



# Gender and human rights in coastal fisheries and aquaculture: A comparative analysis of legislation in Fiji, Kiribati, Samoa, Solomon Islands, Tonga and Vanuatu

Alison Graham and Ariella D'Andrea





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# LIST OF ABBREVIATIONS

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CBFM	Community-based fisheries management
CED	International Convention for the Protection of All Persons from Enforced Disappearance
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CERD Committee	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
CMW Committee	Committee on the Protection of the Rights of All Migrant Workers and Members of their Families
CPR	Civil and Political Rights
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
EDO	Environmental Defenders Office
EIA	Environment impact assessment
ESCR	Economic, social and cultural rights
FAD	Fish aggregating device
FAO	Food and Agriculture Organization of the United Nations
FPIC	Free, prior and informed consent
FLMMA	Fiji Locally Managed Marine Area
IHRL	International Human Rights Law
ILO	International Labour Organization
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LMMA	Locally managed marine area
MPAs	Marine protected areas
MSAF	Maritime Safety Authority of Fiji
NGOs	Non-governmental organisations
OHCHR	Office of the United Nations High Commissioner for Human Rights
PICTs	Pacific Islands countries and territories
SIDS	Small Island Developing States
SMA	Special Management Area (Tonga)
SSF	Small-scale fisheries
SPC	Pacific Community
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNDROP	UN Declaration on the Rights of Peasants and Other People Working in Rural Areas
UNGA	United Nations General Assembly

# Preface

This report was prepared by the Pacific Community (SPC) under the Effective Coastal Fisheries Management Project funded by the New Zealand Ministry of Foreign Affairs and Trade (MFAT), in collaboration with the Pacific-European Union Marine Partnership (PEUMP) Programme and the Wildlife Conservation Society (WCS).

The review of national legislation in six Pacific Island countries (Fiji, Kiribati, Samoa, Solomon Islands, Tonga, Vanuatu) aims at identifying existing biases or barriers that may inhibit the realisation of human rights, including gender issues, for small-scale coastal fishers and fish workers. The analysis covers five main aspects: non-discrimination and gender equality; the right to food and natural resources; the right to healthy and safe environment; participation and democratic governance; and rights to and at work. It provides country-specific and overall legal advice to facilitate the necessary reforms to national legislation.

An earlier version of this report was shared during a virtual workshop in July 2020 with country counterparts and partners. The final version incorporates the comments and suggestions made on that occasion. All activities have been coordinated with relevant SPC divisions and partners to complement existing efforts in the field of gender, social inclusion and human rights across SPC and beyond.

## ACKNOWLEDGEMENTS

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This report was produced with the support of the New Zealand Aid Programme.

# EXECUTIVE SUMMARY

This study was undertaken by SPC to examine the opportunities for and barriers to human rights application in coastal fisheries and aquaculture legislation in Fiji, Kiribati, Samoa, Solomon Islands, Tonga and Vanuatu. It provides a comparative analysis of national legislation against gender and human rights requirements as applicable to small-scale coastal fisheries and aquaculture in the six Pacific Island countries and proposes concrete legal and policy recommendations for each country.

Under international human rights law (IHRL), governments are obligated to respect, protect and fulfil human rights through all policies and legislation. This means that neither conservation nor economic development can take priority. Human rights come first.<sup>1</sup> Even when the life of the nation is at risk, many rights are non-derogable, such as the right to life, which includes the rights to an adequate standard of living, health and social security.<sup>2</sup>

The report is a desk review of applicable legislation and policies, as well as the findings of non-governmental organisations (NGOs), academics and intergovernmental organisations, such as the United Nations (UN), the Food and Agriculture Organization of the United Nations (FAO) and SPC. It recognises the progress made in protecting the human rights of small-scale coastal fishers and fish workers, and highlights areas of improvement. It evaluates the main pieces of legislation covering fisheries and aquaculture, as well as legislation governing the environment and land, against the requirements of the primary human rights treaties.

These treaties include, most notably, the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Also relevant are the 2018 UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP) and the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

Given the complexity of legal systems that include customary laws, local ordinances and statutory legislation in Pacific Island countries and territories (PICTs), the study presents only an indication of some of the issues at stake, rather than an exhaustive analysis. Despite these limitations, it provides a solid platform for future work by identifying key areas that need strengthening in the face of climate change and increasing globalisation.

The report first outlines the general context and situation of small-scale coastal fishers and fish workers worldwide, including the threats they face, before reviewing the applicable human rights standards and principles and introducing the specific situation in the Pacific Island region. The report then provides country-specific analyses outlining the main legislation and the primary human rights issues. It acknowledges the positive work being done in each country and suggests areas for improvement.

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<sup>1</sup>This is stipulated in a number of treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

<sup>2</sup>Under the ICCPR, states can derogate from their obligations, i.e. suspend the current substantive guarantees for the rights under the Covenant. However, it also states that certain rights, such as the right to life and freedom from degrading treatment, are non-derogable. Given the relationship between these rights and the rights to food and social security, the latter are also considered non-derogable.



# 1. INTRODUCTION

## Context

In the Pacific Island region, communities typically depend on fishing in coastal areas that historically have been managed according to local customs. The context, however, is slowly changing. Economies are becoming increasingly monetised, even in remote locations. People are migrating from their villages of origin to urban areas for jobs, and also as a result of climate change, which is reducing the amount of available land. The pursuit of economic growth, including through foreign investment (extraction and tourism industries), is also putting increasing pressure on governments to open up access to natural resources.

Coastal fisheries are vital to local communities in the Pacific region. They are a source of food and livelihood. According to SPC: “inshore fisheries provide the primary or secondary source of income for up to 50 per cent of households in the Pacific region”.<sup>3</sup> Some Pacific Island countries and territories (PICTs) are also developing small-scale aquaculture projects. Secure access to these resources is, therefore, key to the enjoyment of human rights, especially the rights to food, life, and culture.

## Methodology

The study evaluates the main pieces of legislation covering fisheries, as well as legislation governing the environment and land, against the requirements of the primary human rights treaties. These include, most notably, the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Also relevant are the 2018 UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP) and the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

## Legal framework and human rights

The report discusses how most countries reviewed here have combined customary and formal legal systems to protect indigenous cultures and the human rights of every individual, as required under human rights law. Most constitutions to some degree recognise and protect human rights, although this tends to be limited to civil and political rights. However, without a formal requirement that customary law must respect the rights contained in the constitution, customary practices can often breach human rights without being legally challenged. For instance, women may be prevented from participating in decision-making at the community level.

Some countries have limited the scope of customary practices by stipulating that customary law cannot be recognised or enforced if it “would result, in the opinion of the court, in injustice or would not be in the public interest” (Laws of Kiribati Act 1989: Schedule 1(2)) or breach rights contained in the constitution. However, since most constitutions include only civil and political rights, it is foreseeable that customary practices could still jeopardise economic and social rights without being legally challenged. One example could be tribal elders banishing members of a tribe from their traditional areas and therefore their means of subsistence. Some courts are, however, pushing for change, even when they lack jurisdiction over customary issues. For instance, where a decision made by a tribal body threatened to breach human rights, Solomon Island courts have stated that “custom needs to recognise these principles of rights”<sup>4</sup>

## Specific issues

### Non-discrimination and gender equality

In the Pacific region, women have traditionally faced discriminatory customary practices, especially regarding restricted control over land and limited participation in natural resource management at the local level. Often these practices can be protected by the constitution, especially those regarding inheritance, land governance and participation in local village councils. While these discriminatory practices are being slowly addressed through government programmes, legislation is still to catch up and clearly establish and protect women’s rights, regardless of customary practices. There are, however, some positive steps in ensuring that customary practices comply with all human rights. For instance, in Vanuatu, in *Lapenmal v Awop*, the Supreme Court ruled that

<sup>3</sup> SPC (2015) *A new song for coastal fisheries – pathways to change: The Noumea strategy*. Page 1. Available at: <http://purl.org/spc/digilib/doc/b8hvs>.

<sup>4</sup> Solomon Islands High Court case *Ambrose v Keioi* [2016] SBHC172 cited in Yuen 2019.

custom must comply equality provisions in the Constitution and CEDAW.<sup>5</sup> This decision concerned a situation where a woman was entitled to inherit land under customary law as there were no male descendants. “It remains to be seen how courts will deal with custom when female litigants seek to challenge their male counterparts on an equal footing” (Yuen 2019: 31). Throughout the Pacific, it must be clear that equality provisions prevail over customary law and practices.

### Secure tenure, access to natural resources and the right to food

In the Pacific region, communities depend on both access to and control over land and coastal waters to feed themselves and their families. Under human rights law, states must therefore ensure security of tenure to these resources for all people. This is part of ensuring the right to an adequate standard of living. There are also specific rights to natural resources for indigenous peoples and peasants.<sup>6</sup>

Most countries in the region have protected indigenous communities’ rights to land. While compulsory acquisition by the government is still possible, there are usually some human rights safeguards, such as compensation in the form of government land. Regarding the foreshore, the situation is more complicated, with varying arrangements throughout the region. In some cases, customary groups have control and access rights to both land and water in the foreshore. In other countries, such as Fiji and Samoa, the land and waters of the foreshore are owned by the crown, and customary rights holders have only access or user rights. This may jeopardise their access to compensation and other remedies should governments acquire these resources.

To help ensure secure access and conserve coastal areas, some countries have set up community-based fisheries management systems. This can strengthen control over the resources on which they depend, mitigate the pressure on fish stocks and strengthen conservation efforts but there are still several human rights concerns. Other communities may need access to these areas for their livelihoods. This can include nationals who are non-indigenous to that particular place<sup>7</sup> or nearby land-locked communities. In some cases, states have allowed for this by specifying that subsistence fishers from outside the community do not need a permit. However, with the increasing monetisation of local economies, the definition of a subsistence fisher may need revising to avoid excluding some fishers. In other countries, small-scale fishers from outside the local community can apply for a permit. However, under human rights law, this must not be a cumbersome process, and there must be access to a remedy for any breach of the right to adequate food.

The inclusion of economic, social and cultural rights in the constitution and statutory legislation can address some of these issues. For instance, recognising and guaranteeing the right to an adequate standard of living including food would give outside communities some access to recourse for any actions that impinge on their abilities to feed themselves and their families. It can also strengthen all communities’ access to compensation and other remedies should the resources they depend on be acquired by the government.

### Right to a healthy and safe environment

The enjoyment of many human rights rests on a healthy, safe and clean environment, especially the rights to life, an adequate standard of living, and health. Moreover, any actions taken to conserve the environment must be done in full compliance with international human rights law (IHRL), including the core human rights principles of non-discrimination and equality, participation, transparency and accountability.

Throughout the region, there are many examples of statutory legislation aimed at protecting the environment. For the most part, however, they do not include a specific right to a healthy environment nor a remedy for people who have had their livelihoods or health affected by, *inter alia*, pollution and environmental degradation and destruction. Nonetheless, in the interim, many countries could examine how to progressively interpret the right to life (which is included in many constitutions) to include issues related to the environment, although this would be limited in scope as it would address only environmental damage that jeopardises the right to life.

Under IHRL, states should also require the prior assessment of the possible human rights impacts of proposed projects and policies, including the rights to life, health, food, water, housing and culture. In the Pacific region under review, most countries only provide for environmental impact assessments. While this covers a wide range of issues, it does not cover the possible impact on gender and women rights, indigenous rights and tenure rights.

<sup>5</sup> *Lapenmal v Awop* [2016] VUSC 90 cited in Yuen 2019. The Vanuatu Supreme Court decision was partly based on a precedent – a case where the same court argued that “[c]ustom law must provide the basis for determining ownership, but subject to the limitation that any rule of custom which discriminates against women cannot be applied” (*Noel v Toto* [1995] VUSC 3 ; Civil Case 018 of 1994 [19 April 1995]).

<sup>6</sup> In a broad sense, the term ‘peasants’ includes other people working in rural areas, such as fishers and fish farmers.

<sup>7</sup> This could increase due to climate change, causing people to migrate from their place of origin to higher ground.

## Participation and democratic governance

Under IHRL, there is a clear right to participation in public affairs. While most Pacific countries' constitutions do not include a right to participation, much less recognise indigenous' rights to free, prior and informed consent (FPIC), there are extensive arrangements allowing for the community-based fisheries management (CBFM) of coastal resources, which, to some degree, operationalises these rights. In practice, however, the decision-making process may follow customary norms that can discriminate against certain groups, including women and people from outside the community. The inclusion of the right to participate in the constitution and statutory legislation can help ameliorate these concerns and ensure access to remedy for those excluded from decision making processes.

## Rights to and at work

States must ensure that people, even in the informal sector, have health and safety at work, appropriate protective clothing and equipment, information and training on occupational safety, as well as an adequate means of livelihood<sup>8</sup>, which includes social assistance. This is true for both employees and independent workers. Moreover, they must make sure that children are protected from hazardous work, even within the family context, and that family fishing does not prevent them from attending school.

Countries in the Pacific region have included many of these issues in policies but they would benefit from being legally underpinned by the recognition of a right to an adequate standard of living and rights at work that is missing from many constitutions and statutory legislation. Pacific countries would benefit from greater data on the involvement of children in small-scale fishing, and a clear definition of what constitutes hazardous work. There should also be clear guidelines ensuring that family fishing does not stop children from going to school. Such guidelines should also acknowledge the social value and importance of family fishing in Pacific Island culture.

Under IHRL, everyone has the right to social security, including social assistance. Throughout the Pacific, there have been huge efforts to extend social security to all, but for the most part initiatives focus on social insurance models that may be inaccessible for small-scale fishers due to their cost of contributions. The recognition of the right to social security could also help ensure that coastal fishers have access to remedy if they are unable to access such social schemes.

## Main challenges and priority actions

Under IHRL, governments are obligated to respect, protect and guarantee human rights. Unless the life of a nation is at stake, these obligations are non-derogable. Moreover, even if the life of the nation is at stake, states cannot escape their obligations to ensure certain rights, including the right to life, which includes the rights to food, housing, health and safe environment. Governments, therefore, cannot suspend the implementation of human rights for conservation or economic development purposes.

Clearly, Pacific countries are making a good deal of progress in the recognition and implementation of human rights, especially regarding indigenous communities' control over and access to resources through community-based fisheries management. Today, however, governments are facing new challenges that can be met only by stronger articulation of human rights. One of the main challenges is how governments can both protect customary practices and ensure that they comply with human rights law. Another challenge is how to open up access to natural resources and pursue foreign investment, while still protecting human rights.

Priority actions include amending constitutions and statutory legislation to include economic, social and cultural rights, especially the right to food, and the rights to participation for all, including women, and access to remedy in case of a breach. The constitution should explicitly require that all customary practices comply with IHRL and that governments should prohibit discrimination against women in line with CEDAW. Outside the legislative system, governments can also start convening discussions with customary rights holders about how local practices themselves can progressively integrate human rights principles. As noted earlier, some national courts are pushing for this conversation, recognising that "custom needs to recognise these principles of rights" (Yuen 2019: 28).<sup>9</sup>

<sup>8</sup> Under the Declaration on the Rights of Peasants, states should "take appropriate measures to strengthen and support local, national and regional markets and ensure that peasants can equitably-access these markets to sell their products at prices that allow them and their families to attain an adequate standard of living" (UNDROP: Article 16 (3)).

<sup>9</sup> *Ambrose v Keioi* [2016] SBHC172 cited in Yuen 2019.

## 2. GLOBAL CONTEXT: COASTAL FISHERS, LIVELIHOODS AND THREATS

In many parts of the world, coastal resources are crucial to local communities for both food security and income generation. Fishers who depend on available marine resources for their well-being require secure tenure rights over the foreshore and land in the coastal or waterfront area in order to access fishing grounds, as well as for processing and marketing, housing and other livelihood support. The importance of these tenure rights for small-scale fishers are recognised in the 2015 FAO Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (SSF Guidelines).

Nonetheless, there are numerous threats undermining coastal fishers' abilities to provide for themselves and their families. These include competition with industrial fishers for access to declining resources, overfishing, damage to fisheries habitats, and land-based impacts, including pollution. Due to weak tenure rights in many countries, coastal fishers are at risk of having their resources grabbed by commercial interests (UNGA 2012: para 57). Governments have also created "Marine Protected Areas (MPAs) with fishing bans or restrictions, for 'conservation' purposes" despite being relied on by local fishing communities (Transnational Institute 2014: 7). Their access to resources is also often undermined by growth in tourism concentrated in the coastal area (Cambers et al. 2003).

Population growth is increasing pressure on coastal fisheries resources, pushing governments to pursue alternative livelihood options, including ecotourism and recreational fishing, near-shore fisheries around anchored fish aggregating devices (FADs) and aquaculture (i.e. the farming of fish, crustaceans, molluscs, aquatic plants, and other aquatic organisms). While these options are thought to take the pressure off declining wild stocks of reef species, sustainability is a key issue in vulnerable coastal ecosystems. The development of new activities must be carefully designed and regulated to ensure economic viability, social acceptance and environmental sustainability. Some authors warn that, "ironically, if not practised wisely, aquaculture can actually increase pressure on wild stocks [and] cause environmental damage (including damage to fish habitat)" (Nixon 1996: F).

Small-scale coastal fishers worldwide also face difficult working conditions. By being mostly self-employed or engaged informally, they are often without formal employment contracts and suffer from weak labour protection and limited access to social security. They often live in remote locations, and their work is hazardous. For instance, they may be at sea in difficult weather conditions in precarious crafts, including canoes and rafts, or they may have to travel from island to island in small motorised vessels and no safety equipment. Most also lack access to financial resources, including credit and loans, productive services and markets, and institutional support and education.

These fishers also often rely on unpaid family labour, including children. In El Salvador, for instance, the International Labour Organization (ILO) is gravely concerned about the health hazards to children working in coastal fisheries, including risks of "[d] rowning, getting carried out by strong currents or lost at sea, sunstroke, attacks by sharks or other marine animals, bites and stings from insects and other sea and land animals, respiratory problems, blindness" (ILO/IPEC 2002: v).

Further compounding their vulnerable situation, there is limited political organisation of small-scale coastal fishers through unions, associations and cooperatives. This hinders their influence over decision-making. Commentators have noted that small fishers are hampered by "weak political representation" (FAO 2016: viii).

Despite amounting to "an estimated 3 million tonnes of marine fish and other seafood per year, contributing significantly to food and livelihood security in all regions of the world", women's contributions often go unnoticed (Sea Around Us 2020, 4 March). Women are also subject to various degrees of inequalities in terms of access to and control over productive resources and services, and have limited employment options, due to discrimination and societal norms. They also have restricted participation and power in decision-making, including in resource management systems and work associations, and therefore have limited opportunities to address their challenges (FAO 2017a: 4).

### 3. INTERNATIONAL HUMAN RIGHTS FRAMEWORK

States are obligated to ensure human rights as stipulated in a number of treaties, including the 1966 Covenants – ICCPR and ICESCR. Civil and political rights (CPR) include the rights to freedom of association, expression and belief, while economic, social and cultural rights (ESCR) include the right to adequate food and housing, social security and work; and all must be respected, protected and fulfilled. All rights are also independent and indivisible. The realisation of one right depends on the realisation of many other rights. For instance, the realisation of the right to life depends on the right to an adequate standard of living and health. Also, civil and political rights are essential to ensure full accountability for governments in their work to secure the rights of all under their jurisdiction.

Since the adoption of the above two main covenants, numerous other human rights treaties containing both sets of rights (CPR and ESCR) have been drafted and adopted by the international community<sup>10</sup>, including the following:

- 1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- 1979 CEDAW;
- 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- 1989 Convention on the Rights of the Child (CRC);
- 1990 International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (CMW);
- 2006 Convention on the Rights of Persons with Disabilities (CRPD); and
- 2006 International Convention for the Protection of All Persons from Enforced Disappearance (CED).

Table 1. Ratification of international human right treaties by PICTs

Country	ICCPR	ICESCR	CERD	CEDAW	CAT	CRC	CMW	CRPD	CED
Fiji	2018	2018	1973	1995	2016	1993	2019	2017	2019
Kiribati				2004	2019	1995		2013	
Samoa	2008			1992	2019	1994		2016	2012
Solomon Islands		1982	1982	2002		1995			
Tonga			1972			1995			
Vanuatu	2008			1995	2011	1993		2008	

Furthermore, over the last 15 years, the international community has clarified the rights of particular individuals and communities through declarations, such as the UNDRIP on indigenous peoples’ rights, adopted by the UN General Assembly (UNGA) in 2007, and, most recently, the UNDROP on the rights of peasants and rural workers, which was adopted by the UNGA in 2018. Both instruments are particularly relevant to the situation of fisher communities worldwide. More specifically, the UNDROP addresses the gap in the human rights framework as it protects those working in rural areas who depend heavily on access to seeds, land and other natural resources. It covers small-scale fishers, pastoralists, hunters, gatherers, handicraft manufacturers, dependent family members, indigenous peoples and communities working on the land, transhumant, nomadic and semi-nomadic communities, the landless and hired workers.

A human rights-based approach (HRBA) is a conceptual framework based on international human rights standards, intended for promoting and protecting human rights. While HRBA is a rights-based approach to development, it is crucial to differentiate between the adoption of an HRBA in fisheries management and the adoption of the approach known as ‘rights-based fisheries’. Rights-based fisheries focus on the use of property rights in fisheries management, generally promoting the use of transferrable fishing rights (e.g. licences, quotas) to regulate access to a given fishery. Property rights determine how a resource or economic good is owned, used and disposed of, often according to market principles, and if not carefully regulated could result in communities losing their traditional access to resources. In contrast, HRBA “recognises that the benefits from marine resources cannot be measured purely in economic terms” and focuses on ensuring/protecting the human rights of small-scale fishers (Transnational Institute 2014: 39). The FAO’s SFF guidelines also promote the HRBA and help define it for fisheries managers and policer makers.

<sup>10</sup> More information on these treaties is available at: [https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&clang=\\_en](https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&clang=_en)

To comply with their human rights obligations as illustrated in Table 2, an HRBA to fisheries must ensure the following human rights.

#### a) Non-discrimination and gender equality

Non-discrimination and gender equality are core principles of human rights. CEDAW defines the term “discrimination against women” as follows:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field (CEDAW: Article 1).

State obligations go beyond guaranteeing *de jure* (in law) equality to ensuring *de facto* (in practice) equality. A publication of the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) further articulates four key dimensions of substantive equality, namely: “redressing disadvantage; countering stigma, prejudice, humiliation and violence; transforming social and institutional structures; and facilitating political participation and social inclusion” (Fredman and Goldblatt 2015: i).

Under human rights law, states must end all forms of discrimination (direct and indirect) against women in laws, policies and practices. This can include special measures or affirmative action. CEDAW explicitly requires states to:

take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women (CEDAW: Article 2).

This includes “modify[ing] the social and cultural patterns of conduct of men and women” (CEDAW: Article 5).

With regard to rural women, the CEDAW Committee notes that they are often marginalised from the control and management of natural resources and that, in some cases, special efforts are required. This includes designing and implementing strategies that “address discriminatory stereotypes, attitudes and practices which impede their rights to land and natural resources” (CEDAW Committee 2016a: para 57). States must guarantee rural women’s right to education, participation, access to credit and loans and housing and agricultural technologies, as well as equal treatment in land and agrarian reform and in land resettlement schemes. The committee also recommends that indigenous women in rural areas have equal access with indigenous men to ownership and possession of and control over land, water, forests, fisheries, aquaculture and other resources that they have traditionally owned, occupied or otherwise used or acquired, including by protecting them against discrimination and dispossession (CEDAW Committee 2016a). More recently, the CEDAW Committee has further recommended that states prioritise actions:

addressing discrimination in relation to the ownership, access, use, disposal, control, governance and inheritance of property, land and natural resources, as well as barriers that impede the exercise by women of full legal capacity and autonomy in areas such as freedom of movement and equal access to economic, social and cultural rights including food, health, work and social protection (CEDAW Committee 2018a: para 31).

#### b) Security of tenure, access to natural resources and the right to food

***The right to food and secure access to natural resources*** – An HRBA to fisheries must respect, protect and ensure the right to adequate food.

The right to food “is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement” (CESCR 1999: para 6). This requires governments to ensure that food, and the means of procuring it, is adequate (both in terms of nutrition and dietary needs), culturally appropriate, available and accessible (CESCR 1999). The right to food is not a right to be fed, but the right to feed oneself in dignity. States must ensure the conditions that allows a person to either produce food or to buy it. In turn, this requires secure access to land, seeds, water and other resources, and/or access to adequate livelihoods and markets. However, in cases where people are unable to feed themselves, such as after natural disasters, the state must provide food directly. The right to food is also linked with the right to life. This has been articulated by the India Supreme Court in its judgement *People’s Union for Civil Liberties v. Union of India & Ors* [2001], and the Human Rights Committee’s General comment on the right to life (2019).

Since small-scale coastal fishers depend heavily on access to aquatic resources and land for their livelihoods, states must therefore respect and protect this access, as well as protect their access to, use of, and control over fish and aquatic resources as part of their obligations under the right to food. Secure access to natural resources is also part of ensuring the enjoyment of cultural rights of many indigenous and rural communities who are particularly connected to land and water.

The Special Rapporteur on the right to food has further elucidated that fulfilling the right to food requires states to:

- “refrain from adopting any policy that affects the territories and activities of small-scale, artisanal and indigenous fishers unless their free, prior and informed consent is obtained” (UNGA 2012: para 39);
- “protect access rights of traditional fishing communities from industrial fishing and to control private actors that could affect the lands, territories and water on which these communities depend” (UNGA 2012: para 40); and
- “act proactively to strengthen people’s access to and utilization of resources and means to ensure their livelihoods” (UNGA 2012: para 41).

