to the individual members of the organization."<sup>32</sup> Likewise, the income of not-for-profit organizations created for cultural, athletic, or various other enumerated publicly beneficial purposes, and funds created

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<sup>28</sup> These in most cases are consistent with generally accepted international norms.

<sup>29</sup> PNG Associations Incorporation Act, *Revision of the Laws Act 1973*, as Amended.

<sup>30</sup> PNG I.T.A., sec. 11.

<sup>31</sup> *Ibid.* Sec. 21

<sup>32</sup> *Ibid.* Sec.25

for publicly charitable purposes or for certain scientific research purposes is also exempt if used for those purposes.<sup>33</sup> Finally, deductions are allowed taxpayers who make gifts to certain organizations that carry out enumerated charitable, educational, and other publicly beneficial activities.<sup>34</sup>

### Solomon Islands (SI)

In addition to specific provisions governing the *status* of particular organizations, such as the Solomon Islands Red Cross<sup>35</sup> and the Winston Churchill Memorial Trust,<sup>36</sup> the SI also provide more generally for the establishment of Charitable Trusts<sup>37</sup> in a law that governs associations established for enumerated “charitable purposes” including (for example) relief of the poor, education, reformation of criminals, provision of religious instruction, science, athletics, and “such other purposes as may be declared by the Prime Minister to be a charitable purpose.”<sup>38</sup>

The law requires that a trustee of the organization apply to the Registrar of Companies, who has discretion to issue the certificate of incorporation if such incorporation is considered “expedient . . .,” and subject to appointment of trustees, and other particulars.<sup>39</sup> Once established as a legal entity, the organization has all the powers normally attributable to such an entity, including ownership of property (in the name of the Board of Trustees.<sup>40</sup> The law provides for cancellation of the incorporation in the event of improper incorporation, unlawful activities, dissolution or incapacity of the Board.<sup>41</sup> However, if it is impracticable to carry out the trust purposes, the organization’s property may be disposed of for another charitable purpose or purposes, as proposed by the trustees and approved by the Attorney General and a judge.<sup>42</sup>

The SI Income Tax Act expressly exempts from taxation the “income of any religious, charitable, benevolent or educational institution approved by the Minister.”<sup>43</sup> Also, any “transfer of property to or in trust for any corporation of body of persons associated for religious, charitable, or educational purposes; and any instrument for declaring or defining the

<sup>33</sup> Ibid. Secs. 27-28.

<sup>34</sup> Ibid. Sec. 100

<sup>35</sup> SI, CAP. 167

<sup>36</sup> SI, CAP. 56

<sup>37</sup> SI, CAP 55; the laws of Fiji contain similar provisions (e.g., C.A.P. 67, 201)

<sup>38</sup> Ibid. Sec. 2.

<sup>39</sup> Ibid. Secs. 3-5.

<sup>40</sup> Ibid., Secs. 8-10

<sup>41</sup> Ibid. Sec. 12.

<sup>42</sup> Ibid. Secs. 15 ff.

<sup>43</sup> SI CAP. 123, Sec. 16 (Third Schedule).

trust or for appointing new trustees in respect of such property” is exempt from the Stamp Duties.<sup>44</sup>

### Federated States of Micronesia (FSM)

In the FSM, international organizations, contractors, or other foreign entity may import goods duty free when such goods are imported in furtherance of a foreign aid agreement with the FSM<sup>45</sup> that requires tax exemption for such goods. Exempt from income taxes are gross revenues of such an entity receiving funds from foreign aid proceeds.<sup>46</sup>

### Palau

In Palau, exempt from taxation are lawfully incorporated “nonprofit corporations,” operated exclusively for certain enumerated purposes, including religious, charitable, scientific, educational, and the like. Applicable provision states that the Director of the Bureau of Revenue, Customs and Taxation may, “in his discretion, determine that a corporation is a nonprofit corporation for the purposes of this” section.<sup>47</sup> Limited tax refunds are payable to individuals<sup>48</sup> and to businesses<sup>49</sup> for contributions to nonprofit corporations.

The provisions listed in this section represent a selected sample of the approaches taken by island nations in the Pacific in regulating establishment and taxation of CSOs within their jurisdictions. The form of the sampled laws provides in each instance clear evidence of their derivation from the time of the country’s dependency. Furthermore, while creation of CSOs as legal entities in the Pacific is relatively easy, in the examples provided above the discretionary power vesting the government officials is evident. While opportunities for appeal are usually provided, the degree of administrative discretion permitted warrants concern.

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<sup>44</sup> SI CAP125, Sec. 3 (schedule).

<sup>45</sup> Code of FSM, Title 54, Sec. 122

<sup>46</sup> Ibid, Sec. 112 (5)(g).

<sup>47</sup> 40 PNCA, Sec. 1002 (w).

<sup>48</sup> Up to 10% of income taxes paid in the taxable year 40 PNCA Sec. 1104.

<sup>49</sup> Up to 10% of taxes paid. Ibid. Sec. 1206.

As noted earlier, constitutions in countries in the region do recognize the civil and human rights generally established in international covenants and covenants.

Additionally, the laws currently in place in some ways reflect at least primordial versions of contemporary regulatory principles governing appropriate legal frameworks for the CSO sector. However, they clearly do not represent the best in contemporary legal thinking in the field. As noted at the outset, during the past ten years, the most significant advances have been taken in new thought about the role of civil society and its place within the legal environment nationally and internationally. Any review of legislation must take account of the role that CSOs play in building social capital and forming civil society as well as their functional role in the delivery of services. Because most of the received or even adopted laws are directly taken from older Western models, substantial upgrading efforts are clearly in order.<sup>50</sup>

### Next Steps

From the data reviewed in this study, it is clear that certain steps can and should be taken to improve the legal infrastructure affecting CSOs in the Pacific.

- Ways must be found to *recognize local custom* and, where appropriate and relevant, to incorporate it effectively within statute law governing the CSO sector. Avoidance of the cultural reality is not a solution to the problem of parallel systems.
- Introduced or adopted *statutory law must be updated to conform to the culture in which it operates*. It is necessary that the law reflect what is real and true “on the ground” in order for it to be respected and effective, and to advance the rule of law generally. The Fiji model of a commission to reform the laws on a systematic basis is useful. However, many of the Pacific Island nations are too small and too lacking in legal (or financial) resources to sponsor such a commission. A

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<sup>50</sup> For one especially significant example, recent trends have placed substantially more emphasis on *organizational accountability and transparency* as opposed to direct state control.

regional effort (at least with respect to countries with a common legal heritage, such as former British colonies) may well provide the most satisfactory solution, perhaps producing “model” laws governing the sector, suitable for local adaptation.

- At the same time, steps should be taken to *update the laws to conform to current international standards wherever possible*. Again, a centralized regional effort to develop appropriate models may well be the most efficient, and cost—effective, approach. (It should be noted that in the countries from which most of the introduced laws are derived this kind of updating has occurred on a continuing basis, while in the Pacific Islands it has not.)
- *Public education* on the rule of law, and the applicability of certain specific laws (such as those affecting CSOs), is a necessity throughout the region. This can be carried out through simple publications in the popular languages for the literate, and oral campaigns where literacy is lacking.
- *On-going and detailed study* of the CSO sector in its various forms, and its operation in each country should be undertaken, and the range of laws that comprise the legal framework gradually adapted to meet the needs of the sector uncovered by such study.