This last point includes preserving “the long-term (environmental) sustainability of fishing, including by reducing overfishing and conserving fish habitats, while concurrently improving the incomes of small-scale fishing communities” (UNGA 2012: para 41).

The importance of secure access to natural resources is also included in a number of other instruments, although not all are human rights-based. The 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UN Fish Stocks Agreement) requires States: “to take into account the interests of artisanal and subsistence fishers” (UN Fish Stocks Agreement: Article 5(i)). The 1995 FAO Code of Conduct for Responsible Fisheries (CCRF) calls on states to:

appropriately protect the rights of fishers and fish workers, particularly those engaged in subsistence, small scale and artisanal fisheries, to a secure and just livelihood, as well as preferential access, where appropriate, to traditional fishing grounds and resources in the waters under their jurisdiction (CCRF: Article 6.18).

The 2012 FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (FAO Tenure Guidelines) underline the link between the right to food and access to land and other natural resources. The 2015 SSF Guidelines recognise the tenure rights for all small-scale fishers, regardless of whether or not they are indigenous. The SSF Guidelines state that:

[l]ocal norms and practices, as well as customary or otherwise preferential access to fishery resources and land by small-scale fishing communities including indigenous peoples and ethnic minorities, should be recognized, respected and protected in ways that are consistent with international human rights law (SSF Guidelines: Article 5.4).

**Rights to natural resources** – With regard to indigenous peoples and peasants, access rights are elevated to a right to natural resources. Two UN declarations – the 2007 UNDRIP and the 2018 UNDROP – recognise both the collective and individual rights to natural resources.<sup>11</sup> The UNDROP requires states to:

ensure that peasants have the right to have access to and to use in a sustainable manner the natural resources present in their communities that are required to enjoy adequate living conditions, in accordance with Article 28 of the present Declaration (UNDROP: Article 5(1)).

### c) Right to a healthy and safe environment

States are obligated to ensure the enjoyment of a safe, clean, healthy and sustainable environment under human rights law (UNGA 2018).<sup>12</sup> This right is also a key component of other rights, including the right to an adequate standard of living, as well as the rights to food, life, health, water and sanitation.

With regard to the situation of coastal fishers, this especially obligates states to prevent the pollution and contamination of marine areas, and “preserve the long-term (environmental) sustainability of fishing, including by reducing overfishing and conserving fish habitats, while concurrently improving the incomes of small-scale fishing communities” (UNGA 2012: para 41).

<sup>11</sup> Article 26 of UNDRIP states that “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired,” and it directs states to give legal recognition to these territories. The Declaration on the Rights of Peasants similarly recognises both the collective and individual right to land and other natural resources for peasants and other people working in rural areas who depend on it for an adequate standard of living and culture. See Monsalve Suarez 2015.

<sup>12</sup> Although not explicitly recognised under global treaties as a separate human right, the right to a healthy environment is rooted in the Declaration of the UN Conference on the Human Environment (Stockholm Declaration) of 1972 and has since been adopted at national and regional level by over 150 countries.

Under IHRL, states should require the prior assessment of the possible human rights impacts of proposed projects and policies, including the rights to life, health, food, water, housing and culture. Not only should the environmental impact of an activity be assessed but also the possible impact on gender and women's rights, indigenous rights and tenure rights.

States must ensure access to remedy to small-scale fishers for any threats to their healthy environment. Enjoyment of the specific right to a healthy environment includes having access to remedy for anyone who has had their livelihoods or health affected by pollution, environmental degradation and ecosystem destruction.

Finally, any actions taken to conserve the environment must be done in full compliance with IHRL, including the core human rights principles of non-discrimination and equality, participation, transparency, and accountability.

#### d) Participation and democratic governance

An HRBA must also put inclusion, participation and democratic governance at the heart of fisheries governance. The UN Special Rapporteur on the Right to Food stressed the importance of inclusion to mitigate small-scale fishers' vulnerability. This is also included in both the FAO Tenure and SSF Guidelines. The latter urges states and other parties to:

enhance the capacity of small-scale fishing communities in order to enable them to participate in decision-making processes. To this effect, it should be ensured that the range and diversity of the small-scale fisheries subsector along the entire value chain is appropriately represented through the creation of legitimate, democratic and representative structures (SSF Guidelines: Article 12.1).

The High-Level Panel of Experts from the FAO-based World Committee on Food Security recommends ensuring "that fishing communities and fish workers actively and meaningfully participate in all decisions that impact on their enjoyment of the right to food." (HLPE 2014: Recommendation 8d) This is also acknowledged by the FAO CCRF, which notes that:

[i]n view of the multiple uses of the coastal area, States should ensure that representatives of the fisheries sector and fishing communities are consulted in the decision-making processes and involved in other activities related to coastal area management planning and development (CCRF: Article 10.1.2).

This right to participation is elevated in the case of indigenous peoples. They must give their FPIC to any project that could threaten their enjoyment of human rights. While not explicitly including FPIC, the UNDROP stipulates that peasants and other people working in rural areas have:

the right to active and free participation, directly and/or through their representative organizations, in the preparation and implementation of policies, programmes and projects that may affect their lives, land and livelihoods (UNDROP: Article 10(1)).

The Office of the United Nations High Commissioner for Human Rights (OHCHR) has issued Guidelines for states on the effective implementation of the right to participate in public affairs that further elaborate on states' responsibilities in the matter in 2018 (OHCHR Guidelines on the right to participation).<sup>13</sup> In addition to creating the appropriate mechanisms and legislation, states must also create an enabling environment. This includes guaranteeing protection for civil and political rights, including freedom of opinion, expression and assembly. People must be able to engage with the state and other structures without fear of reprisal. States must also ensure access to information, transparency and free media. Without access to information, communities cannot recognise and understand the possible implications of proposed policies, projects and programmes (De Schutter 2012).

Also key to an HRBA is ensuring access to remedy and justice for abuses and violations of human rights. This requires both appropriate legislation and access to relevant mechanisms. These can include customary dispute mechanisms, providing they conform with human rights standards and principles, as well as national and local courts, which should be empowered, in particular, to "adjudicate claims from small-scale fishers whose livelihoods are threatened by measures" (UNGA 2012: para 39).

<sup>13</sup> OHCHR prepared the guidelines as requested by resolution 33/22 of the Human Rights Council. The Council, in resolution 39/11 adopted by consensus, took note with interest of the guidelines and presented them as a set of orientations for states and others.



## e) Rights to and at work

An HRBA requires states to ensure the right to work and the rights at work for all, including those in the informal sector, such as small-scale coastal fishers. States are obligated to ensure adequate and safe working conditions, as well as access to adequate and appropriate protective clothing and equipment, and to adequate information and training. States must also ensure an adequate standard of living with fair wages.

For self-employed persons, states must:

take appropriate measures to strengthen and support local, national and regional markets and ensure that peasants can equitably access these markets to sell their products at prices that allow them and their families to attain an adequate standard of living (UNDROP: Article 16(3)).

This includes ensuring the appropriate means of transportation and the processing, drying and storage facilities necessary to fishers and fish workers (UNDROP: Article 16(2)). The declaration also stipulates that states must take all appropriate measures to ensure that their rural development, agricultural, environmental, trade and investment policies and programmes contribute effectively to protecting and strengthening local livelihood options and to the transition to sustainable modes of agricultural production (UNDROP: Article 16).

Safety at sea of small-scale fishers is specifically covered under the SSF Guidelines. States should address occupational health issues and unfair working conditions of all small-scale fishers and fish workers as an integral part of fisheries management and development initiatives. The guidelines also recognise “the complexity that surrounds safety-at-sea issues (in inland and marine fisheries) and the multiple causes behind deficient safety” (SSF Guidelines: Article 6.16). In this effort, state’s maritime and fisheries authorities must work together, complementing each other’s expertise and capacity. National accident reporting, provision of sea safety awareness programmes and the introduction of appropriate legislation for sea safety in small-scale fisheries<sup>14</sup> are some of the recommended strategies. It is vital in this process to actively involve existing institutions and community-based structures for increasing compliance, data collection, training and awareness, and search and rescue operations. In particular, “States should promote access to information and to emergency location systems for rescue at sea for small-scale vessels” (SSF Guidelines: Article 6.17).

Governments must also ensure access to social security for all, including those operating in the informal sector. This is clear in the 1948 Universal Declaration of Human Rights and is articulated further in Article 9 of ICESCR as including social assistance. Further guidance is provided in ILO Recommendation on Social Protection Floors (No. 202 of 2012), which calls on states to prioritise the establishment of national floors of social protection accessible to all in need, and particularly to cover the unprotected, the poor and the most vulnerable, including workers in the informal economy and their families. This is also covered in ILO Recommendation on Transition from the Informal to the Formal Economy (No. 204 of 2015).

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<sup>14</sup> The international guidelines for work in fishing and sea safety in small-scale fisheries include the Revised 1968 Code of Safety for Fishermen and Fishing Vessels, the 1980 FAO/ILO/IMO Voluntary Guidelines for the Design, Construction and Equipment of Small Fishing Vessels, and the 2010 Safety Recommendations for Decked Fishing Vessels of Less than 12 Metres in Length and Undecked Fishing Vessels.

Table 2. Sources of relevant human rights

Human right	Legal source	State obligations	Relevance in fishery management
Non-discrimination and gender equality	ICESCR ICCPR CEDAW CERD	State obligations go beyond guaranteeing de jure (in law) equality to ensuring de facto (in practice) equality. The latter requires: “redressing disadvantage; countering stigma, prejudice, humiliation and violence; transforming social and institutional structures; and facilitating political participation and social inclusion” (Fredman and Goldblatt 2015: i).	This should be provided for in law and policies that identify the structural reasons for inequality and seek to overcome them.
Right to adequate food	UDHR ICESCR CEDAW CRC FAO SSF Guidelines FAO Tenure Guidelines	Respect, protect and fulfil access to food, livelihoods and housing. This includes secure access to resources, and access to remedy for any breaches. This includes perpetrators being held accountable and the provision of adequate compensation for inter alia those who may have had their access to livelihoods undermined by pollution, tourism, land acquisition, and customary practices, regardless of whether or not they are customary rights holders.	The right to adequate food should be recognised in both the constitution and relevant statutory legislation, such as the main fisheries act.  All legislation governing land acquisition, investment projects, and the environment must include a right to remedy. It must also be clear that customary practices cannot jeopardise or undermine human rights (including the right to food).
Right to natural resources	UNDRIP UNDRIIP	Both the UNDRIP and UNDRIP recognise both collective and individual rights to natural resources. UNDRIP requires states to ensure that peasants and rural people have the right to have access to and to use in a sustainable manner the natural resources present in their communities that are required to enjoy adequate living conditions, in accordance with UNDRIP Article 28.  Again, there must be access to remedy for any breaches.	This should be established in the constitution and statutory legislation relating to fisheries and land.
Right to a healthy and safe environment	UN Declaration on the Human Environment (Stockholm 1972)  UNGA 2018 (Report of the Special Rapporteur report on the global recognition of the right to a safe, clean, healthy and sustainable environment. UN Doc. A/73/188)	States are obligated to ensure the enjoyment of a safe, clean, healthy and sustainable environment under human rights law (UNGA 2018). With regard to the situation of coastal fishers, this especially obligates states to “preserve the long-term (environmental) sustainability of fishing, including by reducing overfishing and conserving fish habitats, while concurrently improving the incomes of small-scale fishing communities” (UNGA 2012: para 41).	This right should be included in the constitution and statutory legislation governing the environment, including those relating to environment management, tourism and mining.
Right to participation and democratic governance	ICCPR UNDRIP UNDRIP OHCHR Guidelines on the right to participation	Indigenous peoples must give their FPIC to any project that could threaten their enjoyment of human rights. Peasants and other people working in rural areas have “the right to active and free participation, directly and/or through their representative organizations, in the preparation and implementation of policies, programmes and projects that may affect their lives, land and livelihoods” (UNDRIP: Article 10(1)). This must be coupled with ensuring CPR, free from fear of reprisal, and access to information.  Recognising the right to participation also helps ensure that individuals can legally challenge any practice that denies them access to decision making.	This should be recognised in the constitution, fisheries act, any statutory legislation governing the foreshore, land reclamation and CBFM processes.
Right to work under safe and healthy conditions	UDHR ICESCR CEDAW UNDRIP UNDRIP ILO Recommendation 202 on Social Protection Floors ILO Recommendation 204 on Transition from the Informal to the Formal Economy FAO SSF Guidelines	States are obligated to ensure adequate and safe working conditions, as well as access to adequate and appropriate protective clothing and equipment, and to adequate information and training. States must also ensure an adequate standard of living with fair wages. For self-employed persons, states must “take appropriate measures to strengthen and support local, national and regional markets and ensure that peasants can equitably access these markets to sell their products at prices that allow them and their families to attain an adequate standard of living” (UNDRIP: Article 16(3)).  “States should ensure the development, enactment and implementation of appropriate national laws and regulations that are consistent with international guidelines of FAO, the ILO and the International Maritime Organization (IMO) for work in fishing and sea safety in small-scale fisheries” (SSF Guidelines: Article 6.12).	This should be addressed in labour and sea safety legislation as applicable to small fishing vessels and be accompanied by appropriate social and fisheries policies that can assist small-scale fishers comply with the relevant provisions.

## 4. SITUATION IN THE PACIFIC

The Pacific Islands are dominated by a vast ocean, with limited land and inland waters. The islanders therefore rely heavily on coastal fishery resources as a means of livelihood, while offshore fisheries, particularly targeting tuna, are a significant source of foreign revenue. Most offshore resources are fished by large, industrial-scale fishing vessels, operating in the exclusive economic zones (EEZs) (Gillett and Tauati 2018). Reportedly, “almost 70 per cent of the offshore catch in the EEZs of Pacific Island countries is made by vessels based outside the region” (Gillett 2011: 26).

One study found that slightly more than half of Pacific Islanders (with the exception of Papua New Guinea) live within one kilometre of the coast, and 90 per cent of Pacific Islanders live within five kilometres of the coast (Andrew et al. 2019). Coastal resources (between the shoreline and the outer reefs) are primarily fished by local communities<sup>15</sup> who depend on them both for subsistence and for earning small amounts of cash, which is becoming increasingly important with the monetisation of rural economies (Gillett and Tauati 2018). Seafood is often the main source of animal protein for local communities, as reported in *A new song for coastal fisheries – The Noumea strategy*, endorsed by SPC members in 2015. It has indeed been reported by FAO that “about 70 per cent of the overall fisheries production from coastal areas of the Pacific Islands is produced by subsistence fishing” (Gillett 2011: 9).

In the region, coastal communities tend to fish using low-technology means such as gleaning from shore, swimming or using a non-powered canoe, and sometimes an entire community shares the catch (Gillett and Tauati 2018). Increasingly coastal communities in the Pacific region are also engaging in small-scale aquaculture, such as seaweed harvesting (Pacific Island News 2019).

Women tend to focus on sheltered coastal reefs and intertidal and lagoonal habitats for cultural and safety reasons, but this is changing (Thomas et al. 2020a). Similarly, while men have typically undertaken high-value commercial fisheries targeting sea cucumbers (Tuara and Passfield 2011), women are also participating in this in some countries (Mangubhai et al. 2017b). They are increasingly involved in fishing, processing and selling seafood to supplement household income. Nonetheless, their contribution to the fisheries sector is largely undervalued because it is often unpaid, informal, part-time or simply considered part of women’s household responsibilities (Harper et al. 2017).

Like other fishing communities worldwide, Pacific fishing communities face threats. These include increasing population; overfishing, particularly near urban areas; increasing population and urbanisation; and habitat destruction through pollution, logging and mining and the siltation of coastal areas destroying catchments/watersheds (Gillett and Cartwright 2010). Access to resources is also being undermined by the increasing development of coastal areas for tourism, including the development of wharfs (Wilson 2018). Coastal fishers also often do not receive enough remuneration for their catch that allows for an adequate standard of living. This is generally due to low prices and limited access to markets because of a lack of processing and storage facilities for perishable products. Many fishers live in rural areas and cannot easily transport their catch to urban areas to sell. There is also a lack of transparency about market prices regarding particular catches, such as sea cucumber (Purcell et al. 2017; Mangubhai et al. 2017b). Moreover, coastal fishers’ informal status means that they can be excluded from safety related legislation and policies. Their profession may not be recognised, as they are often categorised as subsistence rather than professional fishers. They also lack access to social protection, with most systems in the Pacific being contribution-based (social insurance models) to which small-scale coastal fishers, particularly women, may not be able to contribute (Barclay et al. 2019).

To help protect coastal resources, PICTs have predominantly taken a decentralised approach to managing such fisheries. Most provide constitutional protection of customary ownership and/or access to fishing grounds by indigenous communities, villages and clans (Corrin 2011). This is done by constitutionally protecting cultural practices or, as in the case of Fiji, exempting cultural practices regarding land from the constitution’s equality provision. In recent years, some Pacific governments have also combined this legal protection with creating structures that actively allow local communities to manage their resources and exclude outsiders unless they get a licence (Gillett and Tauati 2018). This system, however, does face challenges. Although in most PICTs local fishers claim some form of traditional or customary rights to coastal resources, increasing migration to urban centres for employment means that many are moving away from their traditional lands and fishing areas. In their new location, some may not be regarded as indigenous or customary rights holders and not be included in existing customary arrangements. However, they usually maintain their user rights over natural resources in their places of origin.

<sup>15</sup> While these communities are often indigenous, this is not always the case.

In some cases, customary practices may limit women's rights over land and their participation in decision making. This can also limit their role in building fishing cooperatives and associations. They are, therefore, often likely to be side-lined or excluded from discussions about projects meant to improve the situation of coastal fishers, which can result in inequality of outcome. Such projects may fail to improve the substantive equality of women or they may even further undermine it (Lawless et al. 2019).

In recent years, PICTs have been working closely with SPC to address gender and human rights in fisheries and aquaculture. Gender assessments in fisheries have been completed in several countries since 2018, including in five of the six countries analysed in the present study (Fiji, Samoa, Solomon Islands, Tonga and Vanuatu). In 2019, SPC also published the Pacific handbook on gender and social inclusion in coastal fisheries and aquaculture that provides guidance to PICTs on how to perform gender and social inclusion analyses to inform legislation and policies, as well as programmes and services (Barclay et al. 2019).

Most notably, Pacific members of parliament adopted the Port Vila declaration on human rights, good governance and development at the Pacific Parliamentarians Dialogue, held in Vanuatu in November 2019. The declaration was informed by, among others, the compendium Human rights in the Pacific: A situational analysis (SPC 2016, which included valuable information on Pacific Islands, complementing the earlier UN publication Human rights in the Pacific: Country outlines (OHCHR 2012).

Also relevant to PICTs is the recognition of human rights in small island developing states (SIDS) under the 2014 SIDS Accelerated Modalities of Action (SAMOA) Pathway. The SAMOA Pathway is the outcome document of the SIDS Heads of State Conference held in Apia, Samoa, in 2014, which was then endorsed by UNGA Resolution 69/15. Through the SAMOA Pathway, UN member nations "are committed to working together to support the efforts of SIDS to:

- promote the further use of sustainable practices relating to ... fisheries and aquaculture to improve food and nutrition security while ensuring the sustainable management of the required water resources; and ...
- increase rural income and jobs, with a focus on the empowerment of smallholders and small-scale food producers, especially women (SAMOA Pathway: para 63).

The document recognises that:

[h]ealthy, productive and resilient oceans and coasts are critical for ... poverty eradication, access to sufficient, safe and nutritious food, livelihoods, economic development and essential ecosystem services, including carbon sequestration, and represent an important element of identity and culture for the people of small island developing States (SAMOA Pathway, para 53).

It also gives ample space to gender equality and women's empowerment, considering women as "a driver of economic growth" in SIDS and as "powerful agents of change" (SAMOA Pathway, para 76). The UN supports the efforts of SIDS to "give women equal rights with men to economic resources, including access to, ownership of and control over land and other forms of property, credit, inheritance, natural resources and appropriate new technologies" (SAMOA Pathway, para 77).

Regarding safe and sustainable transportation, states commit to supporting the efforts of SIDS to "gain access to environmentally sound, safe, affordable and well-maintained transportation" and to "advance the safety of land, sea and air transportation (SAMOA Pathway, para 67). In this regard, it is worth noting that, in 2007, SPC developed model regulations on safety on small fishing boats, under the PIMLAWS project implemented by the Geoscience, Energy and Maritime (GEM) Division. GEM is now running the Pacific Safety of Navigation Project in 13 PICTs.

These high-level commitments have trickled down to regional policies and strategies dealing with coastal fisheries and aquaculture in PICTs. A number of regional policy documents were adopted in 2015 to raise the profile of coastal fisheries and aquaculture in the Pacific Island region, furthering the vision of the Pacific Islands Regional Coastal Fisheries Management Policy and Strategic Actions (Apia Policy) 2008–2013.<sup>16</sup> These include *A new song for coastal fisheries – Pathways to change (Noumea Strategy)* and the Coastal Fisheries Roadmap (which is part of the Future of Fisheries – A Regional Roadmap for Sustainable Pacific Fisheries), both endorsed by SPC's Heads of Fisheries Meeting in 2015. At the sub-regional level, in that same year, the Melanesian Spearhead Group (MSG) adopted the MSG Roadmap for Inshore Fisheries Management and Sustainable Development 2015–2024.

These regional policy instrument generally include loose human rights language. In particular, under the Coastal Fisheries Roadmap, PICTs commit to empowering communities to manage their natural resources (right to resources), conserving aquatic habitats (right to a healthy environment) and promoting alternative livelihoods (right to work). Strategy 5 of the roadmap seeks to

<sup>16</sup> "Healthy marine ecosystems and sustainable coastal fisheries that provide seafood security and continuing livelihoods for current and future generations of Pacific people" (Apia Policy, para 21).

ensure equitable access to benefits and involvement in decision making for women, youth and disadvantaged groups. *The new song for coastal fisheries* has two long-term overarching outcomes: (i) improved wellbeing of coastal communities; and (ii) productive and healthy ecosystems and fish stocks. These outcomes are in line with the right to an adequate standard of living and the right to a healthy environment. A number of medium-term outcomes of the *New song for coastal fisheries* specifically address human rights concerns: empowerment of coastal communities with clearly defined user rights; reliance on community-based management to underpin coastal fisheries management; equitable access to benefits and decision making within communities, including women, youth and marginalised groups; and diversity of sustainable livelihoods for coastal communities to generate income, including aquaculture.

In the area of aquaculture, it is worth noting the endorsement of the Regional Framework on Aquatic Biosecurity by SPC Heads of Fisheries in 2020 and the adoption of the Agreement on the Micronesian Association for Sustainable Aquaculture (MASA) in 2015. Through the Regional Framework for Aquatic Biosecurity, PICTs commit to: safeguarding human health in relation to aquaculture production; ensuring that aquaculture is technically accessible, culturally sensitive and environmentally sustainable; and promoting gender equality and broad participation to decision making. In Micronesia, the MASA Agreement aims at supporting the development of aquaculture as a sustainable livelihood alternative to capture fisheries, including equitable sharing of benefits, recognition of indigenous knowledge, and consideration of social aspects relating to aquaculture.



# 5. INDIVIDUAL COUNTRY ANALYSIS

## 5.1 FIJI

Fiji's population includes both indigenous (*iTaukei*) and other ethnicities (including Indo-Fijians), which depend on accessing coastal habitats and waters for their livelihoods. Many sell fish and invertebrates at local markets, particularly those near urban areas (FAO 2017b). Coastal fishers use a wide variety of fishing techniques that involve mainly small outboard-powered vessels, gleaning, hook-and-line fishing, and spearfishing (FAO 2017b).

As with other areas of the Pacific, in Fiji “...traditionally and historically, fishing beyond the reef was the domain of men, while women concentrated their activities on fishing and collecting invertebrates within lagoons and inshore areas,” particularly “within the coastal reef areas, mud and sand flats and mangrove areas” (Vunisea 2014). Recent studies have, however, highlighted the increasing role of *iTaukei* women in commercial fisheries, operating along the entire fisheries value chain, and in areas further out and beyond the reef edge (Mangubhai et al. 2016 & 2017a; Thomas et al. 2020a & 2020b). Nonetheless, women have only limited participation in community decision making due to societal customs and their traditional care-giver role and obligations in the home (Vunisea 2014). This can mean that that no attention is paid to the areas where they fish (Vunisea 2014).

In Fiji, coastal fishers continue to face threats to their livelihoods. This includes over-exploitation and habitat destruction. Deforestation and poorly planned development are causing increased sedimentation of watershed and coastal environments (Mangubhai et al. 2019). Pollution through bauxite mining and other extractive industries, and “inadequate sanitation facilities and poor waste management” threaten ecosystems and undermine the rights to health, water, sanitation and a clean and healthy environment (Boyd 2018). It can also be difficult for small-scale fishers to access offshore fishery resources, and to sell their stock at local markets, given the remoteness of many communities (FAO 2017b). They also face competition from offshore vessels in accessing limited infrastructure and services (FAO 2017b).

While there have been attempts to foster aquaculture in Fiji since the 1950s, the largest investments began in the late 1970s to help create local livelihoods for small to medium scale fishers. They now cover a large variety of species, including tilapia, freshwater prawns, carps, saltwater shrimp, milkfish, seaweed, giant clams, trochus, pearl oysters, *bêche-de-mer*, sponges, turtles, mud crabs, and corals (FAO 2017b). These are mainly implemented by coastal communities. For example, the Lau Group has focused on seaweed farming, while communities around around Savusavu (Vanua Levu), Taveuni Island and Rakiraki (Viti Levu) focus on pearls (SPC 2018a). Communities can also request help from the ministry in charge of fisheries, providing they can prove that they own the land or are leasing it. If owned by a *mataqali* then at least 75 per cent of the members must sign the letter. In Fiji, it is difficult to determine the value and production volumes from aquaculture due to the scattered nature of the farms, with few or no records of harvests (SPC 2018a).

### 5.1.1 International human rights obligations

Fiji has acceded to a number of human rights conventions, including the CAT (2016), ICCPR (2018), CEDAW (1995), CERD (1973), the ICESCR (2018), CMW (2019) and the CRC (1993).



### 5.1.2 Human rights and the legal and policy framework

To comply with its human rights obligations, Fiji must have a legal framework that guarantees these rights and access to justice for violations. The Constitution of Fiji (the Constitution), adopted in 2013, is the primary legal document. It establishes a bill of rights that includes civil, cultural, economic, political and social rights for all Fijians (not just *iTaukei*), including the rights to work and a just minimum wage; reasonable access to transportation; housing and sanitation; adequate food and water; social security schemes and health (New Zealand Law Commission 2006).

With regard to non-discrimination and equality, the Constitution provides that all citizens of Fiji have equal status and identity and states that “the rights of all individuals, communities and groups are fully respected” (Constitution: Chapter 2, Article 26). It also prohibits direct and indirect discrimination on grounds, including sex, ethnic or social origin, gender identity, primary language and/or social and economic status. One exception to this concerns access to and control over land and fishing rights. While Article 26 allows for equality before the law and non-discrimination, it allows exception to this regarding the communal ownership of *iTaukei*, Rotuman and Banaban lands and access to marine resources. It also states that this should not “infringe[ing] the rights or freedoms set out in any other section of this Chapter” (Constitution: Article 26(8)(g)), but it is unclear to what extent it can challenge discriminatory practices against women regarding land and sea tenure.

At the regional level, pursuant to the Local Government Act of 1972, provincial councils have the power to do everything lawfully, including making by-laws for “the health, welfare and convenience of the inhabitants of the municipality” (Local Government Act: Article 88). However, these must still be approved by the minister in charge of local government affairs (Local Government Act: Article 122). The legal system is still therefore essentially a centralised system “where law is made by Ministers through delegated authority in legislation” (Sloan 2017).

### 5.1.3 Overview of fisheries legislation

With regard to coastal fisheries, the Constitution establishes who has rights over natural resources, including coastal areas such as customary fishing grounds (*qoliqoli*). The main legislation is the Fisheries Act of 1942, which sets out the arrangements by which *iTaukei* communities may control their coastal marine resources. In particular, it recognises and gives effect to customary rights to inshore fishing grounds (Fisheries Act: Article 13) and regulates the permit and licensing regime in consultation with the customary rights holders (Fisheries Act: Article 5). This includes how permits may be granted to other non-*iTaukei* communities (Fisheries Act: Article 13). It also allows for the creation of a Native Fisheries Commission to determine “what customary fishing rights in each province of Fiji are the rightful and hereditary property of native owners” (Fisheries Act: Article 14).

The Fisheries Act of 1942 also empowers the Minister for Fisheries to make regulations “prescribing areas and seasons within which the taking of fish is prohibited or restricted, either entirely or with reference to a named species”; designate seasons when fishing is restricted or prohibited, and regulate for “any other matters relating to the conservation, protection and maintenance of a stock of fish which may be deemed requisite” (Fisheries Act: Article 9).

Since the Fisheries Act recognises only access rights rather than management rights over customary fishing grounds, there are no formal provisions allowing a community-based fisheries management (CBFM) approach. Instead, the Fiji Locally Managed Marine Area (FLMMA) Network has helped establish multiple community-based managed areas with management plans and rules based largely on customary and statutory law. However, these plans and rules are voluntary and cannot be legally enforced (Techera and Troniak 2009).

Other fisheries legislation includes the Fisheries Regulations of 1965 and specific regulations on marine reserves, as well as the Offshore Fisheries Management Act 2012 (previously Decree) and its regulations. Some of their provisions are relevant to all types of fisheries, including coastal fisheries. The fisheries regulations cover licenses, registration, prohibited fishing methods, mesh limitations, size limits, and exemptions. An Inshore Fisheries Management Decree, which touched on rights issues, was drafted many years ago, but then shelved, with nothing in its place to guide the access right, use and management of inshore fisheries resources. As a result, the Ministry of Fisheries is applying the Offshore Fisheries Management Decree to address some of the issues on coastal fisheries.

In terms of human rights analysis, while the Fisheries Act recognises to some extent customary rights to natural resources for the *iTaukei*, it does not include specific human rights language. Most noticeably, it should recognise coastal fishers’ right to an adequate standard of living and participation in decision-making. This should include all communities that depend on these resources for their livelihood, regardless of whether or not they are *iTaukei*.

In addition, the government has submitted an Aquaculture Bill to regulate fresh water, brackish water and marine aquaculture and for related matters. Its objective is “the management and development of aquaculture to ensure long-term benefits to the people of Fiji” (Aquaculture Bill: Article 4). This reflects the fact that achieving sustainable aquaculture is part of the government’s strategy to



alleviate pressures on fish stocks (Fiji Environmental Law Association and EDO NSW 2017). While this is commendable, the bill must also contain provisions protecting coastal fishers' current livelihoods and providing access to remedy if these are undermined by any aquaculture activity.

#### 5.1.4 Specific issues

##### Non-discrimination and gender equality

Fiji ratified CEDAW in 1995 and the 2013 Constitution prohibits both direct and indirect discrimination on the basis of sex (Constitution: Article 26(3)(a)). According to the CEDAW Committee, however, Fiji has still to adopt "a comprehensive anti-discrimination law that contains a definition of discrimination against women, in accordance with article 1 of the Convention, encompassing both direct and indirect discrimination and covering all areas of the Convention" (CEDAW Committee 2018b: para 1).

Since Chapter 2, Article 26 of the Constitution allows for exceptions to the principle of equality before the law and non-discrimination when it concerns the communal ownership of *iTaukei*, Rotuman and Banaban lands and access to marine resources, it is unclear to what extent discriminatory practices against women regarding land can be legally challenged. Moreover, while CEDAW has been applied by the High Court in several judgements,<sup>17</sup> these have not concerned customary practices regarding land. Moreover, the Revised *iTaukei* Land Act of 1978 specifically states that "such lands may be cultivated, allotted and dealt with by native Fijians as amongst themselves according to their native customs" (*iTaukei* Land Act: Article 3). One way of addressing this normative gap in terms of human rights protection would be for the Constitution to explicitly require all customary practices to comply with IHRL.



Photo: Kalo Pakoa, 2012, SPC

expired, many of the lessees were evicted without compensation.<sup>19</sup> Many were forced to live in informal settlements, where lack of access to land increased their dependence on coastal fishing. In 2010, the lease process was modified further with the adoption of the Land Decree, which allows the *iTaukei* to deposit unused land to a land-use bank within the Ministry of Lands and Mineral Resources, providing that 60 per cent of the *mataqali* agree. This land can then be leased for agricultural, commercial and, more recently, conservation purposes for up to 99 years.

##### Security of tenure, access to natural resources and the right to food

Under IHRL, those depending on natural resources for livelihoods must have secure tenure. This right is elevated for peasants and indigenous peoples who have a special relationship with the natural resources. The international community has explicitly recognised their right to such resources.<sup>18</sup>

In Fiji, indigenous communities have the main rights to land and coastal resources. This is established in the Constitution and subsequent legislation relating to indigenous affairs, such as the Native Lands Act of 1978, the Native Land Trust Act of 1940 (revised in 1985 and renamed the *iTaukei* Lands Act) and the Agricultural Landlord and Tenants Act of 1978. With regard to land, the *iTaukei* Lands Act provides that "[n]ative lands shall be held by native Fijians according to native custom as evidenced by usage and tradition" (*iTaukei* Land Act: Article 3). Since 1940, the *iTaukei* have been able to lease their land (if it is not being used for subsistence) to other communities and the private sector, under the Native Land Trust Act of 1940 and later the Agricultural Landlord and Tenant Act of 1978, for periods of 30 years, providing that 60 per cent of members of the *mataqali* that 'owns' the particular area of land have consented. In the 1990s, however, when these leases

<sup>18</sup> See UNDRIP and UNDROP.

<sup>19</sup> Many Indo-Fijian communities that previously leased land from *iTaukei* for sugar cane farming were evicted in the late 1990s when their agricultural leases began to expire. They had to move to squatter settlements in urban areas. See Reddy and Naidu 2002.

With regard to customary fishing grounds, the Constitution is more nuanced. It does not recognise *iTaukei* rights to own traditional fishing grounds. Instead, the foreshore is owned by the state, and the *iTaukei* have access rights to its resources (Constitution: Article 26(8)(g)).<sup>20</sup> While there have been attempts to give the *iTaukei* stronger rights to the foreshore areas, this has been resisted by other communities, who are concerned that such strengthened property rights will erode their own livelihoods, since they also depend on access to the foreshore.<sup>21</sup> For *iTaukei* communities, the only rights concern compensation or royalties related to mining of minerals (Article 30). Such access rights mean that “*iTaukei* communities do not need a permit to fish for subsistence within a *qoliqoli* registered to the *yavusa* to which they belong,” (Sloan 2017). Non-*iTaukei* and *iTaukei* Fijians from other communities need a permit from the Commissioner to access the foreshore, unless the fishing is done with hook and line or with a spear or portable fish trap that can be handled by one person. In practice, however, the Commissioner consults with the customary rights holders and fishing permits are commonly approved by the local chief (Rohe et al. 2019).

Commercial fishers, whether or not they are the resource owners, are also required to have a licence, although the process would benefit from being better defined (Fiji Environmental Law Association and EDO NSW 2017). Several commentators have noted that “[u]ncertainty about the term ‘trade or business’ makes it unclear when a licence is required” (Minter 2008: 4). Without further clarification, local fishermen who sell their small catch or any surplus by the side of the road could be considered commercial, and the cost of attaining a licence could jeopardise their ability to provide for themselves and their families (Minter 2008).

Further impeding the livelihoods of small-scale fishers, including roadside sellers, are the good-will payments traditionally required by the chief for both permits (usually for non-*iTaukei* communities) and licences. In 2008, the amount of this payment could range from FJD 1,000 for *iTaukei* and FJD 5,000 for Indo-Fijians (Minter 2008). While the government is considering replacing such payments with a standardised access fee, of which 90 per cent will go to the resource owners, the appropriate legislation is still to be adopted (Turagaiviu 2019) and the practice of good-will payments appears to be continuing. The fact that the amount to be paid is based on racial grounds violates the constitutional right of equality (Minter 2008). Moreover, the amount can seriously undermine livelihoods and threaten the enjoyment of their rights to an adequate food and health.<sup>22</sup> While it is possible to challenge this under the Constitution’s recognition of the right to an adequate standard of living, it is unclear whether such good-will payments are included in the constitutional protection of customary practices regarding land and marine resources.

While the government does protect indigenous rights to natural resources, it must go further to fully comply with IHRL, such as requiring any developer or the government to gain the FPIC of the customary rights holders before developing the foreshore. As the foreshore is owned by the state, under the State Lands Act of 1978, only the approval of the minister in charge of land matters is required. The State Lands Act also specifies that before “such approval is given or declaration made”, a description of the lease and the project must be published in the ordinary gazette and in a Fijian newspaper and include a notice “calling upon persons having objections” to make them within thirty days of the “second insertion in the Gazette” (State Lands Act: Article 21), but this is not the same as requiring FPIC. While it is clearly a contentious issue, the government should ensure the *iTaukei*’s FPIC, as well as protecting the rights of other communities to the resources they depend on for livelihoods. This could include amending the Constitution to include the broad right to FPIC and amending the State Lands Act to provide more detail on how this right can be ensured, as well as guaranteeing the rights of other communities.

Women are particularly disadvantaged by customary practices over resources and their constitutional protection. They are often excluded from the decision-making process on *iTaukei* (indigenous) communal land, including discussions about leasing it, even if it concerns mangroves and seagrass areas, which are critically important to women fishers. “While women have the right to a share in the distribution of *iTaukei* land lease proceeds, this right is seldom recognized” (OECD 2014: 5). In terms of human rights, although the Government of Fiji does protect the customary rights of indigenous peoples to land, it does not fully protect women from being disadvantaged by customary practices regarding land. This could be addressed, for instance, by the Constitution specifying that customary practices must conform with IHRL.

There is also limited access to justice for human rights violations related to land/fishing. While there are mechanisms that deal with land disputes – e.g. the *iTaukei* Lands and Fisheries Commission, which adjudicates on disputes regarding land ownership and fishing rights, and the *iTaukei* Lands Appeals Tribunal that can challenge the decision of the commission – their decisions are based on the rules of customs, and not human rights standards and principles such as non-discrimination (*iTaukei* Lands Act 1905: sections III and IV). Moreover, it is also unclear to what extent any decision that allegedly contravenes human rights could

<sup>20</sup> At the local level, there are 409 traditional fisheries management areas (*qoliqoli*).

<sup>21</sup> In 2006, efforts were made to strengthen *iTaukei* rights with the pro-*iTaukei* *Qoliqoli* Bill, under which all proprietary rights to *qoliqoli* areas would be returned to the identified traditional (pre-colonial) *qoliqoli* owners. This was heavily opposed by Indo-Fijians and other groups, who were concerned that there were no rights for non-indigenous groups, who also depend on access to coastal areas for livelihoods. The initiative was disbanded, and customary fishing rights and the question of expanding or restricting customary control over coastal fishing areas remains a politically sensitive issue in Fiji. So far, it appears that this issue will not be revisited in the National Fisheries Policy. According to some commentators, these are unlikely to “make a radical shift from the legal status of Government ownership over *qoliqoli* areas” (Rohe et al. 2019).

<sup>22</sup> “Respondents said access to fishing areas had become more difficult and expensive, partly because of raised expectations following the debate on the *qoliqoli* Bill, and also over issues of conservation, and marine protected areas. A respondent in Lautoka said: ‘We can’t fish, our boats are idle, we have laid off workers because Taukei want too much “goodwill” and we also are harassed a lot of times.’ Smaller-scale fishermen find demands of customary fishing area owners excessive.” (Naidu 2013: 26).

be appealed at the High Court. As the commission is an administrative body within a common law system, the High Court always has the power of review of decisions and there is a power of statutory appeal in section 17 of the Fisheries Act on the basis of further evidence being available. However, this could only take place within three months of the decision, and since most decisions concerning traditional fishing grounds were completed by the 1990s, it is unclear if they could be reopened.

Non-*iTaukei* may have even less access to justice when deprived of their means of livelihood, such as not being granted a permit to fish in a particular area or facing the pressure to make 'goodwill payments' (Mangubhai et al., in review). They are unable to settle claims through customary mechanisms. Moreover, while the 2013 Constitution recognises the right to adequate food and water for all Fijians, because it also protects customs regarding land and marine resources, non-indigenous communities cannot challenge customary practices that deny them access to the resources they need. Similarly, while the Native Fisheries Commission (established) under the Fisheries Act determines the compensation due in the case of loss or diminution of customary access rights to fishing grounds because of, for instance, development of the foreshore, it is doubtful that non-indigenous communities are entitled to such compensation, even if they are affected.

### Right to a healthy and safe environment

States are obligated to ensure the enjoyment of a safe, clean, healthy and sustainable environment under human rights law (UNGA 2018). This is essential to the enjoyment of the rights to safe water, an adequate livelihood and health. With regard to the situation of coastal fishers, this especially obligates states to "preserve the long-term (environmental) sustainability of fishing, including by reducing overfishing and conserving fish habitats, while concurrently improving the incomes of small-scale fishing communities" (UNGA 2012: para 41)

Under the Fijian Constitution, "[e]very person has the right to a clean and healthy environment, which includes the right to have the natural world protected for the benefit of present and future generations through legislative and other measures" (Constitution: Article 40). According to the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (Special Rapporteur on human rights and the environment), such recognition of this right "raised the profile and importance of environmental protection and provided a basis for the enactment of stronger environmental laws" (Human Rights Council 2018a: para 13). However, neither this right, nor any other related rights, has been specified in primary legislation aimed at protecting the environment.

The main piece of legislation is the Environment Management Act of 2005, which provides for the protection of natural resources and for the control and management of developments, waste management and pollution control. It also provides for the establishment of a national environment council and related matters. Other relevant legislation, especially for coastal fisheries, includes the Fisheries Act, which empowers the minister in charge of fisheries to: (i) make regulations prohibiting any practices or methods, or the use of equipment including particular nets, that undermines a stock of fish; (ii) prescribe areas and seasons within which the taking of fish is prohibited or restricted; (iii) regulate the issuing and cancellation of licences; and (iv) regulate any other matter relating to the conservation, protection and maintenance of a stock of fish which may be deemed requisite (SPC 2018a). This is implemented through regulations on the establishment of permanent or temporary no-take zones, seasonal bans on certain species, and prohibition of certain fishing practices (e.g. night spearfishing) (Boyd 2018). However, there needs to be more protection of communities' access rights, which is discussed more in the section below on MPAs.

Statutory legislation has not yet addressed the need to ensure a "safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation and violence" (Human Rights Council 2018a: 9). It is important that such activists are also recognised as human rights defenders, given the intimidation and harassment they can face in Fiji (Amnesty International 2019). The Special Rapporteur on the right to a healthy environment "heard concerns expressed by environmentalists and human rights activists about being threatened" (Boyd 2018). He also noted that "although the National Human Rights and Anti-Discrimination Commission has a mandate to receive and adjudicate citizen complaints, it does not appear to have received any environment-related complaints", suggesting that many people are not aware of this (Boyd 2018).

It is also unclear what access to remedies exist for violations of Fiji's obligations regarding the environment, including access to relevant information, and public participation in environmental decision-making. The Special Rapporteur on the right to a healthy environment noted: "[t]he Environment Management Act 2005 provides for the appointment of an Environmental Tribunal, but there is no publicly available information regarding its members, procedures, or decisions. Rules governing the tribunal were published in 2013, but the absence of other public information makes the process opaque and inaccessible" (Boyd 2018). Moreover, despite the right to a clean and healthy environment being included in the Constitution, there are no cases that have been brought to the courts, "suggesting a need for capacity-building in the legal profession as well as judicial education" (Boyd 2018). The



Special Rapporteur also noted that “the constitutional right to a clean and healthy environment has not yet been incorporated into any of the national environmental laws” (Human Rights Council 2019: para 39). Boyd contends that this “would contribute to stronger, more sustainable administrative decisions, increase public participation in environmental decision-making, and bolster the implementation and enforcement of environmental laws, regulations and standards” (Human Rights Council 2019: para 39). There are similar concerns about access to justice under the Mining Act of 1978, which does not include “public consultation of proposals for extractive activities” (IUCN nd: 49). Under this act, the Director of Mineral Resources can issue, without gaining the consent of land owners, prospecting licenses and “declare any area, not exceeding 250 ha in extent in any instance, to be a Government protection area” (Mining Act: Article 5, see also Vukikomoala et al. 2012: 12). There is also only compensation for “the persons entitled to the surface rights of the land” (IUCN nd: 49). Those local communities affected by “environmental degradation of land and water in the catchment areas of the mining operations, including on mangroves ecosystems” are not entitled to compensation (IUCN nd: 49).

The Special Rapporteur on the right to a healthy environment has noted “Fiji also faces major challenges related to the implementation and enforcement of the commitments made in its environmental laws, regulations and decrees” (Boyd 2018). He also observed that “the Ministry of Environment is seriously under-resourced” and according to the Department of Environment website, has only ‘5-6 staff who handle waste and pollution related matters Fiji-wide’ as part of the Waste Management and Pollution Control Unit” (Boyd 2018). Despite the pollution “entering the ocean from land and ships, damaging fisheries, coral reefs, and other marine ecosystems” and relevant provisions of the Seaport Management Act of 2005 and Maritime Transport decree of 2013, Boyd (2018) also observed “there are limited human and financial resources for enforcing environmental regulations related to pollution from ships”.

**Environmental impact assessments:** As part of its human rights obligations, especially the obligation to take reasonable measures to prevent violations, states should require the prior assessment of the possible impacts of proposed projects and policies on the enjoyment of human rights, including the rights to life, health, food, water, housing and culture (Human Rights Council 2018a). The assessment procedure itself must comply with human rights obligations, including by ensuring access to information; public participation, especially by those who may be affected by the proposed action; and providing for effective legal remedies (Human Rights Council 2018a).

In Fiji, under the Environment Management Act of 2005, each development project that could cause a significant environmental or resource management impact, such as mining or logging, must be subject to an environment impact assessment (EIA). However, according to this act and the Environment Management (EIA Process) Regulations 2007, the scope is quite narrow with no reference to human rights. This means that the EIA does not cover issues affecting, for instance, security of tenure, gender equality, cultural rights or, for indigenous peoples, the right to natural resources. Moreover, under this legislation, the types of proposals needing an EIA are limited to those having a significant impact and, according to the legislation, these most probably concern proposals for mining, commercial logging or a saw-milling operation; or ones jeopardising the continued existence of protected areas or ecosystems of national importance. This clearly does not cover all actions that can have a human rights impact. An ecosystem, for instance, does not have to be of national importance yet be critical to the survival of particular communities, and any change could irreparably undermine their livelihoods and threaten their rights to an adequate standard of living and health, among others.

The procedures could also be improved by making full and informed public participation mandatory in the preparation of EIAs. Currently, according to Article 18 of the Environment Management (EIA Process) Regulations of 2007 “[t]he processing authority may, if it considers appropriate, involve the public in the scoping exercise to gather information that is likely to benefit the planning of the development proposal.” Moreover, while the drafting guidelines suggest that the EIA includes details of individuals, organisations, government offices, ministries, etc. that have been consulted, and a summary of such consultations, it does not establish key criteria for effective and full participation. Importantly, it does not require the full participation of women and other individuals living in vulnerable situations. Furthermore, interviewees reported that the EIAs submitted are not being made publicly available as required under Article 28, thus undermining human rights principles of transparency and access to information.<sup>23</sup> The Special Rapporteur on the right to a healthy environment noted that:

Citizens, civil society organizations, and some *iTaukei* landowners expressed frustration with their inability to gain easy, timely and affordable access to important information, the lack of adequate consultation, constraints on the public’s ability to participate in assessment processes, the poor quality of some EIA reports, and the lack of access to remedies (Boyd 2018).

The Special Rapporteur on the right to a healthy environment also called for a new law to “ensure that mining permits are issued only after a full assessment of environmental, social and human rights impacts is completed, all relevant information is provided publicly, and local communities are consulted for their views on the proposed operation” (Boyd 2018).

<sup>23</sup> Environment Management (EIA Process) Regulations 2007 (Article 28(c)).

**Conservation:** Over the last decades, governments have been creating MPAs to conserve marine biodiversity and sustain fisheries, although in some cases this has also led to small-scale fishers being denied access (Transnational Institute 2014). In the Pacific region, governments have also created local management systems.

In Fiji, MPAs covering the nearshore can be created under section 9 of the Fisheries Act 1942. This allows the minister in charge of fisheries to regulate fishing areas and essentially create “an MPA regime”.<sup>24</sup> Most specifically, Section 9b) allows the minister to create ‘restricted areas’, and section 9(g) allows the minister to regulate “any other matter relating to the conservation, protection and maintenance of a stock of fish which may be deemed requisite.” This has been described as “a catch-all regulation-making power” (Fiji Environmental Law Association and EDO NSW 2017b: 12), and certainly it appears to have no safeguard protecting the rights of those depending on accessing the fishing area for their livelihoods. While the creation of MPAs can be positive in ensuring biodiversity, in Fiji the legislation needs to be improved to ensure the protection of human rights. There should be a formal definition of an MPA, creation of a proper process with effective participation of all communities affected, including the FPIC of the customary rights holders, and protection of the human rights of those depending on the resources. This includes access rights and compensation for anyone whose rights are affected (Fiji Environmental Law Association and EDO NSW 2017b).

### Participation and democratic governance

A human rights approach must also put inclusion, effective participation and democratic governance at the heart of fisheries governance. In Fiji, this must include both indigenous and other communities that rely on access to coastal areas.

There is no explicit right to participation in decision-making, much less indigenous peoples’ (*iTaukei*) right to FPIC. The constitutional right to participate is limited to participation in political parties, and the right to full and free participation in the economic life of the state. While Article 50(2) of the Constitution specifies that any person making any regulations “... must, so far as practicable, provide reasonable opportunity for public participation in the development and review of the law before it is made.” This, however, falls short of recognising and protecting the right to participation.



Photo: William Sokimi, 2008, SPC

<sup>24</sup> Two examples of reserves created under section 9 are the Shark Reef Marine Reserve and the Wakaya Marine Reserve.

<sup>25</sup> Such as the Native Land Trust Act of 1940, the Agricultural Landlord and Tenant Act of 1978, and the Land Decree of 2010

The government also needs to take steps to ensure that statutory legislation complies with international standards for participation in decision making. As already highlighted, legislation regarding environmental impact assessments does not require full and informed public participation in their preparation. Legislation regarding customary land<sup>25</sup> requires the *iTaukei mataqali* to give their consent before any land can be leased to other parties but it is unclear how this works in practice, with allegations of corruption amongst chiefs exacerbated by a lack of information and transparency. This consent process would, therefore, benefit from legislative safeguards, stipulating that it must be undertaken in accordance with human rights standards and principles. Moreover, as already highlighted, the State Lands Act of 1978 should be amended to ensure *iTaukei's* FPIC with regard to the foreshore, as they have only access rights, and are not part of any decision-making processes, despite their dependence on and relationship with such resources. The act should also recognise the right to participation of other communities who depend on these coastal resources. Lastly, the recent Mining Act allows the government to grant prospecting licences over land up to 250 ha without acquiring consent from the owner, including with regard to customary land. There are no provisions for local participation in decision-making although any “owner or occupier of any land affected by the application” can object, providing it does so within thirty days of the date of the advertisement of such application “in the Gazette and in one newspaper circulating in Fiji” (Mining Act: Article 18 (3)).

With regard to CBFM, Fijian legislation recognises access rights and allows the customary rights holders to have some management powers, such as determining whether outsiders can receive fishing licences/permits and establishing ‘no fishing in protected areas’. In addition, under the Fisheries Act, fish wardens at community level can enforce customary laws (*goliqoli* system). The Fiji Locally Managed Marine Area (FLMMA) network has built on this by helping establish multiple community-based managed areas with management plans and rules based largely on customary law and national law. “However, at present these areas are not formally recognised and there is no legal authority to enforce the management plans” (Techera and Troniak 2009: 7).

These mechanisms may exclude women, since community decision-making is usually still governed by customary practices. Women have only limited input into the rules governing their customary fishing grounds. One example documented is the difficulty women had in raising the issue of how the destruction of the mangroves was reducing the possibility of mud crab gleaning, which was providing food and supplementing their income (Barclay 2019). While this is beginning to change, the absence of an explicit right to participation means that any exclusion cannot be legally challenged.

This FLMMA network should ensure that women are fully part of the participatory process, and should also recognise the rights of non-indigenous communities who may depend on the reserves for livelihoods. According to observers, however, the network, while encouraging participation, does not specifically address discrimination against women. Many of the approaches used by managers and practitioners in the fisheries sector are gender blind and can reinforce or widen gender inequality (Mangubhai and Lawless 2021). This is largely because most fisheries managers and practitioners have received little to no gender training, and gender mainstreaming into the coastal fisheries sector is still in its infancy (Mangubhai and Lawless 2021; SPC 2018a).

In terms of the enabling environment, despite meaningful consultation and participation requiring access to information, restrictions in civil and political rights is limiting full and free participation. While the Constitution provides for freedom of expression, speech, thought, opinion and publication, the Parliamentary Powers and Privileges Act proposes penalties for defaming, demeaning or undermining the sanctity of parliament. Freedom of association has also been limited by the government failing to give out the necessary permits for meetings on contentious issues relating to land (Amnesty International 2016) Overly broad laws can be and have been used to prosecute journalists whose work is deemed to be against the “public interest or public order”, with violations punishable by fines of up to FJD 1,000 (USD 530) or imprisonment of up to two years under the Media Industry Development (Amendment) Act 2015. Media organisations can be fined up to FJD 100,000 (USD 45 500).<sup>26</sup>

## **Rights to and at work**

States have clear human rights obligations to ensure that people, even in the informal sector, have access to decent work opportunities, as well as health and safety at work, access to adequate and appropriate protective clothing and equipment, information and training on occupational safety, and an adequate means of livelihood and social security. Despite Fiji's Constitution including the rights to and rights at work, it is unclear how they are being realised, especially for the workers in the informal sector who are excluded from relevant legislation and policy directives.

In 2003, the FAO reported that “small boat activities account for about 95 per cent of the sea safety incident reports and characteristically involve mechanical problems, difficulties associated with poor weather, or capsizing.” (Gillett 2003). Since then, the Government has adopted legislation to secure safe and healthy working conditions on boats. This includes the Maritime (Pleasure Craft) Regulations 2014 that stipulate certain basic safety requirements for pleasure crafts, including such broad requirements as

<sup>26</sup> This is based on one USD being worth 2.2 Fijian dollars. See [www.xc.com](http://www.xc.com)

“for an operator to safely sail”, wearing a lifejacket, and equipping the vessel with radio communications devices. The Maritime (Fiji Small Craft Code) Regulations 2014 relate to commercial boats under 15 metres in length but it is unclear to what extent it regulates the boats used by informal subsistence fishers. Nonetheless, it elucidates standards by which one shall be tested for a boat master’s license for sheltered waters voyage, including small boat standards, the standards with which small crafts must comply to be deemed seaworthy. The Maritime (Fiji Maritime Code) Regulations 2014 requires small boat builders to submit their schematics to MSAF for approval and contains extensive building standards for boats.

In August 2019, the Fiji Sun reported the detention of small boats at Nasali Landing because they did not carry compulsory safety appliances (Rabonu 2019). While this suggests that the Maritime Safety Authority of Fiji (MSAF) actively enforces at least some small boat safety laws, it also indicates a lack of awareness of the relevant legislation and/or an inability to comply. In the press article, one boat operator said that the MSAF needs to be more aware of the challenges faced by boat operators. Under human rights law, while the government must secure safe conditions at work, it must also ensure that such measures do not impede access to livelihoods under the right to food. In this instance, the government needs to ensure that such regulations cover informal coastal fishers, and that assistance is provided to help them comply. At the policy level, in the 5-Year and 20-Year National Development Plan of 2017, the Fijian Ministry of Economy has committed to exploring and encouraging ways of improving small craft safety through compliance with legislation, education programmes and sponsorship, but it is unclear what actual steps have been taken in this regard.

In general, children globally can face hazardous working conditions, even when working for family businesses. With regard to Fiji, the CRC Committee notes with appreciation the Employment Relations Promulgation of 2007 (Sections 92 and 95), which established “the minimum age for employment at 15 and prohibiting children under age 18 from engaging in hazardous work” (CRC Committee 2014: para 65). However, it also regrets “the absence of a comprehensive list of hazardous work”, and was particularly concerned by “[t]he high number of children engaged in child labour in the State party, most of them working in informal ways for families as domestic workers, labourers, or farm workers” (CRC Committee 2014: para 65). Certainly, informal fishing equipment is exempted from some safety legislation, which could have implications for minors.

With regard to adequate remuneration and livelihood, under the Declaration on the Rights of Peasants, states shall take appropriate measures to help peasants and other people working in rural areas access transportation, processing, drying and storage facilities, and national and regional markets. As elsewhere in the Pacific, coastal fishers face low prices and insufficient access to markets, especially if they are in remote areas. In fact, the need to address transportation requirements, access to markets and available market space is considered a key challenge facing women in their selling and distributing activities (Vunisea 2014). While Fiji’s National Development Plan 2017 includes initiatives about increasing access to markets through better roads and the strategic placement and maximisation of infrastructure, including storage facilities, it would be further improved by clarifying who will have access to these and whether they would be appropriate for small-scale coastal fishers.

Under human rights law, everyone has the right to social security, including those in the informal sector. While the Constitution stipulates that everyone has the right to social security (ILO 2015), in reality most social protection schemes are contributory systems for people in formal employment (social insurance model). This has been noted by the ILO: “[t]he informal nature of the economy presents significant challenges in social protection provisions, especially since the current focus of the government is still on developing contributory social insurance (targeted at formal sector workers) and less on social assistance” (ILO 2015: 3). Although there are some social assistance programmes for the very poor and vulnerable, including the Poverty Benefit Scheme that provides cash transfer to poor families (poorest 10 per cent of the population), the Care and Protection Allowance (C&P Allowance) for poor and vulnerable children, a social pension for poor elderly, and a food voucher scheme (ILO 2015), these are not extensive. Personal communications have suggested most communities lack extensive knowledge of these schemes, and some fishers have complained that these schemes benefit only *iTaukei* fishers, and no other ethnic groups (Mangubhai et al., in review). This suggests that the government needs to take more action regarding access to information/transparency.

### 5.1.5 Looking forward: conclusions and recommendations

Fiji has ratified the main human rights treaties and its extensive Constitution recognises most human rights, including civil, cultural, economic, political and social rights for all Fijians, not just *i-Taukei*, without discrimination (Constitution: Article 26). Social rights include: the rights to work and a just minimum wage; reasonable access to transportation; housing and sanitation; adequate food and water; social security schemes; and health. It also prohibits direct and indirect discrimination on grounds of sex, ethnic or social origin, gender identity, primary language and/or social and economic status (Constitution: Article 26).

There are, however, still numerous areas for improvement. The fact that control over land and fishing resources remains mainly in the hands of indigenous communities can be seen as protecting indigenous rights to land, but it could also be argued that it jeopardises the right to non-discrimination and equality for other communities and, in some cases, even undermines their right to



an adequate standard of living. Moreover, under the *iTaukei* Lands Act, such land must be administered by customary practices (*iTaukei* Lands Act: Article 3), which can be discriminatory towards women. While this theoretically could be challenged by the Constitution's recognition of the right to an adequate standard of living for all, it is complicated by the protection of communal ownership of *iTaukei*, Rotuman and Banaban lands and access to marine resources. To address this, the Constitution could stipulate that all customary practices must comply with human rights law, including those relating to land and natural resources.

Another areas for improvement is strengthening indigenous rights protection. While indigenous communities enjoy, to some degree, the right to FPIC over their land, this is not enjoyed over the foreshore, which can be threatened by coastal development. While it is clearly a contentious issue, the government should ensure both the *iTaukei*'s FPIC, and protect the rights of other communities to the resources they depend on for livelihoods. The government should consider to what extent participatory rights could be extended to other communities who rely on the foreshore, looking at best practices elsewhere (Sloan 2017).

A further area of improvement concerns ESCR and the need to go beyond the Constitution in securing the rights to and at work, particularly social security. Despite Fiji's Constitution including these rights, it is unclear how they are being realised, especially for the workers in the informal sector, who are often excluded from relevant legislation and policy directives, and may be in need of assistance to implement appropriate safety equipment. For instance, most social protection schemes are contributory systems for people in formal employment (social insurance model), which could exclude small-scale coastal fishers (ILO 2015). It is also unclear to what extent the few social assistance schemes reach these communities.

In general, Fiji is making progress but still needs to go beyond its extensive Constitution to ensure the enjoyment of human rights in practice and to address the issues that are impeding their implementation. Based on the above analysis of the current framework, the following legal and policy recommendations are made for Fiji.



Photo: Vanua Levu, PROCFish, 2006, SPC



### Short-term policy and programme actions

1. Review upcoming legislation, policies and programmes, especially the Aquaculture Bill and Development Plan, to make sure they respect and protect economic, social and cultural rights and do not jeopardise the access rights of communities that depend on coastal areas for their livelihood.
2. Train the judiciary, civil society and customary institutions on upholding economic, social and cultural rights through the court system, particularly those rights for which access to land is vital, such as the right to food and housing and the right to a clean and healthy environment (Human Rights Council 2019).
3. Organise discussions and input sessions on how the EIA procedure could be improved to ensure better access to information and more public participation, especially by those who may be affected by the proposed action, and provide for effective legal remedies (Human Rights Council 2018a).
4. Conduct gender training for fisheries managers and practitioners.
5. Help the government ensure better access to information and transparency regarding social assistance programmes for the very poor and vulnerable.
6. Collect data on child labour, the incidence of hazardous child labour, and working conditions, disaggregated by age, sex, geographical location and socio-economic background, and how it affects access to education (CRC Committee 2014).
7. Develop “an online registry that would make environmental information for all easy to access, including on air and water quality, laws, regulations, policies, permit applications and decisions, pollution data and enforcement actions taken” (Human Rights Council 2019).
8. Review environmental legislation to identify where new or amended legislation/regulations are needed to be consistent with the constitutional right to a clean and healthy environment and other related human rights, including a right to remedy (Special Rapporteur on the right to a healthy and safe environment).

### Medium-term legislative changes

9. Adopt specific anti-discriminatory legislation governing access and control over natural resources, including the decision-making processes that govern all stages of a value chain.
10. Amend the Crown Land Act (especially Part V - Special Provisions Relating to Foreshore Land and Soil Under Waters of Fiji), to require explicit FPIC of customary indigenous rights holders and the participation of other communities in decision-making, and recognise rights to remedy and compensation for all those who depend on the resources for livelihoods.
11. Review the EIA process and extend it to cover human rights in accordance with the guidelines on businesses and human rights.
12. Amend the Environment Management (EIA Process) Regulations of 2007 to require that impact assessments cover the potential impact of a project on human rights.

### Long-term constitutional changes

13. Amend the Constitution to require that all customary practices comply with IHRL and include the right to FPIC for indigenous communities and the right to participation for all, including non-indigenous communities, women and other marginalised groups, including youth, migrants and persons with disabilities.





Photo: Antoine Teitelbaum, 2010, SPC

## 5.2

# KIRIBATI

In Kiribati, over 90 per cent of the population is indigenous (*I-Kiribati*), organised by familial clans called *utu*. Since Kiribati has far more water than land, no inland fisheries, and poor soil that limits agriculture, most households rely on coastal fishing, including fishing for tuna for both direct consumption and sometimes for obtaining a small income from selling it (Gillett and Tauati 2018). People's dependence on coastal fishing is also increased by frequent droughts that ruin crops and destroy farmers' livelihoods.

Coastal fishers in Kiribati use traditional canoes powered by sail or paddle, plywood canoes with outboard motors, and sometimes larger craft. As in other countries in the region, men have traditionally dominated fishing activities at sea, while women have been heavily engaged in shore-based harvesting and processing activities. Offshore waters are dominated by international industrial-scale commercial tuna fisheries.

As in many other Pacific countries, coastal fishers are facing numerous threats to their means of subsistence. These threats include increasing population, putting more pressure on fishing resources; climate change; and the over-exploitation of the resource by the commercial sector. Coastal waters have been polluted by metals and chemicals from mining activities, agricultural chemicals and waste, including open defecation (only approximately 2,000 households on South Tarawa are connected to a waterborne sewage system) (Human Rights Council 2013). With increasing rural to urban migration, overcrowding in Kiribati's largest towns and atolls has led to poor sanitation and public health problems.

Moreover, like elsewhere in the Pacific, people living in remote areas face immense difficulties to transport and market fishery products to the urban areas where there are more selling opportunities.

The government is promoting aquaculture, including oyster farming, seaweed, brine shrimp, cockles, mojarra, mullet, pearl oyster, tilapia and giant clams, but so far the only significant aquaculture products are milkfish, seaweed and giant clams. In the Tabuaeran and Christmas Islands, seaweed farming reportedly helps supplement household income (FAO 2017c).

### 5.2.1 International human rights obligations

Kiribati has ratified CEDAW (2004), the CRC (1995), CAT (2019) and the CPRD (2013). It is also morally and to a certain extent legally bound by the Universal Declaration of Human Rights, which includes all rights, be they civil, cultural, economic, political and social.<sup>27</sup> In 2013, the Special Rapporteur on the right to water and sanitation noted: "Kiribati has been a State Member of the United Nations since September 1999, which obliges the country to respect the Charter of the United Nations and the Universal Declaration of Human Rights. The Universal Declaration of Human Rights is a constitutional document of the United Nations and is part of customary international law" (Human Rights Council 2013 para 5).

<sup>27</sup> According to many scholars, the UDHR "remains the primary source of global human rights standards" (Hannum 1998: 146). Other academics acknowledge that only certain articles of the UDHR have the status of customary international law, such as the prohibition of racial discrimination (Lawyers Rights Watch Canada). Nonetheless the UDHR remains the articulation of the UN Charter's human rights provisions and is "the primary source of the global consensus on human rights" (Hannum 1998: 154).



## 5.2.2 Human rights and the legal and policy framework

Under IHRL, Kiribati is obligated to establish a legal framework that guarantees human rights. The Constitution of 1979 (with Amendments through 1995) protects several human rights, such as the rights to life and liberty; and protection from slavery, forced labour, inhuman treatment, and deprivation of property. Other rights include the right to privacy of home; due process and fair trial; and freedom of conscience, expression, assembly and association; and freedom of movement. There is, however, no mention of economic, social and cultural rights. The Special Rapporteur on the right to water and sanitation thus calls on the government to “consider widening the Constitution” to include economic, social and cultural rights, “such as the rights to education, health, food, social security and housing” (Human Rights Council 2013: para 7). The explicit recognition of these rights is crucial to guarantee the fundamental rights and freedoms of the individual. As she noted “these cannot be fully realized nor enjoyed with no clear and full protection of socioeconomic rights” (Human Rights Council 2013: para 7).

While Article 15 of the 1979 Constitution includes several prohibited grounds for discrimination – race, place of origin, political opinions, colour and creed – it does not include sex, gender and disability. The Special Rapporteur on the right to water and sanitation noted that the definition of discrimination is “much narrower ... than the one contained in the Universal Declaration of Human Rights or core international human rights treaties, where discrimination is defined as any distinction based on “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (Human Rights Council 2013: para 8).

As with many other Pacific states, Kiribati has a plural legal system to reconcile customary traditions with formal law. The Constitution gives the customs and traditions of the people of Kiribati constitutional protection, and the Laws of Kiribati Act of 1989 stipulates that “[c]ustomary law shall be recognised and enforced by, and may be pleaded in, all courts except so far as in a particular case or in a particular context its recognition or enforcement would result, in the opinion of the court, in injustice or would not be in the public interest” (Laws of Kiribati Act: Schedule 1, Article 2). It is unclear, however, when and how this could be applied, and whether it could be used to address customary practices that discriminate against women.<sup>28</sup> This is further hindered by the lack of reference to sex as a prohibited grounds of discrimination. One means of remedying this would be to require all customary practices to comply with IHRL.

Under the Local Government Act of 1984, local government and councils can also make and amend, vary or cancel by-laws, providing they comply with the Local Government Act and are made available for public discussion prior to adoption (Part IV). They are not allowed to amend customary law when making by-laws (Local Government Act: Section 50(4)).

## 5.2.3 Overview of fisheries legislation

The basic fisheries law of Kiribati is the Fisheries Act of 2010 (amended in 2015 and 2017). The purpose of this legislation is to: (i) promote the sustainable management of the fisheries of Kiribati and the development and use of fisheries resources for the benefit of Kiribati; and (ii) protect fish stocks and the marine environment of Kiribati. To do this, it gives the President of Kiribati wide powers: (i) to regulate the licensing of fishing vessels; (ii) to protect all species of fish; (iii) to prohibit certain fishing gear and methods; and (iv) to organise seafood marketing and export.

At the local level, coastal fisheries within three nautical miles are managed by Island Councils through the Local Government Act. Island Councils can establish by-laws regulating different aspects of fishing activities at the local level. Examples include the Maiana Island Council (Business Licences) By-Laws of 1982; Betio Town Council (Illegal Fishing – *Te Ororo*) By-Laws of 1999, and Eutan Tarawa Council (Illegal Fishing – *Te Ororo*) By-Law of 1999. As has already been noted, these by-laws cannot amend or undermine customary law, which is protected under the Constitution. However, there are some ongoing questions about the scope of local councils with regard to enacting and enforcing by-laws, especially regarding the closure of certain zones.

While the Fisheries Act does not explicitly recognise the right to participation or provide for a CBFM approach, it does protect the traditional fishing rights of Kiribati communities. It prohibits the taking of fish in any traditional fishing area except by members of the area’s traditional owners or custodians, unless a license from the minister responsible has been obtained. It thereby lays the basis for the communities to manage the resources themselves. Building on this, in November 2019, the Government adopted the Fisheries (Conservation and Management of Coastal Marine Resources) Regulations, to “enable the inclusivity of the community in fisheries management through recognising and enforcing community-based fisheries management plans” (Regulation 2 (3)). The regulations define a “coastal community” as:

<sup>28</sup> Amnesty International for instance notes that “[w]omen are hardly, if ever, allowed to speak in the *Maneabas* (traditional meeting houses), nor are they treated equally in the distribution of land or resources and or in the decision-making in the family.” (Amnesty International 2009).

a community that is established and recognised under the Incorporated Societies Act 2002 as an incorporated society for purposes which include participation in the conservation, management and protection of coastal marine resources in adjacent coastal areas (Fisheries (Conservation and Management of Coastal Marine Resources) Regulations: Regulation 3).

The regulations also provide that any approval of a community-based fisheries management plan by the relevant minister is contingent on the following conditions: “that the community adjacent to the waters that are likely to be affected by the plan participated in preparing the plan”; that the relevant island council has been notified of the establishment of the coastal community and the intention to prepare a community-based fisheries management plan; and “that the coastal community and the island council have endorsed the plan” (Fisheries (Conservation and Management of Coastal Marine Resources) Regulations: Regulation 4).

Other regulations issued under the Fisheries Act of 2010 include the Prohibited Fishing Areas (Designation) Regulations 1978; Fisheries Conservation and Protection (Rock Lobster – *Panulirus* species) Regulations 1979<sup>29</sup>; Fisheries (Processing and Export) Regulations 1981; Fisheries (Vessel Licences) Regulations 1981; and Fisheries (Vessel Licences) Regulation (No. 1) 1982. Another legal instrument relevant to fisheries is the Marine Zones (Declaration) Act of 1983, which defines and establishes a 12-mile territorial sea and a 200 nautical mile exclusive economic zone. The Native Lands Code of 1957 also gives legal recognition to ownership of fish traps, reefs and fish-ponds. With the exception of stipulating indigenous rights to fishing areas, this legislation does not refer to human rights and principles.



Photo: Tarawa, Céline Muron, 2020, SPC

## 5.2.4 Specific issues

### Non-discrimination and gender equality

Despite Kiribati's ratification of CEDAW, and the Constitution guaranteeing equality before the law, the Constitution does not include sex or gender as a prohibited ground of discrimination. This means that discrimination against women can be considered legal, since laws that discriminate against women cannot be declared unconstitutional. Moreover, given that customary law has constitutional protection, it is possible that “women have no legal recourse where these (customs) infringe on the enjoyment of their

<sup>29</sup> These have been incorporated in the Fisheries (Conservation and Management of Coastal Marine Resources) Regulations 2019.

rights and freedom” (UN Women, Kiribati Profile), even when it is a question of equality before the law. For instance, women cannot challenge discriminatory legislation, such as the Native Lands Ordinance stipulation that “[a] daughter will receive fishponds or fishtraps (only) if there are no sons of the owner, or if the parent or her brother so decides.” (Native Lands Ordinance: Article 11)

### Security of tenure, access to natural resources and the right to food

Access to land and marine areas is a critical issue for communities in Kiribati who depend on coastal fishing for subsistence. Given the size of the islands in Kiribati, nearly all of the land borders the foreshore and is critical for housing, processing, storing and processing fish, establishing fish-ponds (aquaculture projects) and accessing beaches.

The Constitution vests ownership of Kiribati’s resources in the people and their government. This is further detailed in the Native Lands Ordinance of 1956 (amended in 2013), which stipulates that “native land shall not be alienated, whether by sale, gift, lease or otherwise, to a person who is not a native” (Native Lands Ordinance: Article 5). It also codified the traditional rules of land tenure that are included in the Gilbert and Phoenix Islands Land Code, a collection of practices relating to disposal, transfer and inheritance of native land (including fish-ponds and fish-traps) collected by members of the colonial administration. Some of these provisions discriminate against women, such as the afore-mentioned Native Lands Ordinance. Since the Constitution does not include sex or gender as a prohibited ground of discrimination and protects customary law, this discriminatory legislation cannot be challenged.

Under the Native Lands Ordinance of 1956, customary land cannot be alienated, whether by sale, gift, lease or otherwise, to a person who is not a native, but it can be alienated by “the Crown, a council, the Housing Corporation, a society registered under the Co-operative Societies Ordinance or the National Loans Board” (Native Lands Ordinance: Article 5). With regard to government acquisition, the Land Planning Ordinance establishes a Central Land Planning Board, to designate any area for the purposes of controlling development, and to prepare a general land-use plan. Under section 16, the public is to be advised of land-use plans but there does not appear any requirement to consult with *I-Kiribati*, either before the land acquisition or during the planning processes. It is also unclear whether the customary owners of the land receive compensation.

Under the Foreshore and Land Reclamation Ordinance of 1969, the foreshore and sea-bed are owned by the Crown, subject to the public rights of: (i) navigation and fishing, and (ii) passing over the foreshore. This means that the legislation does not override customary rights in marine areas. The Fisheries Act also recognises and protects customary fishing rights, stipulating that persons can only “take fish in any sea or lagoon area or on any reef forming part of the ancient customary fishing ground” if they are a member of the community indigenous to that area or have a license (Fisheries Act: Article 18). Those not belonging to the particular *kainga, utu* or other division of the people may fish only if they have a licence, typically for no longer than one year, usually granted by the Director of Fisheries. While women belonging to the particular *kainga, utu* have access rights, their activities may be curtailed by management decisions taken by the men in the region, who decide when to close or restrict access to certain areas, such as the reef.

Despite these customary access rights, the Foreshore and Land Reclamation Ordinance of 1969 (revised in 1977) provides that the minister responsible may authorise the reclamation of the foreshore or the seabed. This can directly undermine fishing rights. The Ordinance states that:

[u]pon the publication of the authorisation of a proposed reclamation or upon the construction of a causeway or landing-place, all public and private rights of navigation or fishing and rights ancillary thereto, all public and private rights of access or user, and all other public or private rights (if any) in, upon or over the foreshore or sea-bed occupied by the proposed reclamation or by the causeway or land-places shall be extinguished and cease to exist (Foreshore and Land Reclamation Ordinance: Article 6).

Although public notices invite objections to be lodged with the Chief Lands Officer within specific time frames, there is no mention of indigenous people’s FPIC, which is required by IHRL. Moreover, while the ordinance stipulates that compensation will be given for the acquisition of private land, it is unclear whether this also relates to customary access rights for fishing.

Under human rights law, everyone depending on natural resources for a means of livelihood must have security of tenure. While there are clear customary rights, not everyone can enjoy them. Increasing migration to the main islands due to climate change, lack of employment opportunities and, in some cases, pollution, has meant that many people depend on access to land and water from outside of their *utu* or *kainga* and therefore do not have customary rights, and may have to apply for a permit to fish. Often, however, the customary approach can help mitigate the pressure on fish stocks due to increased population around ‘urban’ centres, and opening up access to others can be a controversial issue, yet under human rights law people must have secure access to the resources they depend on for a livelihood.

Women's rights are particularly undermined, as they have no effective control over fishing rights. Moreover, if they are located outside of their *utu* or *kainga*, they are unfairly disadvantaged in the permit process, with more limited opportunities for cash. Moreover, clear customary rights to both land and water are being jeopardised by pressures to develop the foreshore for mining and tourism, and there is no clear right to FPIC as required for indigenous peoples under human rights law.

There is also only limited access to justice for any human rights violations in relation to land and fishing resources. Titles to land were registered by the Native Lands Commission (created under the Native Lands Commission Ordinance (Cap. 2) of 1952), and any land disputes<sup>30</sup> are settled by the magistrates' court "in accordance with the provisions of the Lands Code applicable [Gilbert and Phoenix Islands Lands Code] or, where the Code is not applicable, the local customary law" (Magistrates' Courts Act: Article 58). With the constitutional protection of customary practices, it is, therefore, unlikely that the magistrates' courts, or any appeals, would consider human rights principles and standards, even if specified in the Constitution, unless it falls under the definition of injustice as contained in the Laws of Kiribati Act of 1989.<sup>31</sup> This includes principles related to non-discrimination. This means that women disadvantaged by discriminatory customary practices cannot seek legal remedy. Given the lack of recognition of economic, social and cultural rights, it is further unlikely that the term 'injustice' would cover any breaches of these rights.

Moreover, since economic, social and cultural rights are not included in the Constitution, it is difficult for communities and individuals to seek a remedy when, for instance, the development of the foreshore threatens their right to food. It would thus be worth investigating whether cases could be brought under the right to life, as recognised in the Constitution (Constitution: Article 4). There are examples of judicial bodies recognising the link between the right to food and the right to life, e.g. the India Supreme Court<sup>32</sup> and the UN Human Rights Committee on the link between the right to food and the right to life.<sup>33</sup>

### Right to a healthy and safe environment

A healthy, safe and sustainable environment is key to the enjoyment of many human rights. Obligations, for instance, to ensure the livelihoods of coastal fishers include "preserv[ing] the long-term (environmental) sustainability of fishing, including by reducing overfishing and conserving fish habitats" (UNGA 2012: para 41) as well as protecting people's means of subsistence from pollution and contamination. As already mentioned, the lack of sanitation facilities is also significantly polluting coastal waters.

While the Constitution vests ownership of Kiribati's resources in the people and their Government, it does not contain any reference to the need to protect the environment. Moreover, it does not refer to economic, social and cultural rights, which would also require the protection of the environment. There are however a number of pieces of statutory legislation that seek to protect the environment. One such is the Environment Act of 1999 (amended in 2007) to provide for the protection, improvement and conservation of the environment, including controlling pollution, hazardous substances and the impacts of agricultural, fisheries and food production activities and activities involving genetically engineered organisms. Specifically regarding coastal fisheries, there is legislation prohibiting the use of explosives, poison or other noxious substances for killing, stunning, disabling or catching fish (Fisheries Ordinance 1977), and designated 'prohibited fishing areas' in coastal areas (Prohibited Fishing Areas (Designation) Regulations 1978). Island councils have also restricted fishing gear, such as banning monofilament gill nets on one island) and prohibiting fishing for certain species.

However, "Kiribati does not have a comprehensive law to govern the provision of water and sanitation" and, despite legislation prohibiting it, open defecation still happens, including in the lagoon, which may affect the marine ecosystem in densely populated atolls (Human Rights Council 2013). In densely populated atolls (e.g. Tarawa), coastal fishers – and the whole population – must fish further outside the lagoon, which can be more dangerous.

The Special Rapporteur on water and sanitation has noted that, while policies such as the National Water Resources Policy of 2008 and the National Sanitation Policy of 2010, respectively "cover many of the normative contents of the human rights to water and sanitation and some human rights principles, such as participation... they do not include a specific reference to human rights" (Human Rights Council 2013: para 12). She further notes that the National Sanitation Implementation Plan (a ten-year plan based on the National Sanitation Policy) falls short of international standards by not "adopting and implementing a national water and sanitation strategy and plan of action covering the entire population and all the dimensions of the human rights to water and sanitation ... on the basis of a participatory and transparent process" (Human Rights Council 2013: para 13). Lastly

<sup>30</sup> According to the Magistrates' Courts Act, this can include "all causes and matters concerning land, land boundaries and transfers of title to native land registered in the Register of Native Lands and any disputes concerning the possession and utilisation of native land, and includes causes and matters concerning native wills, native adoption, native customary fishing rights, native leases and native paternity, and all matters referred to in Part VI and sections 35 and 36 of the Native Lands Ordinance; Cap. 61" (Magistrates' Courts Act: Article 2).

<sup>31</sup> The Laws of Kiribati Act of 1989 stipulate that "customary law shall be recognised and enforced by, and may be pleaded in, all courts except so far as in a particular case or in a particular context its recognition or enforcement would result, in the opinion of the court, in injustice or would not be in the public interest" (Laws of Kiribati Act: Schedule 1(2)).

<sup>32</sup> *People's Union for Civil Liberties v. Union of India & Ors* [2001] 1 SCC 39 (Supreme Court of India, Writ petition (Civil) No.196).

<sup>33</sup> The Human Rights Committee recognises "The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity" including eliminating malnutrition (Human Rights Committee 2019: para 26).



the Special Rapporteur observed that, since island councils play a key role in the implementation of rural water and sanitation schemes, the government needs to allocate “clear responsibilities in the water and sanitation sectors at the national level, including the establishment of an independent regulator” (Human Rights Council 2013: para 14).

Environmental legislation would benefit from explicit reference to key human rights principles, such as transparency, participation and access to justice. While the Environment Act of 1999 calls on the minister responsible to “promote the participation of the community in environmental decision-making” (Environment Act 1999: Article 6(1)(g)), the language used is promotional rather than suggesting legal responsibilities. Similarly, it stipulates that the minister must “develop a comprehensive community participation policy concerning all aspects of the Division’s work, and facilitate the implementation of such policy” (Environment Act 1999: Article 7(g)). It should also stipulate the need to take core human rights principles into account, including protection from reprisals and access to information, as well as guarantee access to remedy for breaches of environmental-related human rights, e.g. when the government has failed in its obligations to ensure a healthy environment for coastal fishers. Feasibly, there could be possibilities to seek remedy for policies under the Constitution’s recognition of the right to life.

**Environmental impact assessment:** As part of its human rights obligations, especially the obligation to take reasonable measures to prevent violations, states should “require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights” including the rights to life, culture, adequate standard of living (Human Rights Council 2018a).

In Kiribati, there are several pieces of legislation that provide for an EIA to be conducted. Under the Environment Act of 1999, any development proposal must be accompanied by either: (i) an initial environment evaluation report; or (ii) an environmental impact statement, in a form as prescribed in accompanying regulations, although, on the advice of Cabinet, these requirements may be waived. Similarly, the issuing of licenses for prospecting and mining ventures by the Mining Development Licensing Ordinance (1978) require environmental impact assessments.

Like in other areas of the Pacific, the legislation does not require the EIAs to examine how any proposed project could impact human rights. This means that issues such as gender and women’s rights are not addressed, nor is the impact on tenure rights and cultural rights, which include indigenous communities’ right to land. There are also human rights concerns about the process. The Environmental Regulations of 2001, which detail the process regarding EIAs, should also require public participation in the drafting or consideration of the EIA, and make the EIAs public before and after approval.

### **Participation and democratic governance**

The right to participation is not included in the Constitution nor in statutory legislation. While the Fisheries Act protects customary practices in managing their resources (discussed more below), this could be further strengthened by explicit recognition of the right to participate. Similarly, while the Foreshore and Land Reclamation Ordinance (revised edition of 1977) allows for consultation with adjacent landowners that are likely to be affected by any change (Article 3), this falls short of ensuring the right to participation for all. Similarly, in practice, projects may involve the participation of women and youth but, unless there is an explicit right to participation, any exclusion cannot be legally challenged and often only the village elders are consulted. Incorporating the right to participation, including FPIC of customary rights holders, in both the Constitution and statutory legislation, would give every individual a legally enforceable right to participate in decision-making. This would be crucial in ensuring that women and other communities are not bypassed in customary processes.

As in many other countries in the Pacific region, indigenous communities can actively participate in the management of their own resources. The afore-mentioned Fisheries (Conservation and Management of Coastal Marine Resources) Regulations “enable the inclusivity of the community in fisheries management through recognising and enforcing community-based fisheries management plans” (Regulation 2 (3)). The regulations define community-based fisheries management as a “co-management system, under which the community takes a leading role in managing fisheries in adjacent coastal areas in partnership with or with support from a promoting agency” (Regulation 3). The regulations specify that the coastal community must be involved in the preparation and endorsement of the management plan (Regulation 4) but it would be useful if there could be further provisions on how the management should practically take place. For instance, can communities that are not adjacent to coastal resources yet still depend on them for livelihoods have any input into any management decisions? New migrants to the area may also not be able to participate in discussion around development or management and will have to comply with the decisions made by the community.

The regulations would also benefit from explicit provisions governing women’s participation. This is important to address, as often women are still typically unable to participate in the island councils. In Kiribati, community decision-making takes place in the *maneaba*, and women, in accordance with the social customs, sit behind the men and listen to what they decide. Many say that women speaking in the *maneaba* is not part of Kiribati culture (Barclay et al. 2019).



The legislation governing this process would thus benefit from requiring such resources to be managed in conformity with human rights standards and principles, especially with regard to non-discrimination and equality, participation, transparency and access to information. In addition to ensuring the right to participation of all, the management of coastal resources should recognise and respect the right to food of all communities and ensure that any measure taken does not impede access to livelihoods.

The full enjoyment of the right to participation, which includes the enjoyment of civil and political rights and access to information, is also dependent on an enabling environment. In fact, this becomes especially important when there is no right to participate in formal legislation. While the Constitution provides for freedom of speech and press, there have been some concerns about the lack of local independent media and transparency in the registration process for media organisations.<sup>34</sup> Most locally-based news media are owned and operated either by the government's Broadcasting and Publications Authority or a media company owned by a member of parliament (United States Department of State 2013). There is also limited access to information with no legislation specifically allowing access to government information (United States Department of State 2013). Moreover, although there is public access to the internet in South Tarawa, access is limited.



Photo: Tarawa, Céline Muron, 2020, SPC



## Rights to and at work

Under human rights law, everyone is entitled to the right to and rights at work which includes safe and healthy working conditions. This includes those working in the informal sector, such as most coastal fishers. However, despite Kiribati joining the ILO and ratifying core ILO conventions, such rights are not included in its Constitution. In 2012, AusAID noted that the government had yet to introduce health and safety legislation and comprehensively review labour legislation to identify the normative gaps and areas of priority (AusAID 2012a).

Since then, several pieces of legislation have been adopted but the Fisheries Act of 2010, (amended in 2015 and 2017) addresses only the seaworthiness of fishing vessels in excess of seven metres, and therefore could exclude many coastal fishers. The Maritime Act of 2017 provides for the conditions under which vessels should be registered and considered seaworthy. However, there are exceptions to certain parts of the act, especially if vessels are less than seven metres in length, a pleasure craft, or of a traditional build, which could exclude coastal fishers. Moreover, specific references to 'fishing vessel' means a vessel used or adapted for use for fishing

<sup>34</sup> The law requires the registration of newspapers.

commercially, and again can exclude small-scale fishers operating on the coast. Importantly, the Maritime Act 2017 empowers the minister responsible to adopt small craft regulations, in particular in relation to “commercial vessels less than 10 meters in length” (section 214). The National Fisheries Policy 2013–2025 would also benefit from more references to safety, and from clarifying the necessary legislation that needs to be adopted to address the specific situation of coastal fishers.

With regard to adequate livelihoods, under IHRL, states should ensure access to the means of transportation and the processing, drying and storage facilities necessary for selling their products on local, national and regional markets at prices that guarantee them a decent income and livelihood (UNDROP). In Kiribati, however, like other Pacific countries, coastal fishers often receive low prices for their stock, due partly to the difficulty in accessing markets and lack of appropriate infrastructure.<sup>35</sup> This particularly affects women, since they do most of the post-harvest, marketing and selling work. While various policies have goals relating to food security and sustainable livelihoods,<sup>36</sup> Kiribati workers would be stronger if they had legal guarantees, such as the right to an adequate standard of living in the Constitution and statutory legislation. This would help ensure access to justice for any failure to deliver on policy commitments.

Under IHRL, everyone has the right to social security that includes social assistance. In Kiribati, the social security system contains some cash transfer programmes, such as the Elderly Fund and the Copra Fund Subsidy, but no core social protection programmes are targeted at the very poor or destitute. The Elderly Fund is a universal non-contributory pension for older people with a high coverage rate. It is, however “not underpinned by legislation” which means it can be viewed as an act of charity and can be changed by regime changes (AusAID 2012a: 40). It also means there are no rules governing its implementation, such as ensuring that it is indexed to inflation rates so that it remains adequate, as required by IHRL. The Copra Fund Subsidy is the “largest formal social protection mechanism”. It aims to help maintain the production level and discourages migration. It also guarantees a minimum purchase price from the government. Receiving this is thus conditional on producing copra.



Photo: Nonouti Island, William Sokimi, 2010, SPC

There is also a social insurance model, regulated by the Provident Fund Ordinance of 1977, which provides for a social insurance system through a provident fund system. While voluntary coverage is available, coastal fishers are unlikely to be able to afford this, given their limited possibilities for income and the fact that most operate on a subsistence basis or selling at local markets. Women coastal fishers are particularly unlikely to be able to afford social insurance, since they are more involved with subsistence fishing within the household. They also often have limited access to information and can live in isolated areas.

### 5.2.5 Looking forward: conclusion and recommendations

The Government of Kiribati faces significant challenges in ensuring the human rights of coastal fishers, given the increasing impacts of climate change, declining access to land, and people moving from their traditional areas to urban areas for work. This is only set to increase over the next decades.

The government has already taken important steps in ratifying several human rights treaties and including many human rights in its Constitution but some challenges remain. Currently, the plural legal system that protects customary practices unless they are considered to be unjust<sup>37</sup>, accompanied by only limited recognition of ESCR, can leave coastal fishers vulnerable to violations of the right to an adequate standard of living without access to remedy. These can include changes to the foreshore that undermines their ability to fish. There may also be only limited access to resources for new migrants who are not indigenous to the area. It can also be difficult for women to challenge decisions (made by men) that could prevent them from accessing the areas in which they fish, such as the reef. These normative gaps can be addressed by widening the constitution to include economic and social rights.

In the meantime, further clarification of the right to life and the extent to which it includes elements of the right to food could improve protection. The Constitution could also be amended to specify that customary practices cannot jeopardise human rights. Importantly, the judiciary could also elaborate further what is meant by injustice as included in the Laws of Kiribati Act of 1989, especially in relation to all human rights. Greater recognition of economic and social rights in the Constitution and inclusion in statutory legislation and subsidiary regulations can also help protect the environment and coastal fishers' livelihoods from the actions of third parties.

As elsewhere in the Pacific, Kiribati is building strong mechanisms to allow for the participatory management of fishery resources. This is key to helping address threats, such as overfishing in coastal regions, but more analysis is needed to see if this participatory management fully complies with the Declaration on Indigenous People. Kiribati would also very much benefit from clear recognition of FPIC and the right to participation, and further articulation of what this means in practice, especially regarding women, new migrants to the area, and neighbouring communities, who may all depend on the resources for their livelihoods. The OHCHR Guidelines on the right to participation could be particularly useful in this regard.

Based on the above analysis of the current framework, the following **legal and policy recommendations** are made for Kiribati.

#### Short-term policy and programme actions

1. Document how the permit/license process works for people, especially women outside the *kainga/utu* and needing to fish in traditional waters, and how it can affect their access to livelihoods (right to food).
2. Train the judiciary on human rights law, in particular economic and social rights and their relationship with the right to life.
3. Ask academics and legal practitioners to clarify how the right to life under the Constitution can be used to protect economic and social rights, especially the rights to adequate food and a healthy environment.
4. Encourage the judiciary to elaborate further on what is meant by injustice as in the Laws of Kiribati Act of 1989 (Schedule 1, Article 2), and its relationship with all human rights.
5. Have an expert review of labour legislation to decide on the normative gaps and areas of priority as they affect coastal fishers (AusAid 2012a). This should include any positive measures to help coastal fishers comply with health and safety standards.

<sup>35</sup> A key challenge to the expansion of small-scale commercial fisheries is the lack of commercially viable and efficient means of transporting fish from outer islands to the strong markets in South Tarawa. See Ministry of Fisheries and Marine Resources Development Government of Kiribati Kiribati National Fisheries Policy 2013-2025. Available at: [http://www.spc.int/CoastalFisheries/CFM/Document/Get/2b64b339-d21a-4a22-b809-8a4ec2f9900f/KI\\_National%20Fisheries%20Policy%202013%20-%202025.pdf](http://www.spc.int/CoastalFisheries/CFM/Document/Get/2b64b339-d21a-4a22-b809-8a4ec2f9900f/KI_National%20Fisheries%20Policy%202013%20-%202025.pdf)

<sup>36</sup> For instance, Kiribati's National Fisheries Policy includes goals such as "[p]rotect[ing] and secur[ing] food security and sustainable livelihoods for I-Kiribati" (Fisheries Policy: 15)

<sup>37</sup> Laws of Kiribati Act of 1989 stipulates that "[c]ustomary law shall be recognised and enforced by, and may be pleaded in, all courts except so far as in a particular case or in a particular context its recognition or enforcement would result, in the opinion of the court, in injustice or would not be in the public interest" (Laws of Kiribati Act: Schedule 1 on the Determination and Recognition of Customary Law, Article 2).



### **Medium-term legislative changes**

Amend appropriate statutory legislation and subsidiary regulations to explicitly include and regulate specific human rights, including access to remedy. In particular, amend the following legislation.

6. The Foreshore and Land Reclamation Act to include the right to FPIC for indigenous people and the right to participation of all who depend on access for their livelihood, regardless of whether they are customary rights holders, as well as ensure access to remedy and compensation for all.
7. The Fisheries Act to include the right to an adequate standard of living for all and ensure the right to remedy for any denial of or threat to access to livelihoods, regardless of whether they are customary rights holders.
8. The Environment Act of 1999 to include human rights language recognising the right to a healthy environment, the right to participation and access to remedy.
9. The Environmental Regulations of 2001 to ensure that impact assessments also examine and identify the potential impact on human rights, including gender. The regulations should also require public participation in the drafting or consideration of the EIA and make the EIAs public before and after approval.
10. Small craft regulations to be adopted under the Maritime Act 2017 to specifically regulate small boat safety at sea. Licensing, registration, and renewal should be free or at least affordable, and include assistance with purchasing the necessary equipment to effectively encourage compliance.

### **Long-term constitutional changes**

11. Amend the Constitution to: (i) include the right to an adequate standard of living and a healthy environment; the right to education, health, food, social security and housing; and the right to participation (Human Rights Council 2013); (ii) require all customary practices to comply with IHRL; and (iii) “incorporate ... a comprehensive definition of discrimination against women and girls in line with Article 1 of the Convention, encompassing direct and indirect discrimination in both the public and private spheres and recognizing intersecting forms of discrimination” (CEDAW Committee 2020: para 14).



Photo: Ariella D'Andrea, 2018, SPC



## 5.3 SAMOA

In Samoa, most of the population is Samoan (92 per cent) and live on narrow coastal plains, relying on subsistence agriculture and coastal fishing (including mangroves) for livelihoods (AusAID 2012b). Seafood is estimated to account for 77 per cent of the food source of villages on Upolu, and 80 per cent of families on Savai'i consider themselves subsistence fishers (Techera 2008). Women and children collect many species of shellfish, *bêche-de-mer*, urchins, octopus, crabs and seaweed from the shore area at low tide (Lambeth et al. 2002). They may also dive from canoes for urchins, *bêche-de-mer* and seaweed. Women's fishing techniques tend to be more low-tech than men's and involve only basic tools and equipment (SPC 2018b).

Such communities are becoming increasingly left behind as Samoa transitions to a monetised economy, and they have limited or no access to markets for their crops (AusAID 2012b). This is increasing women's vulnerability, as they tend to be involved in subsistence agriculture and have therefore less access to cash (AusAID 2012b). Coastal fishers also have restricted access to government services such as education and health (AusAID 2012b). The Samoans are also facing threats to their livelihoods through, *inter alia*, increasing pressure to open up coastal areas to tourism, industry and resource extraction.

### 5.3.1 International human rights obligations

Samoa has ratified or acceded to a number of human rights treaties, including the CAT (2019), ICCPR (2008), CED (2012), the CRC (1994) and its optional protocols, the CRPD (2016) and the CEDAW (1992). While it is still to ratify ICESCR, many of the treaties that it has ratified include economic and social rights.

### 5.3.2 Human rights and the legal and policy framework

To comply with its human rights obligations, Samoa must establish a legal framework that guarantees and protects human rights. Its Constitution of 1960, which is recognised as the supreme law of Samoa,<sup>38</sup> provides for the protection of fundamental rights but only explicitly recognises civil and political rights: as the right to life; the right to personal liberty; freedom from inhuman treatment; freedom from forced labour; the right to a fair trial; freedom of religion; freedom of speech, assembly, association, movement and residence; and the right to property, which requires the government to provide just compensation for compulsory acquisition of land (Art. 14).

The Constitution also specifies that all persons are equal before the law and lists sex as one of the prohibited grounds of discrimination. Opening the door for affirmative action, it also stipulates that “nothing in this Article shall ... [p]revent the making of any provision for the protection or advancement of women or children or of any socially or educationally retarded class of persons” (Constitution: Article 15(3)). Samoa has introduced reserved seats for women in Parliament in line with Article 4 of CEDAW.

Like many other Pacific states, Samoa has a pluralistic legal system with the Constitution recognising custom as a source of law among others (Constitution: Articles 100, 111(1) and 114). Moreover, in many cases custom has been formally codified in primary legislation, such as in Samoa's Village *Fono* Act of 1990, which gives village councils authority over village law and order, land disputes and health and social issues. Village council by-laws,

<sup>38</sup> The Constitution has been amended on several occasions: in 1963, 1965, 1969 and 1975.

however, must not breach rights contained in the Constitution. This includes non-discrimination on the basis of sex. “There have been cases in which such by-laws have been brought to court for violating constitutional guarantees” (Human Rights Council 2018b: para 14). While these cases are predominantly related to “the penalty of banishment and establishment of new churches in the villages and conversions to other denominations outside the village”, the Working Group “is encouraged that constitutional review of village council by-laws is possible” and recommended that the “Constitutional guarantees of non-discrimination on the grounds of sex should guide the review of village council by-laws and other policies by local and national government” (Human Rights Council 2018b: para 14).

### 5.3.3 Overview of fisheries legislation

The main act regulating oceanic and coastal fisheries is the Fisheries Management Act of 2016. This act repeals the Fisheries Act 1988 and regulates and controls the conservation, management or development of fisheries and the licensing of Samoan fishing vessels and foreign fishing vessels. This includes protecting against pollution and waste originating from fisheries operations (SPREP and EDO NSW 2018a). Part 8 of the act enables a village *fono* to make village fishery by-laws “for the purpose of conserving, managing, developing and sustaining harvest of fish in the village fisheries management area” (Fisheries Management Act: Article 86).

The Fisheries Management Act of 2016 also provides for the community-based management of fisheries and aquaculture. Under Article 19, “[t]he Chief Executive Officer (CEO) may... declare and mark an area as a village fisheries management area”, in possible consultation with “the Village *Fono* of the area and of any neighbouring village”. The act also allows the minister responsible to “declare an area to be a designated fishery, if the minister considers that: (a) it is in the national interest; and (b) management measures are needed to ensure sustainable use of the fishery resource” (Fisheries Management Act: Article 20).

While the Fisheries Management Act 2016 underscores the importance of taking a transparent and accountable approach to the conservation of Samoan fisheries, the obligations to protect and preserve the marine environment and improve the welfare and livelihood of fishers and the fishing community, it does not explicitly use human rights language. The act defines “sustainable use” as “conserving, using, enhancing, or developing marine resources to enable persons to provide for their social, economic, or cultural wellbeing” and “avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment” (Fisheries Management Act: Article 2). This act could be further strengthened by including guarantees of remedies for those who have had their means of subsistence and or identity undermined.



Photo: Johann Bell, 2013, SPC



### 5.3.4 Specific issues

#### Non-discrimination and gender equality

In Samoa, discrimination against women is common, particularly at the community level. For instance, social norms can limit the extent to which women can engage in decision-making. Historically, only men held the position of *aiga* (head of the core social unit) or *matai* (head of the extended family) and could thus engage in village councils (Crichton 2018) but this is slowly evolving and, reportedly, women are currently sitting on some village councils.

The Samoan Constitution specifies that all persons are equal before the law and lists sex as one of the prohibited grounds of discrimination. CEDAW can be applied in courts; they “recognise and acknowledge CEDAW as legally binding” (Samoa Umbrella Organisation for NGOs 2012: 4). While this “allows the state to remove discriminatory practices including those of customs and traditions”, many women may not be able to challenge such customary practices due to a lack of time and resources (Crichton 2018: 2).

The Constitution also allows for affirmative action for women. It states that “nothing in this Article shall ... [p]revent the making of any provision for the protection or advancement of women or children or of any socially or educationally retarded class of persons” (Constitution: Article 15(3)). According to the UN Working Group on the issue of discrimination against women in law and in practice, “this important provision is formulated in such a way that women are listed with children and ‘retarded ... persons’ which may be “reinforcing the negative stereotypical image of women and undermining their equal status with men” (Human Rights Council 2018b: para 12). Moreover, there is no explicit provision recognising equality of men and women.

At the policy level, SPC has found that the Ministry of Women Community and Social Development does not have the staff or technical capacity to engage effectively in technical working groups, and that therefore “there is currently little gender analysis being done in relation to the sector plan” aimed at increasing women’s capacity, and access to opportunities (SPC 2018b: 2).

#### Security of tenure, access to natural resources and the right to food

Under IHRL, people must have secure access to natural resources if they depend on them for their livelihoods. Like in all Pacific communities, coastal communities in Samoa depend on access to land and marine resources for subsistence.

According to the Constitution, land in Samoa is either customary, freehold or public. Eighty-one per cent of land is customary, i.e. land held in accordance with Samoan custom and usage and with the law relating to Samoan custom and usage (Fana’afi 1986). However, this does not extend to the foreshore. Under the Constitution, all land lying below the line of high-water mark shall be public land,<sup>39</sup> although most villages retain the right to use marine areas bordering the village land, regardless of the official policy (Cambers et al. 2003). Traditionally, under customary law, coastal waters were included as part of village property and managed by village councils (*fono*) composed of the traditional leaders (*matai*), who are usually men (Techera 2008). People who have migrated to such villages from elsewhere cannot, therefore, be assumed to have secure access and and/or control over their local resources, despite depending on them for livelihoods (Techera 2008).

Under the Fisheries Management Act, a disadvantaged village community<sup>40</sup> may access fishing areas of a coastal village community, claiming ownership of the fisheries management area, but this depends on traditional access rights, the needs of the disadvantaged village community, the relevant national coastal fisheries management and development plan, and the relevant national aquaculture plan. While the Fisheries Management Act stipulates that the needs of the disadvantaged village community must be taken into account when determining access, it should go further and ensure secure tenure under the right to an adequate standard of living should they depend on this access for livelihoods. There should also be access to remedy if they are denied such access.

Customary land can be alienated either by compulsory acquisition under the Taking of Lands Act of 1964, or by granting a lease or a licence under the Alienation of Customary Land Act of 1965, provided it is “in accordance with Samoan custom and usage” and with the desires and interests of the beneficial owners of the land and the public interest.<sup>41</sup> As public land, the foreshore has even less protection and can also be leased to foreign states or organisations under the Land for Foreign Purposes Act of 1993 for activities such as sand mining, which makes fisheries management very difficult. There is no consultation with the customary owners. There is also no provision recognising that custom and usage must be taken into account: This falls short of the requirement of FPIC (Human Rights Council 2016a). There is also no provision regulating the payment of compensation to those affected.

<sup>39</sup> In this regard, the term “high-water mark” means the line of median high tide between the spring and neap tides.

<sup>40</sup> A disadvantaged village community means a community that must cross the land of a coastal village community in order to access the coastal waters to fish or carry out aquaculture (Fisheries Management Act).

<sup>41</sup> Part 3, para 4 of the Alienation of Customary Land Act of 1965, Available at: <https://www.mnr.gov.ws/wp-content/uploads/2017/08/Alienation-of-Customary-Land-Act-1965.pdf>



While coastal fishers are dependent on access to land, including the foreshore, for their livelihoods and cultural identity, there are limited possibilities of justice when such access is eroded and their human rights are threatened or violated. Following the adoption of the Land and Titles Act of 1981, all customary land disputes and claims of authority over land are dealt with by the Land and Titles Court, based on custom and usage. Decisions of the *fono* (village council) may be appealed to the Land and Titles Court. While decisions of the Land and Titles Court are not normally reviewable by other courts, the Supreme Court may review decisions if there is an alleged infringement of the fundamental rights guaranteed under the Constitution. This includes only civil and political rights, and it is therefore unlikely that the Constitutional Court could challenge any customary practices preventing people from being able to access the resources they need. Nonetheless, since the Constitution prohibits discrimination on the basis of sex, in theory the Constitutional Court could challenge discriminatory practices by the *fono*, although, as noted earlier, this takes time and resources, which women may lack. It is also interesting to consider whether possible violations of the right to food could be considered under the Constitution's protection of the right to life.

### **Right to a healthy and safe environment**

The enjoyment of many human rights rests on a healthy, safe and clean environment, especially the rights to an adequate standard of living and health. State obligations therefore include “preserv[ing] the long-term (environmental) sustainability of fishing, including by reducing overfishing and conserving fish habitats, while concurrently improving the incomes of small-scale fishing communities” (UNGA 2012). Moreover, any actions taken must be done in full compliance with IHRL, including the core human rights principles of non-discrimination and equality, participation, transparency, and accountability.

In Samoa, “[m]arine biodiversity is essential for indigenous Samoans, who are heavily reliant on harvests from the sea for sustenance” (Techera 2008). While the Constitution does not refer to the environment, there are a number of acts that seek to protect it. The Land Surveys and Environment Act of 1989 ensures and promotes the conservation and protection of the natural resources and environment; prevents, controls and corrects pollution of air, water (including inland and coastal waters) and land resources and promotes litter control. It also provides for the carrying out of relevant investigations and research; promotes public awareness of the environment and conservation; protects the foreshore and coastal waters by prohibiting the removal of material from those areas; and criminalises the pollution of seas and inland waters (SPREP and EDO NSW 2018a). The Marine Pollution Prevention Act of 2008 also seeks to prevent the pollution of the marine environments (SPREP and EDO NSW 2018a).

Additionally, the Fisheries Management Act of 2016 provides for the conservation of fisheries, primarily through licensing fishing vessels and protecting against pollution and waste originating from fisheries operations. Given the threats to the environment from tourism, the Tourism Development Act of 2012 stipulates that the “environmental impacts from tourism developments are to be minimised, and due regulatory processes are to be applied to ensure the protection and conservation of Samoa’s biodiversity, water resources and terrestrial and marine environments”.

While this legislation appears to be extensive, it includes no reference to human rights standards or principles, including the protection of environmental defenders, and access to information and remedy. For instance, while the Marine Pollution Prevention Act of 2008 includes a right to compensation, this is only for persons “who ha(ve) incurred expense, loss or damage” as a result of state officials “taking [...] any action or measure under section 37” of the act in the exercise of their powers in relation to marine casualties (Section 38). The act would therefore benefit from including provisions requiring compensation to be paid to those who have had their livelihoods or health affected by such pollution and government’s failure to meet its obligations to prevent such pollution. Similarly, while the Tourism Development Act of 2012 specifies that due regulatory processes are to be applied, these are not further elaborated and there is no provision for remedying any threat to the environment and the subsequent threat to coastal fishers’ livelihoods posed by tourism.

Under Article 6 of the National Parks and Reserves Act of 1974, the government can also “declare any public land, or any area of the territorial sea, that is not set aside for any other public purpose, to be a nature reserve for the protection, conservation, and management of flora, fauna, or aquatic life, or the habitat of fauna or aquatic life,” and should “not affect the customary fishing rights of any person or persons in respect of that area”. It is unclear, however, whether Samoans who have migrated to this area will have their access to these resources respected. As noted earlier, there has been significant migration in Samoa away from villages of origin due to industrialisation and climate change (Techera 2008). By recognising ESCR in the future, the Constitution could help challenge customary practices that jeopardise the right to an adequate standard of living of communities that are not indigenous to a specific area.

**Environmental impact assessments:** As part of its human rights obligations, especially the obligation to take reasonable measures to prevent violations, states should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights (Human Rights Council 2018a).

As elsewhere in the region, in Samoa this is limited to environmental impact assessments that do not refer to human rights. For instance, under the Land, Survey and Environment Act of 1989, there must be regulations “providing for the undertaking of environmental impact assessment as a prerequisite for development proposals”.



Photo: Johann Bell, 2013, SPC



## Participation and democratic governance

Despite participation being a human right and principle, there is no mention of the right to participation in the Constitution. There is also no reference to indigenous peoples' right to FPIC. Moreover, the right to participation is not protected by primary legislation, such as The Land for Foreign Purposes Act of 1993. Organisations have noted that the indigenous communities are not participating in the development of policies on climate change adaptation and mitigation, in accordance with the principles of FPIC (Human Rights Council 2016a).

The Fishery Management Act, however, allows community participation in the management of fisheries resources at the local level by *fono*, or village councils, using traditional practices, such as limits on harvesting to protect an essential natural resource (Techera 2008), as well as non-traditional measures. Each participating village develops its own strategy (fisheries management plan) to manage its marine resources and its environment in consultation with the Fisheries Division under the Samoa Community-based Fisheries Management Plan (CBFMP). The CBFMP examines the various communal issues listed in each village's fisheries management plan and assists communities, especially in controlling fishing activities by outside villagers (Gillett and Tauati 2018).

The *fono* can also make village fishery by-laws that are “consistent with this Act, for the purpose of conserving, protecting, managing, developing and sustaining harvest of fish in the village fisheries management area” (Article 86), which must be monitored by the village fisheries management committee (Article 87). Village by-laws must go through the Attorney General's office before they are approved. According to personal communications, no new by-laws have been adopted since 2013.

While this legislation provides a solid basis for the CBFMP, without further regulations these participatory mechanisms risk being governed only by customary practices that can breach human rights standards. For instance, only titled people may sit on *fono* (village councils), which are predominantly men (SPC 2018b) as women rarely hold *matai* titles (SPC 2018b). The CEDAW Committee (2018c) has explicitly expressed concern that some villages still prohibit women from holding the *matai* (chief) title, and also restrict the participation of women in village *fono*. Moreover, indigenous women marrying outside their home village (*nofotane*) are excluded completely in decision-making within their homes and communities (UN Women 2017). While welcoming the various plans in place “promoting the participation of women in village decision-making bodies and village development committees,” CEDAW also called for legislative reform to allow women with or without *matai* titles to stand for election (CEDAW Committee 2018c). It also urged Samoa to ensure that women's committees have equal decision-making powers and responsibilities as those of men at all village *fono* (CEDAW Committee 2018c).

There are also specific rules regarding the participation of disadvantaged village communities.<sup>42</sup> They have the right to participate on an equal basis only if they have traditional links and affinity; familial or clan relationship; and/or own land adjacent to the coastal waters. This means that, even if they rely on accessing these areas for livelihoods, they may not be able to participate in their management.

The CBFMP would benefit from legislation, ensuring that customary management takes a human rights approach and is required to comply with relevant standards and principles, such as gender equality and non-discrimination, and the right of everyone to an adequate standard of living.

## Rights to and at work

Under the UNDROP, “States shall create an enabling environment with opportunities for work for peasants and other people working in rural areas and their families that provide remuneration allowing for an adequate standard of living”. They should also, with the participation of peasants: (i) ensure safe and healthy working conditions; (ii) implement “measures to prevent, reduce and control hazards and risks”; (iii) ensure access to adequate and appropriate protective clothing and equipment; and (iv) ensure access to adequate information and training on occupational safety.

In Samoa, like elsewhere in the Pacific, coastal fishers work mostly for themselves in the unregulated informal sector. While there is no right to decent work in the Constitution, there are several pieces of statutory and secondary legislation that address sea safety for coastal fishers, such as The Fisheries Amendment Act of 1999 and its subsidiary legislation. The Shipping (Small Vessels) Regulations of 1999 “apply to all vessels in Samoa waters that are less than 15 metres in length” (Gillett 2003: para 7.5). The FAO reports that, under these regulations, “the vessels covered must have safety and seaworthiness certificates and be registered with the Ministry of Agriculture, Forestry, Fisheries and Meteorology” (Gillett 2003: para 7.5). It would be worth investigating to what extent the Government is supporting local fishers to comply with these regulations. Given the limited resources of many coastal fishers, such regulation would have to be accompanied by assistance measures.

<sup>42</sup> Disadvantaged villages are those that are landlocked and do not have direct access to the ocean.

With regard to the role of children and their working conditions in coastal fishing, there is limited information. In 2016, the CRC Committee welcomed the establishment of the working group on child labour, the adoption of relevant legislation, such as the Education Act of 2009 and the Labour and Employment Relations Act of 2013, which prohibits children under the age of 15 from being involved in labour, except for light work. The CRC Committee also noted, however, that the government had not yet adopted a hazardous child labour list, and that school absenteeism is still a problem (CRC Committee 2016).

In terms of ensuring adequate livelihoods, under the UNDROP, states should promote access to markets and ensure appropriate infrastructure to support peasants' means of livelihoods. As in other Pacific countries, increasing monetisation of the economy means that coastal fishers are under pressure to sell some of their catch, but due to their limited access to markets they often only receive low prices. In Samoa, while the goal of Samoa's Coastal Fisheries Management and Development Plan of 2013–2016 was "to ensure sustainable food security and livelihoods through sustainable utilisation, development and management of coastal fisheries in Samoa," it would also benefit from including specific initiatives in line with the UNDROP. This could include taking "appropriate measures to strengthen and support local, national and regional markets and ensure that peasants can equitably access these markets to sell their products at prices that allow them and their families to attain an adequate standard of living" (UNDROP: Article 16). This includes ensuring proper means of transportation and facilities for processing, drying and storage. Moreover, the inclusion of the right to an adequate standard of living in the Constitution and statutory legislation, such as the Fisheries Management Act of 2016, would provide a clear legal underpinning for such policy initiatives, and guarantee access to justice for any failures to fulfil such rights.

Under human rights law, everyone has the right to receive social security, including social assistance if in need. In Samoa, the Constitution does not include this right, and formal social security is provided only through contributory systems (SSA 2012). The National Provident Fund Act of 1972 regulates social protection in Samoa and provides for a provident fund programme (social insurance model). While self-employed people can join, some subsistence coastal fishers in Samoa may be unable to afford contributions. The law also provides for a universal old-age pension system financed by public funds (AusAID 2012b). There is no assistance for working age coastal fishers, even though some could be living below the poverty line.

### 5.3.5 Looking forward: conclusions and recommendations

Like many other countries in the Pacific, Samoa has ratified several human rights treaties and its constitution protects fundamental rights, including the right to life, personal liberty and fair trial; freedom from inhuman treatment and freedom of religion; and freedom of speech, assembly, association, movement and residence. It also protects the right to property, which requires the government to provide just compensation for compulsory acquisition of land (Constitution: Article 14). The Constitution also specifies that all persons are equal before the law (Constitution: Article 15), and lists sex as one of the prohibited grounds of discrimination. While recognising custom as a source of law, which in many cases has been codified in national law and village by-laws, it is clear that custom must not breach rights contained in the Constitution, which includes non-discrimination on the basis of sex. Moreover, "there have been cases in which such by-laws have been brought to court for violating constitutional guarantees" (Human Rights Council 2018b: para 14). Moreover, the Fisheries Act allows for strong participation by the local community in the management of fisheries resources, even without a right to participation in the Constitution or statutory legislation.

There are still, however, many challenges to the enjoyment of human rights. The lack of recognition of all rights, including economic and social rights and the right to participation, means that cultural practices and even village by-laws can jeopardise these rights without being challenged at the Supreme Court. This could include, for instance, disadvantaged communities being marginalised in decision-making processes. Although there is some potential for the court to consider discriminatory practices by the *fono*, as noted earlier, this takes time and resources, which women may lack. Other challenges include better human rights safeguards protecting communities from the acquisition of the resources they depend on for their livelihoods. Again, this would be helped by explicit recognition of ESCR and the right to participation. In the meantime, it would be interesting to examine whether possible violations of economic and social rights could be considered under the Constitution's protection of the right to life.

It is clear that Samoa is making progress, especially regarding non-discrimination and the participatory management of resources, but this needs to be accompanied by clear articulation of all human rights in the Constitution and statutory legislation to ensure that the individual rights of women, disadvantaged communities and others are to be fully protected and guaranteed.



Based on the above analysis of the current framework, the following **legal and policy recommendations** are made for Samoa.

### **Short-term policy and programme actions**

1. Train the judiciary on human rights law, in particular economic and social rights.
2. Ask academics and legal practitioners to clarify how the right to life under the Constitution can be used to protect economic and social rights, especially the rights to adequate food and a healthy environment.
3. Develop a 'hazardous child labour list' and determine the conditions under which light work may be permitted and the number of hours during which children may be employed in such work to ensure they still have access to education and play (CRC Committee 2016).
4. Research and document the barriers that prevent women from challenging customary practices that discriminate against them.
5. Examine how the government could support local fishers in ensuring safe working conditions.
6. Analyse coastal fishers' access to social security through the contributory, and other informal, systems.
7. Implement the small craft regulations adopted under the Shipping Act 1998 to ensure the safety of small boats in general, and define specific standards and measures for the safety of local fishers and vessels under the Fisheries Management Act. Licensing, registration, and renewal should be free or at least affordable, and include assistance with purchasing the necessary equipment to effectively encourage compliance.

### **Medium-term legislative changes**

Incorporate key human rights into statutory legislation, as listed below.

8. Develop a comprehensive definition of discrimination against women, covering all prohibited grounds of discrimination and encompassing direct and indirect discrimination in the public and private spheres, and incorporate it into the Constitution and other national legislation, in line with Article 1 of the Convention (CEDAW Committee 2018c).
9. Amend the Fisheries Act so that it recognises the right to an adequate standard of living and secure access to all resources for all communities, including disadvantaged villages. This should include access to remedy if they are denied such access.
10. Ensure that all legislation relating to the environment, such as the Land Surveys and Environment Act of 1989, the Marine Pollution Prevention Act of 2008 and the Tourism Development Act and their related regulations, include provisions allowing access to remedy for those who have had their livelihoods or health affected by damage to the environment.
11. Adopt regulations that require impact assessments for proposed projects to include their potential effects on the enjoyment of human rights.
12. Introduce legislation ensuring that this customary management takes a human rights approach, and is required to comply with relevant standards and principles, such as gender equality and non-discrimination, and the right of everyone to an adequate standard of living, including those living in disadvantaged villages.
13. Amend the Village *Fono* Act to require by-laws to comply with and protect all human rights under IHRL.
14. Amend section 5 of the Electoral Act 1963, to allow women with or without a *matai* title to stand for election and take legislative measures to address restrictions on female *matai* title-holders in all villages (CEDAW Committee 2018c).

## Long-term constitutional changes

15. Amend the Constitution to include all human rights, especially economic, social and cultural rights, including the right to participation and FPIC for indigenous peoples and specify that customary practices, and subsequent by-laws, must comply with all rights under IHRL.



Photo: Ariella D'Andrea, 2017, SPC





## 5.4

# SOLOMON ISLANDS

Approximately 90 per cent of the Solomon Islands population is indigenous and living in rural areas (Human Rights Council 2016b), which includes atolls, and the coastal margins of mountainous islands. According to the FAO, “they depend on the extensive coral reefs, extensive seagrass beds and mangrove forests that provide fish and other marine products, which are then either consumed directly or sold at local markets”, particularly near urban areas (FAO 2017d). According to estimates, as little as 20 per cent of the fish and invertebrate catch is being sold at cash markets. Dependence on coastal fishing for livelihoods has increased due to logging and the erosion of forests that rural indigenous people have relied on for subsistence agriculture (Human Rights Council 2016b). Fishers mainly use non-powered canoes or swim from the shore, with common fishing methods being hook/line, hand collection, various types of traditional netting, and spearing by both wading and diving (FAO 2017d).

Like other islands in the Pacific, coastal fishers are having their livelihoods threatened by rising sea levels, increased frequency of flooding, drought, typhoons, and irregular fishing patterns (Human Rights Council 2016b: para 43). This reportedly caused many Solomon Islanders to migrate from low-lying islands to larger islands, which has caused intercommunity tensions (Human Rights Council 2016b: para 43).<sup>43</sup> In Rennell Bellona Island, pollution from bauxite mining and logging, and oil spills from container ships have threatened local fishing grounds by “kill[ing] fish and invertebrates directly, ... curtail[ing] coral growth and reproduction and diminish[ing] coral and fish biodiversity” (Wilson 2019). In fact, while offering economic incentives to the state and resource-owning individuals and groups, larger-scale logging and mining “are associated with broad-scale environmental (including coastal resource) decline” (Schwarz et al. 2020).

Coastal fishers also face harsh working conditions, such as low prices for goods, limited access to markets, and no possibility for collective bargaining since trade unions exist only in the formal labour markets. To help generate alternative income sources, in 2001, the government created the Aquaculture Section. Aquaculture activities have increased over the past years and are currently prioritising seaweed and tilapia (SPC 2018c).

### 5.4.1 Human rights obligations

Solomon Islands is bound by several human rights treaties through succession.<sup>44</sup> These are the CEDAW (2002) and its optional protocol, the CERD (1982), ICESCR (1982) and the CRC (1995).

<sup>43</sup> In 1999 the situation degenerated into sporadic violence. In 2000 many fishing enterprises closed, air service to the country was suspended, institutions were plundered, and fishery exports declined substantially (FAO 2002).

<sup>44</sup> Succession occurs when one state ceases to exist or loses control over part of its territory, and another state comes into existence or assumes control over the territory lost by the first state. This often happens when a state becomes independent.



## 5.4.2 Human rights and the legal and policy framework

To meet its human rights obligations, Solomon Islands must establish a legal framework that guarantees human rights. Its Constitution recognises the rights to: life, liberty, security of the person and the protection of the law; freedom of conscience of expression and of assembly and association; and protection for the privacy of the home and other property; and from deprivation of property without compensation. While it protects customary land rights, despite having ratified the ICESCR, it does not cover economic, social and cultural rights. It also provides protection from discrimination on grounds of race, place of origin, political opinions, colour, creed and sex but has no provisions on gender equality either *de jure* (in law) or *de facto* (in practice).

The enjoyment of human rights can also be complicated by the recognition of customs as a source of law.<sup>45</sup> While the Constitution also provides that customary practice is part of the country's law as long as it is consistent with the Constitution and acts of parliament, it also recognises that parliament has a duty to "have particular regard to the customs, values and aspirations of the people of Solomon Islands". Some commentators have therefore suggested that any relevant legislation that has not taken such customs into account "might be open to challenge on the basis that it is unconstitutional" (Corrin 2011). There might be some tensions between customs and explicit values and rights recognised in the Constitution.

Following the Provincial Government Act of 1997, provincial governments can also develop ordinances that are in line with national acts on issues such as cultural and environmental matters, protecting wild creatures, coastal and lagoon shipping, agriculture and fishing, and land use. They can also codify customary law about land, and register customary rights, including customary fishing rights.

### 5.4.3 Overview of fisheries legislation

The main piece of legislation on fisheries management and conservation is the Fisheries Management Act of 2015, which *inter alia* regulates licensing and prohibits certain types of fishing. It establishes a Fisheries Advisory Council, a Fisheries Appeals Committee, a Fisheries Licensing Committee and a Fisheries Management and Development Fund. This act also specifies that each provincial government shall have primary responsibility for the management, conservation and sustainable use of fisheries resources within its provincial waters. Under this act, the minister responsible may declare a national marine protected area or a national marine managed area and authorise the establishment of aquaculture farms.

The Fisheries Management Act defines "customary fishing" as "fishing by indigenous Solomon Islanders, in waters where they are entitled by custom to fish", where "the fish are taken in a manner ... in accordance with the indigenous Solomon Islanders' customary traditions ... any boat used is small scale ... individually operated; the fish are taken primarily for household consumption, barter or customary social or ceremonial purposes; and ... not taken or used for commercial purposes" (Fisheries Management Act: Article 2). The act is implemented by two main sets of regulations, namely the Fisheries Management Regulations 2017 and the Fisheries Management (Prohibited Activities) Regulations 2018.

The Fisheries Management Act also provides the legal framework for CBFM. It specifies that "customary rights shall be recognised and access for customary fishing ensured" and that "the interests of artisanal and subsistence fishers shall be taken into account, including their participation in management of their respective fisheries" (Fisheries Management Act: Article 5). Under this act, communities can develop their own fisheries management plan "in consultation with the Director and Provincial Executive", providing it applies "to an area no greater than the extent of the customary rights of the relevant community" and is "consistent with applicable Provincial Ordinances, by-laws and fisheries management plans applicable to provincial waters" (Fisheries Management Act: Article 18). Moreover, it stipulates that fisheries management plans at the community level must be approved by both "the Provincial Executive and a management committee representing the customary rights holders" (Fisheries Management Act: Article 17). Through its management plan, a community may also establish marine protected areas and marine managed areas, consistent with applicable legislation and plans (Fisheries Management Act: Second Schedule, Articles 11 and 12).

The Protected Areas Act 2010 also allows for the registration of a protected area, providing it meets biodiversity criteria and "consent and approval are obtained from anyone having rights or interests in the area" (Protected Areas Act: Article 10(7)(c)).

There are also number of local ordinances at the provincial level governing issues relating to fisheries that were adopted pursuant to the Provincial Government Act of 1997, such as the Choiseul Province Fisheries and Marine Environment Ordinance 2011; the Guadalcanal Fisheries Ordinance 2009; the Western Province Fisheries Ordinance 2011 and the Isabel Province Resource Management and Environmental Protection Ordinance 2005. With the goals of *inter alia* preserving the fisheries and marine environment for current and future generations and allowing the local communities to manage their own fisheries and marine environment, they govern and enforce a number of different issues, including fishing permits, customary fishing areas, and creating

<sup>45</sup> As with many other countries in the Pacific, Solomon Islands is a pluralistic legal system reconciling society customs with a formal legal regime.

MPAs and marine exclusion areas. In some cases, they explicitly “establish a statutory framework to provide for the recognition and enforcement of customary fishing rights of traditional customary rights holders” (Western Province Fisheries Ordinance of 2011: Article 2b).

In general, the Fisheries Management Act and related legislation would benefit from more human rights provisions. For examples, instead of using the terminology ‘taking into account the interests’ of artisanal and subsistence fishers, it could refer to the obligation to ensure their human rights, which have been clearly articulated in international law and include the rights to an adequate standard of living, education and health, amongst others. It should also include access to remedy for any breach or violation of these rights. Moreover, while communities can be involved in drawing up their own resource management plan, and customary rights holders must approve fishery plans at the community level, there is no individual right to participation. The inclusion of such a right would help ensure the participation of women and other traditionally marginalised groups in any decision-making, and help guarantee access to a remedy for any breach.



Photo: Filip Milovac, 2020, SPC

#### 5.4.4 Specific issues

##### **Non-discrimination and gender equality**

In Solomon Islands, customary practices often discriminate against women, including in participation in decision-making and having control over resources they depend on for livelihoods. Moreover, women are overrepresented in poorly paid, non-skilled labour, largely due to their more limited levels of skills training, education and literacy (UN Women, Solomon Islands Profile). Typically, women produce the majority of subsistence foods and make up the most market vendors, while men tend to be more involved in the production, sale and marketing of more financially lucrative cash crops.

At the policy level, the government is taking steps to address these issues. The Gender Equality and Women’s Development (GEWD) Policy 2016–2020 was drafted as an “overarching policy framework for achieving gender equality and women’s human rights in Solomon Islands” (Gender Policy: vi). Its goal “is to advance gender equality in all areas of life and at all levels so that women and men in the Solomon Islands can fully enjoy their human rights to participate and access equal opportunities and development outcomes” (Gender Policy: 4) It has seven key priority areas, including gender responsive government programmes and services, improved economic status of women, and equal participation of women and men at all levels of decision-making. It specifically addresses relevant issues for female coastal fishers – including lack of access to credit, the increased likelihood of working in the informal sector for low levels of pay, marginalisation from community decision-making – and proposes concrete actions. These include examining how to “increase social and financial protection for women in the informal section”, developing a



“policy on security of land and property ownership rights for women” and “exploring and coordination of activities and projects to support women’s economic advancement” (Gender Policy: 12). It also notes the need to “review the legislative framework to ensure compliance with CEDAW and the protection of women’s human rights” (Gender Policy: 5). However, it would be strengthened by further examination of particular structural issues that are facing women and the specific legislative changes needed. Many of these that socially affect coastal fishers are discussed in more detail in the paragraphs and sections below.

The Constitution prohibits the passing of any law that discriminates on the basis of sex but there is no guarantee of substantive equality between women and men. Moreover, when passing new laws, parliament must consider customary laws (even if they discriminate against women), thus undermining the effectiveness of the non-discrimination clause. Civil society has called for the Constitution to be amended to ensure that traditional customary law does not interfere with the rights and equality of women (Human Rights Council 2016b). The CEDAW Committee has also noted with concern the “absence of specific anti-discrimination legislation aimed at recognizing all forms of discrimination against women, including multiple and intersecting discrimination” (CEDAW Committee 2014: para 10).

Despite the prohibition of discrimination, there also appears to be only limited access to justice when challenging discriminatory customary norms. For instance, in 1995 the Court of Appeal upheld that a widow’s right to inherit a share of her late husband’s assets was governed by customary law, which, because of her gender, prevented her from receiving the funds. The same court also ruled that provincial councils can consist only of men, “again overruling the provisions prohibiting discrimination on the basis of gender” (UN Women, Solomon Islands Profile). The CEDAW Committee has called on the state to establish mechanisms to promote equality and ensure remedies to victims of discrimination (CEDAW Committee 2014).

### **Security of tenure, access to natural resources and the right to food**

Under human rights law, coastal fishing communities must have secure access to land and coastal resources since they rely on them as a means of subsistence. Additionally, peasants and indigenous peoples who have a special relationship with land and natural resources have an explicit right to them.

The constitution recognises the importance of the country’s natural resources in the preamble, which states that: “The natural resources of our country are vested in the people and government of Solomon Islands” (SPREP and EDO NSW 2018b). It also stipulates that only “Solomon Islanders” may hold a perpetual interest in land, which is the nearest equivalent to freehold. Eighty-three per cent of the land in Solomon Islands is customary and, in accordance with the Land and Titles Act of 1968, is governed by customary law, which is protected under the Constitution (Corrin 2011). While this is “not a universally accepted body of rules or practice”, the land is usually held and controlled communally through clans (Corrin 2011: 227).

The situation regarding the foreshore, however, is less clear. While “coastal marine resources have been traditionally controlled by customary provisions with coral reefs and lagoons being traditionally considered an extension of the land” (Rohe et al. 2019: 93), the Land and Titles Act does not expressly state who owns the land below high water mark, and common law presumes it belongs to the Crown (Corrin 2011). The Fisheries Management Act of 2015 has clarified that customary rights include fishing rights in areas where “communities of indigenous Solomon Islanders own, use, or occupy according to current customary usage” (Fisheries Management Act: Article 2). This can include foreshore areas, “although there remains some ambiguity as to whether this also includes tenureship of reefs and the seabed” (Rohe et al. 2019: 94). Authorised by the Provincial Government Act,<sup>46</sup> some provinces have formalised customary rights with regard to fishing. For example, the Western Province Fisheries Ordinance specifies that:

[c]ustomary Fishing Rights refers to the rights that certain indigenous groups of people from the Western Province are able to establish over certain fishing areas by virtue of historical use and association with such areas of water and through acknowledgement of such rights by traditional leaders (Western Province Fisheries Act of 2011: Article 4).

While customary land practices and ownership have constitutional and statutory protection, the Constitution does allow for compulsory acquisition of customary land if this is done in the public interest and is subject to certain conditions (Corrin 2011). This is further elucidated in the Land and Titles Act of 1969 (amended in 2014), which creates a Land Board that can demonstrate interest in land, develop it and ensure “that the administration of land is carried out in a fair, transparent and equitable manner, to meet the needs and welfare of the people of Solomon Islands” (Land and Titles Act: Section 8A). If customary land is requisitioned, government land can be given as compensation subject to Cabinet approval. The act would, however, benefit from clearer legal safeguards, allowing those affected to have some choice in the land available and in ensuring security of tenure. Moreover, regarding public land such as the foreshore, it is not clear which rights if any, indigenous populations will have once it has been requisitioned,

<sup>46</sup> The Provincial Government Act, 1997 allows provincial governments to codify and amend existing customary law about land and register customary fishing rights.



Photo: Jan Van der Ploeg , 2016, SPC



beyond being granted rights of way. What happens if the project results in a loss of fish and other flora and fauna that form an important part of people's livelihoods? Will they receive any form of compensation for this loss of livelihood?

As already indicated, there are numerous areas where human rights protection could be improved. People may be excluded from the narrow definition of customary fishers and therefore denied customary fishing rights, despite their dependence on such for their livelihoods. Several commentators have observed that "... customary tenure as stipulated by the Fisheries Management Act encompasses only those activities regarded to be consistent with the emblematic image of customary fishing in Solomon Islands" and is very specific. To be regarded as customary fishing, only one small boat can be used and it must be individually operated and have only one motor. Moreover, any fish taken should primarily be for "household consumption, barter or customary social or ceremonial purposes" and not for commercial purposes (Fisheries Management Act: Article 2). However, in reality, more people are having to sell their catch due to the monetisation of the Pacific economies, and this definition now and in the future could exclude these small-scale fishers.

There is also a risk that coastal fishers can lose access to the resources they depend on for their livelihoods due to the increasing pressures on the national government to make land available for commercial and development purposes (Corrin 2011). The National Development Strategy 2016 to 2035 for instance states: "Much land is underutilised and the land tenure system is an obstacle to development. Rural and customary land need to be made available for commercial and agricultural development" (National Development Strategy: 11). It makes no reference to the need to protect human rights, including indigenous rights to land and an adequate standard of living. This could be of concern since there are only minimal human rights safeguards when land is compulsorily acquired by the government.

The government must also ensure safeguards for public land such as the foreshore. Currently, despite having strong access rights, local communities who depend on them for their livelihoods have no access to remedy, such as compensation, if the foreshore is developed. There also appears to be no requirement for consultation with the communities affected, much less FPIC, as stipulated in the Declaration on the Rights of Indigenous Peoples.

There is also limited access to justice for customary practices in relation to land and other resources that discriminate against women, despite the Constitution's prohibition of discrimination. Disputes over access to customary land in Solomon Islands are resolved through the customary system and its local courts. Such decisions can be appealed to the Customary Land Appeal Court (CLAC), which also applies customary law. While decisions can also be appealed at the High Court, this can only be regarding "state law or procedure, but not customary law" (Monson 2011: 170). In *Ambrose v Keioi* for instance, the applicants took a customary land dispute that had been resolved against the respondents by Malaita Local Court to the High Court, seeking equal rights to access customary land. The High Court had to consider whether it could legally challenge the action of the tribal elders in banishing a person and his descendants from an area. In making this decision, the High Court relied on the relevant provisions of the Land and Titles Act that prescribe the exclusive original jurisdiction of the local court regarding customary land disputes and in appeals to the CLAC. Since the High Court only has limited appellate jurisdiction for appeals from the CLAC on points of non-customary law, it determined that the issue in question was beyond its jurisdiction. The court however, recognised that customary systems need to evolve to take into account human rights considerations. It reasoned that:

the manner in which the tribal paramount body approaches the difficulties as shown by the statement of [the respondents] may be seen as a threatening breach of an International Convention against Human Rights [sic] for the statement would appear to prevent the basic right to sustenance from one's own land. Underlying custom needs to recognise these principles of rights if in fact there is a risk (Yuen 2019: 28).<sup>47</sup>

### **Right to a healthy and safe environment**

Many human rights, especially the rights to an adequate standard of living and health, require the state to guarantee a healthy, safe and sustainable environment, ensuring biodiversity and protecting it from pollution and sewage.

In Solomon Islands, the main piece of legislation is the Environment Act of 1998, which sets out a general legislative framework for the protection of the environment in Solomon Islands and provides for the establishment of the Environment and Conservation Division and the Environment Advisory Committee to advise the director. It also contains many provisions governing development control, environmental impact assessment, review and monitoring, and the control of pollution. The Fisheries Management Act of 2015 is particularly relevant for coastal fishers. It "shall ensure the long-term management, conservation, development and sustainable use of Solomon Islands fisheries and marine ecosystems for the benefit of the people of Solomon Islands" (Fisheries Management Act: Article 4). It contains a number of provisions regulating aquaculture and mariculture, protecting endangered species, polluting fish waters, and licensing. It also stipulates that "each Provincial Government shall have primary responsibility

<sup>47</sup> *Ambrose v Keioi* [2016] SBHC172 cited in Yuen 2019.

for management and conservation and sustainable use of fisheries resources within its provincial waters” (Fisheries Management Act: Article 14). The minister responsible can also declare a national marine protected area or national marine managed area in consultation with community rights holders.

To comply with human rights law, such legislation should hold all actors accountable, and in Solomon Islands the legislation would benefit from some improvement. Both the Fisheries Management Act and the Environment Act lack reference to human rights, including more explicit provisions and guidelines about the right to participation and indigenous peoples’ right to FPIC. There is also no reference to the need for transparency, access to information, and accountability, including the right to remedy for any infringement of people’s rights, nor the rights to an adequate standard of living and health (SPREP and EDO NSW 2018b). While the Environment Act stipulates that the Environment and Conservation Division, it creates must “promote the participation of the community in environmental decision-making” (Environment Act: Article 6(f)) and “ensure freedom of and access to information on environmental matters” (Environment Act: Article 6(g)), this would be strengthened further by an explicit recognition of the right to participation and information.

Commentators have noted that both national and provincial level governments “conduct virtually no monitoring or enforcement of national fisheries or environmental regulations at the local level” and “generally play only a nominal role in local management of coastal, non-exported fisheries resources” (Rohe et al. 2019: 94). This can have a detrimental impact on people’s means of subsistence and violate their right to an adequate standard of living. There is no right to remedy for failure to enforce the Environmental Act, and for violations of the right to food and health, since these rights are not recognised by the Constitution.

***Environmental impact assessments:*** As part of its human rights obligations, and to avoid undertaking or authorising actions with environmental impacts that interfere with the full enjoyment of human rights, states should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights (Human Rights Council 2018a).

As already highlighted, both customary and public land are at risk of being considered for development or commercial projects that could jeopardise communities’ enjoyment of human rights. Like many other countries in the Pacific region, under the Solomon Islands’ Environment Act, any developer wishing to carry out a development must submit a public environmental report or an environment impact statement with their application. While the act outlines what the EIA should cover, such as “any aspects of the prescribed development having or likely to have a substantial or important impact on the environment” and “the effectiveness of any safeguards or standards intended to be adopted or applied for the protection of the environment”, there is no explicit reference to human rights (Environment Act: Sections 20 and 31). This means that the scope of the EIA is very narrow and does not incorporate issues such as the impact on women’s or indigenous rights, including their right to land and other natural resources. There is no mention of how communities can seek a remedy or compensation if their livelihoods or health are threatened.

Ten years later, however, the Environment Regulations of 2008 broadened the scope of the EIA by specifying that any impact assessment “shall include ... the social impact on the surrounding communities ...; ensure public participation in the prescribed development; spell out employment opportunities for Solomon Islanders ...; provide demographic impact assessment; provide a health impact assessment; provide a gender impact assessment; [and] provide a noise impact assessment” (Environment Regulations: Regulation 5). In 2019, for the first time, the Solomon Islands Environment Advisory Committee (EAC) considered a merits appeal of a decision of the Director of Environment to the EAC and refused to award development consent for a bauxite mine on Wagina Island. The committee determined that legislative procedures for public consultation and publication of the environmental impact statement (EIS) were not followed; the EIS did not meet legislative and regulatory requirements; the decision to issue a development consent was inconsistent with the Convention on Biological Diversity and the Declaration on the Rights of Indigenous Peoples; and there were unacceptable impacts on the environment, the residents of Wagina and their livelihoods and on nearby islands and marine environments (EDO NSW 2019).

Nonetheless, while this decision is a positive development, the legislation and regulations lack explicit reference to the need to evaluate the possible impact on human rights, including indigenous rights to land, and possible access to remedies. While this decision refers to the Declaration on the Rights of the Indigenous Peoples, this has not yet been incorporated into the relevant legislation. There is also no explicit requirement to take any objections into account in the decision making. This falls short of the requirement of FPIC when it comes to projects affecting or undermining indigenous rights. In the case above, the appeal was upheld due to a technical failure to follow the proper consultative and participatory procedure, rather than due to the objections of those most affected. Moreover, while indigenous peoples have the right to appeal against the decision of the director, the fact that this is the first time since the act came into operation in 1998 suggests that this right is not easily understood nor accessible for large parts of the population.



## Participation and democratic governance

The right to participation is an integral part of human rights law, especially for indigenous persons, where it is elevated to a right to FPIC. This requires appropriate legislation and mechanisms, as well as an enabling environment in which people can enjoy freedom of expression and assembly and have access to information.

While the Constitution of Solomon Islands specifies in its preamble that its people pledge that “we shall ensure the participation of our people in the governance of their affairs and provide within the framework of our national unity for the decentralisation of power”, there are no specific references to the right to participation, much less indigenous peoples’ right to FPIC. It is also not included consistently in statutory legislation. For instance, as discussed above, the process surrounding EIAs allows only limited participation, and falls well short of the requirement of FPIC when it comes to projects affecting or undermining indigenous rights. Even if consultations are provided for in legislation or organised independently, they must be regulated in accordance with the right to participation.

The Fisheries Management Act of 2015 provides for community management of resources at the local level through village councils. Typically, men tend to dominate local councils, and women are excluded from decision-making on issues that directly affect them (SPC 2018c). Other people might also be excluded, such as newcomers to the area. Commentators have asserted that existing participatory mechanisms can “... inadvertently perpetuate existing inequalities in decision-making and subsequent participation and distribution of benefits” (SPC 2018c). This inequality can result in customary groups restricting access to areas close to the village where women are more likely to fish. This can restrict the fish present in a family’s diet or cause the woman to travel further to fish (Barclay et al. 2019). Such limited access to decision-making can undermine women’s access to livelihoods, especially for women-headed households.

The Protected Areas Act of 2010 and its regulations of 2012 similarly provide that communities can apply to create a (marine or terrestrial) protected area under the act, and thus protect it from logging, mining or other damaging activities. However, as of early 2019, “no application had been successful due to the rather complex criteria and required biodiversity relevance of the sites” (Rohe et al. 2019: 94). This raises questions about whether it is actually possible for the communities to enjoy this right in practice as well as in law.

In terms of human rights, the legislation would benefit from greater recognition of economic, social and cultural rights, particularly since they are not included in the Constitution. It should be made clear that conservation must respect and protect all rights, especially the right to food and participation. This would help ensure that the creation of protected areas and fisheries management plans respect the rights of all communities to access the resources they need for their livelihoods.

Civil society has called for the Constitution to be amended to ensure that traditional customary law does not interfere with the rights and equality of women (Human Rights Council 2016b). The Constitution would also benefit from being accompanied by explicit recognition of the right to participation in both the Constitution and statutory legislation that requires participation mechanisms to facilitate the free participation of women and other traditionally marginalised communities. This could include requiring that management committees are composed of elected representatives of all customary rights holders, including women and other people dependent on the resources in question.

With regard to an enabling environment, “[t]he Constitution provides for freedom of speech and press, assembly and association,” and reportedly there are “no government restrictions on access to the internet or credible reports that the government monitored e-mail or internet chat rooms” (United States Department of State 2014: Section 2 (a)). While press freedom is usually respected, there are reports that politicians sometimes use legal and extra-legal means to intimidate journalists (Freedom House 2018). Moreover, there is no law stipulating a formal process by which members of the public may request public information (Freedom House 2018).

## Rights to and at work

While there are only limited data on coastal fishers (FAO 2017d), as elsewhere in the Pacific they face many challenges, including dangerous conditions and inadequate livelihoods. The National Gender Equality and Women’s Development Policy 2016–2020 notes “[t]here are also very few protection mechanisms for workers in unpaid work and in the informal sector. This means they do not have protection or get compensation for accidents, injuries, long-term illnesses or maternity leave cover” (Gender Policy: 5).



The Constitution would benefit from recognising rights at work, which would include healthy and safe labour conditions. While the country has numerous pieces of legislation giving safety standards for small vessels, it is unclear to what extent they cover small-scale fishers in the informal sector. Relevant legislation includes the Shipping Bill 1998, which details safety rules, crew certification, and a specific section dedicated to small craft (vessels 10 m or less in length) and the Shipping (STCW Convention) Regulations 2010, which has specific provisions covering small boats (15 m and smaller) and focuses on safe manning, crew responsibilities, watch-keeping, and medical standards on deck. Under the Solomon Islands Maritime Authority Act 2018, the Solomon Islands Maritime Authority can enforce applicable maritime laws, inspect and control vessels in port and at sea, and set and enforce standards for construction of vessels.

One particular challenge is that coastal fishers may lack the resources necessary to comply with safety regulations. While the government must ensure safety at work, it must also ensure that coastal fishers can feed themselves and their families. It should thus provide assistance programmes to such fishers. Policy documents such as the Solomon Islands Ministry of Fisheries and Marine Resources Strategy 2017–2019 should also address safety issues for coastal fishers. The National Development Strategy 2016–2035 includes the importance of sea safety but focuses on service providers, although it also suggests the need to promote awareness of safety requirements in all types of shipping, including small boats. Nonetheless, future strategies would benefit from going further and detailing how the government can ensure healthy and safe work for all, including those in the informal sector.

There is limited information on children involved in coastal fishing, perhaps because of its informal nature, but in 2018, the CRC Committee reported that cases of child labour had been reported in the fishing industry, although it does not say whether this occurs in coastal fishing (CRC Committee 2018). It raised specific concerns about child labour: (i) the lack of policies addressing child labour; and (ii) social programmes to prevent child labour and support children involved in that practice (CRC Committee 2018).

Coastal fishers in Solomon Islands have limited income opportunities, due in part to a lack of access to markets. Some actors estimate that approximately 80-90 per cent of the population live in remote rural areas and are unable to access the more profitable tuna resources (FAO 2017d). Under the Declaration on the Rights of Peasants, states should take a number of measures to improve the livelihoods of those working in rural areas, including taking appropriate measures to guarantee and strengthen access to markets and “ensure that peasants can ... sell their products at prices that allow them and their families to attain an adequate standard of living” (UNDROP: Article 16(3)).

The National Development Strategy 2016–2035 acknowledges the need for sustained and inclusive economic growth and alleviating poverty across the whole of Solomon Islands, and commits to developing “in-shore fishery facilities, including aquaculture, mariculture and other types of farming for subsistence and commercial development” (National Development Strategy: 17); and promoting “artisanal and semi commercial activities by providing incentives, market access and relevant supporting infrastructure to foster community fisheries development; diversify and introduce appropriate aquaculture systems” (National Development Strategy: 19). The strategy would benefit, however, from clear reference to human rights standards and principles, including requiring such projects and initiatives to comply with human rights law. This is vital, as aquaculture projects can undermine the livelihoods of coastal fishers and should include their participation in any decision-making. It would also benefit from more analysis of the barriers coastal fishers face in securing adequate livelihoods; and of who is being left behind and living in poverty, and why and what needs to be done to address this. The same thing can be said for women. While the strategy includes the goal “[i]mprove gender equality and support the disadvantaged and the vulnerable” (page 33), there is no detailed analysis of the barriers women face and what is needed to overcome them. Moreover, without a guarantee of substantive equality between women and men in the Constitution, there is no legal imperative underpinning such policies.

Furthermore, despite IHRL stipulating that everyone has the right to social security including social assistance (non-contributory benefits), the Constitution of Solomon Islands does not include the right to social security. Statutory legislation establishes a social insurance system through the National Provident Fund Act of 1973 and the Labour Act of 1996 also provides for sick leave, provided the person in question has been in continuous employment for 26 weeks, but these provisions cover only those in formal employment systems and/or those who have paid contributions. The country also needs to implement a social assistance system that covers people with precarious or low incomes working in the informal sector who are unable to contribute to insurance systems. This can include coastal fishers.

As early as 2002, CESCR recommended that Solomon Islands take effective measures to address the problem of the erosion of the traditional support system and *wantok* communities, particularly in rural areas, and complement and support such a system by some other form of social assistance (CESCR 2002). In 2018, commentators noted that such insurance schemes “only benefits a small section of the population, comprising mainly public sector employees and a small number of private sector workers” (Prasad and Kausimae 2018: 39). By recognising the right to social security that includes social assistance, the Constitution would provide a legal imperative to establish social assistance programmes.



#### 5.4.5 Looking forward: conclusions and recommendations

While Solomon Islands has taken many positive steps, including ratifying key human rights treaties and including human rights in its Constitution, it needs to go further to fully guarantee the human rights of coastal fishers. Like many countries in the Pacific, its Constitution recognises only civil and political rights: life, liberty, security of the person and the protection of the law; freedom of conscience of expression and of assembly and association; and protection for the privacy of the home and other property and from deprivation of property without compensation. Despite having ratified the ICESCR, it does not cover economic, social and cultural rights. These could, however, be covered by progressive interpretation of the right to life, although this would provide only limited protection of ESCR to infringements that jeopardise life. It may also not extend to offering adequate safeguards regarding the acquisition of customary land and foreshore. One area where Solomon Islands has gone beyond many of the other Pacific countries is in broadening the scope of EIAs through its Environment Regulations of 2008, but they still need to include explicit reference to human rights.

The country also faces similar challenges to other countries in the region in implementing a plural system that both ensures customary protection and also guarantees the rights of women and responds to changing contexts, such as migration from rural to urban areas. In Solomon Islands, the relationship between customary and formal law is not clear and it is unsure to what extent customary law must respect and protect rights in the Constitution, unlike countries such as Samoa that have included clear stipulations that customary norms must respect rights contained in the Constitution. In Solomon Islands, while the Constitution provides that customary practice is part of the country's law as long as it is consistent with the Constitution and acts of parliament, it also recognises that parliament has a duty to have particular regard to the customs, values and aspirations of the people of Solomon Islands. It is, therefore, unclear which takes precedence. This, coupled with the lack of reference to economic, social and cultural rights, means that customary practices can jeopardise basic subsistence rights without any form of remedy. In fact, the High Court has recognised this, asserting that: “[u]nderlying custom needs to recognise these principles of rights” (Yuen 2019: 28).<sup>48</sup>

Based on the above analysis of the current framework, the following **legal and policy recommendations** are made for Solomon Islands.



Photo: William Sokimi, 2011, SPC

<sup>48</sup> Solomon Islands High Court case *Ambrose v Keioi* [2016] SBHC172 cited in Yuen 2019.

### Short-term policy and programme actions

1. Provide training to the judiciary on human rights law, in particular economic and social rights.
2. Ask academics and legal practitioners to clarify how the right to life under the Constitution can be used to protect economic and social rights, especially the rights to adequate food and a healthy environment.
3. Develop and draft a policy on child labour and compile a hazardous labour list; and identify the measures necessary to ensure that no child engages in hazardous labour, including in the agriculture, logging, tourism and fishing industries (CRC Committee 2018).
4. With regard to EIAs, increase awareness of the right to appeal the decision of the director to the Environment Advisory Committee, and the relevant procedures.
5. Organise consultations with different communities to identify key elements of an effective participatory process that would allow them to give their input on different projects.
6. Monitor how the creation of protected areas (Arnavon Community Marine Park, 11 May 2017) is affecting or strengthening the enjoyment of human rights of all communities, including those outside the customary rights holders.
7. Give coastal fishers, especially women, access to social security and remove any barriers they may face.
8. Implement the shipping regulations regarding small boat training and require specific safety equipment for small boats. Licensing, registration, and renewal should be free or at least affordable, and include assistance with purchasing the necessary equipment to effectively encourage compliance.

### Medium-term legislative changes

Make more explicit reference to human rights throughout statutory legislation, including by amending the legislation listed below.

9. The Fisheries Management Act, to explicitly clarify coastal fishers' access rights to the foreshore as part of their right to an adequate standard of living. Also revise the definition of coastal fishers to ensure it does not exclude those who may have to sell their catch due to increasing monetisation of the economy.
10. The Fisheries Management Act, to stipulate that the CBFM must take a human rights approach, i.e. expressly state that participation needs to be ensured in conformity with human rights law and includes ensuring mechanisms for the free participation of women and other traditionally marginalised communities.
11. The Land and Titles Act of 1969, to ensure that the acquisition process includes human rights safeguards for those who depend on this for their livelihoods, even if they are not customary right holders.
12. The Environment Act, to recognise the right to a safe and healthy environment, and access to remedy for failure to ensure a healthy and safe environment for coastal fishers.
13. The Environment Regulations of 2008, to ensure that impact assessments include the potential impact of any proposed project on human rights.

### Long-term constitutional changes

14. Amend the Constitution so that it: (i) recognises and protects all human rights, including ESCR; (ii) clarifies the relationship between customary law and formal law; (iii) clearly stipulates that customary law cannot breach human rights law under UDHR, including the right to participation, ESCR and the rights of women; and (iv) ensures that customary decisions can be reviewed by the Constitutional Court if they breach human rights, even with regard to land and natural resources.





## 5.5 TONGA

Tonga has a constitutional monarchy and its people are divided into two main classes: the nobles and the commoners (Kennedy 2012). In 2012, there were only 33 nobles in a population of over 100,000 people and, until 2009, they were disproportionately represented in parliament (Kennedy 2012). While this has been addressed, control over land and resources is primarily vested in the monarchy and chiefdoms (Kennedy 2012).

Coastal fishing plays a major role in the daily livelihoods of communities, often providing a direct source of food, especially for coastal and/or landless communities.<sup>49</sup> Rising urbanisation, especially internal migration to Greater Nuku'alofa, is putting pressure on available land resources, even for residential space, which is increasing the number of squatter households along the coast. These households also rely on coastal fishing.

Women are also likely to be landless because of their lack of rights over land (discussed more under tenure rights) and could therefore disproportionately rely on coastal fishing. They are typically engaged in gleaning, foraging and fishing within the inshore area, primarily inside the reef, on the sandflats at low tide, and within the lagoon area (Emberson-Bain 1998). They often use more rudimentary utensils like knives and plastic containers (Emberson-Bain 1998).

Coastal fishers face numerous factors undermining their access to livelihoods: over harvesting/fishing due, in part, to unregulated fishing and more efficient fishing technology; clearing of mangroves for residential purposes; and industrial and sewerage pollution. The government is investing in aquaculture to address some of these threats and re-establish over-exploited species such as giant clams and mullets, and create new commercial opportunities, such as pearl oyster farming, seaweed and sea cucumber culture (FAO 2014).

### 5.5.1 International human rights obligations

Tonga has acceded to CERD (1972) and the CRC (1995). Both of these conventions include all rights: civil, cultural, economic, political and social rights. However, the country has not ratified the two main human rights treaties, namely ICCPR and ICESCR, and neither has it ratified CEDAW. Nonetheless, under the Universal Declaration of Human Rights, Tonga has a moral and legal responsibility to implement all human rights.

### 5.5.2 Human rights and the legal and policy framework

To guarantee all human rights, Tonga's legal framework must recognise and protect all rights. While its Constitution references some civil and political rights, such as fair trial and freedom of the press, it is not as extensive as other countries in the region and, for instance, does not include a right to life. It would benefit from also including economic, social and cultural rights.

<sup>49</sup> Presentation: Overview of Coastal Community-based Fisheries in Tonga; Regional Seminar on Community-based Coastal Resource Management Project for Promotion of Grace of Sea in Coastal Villages- Phase 2 Port Vila, Vanuatu 13 to 16 October, 2014. Retrieved from: [https://fisheries-gos.gov.vu/docs/regional-seminars/Tonga%20Community%20Based%20Fisheries%20Management\\_10\\_2014.pdf](https://fisheries-gos.gov.vu/docs/regional-seminars/Tonga%20Community%20Based%20Fisheries%20Management_10_2014.pdf).

<sup>50</sup> Unlike other countries in the region, Tonga's Constitution does not allow for the application of customary law.

The only provision on equality and non-discrimination is Article 4, which states that “There shall be but one law in Tonga for chiefs and commoners for Non-Tongans and Tongans”. It therefore does not explicitly prohibit discrimination. Unlike other countries in the region, the Constitution does not formally recognise customary law, even regarding land rights.<sup>50</sup> It stipulates that all land is the property of the king.

At the local level, under the Government Act of 1903 (revised in 1988), district officers can make “regulations concerning village plantations and other matters relating to the welfare of the village” (Article 26). Before entering into force, such regulations must be approved by cabinet and signed-off by the prime minister.

### 5.5.3 Overview of fisheries legislation

The main laws related to fisheries and aquaculture in Tonga are the Fisheries Management Act of 2002 and the Aquaculture Management Act of 2003. Under the former, the relevant minister is responsible for conservation, management, sustainable utilisation and development of fisheries resources. This includes determining the total allowable catch, and the registering and licensing fishing vessels.

The Fisheries Management Act of 2002 allows local communities to manage their nearby marine areas through the establishment of special management areas (SMAs) that include fisheries waters and corresponding subjacent areas (Section 14). The communities can manage the area by controlling who is allowed to fish, setting up catch sizes and quotas, deciding the methods of fishing that may be used, and prohibiting any harmful practices. Any person found fishing in the SMA “in contravention of any Order made under this section shall be guilty of an offence and shall be liable on conviction to a fine not exceeding [TOP] \$ 50,000.” According to the act, any local community in Tonga can be designated a coastal community, but, when making the decision, the minister responsible will take into account the concerns of communities living adjacent to the SMA and the organisation of communities, towns, districts or other institutions. Under the act, the community must develop a management plan in consultation with the Ministry of Fisheries.

The Fisheries Management (Coastal Communities) Regulations further specify the functions of the coastal committees for the special management area, including the election of members, and the decision-making (by consensus) processes. It also provides more details on the drafting of the management plan (Section 12), stipulating that the committee must “ensure all community members are provided an opportunity to be involved in the preparation of the Plan ... facilitate meetings or discussions with sectors of the coastal community such as fishers, women, youth and any other relevant key stakeholders ... consult with adjacent communities and other stakeholders about the Plan; and implement, monitor and conduct annual revision of the Plan”. The regulations specify that subsistence fishers who are not members of the coastal community can apply for a permit to fish in the SMA.

There are several other regulations and orders that support the Fisheries Act, covering details of licensing, prescribed fisheries management and conservation measures, including prohibiting certain types of fishing. They include: Fisheries (Limu Tanga'u) Regulations 2010; Fisheries (Local Fishing) Regulations 1995; Fisheries (Vessel Monitoring System) Regulations 2010; and the Fisheries Management (Conservation) Regulations 2008.

The Aquaculture Management Act of 2003 provides for the management and development of aquaculture. It mandates the minister responsible to prepare and keep under regular review a plan for the management and development of aquaculture. The current plan is the National Aquaculture Management and Development Plan 2018–2022. It establishes an Aquaculture Advisory Committee to advise the minister on policy, planning and guidelines for the regulation, management and development of aquaculture. The minister may also issue and publish codes of practice. According to this act, persons must hold an aquaculture development licence or other authorisation before conducting aquaculture and related activities (Gillett and Tauati 2018). This process is further elaborated in the Aquaculture Management Regulations of 2008.

These acts and accompanying regulations would benefit from a more explicit reference to human rights. The only rights mentioned in the Fisheries Management Act of 2002 are participatory rights, which relate to the percentages of agreed allowable catch or effort rather than as absolute tonnages. Clear recognition of the right to an adequate standard of living could help ensure that the permit process does not erode the enjoyment of human rights. Similarly, the monitoring of the plan should consider its impact on the human rights of all those affected by the SMA, including neighbouring communities. Likewise, the Aquaculture Management Act of 2003 would benefit from requiring all aquaculture initiatives to respect the human rights of all communities in order to prevent any adverse effects on the livelihoods of coastal fishers and ensure remedy for them should they occur.



Photo: Ariella D'Andrea, 2017, SPC



### Non-discrimination and gender equality

Tonga is still to ratify CEDAW. While Article 4 of Tonga's Constitution (Act No 3, 1976) states that "There shall be but one law in Tonga for chiefs and commoners for Non-Tongans and Tongans," and this has generally been considered as confirming women's equal legal status, such protection can be guaranteed only by "a specific prohibition of gender discrimination" which is absent from the Constitution (Emberson-Bain 1998). Moreover, discriminatory legislation and customary practices cannot be challenged, since discrimination is not explicitly prohibited by the Constitution, so long as customary law is not recognised as a formal source of law. Discriminatory legislation includes the Land Act 1903 (revised in 1988), which only recognises the right of Tongan men to be granted land. Similarly, traditional systems and cultural factors that limit participation of women in political processes and local government cannot be challenged.

### Security of tenure, access to natural resources and the right to food

In Tonga, coastal fishers depend on access to land and marine areas for their livelihoods. Thus, under IHRL, they must have security of tenure. Also, under human rights law, indigenous peoples and peasants have a right to natural resources.

In Tonga, all land belongs to the Crown and cannot be bought or sold. It may only be leased through formal lease arrangements of usually 50 years duration, although the law permits terms of up to 99 years. Large estates have been allotted to nobles, who then have a life interest that is passed down from father to son. Under the Constitution and Land Act, all Tongan males have a right to a full grant of land, sometimes allotted from a noble's land. However, due to the increasing shortage of land, few men are receiving their entitlement.<sup>51</sup> Women are not eligible to receive an allotment from the King and can hold allotments of land only under specific circumstances. Inheritance rights, for instance, pass through the male heirs only, unless they have all died. Widows have only succession rights until they die ('life interest' rights). The inheritance and land rights laws reduce women's ability to access credit and to own and operate businesses (Emberson-Bain 1998). Land is, therefore, a critical issue and a lack of access to land increases reliance on coastal fishing.

The Minister for Fisheries can also designate any local community "a coastal community for the purposes of community-based fisheries management" and give the community access to and a certain degree of control over special management areas, which includes making regulations. The role of coastal communities is further articulated in the Fisheries (Coastal Communities) Regulation of 2009, including the allocation of subsistence and small-scale fishing permits<sup>52</sup> for non-registered fishers and landlocked communities. It is important to ensure that such fishers can enjoy their right to food but there should also be access to remedy if individuals and communities are denied a permit and therefore have their access to livelihoods jeopardised.

Under IHRL, coastal fishers must have secure access to the resources they need for livelihoods. This must take precedence over commercial interests. While the legislative situation in Tonga means that "unlike the situation in other Pacific Island countries, coastal communities in Tonga have no preferential access to adjacent resources" and therefore "have to compete with commercial interests"<sup>53</sup>, coastal communities can establish and help manage an SMA. This is crucial in strengthening communities' control over their fishing resources and has been met with enthusiasm by Tongans (Gillet 2016). It should, however, be accompanied by legislation fully protecting access and the participatory management of these resources areas, with clear access to justice for any breaches in accordance with the right to an adequate standard of living and other human rights. This includes for people outside of the community who rely on access for subsistence and/or small-scale fishing.

### Right to a healthy and safe environment

The enjoyment of human rights, especially the rights to an adequate standard of living and health, depend on a healthy, safe and sustainable environment (UNGA 2012). In Tonga, the Constitution would benefit from including such a right. Currently, since there is also no recognition of the right to an adequate standard of living, there is no overarching principle protecting people's livelihoods and health from pollution, contamination and overfishing amongst other threats.

<sup>51</sup> The Land Act establishes two main types of allotment, which are life interests in land: town allotments (*api kolo*) for residential use and tax allotments (*api tukuhau*) for agricultural use. An allotment can only be held individually by a Tongan male and is passed from generation to generation. Typically, they are "located on and granted out of hereditary estates, rather than Crown Land" due to the "relatively small amount of Crown land compared to hereditary estate land". Moreover, each holder of a tax allotment must pay rent to "the Noble or Chief who holds the hereditary estate; or (2) the Crown." (International Federation of Red Cross and Red Crescent Societies and Australia Red Cross 2017: 4). Also see Latu and Dacey, 2006.

<sup>52</sup> "Any other person not listed on the Register of Fishers may apply for a subsistence fishing permit from the Committee for a single fishing trip for subsistence fishing purposes only within the Special Management Area but not within the Fish Habitat Reserve" (Section 18).

<sup>53</sup> The Kingdom of Tonga, *Tonga Fisheries Sector Plan 2016-2024*.



While there are key pieces of legislation regulating the environment, all would benefit from explicitly referring to the need for a safe, clean, healthy and sustainable environment, an adequate standard of living, and health. The primary piece of legislation is the Environment Management Act of 2010, which established the Ministry of Environment and Climate Change. Its function is to protect, manage and monitor the environment, including coastal areas, and to promote public awareness and participation of non-governmental organisations and agencies expert in environmental management. There is, however, no comprehensive legislation addressing pollution in Tonga and, without these rights being enshrined in the Constitution, it is difficult to gain a remedy for government failures to meet its obligations under human rights law (SPREP and EDO NSW 2018c).

In addition, none of the legislation reviewed takes into account the need to ensure access to information and a safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation and violence. States should provide for access to effective remedies for violations of human rights and domestic laws relating to the environment. Moreover, while the Environmental Act mandates the ministry responsible to facilitate the participation of NGOs, it is not extended to the wider general public, and does not specify that this participation will be taken into account in decision-making. There is also no mention of people who are living in a vulnerable situation, particularly those who are affected by environmental change and damage. The act also provides no access to remedy for violations of human rights and domestic laws in relation to the environment.

***Environmental impact assessments:*** As part of its human rights obligations, and to avoid undertaking or authorising actions with environmental impacts that interfere with the full enjoyment of human rights, states should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights (Human Rights Council 2018a).

In Tonga, the Environmental Impact Assessment Act of 2003 requires all major projects to be supported by an appropriate environmental impact assessment. The ministry responsible must determine whether the planned project has, *inter alia*, an impact on “any land, water, sites, fishing grounds, or physical or cultural resources, or interests associated with such areas, which are part of the heritage of the people of Tonga and which contribute to their well-being”. The Environmental Impact Assessment Act is supported by the Environmental Impact Assessment Regulations 2010, which detail the procedures for environmental impact assessments. When listing the factors that are to be taken into account by the minister and other competent bodies, there is no mention of human rights. Instead, the regulations refer to the possible environmental impact upon a community. This means that the assessments do not consider the impact any development might have on women’s rights or their security of tenure. The regulation should also require that the EIA be made public for comments and objections.

### **Participation and democratic governance**

There is no mention of the right to participation in the Constitution. While key pieces of legislation have included participation, they do not reach the standard required by international standards. For instance, as noted above, the Environmental Impact Assessment does not guarantee affected individuals’ right to meaningful participation.

In terms of mechanisms at national level, while the National Fisheries Council “is intended to be representative of the entire range of fisheries sector stakeholders ... it is currently dominated by the Nuku’alofa representatives of the exporters, both in design and practice for several reasons”. This is because the cost associated with participating is out of reach for the majority of small-scale and subsistence fishers, who have limited communication possibilities and lack organisation (Tonga Fisheries Sector Plan 2016–2024).

With regard to an enabling environment, the Constitution guarantees freedom of the press, and a variety of news outlets operate independently, including online. However, Freedom House has noted that “Tonga does not have a law to guarantee public access to government information, which can be difficult to obtain in practice” (Freedom House 2018). This substantially undermines meaningful participation.

At the local level, the Fisheries Management Act of 2002 gives coastal communities the possibility to participate in managing their coastal resources through the creation of SMAs. This is further regulated through the Fisheries Management (Coastal Communities) Regulations of 2009. The regulations specify that committees must “ensure all community members are provided an opportunity to be involved in the preparation of the Plan” and “facilitate meetings or discussions with sectors of the coastal community such as fishers, women, youth and any other relevant key stakeholders” (Section 12). This is crucial, as women can be excluded from any local management mechanisms due to traditional practices. In Tonga households and communities, decision-making is traditionally done by men. To help remedy this, perhaps the legislation could be amended to require that committees include representatives of women’s organisations. While customary practices in Tonga are not protected, the Constitution is yet to explicitly prohibit discrimination against women, and recognise the right to participation. This means that it is difficult to challenge any practices that exclude women from decision making. It is thus crucial that statutory legislation and regulations provide for the participation of women in decision-making and ensure access to remedy for non-compliance.



Photo: Mecki Kronen , 2008, SPC

Acknowledging that other communities may also depend on the SMA for their livelihoods, the Fisheries (Coastal Communities) Regulations also include the possibility of allocating permits to subsistence and small-scale fishers outside the local community. These could include those living adjacent to SMAs and landlocked communities. Without specific reference to the right to an adequate standard of living, however, it will be difficult for any community members to legally challenge situations where they might be denied a permit or be over-burdened by complicated and cumbersome permit procedures, including delays, or face prohibitive costs. With regard to the latter, at the Felemea SMA, outsiders are charged if they want to fish in the SMA (Gillett 2017).

There are some examples of how neighbouring countries have ensured both conservation and access for outside communities. As noted in this FAO study, in Fiji, outsiders can carry out subsistence fishing. However, to be fully compliant with IHRL, this requires a careful definition of subsistence fishing to ensure it does not exclude those small-scale fishers who are dependent on selling fish on the roadside or at small markets (Gillett 2017). Gillett also suggests the possibility of having a “district SMA’ in which several communities (perhaps including those that are landlocked) have access to an extended SMA” (Gillett 2017). He also suggests that “[c]ertain areas (e.g. land adjacent to the King’s land and urban areas) could remain open access” (Gillett 2017).

Other issues could include the length of time it takes to create an SMA. SMAs have proved to be very popular in Tonga, and this, combined with the expansion into “peripheral activities”, has led to some communities “waiting almost a decade” for their SMA to be created and formally recognised (Gillett 2017).

### Rights to and at work

Tonga is yet to ensure rights to and at work in its Constitution and statutory legislation. While workers have the legal right to organise trade unions, implementing regulations have never been issued, meaning the country’s various *de facto* unions generally operate as associations.

The government needs to make sure that the legislation covers the informal labour market. In 1998 commentators noted that coastal fishers are not covered by any legislation covering safety and protective garments, etc. (Emberson-Bain 1998). To be truly effective, such legislation must specifically cover the situation of subsistence and small-scale fishers and be accompanied by specific

policies to help the fishers comply. Moreover, any costs of compliance, including registration fees, must not threaten the enjoyment of the right to an adequate standard of living and other rights.

Under the Fisheries Management Act, all fishing boats must be registered with the MOF. The Local Fishing Regulations of 2009 enlarges upon this and covers the registration and licensing process of boats used for local fishing and determined seaworthy. The certificate of registration for local fishing vessels under the Fisheries (Local Fishing) Regulations 2009 is issued only if the CEO is satisfied that the vessel is “fit for fishing and satisfies the requirements of Tongan law relating to safety and hygiene” (Schedule II). This requirement is difficult to prove for boats below 15 m, given that under the Tongan Shipping Act 1972, as amended, registration (including full safety certification) is required only for boats of 15 m and above. The Marine and Ports Division also performs safety checks on boats between 8 and 15 m, but boats below 8 m exceed the scope of the Act (1999 amendment).

With regard to possible child labour in Tonga, the CRC Committee has called for the adoption of the Employment Relations Bill of 2013, which explicitly prohibits the worst forms of child labour and establishes the minimum age for hazardous and non-hazardous work (CRC Committee 2019: para 59).

Under IHRL, states are also required to ensure and facilitate adequate livelihoods. With regard to informal coastal fishers, this includes “tak[ing] appropriate measures to strengthen and support local, national and regional markets and ensure that peasants can equitably access these markets to sell their products at prices that allow them and their families to attain an adequate standard of living” (UNDROP: Article 16 (3)). Several policies mention the need to ensure access to adequate livelihoods. For instance, Goal 9 of the Tonga Fisheries Sector Plan 2016–2024 is to promote the creation of integrated programmes and income-generating opportunities for coastal communities. However, it would be beneficial if the policies included more analysis on the barriers that restrict the livelihoods of coastal fishers, including why women are being left behind. Inclusion of the rights to an adequate standard of living and health in the Constitution and statutory legislation, such as the Fisheries Management Act of 2002, would establish legal imperatives and give legal guarantees, helping ensure access to justice for any failure to implement appropriate policies.

Like many other PICTs, there is no right to social security in Tonga’s Constitution, and its social protection model focuses on the social insurance model that can be inaccessible for subsistence and small-scale coastal fishers who cannot afford contributions. Legally recognising the right to social security in accordance with Article 9 of the ICESCR would enable those individuals and communities in need to legally challenge any gaps in social assistance programmes.

#### 5.5.5 Way forward: conclusions and recommendations

While Tonga is still to ratify the two main human rights treaties – ICESCR and ICCPR – its Constitution does protect some human rights, such as the right to fair trial, the same law for all classes and freedom of the press, but it is much more limited than the constitution of many other Pacific countries. For instance, it does not recognise the right to life. It would benefit greatly from also including economic, social and cultural rights. Since there is no recognition of the right to life, it is not possible to use this right to cover some elements of ESCR in the short term. While the country does not recognise customary law and therefore does not constitutionally protect customary practices that could discriminate against women, the lack of a clear prohibition of discrimination against women means that formal law can still be discriminatory, such as the afore mentioned Land Law that limits inheritance rights for women.

Tonga also differs from many other countries in the region as its local communities have no customary right to land. Instead, men receive allotments often from nobles’ estates and, as the Tonga Fisheries Sector Plan 2016-2024 notes, coastal communities have no preferential access to coastal resources and therefore “have to compete with commercial interests”. Nonetheless, under the Fisheries Act, the government can declare special management areas (SMAs) that allow local communities to manage the coastal area, including making regulations, but it is unclear how open this is to change in the future, given the lack of recognition of customary rights and ESCR in the Constitution. It is also unclear what impact the creation of SMAs has on the landlocked communities’ access to coastal areas (Gillett 2017). While communities managing the SMA can allocate fishing permits, without any explicit recognition of the right to an adequate food in the Constitution or Fisheries Act, there is no legal imperative to do so, and no access to remedy for any permit denial. Stronger articulation of human rights throughout the Constitution and statutory legislation would thus benefit fisher communities greatly.



Based on the above analysis of the current framework, the following **legal and policy recommendations** are made for Tonga.

### **Short-term policy and programme actions**

1. Develop a hazardous child labour list and start consultations on a draft strategy for the elimination of the worst forms of child labour (CRC Committee 2019).
2. Determine the conditions in which light work may be permitted and the number of hours during which such employment of children may be undertaken, ensuring that children have sufficient leisure time and do not miss school (CRC Committee 019).
3. Identify health and safety measures that would improve working conditions for coastal fishers, including specific policies and programmes.
4. Document the allocation of subsistence and small-scale fishing permits under the Fisheries (Coastal Communities) Regulations of 2009<sup>54</sup> and its impact on coastal fishers' access to livelihoods (right to food), especially those coming from outside the community.
5. Investigate and document the situation of communities waiting to be awarded an SMA, given the fact that they do not have preferential access to resources and have to compete with commercial interests.
6. Analyse the barriers that restrict the livelihoods of coastal fishers, including women, and why they are being left behind. This can help guide future government strategies.
7. Ensure full implementation of the Fisheries Management (Coastal Communities) Regulations.
8. Define safety requirements for small boats below 8 m and clarify safety requirements for boats 8-15 m. Identify any challenges for small fishers to comply and ensure that licensing, registration, and renewal are free or affordable, and include assistance with purchasing the equipment to effectively encourage compliance.

### **Medium-term legislative changes**

Develop and amend statutory legislation to ensure better protection of human rights, as listed below.

9. Adopt legislation guaranteeing public access to government information.
10. Amend the Environment Management Act 2010 to include the rights to a safe, clean, healthy and sustainable environment, adequate standard of living or health, and access to remedy.
11. Amend the Environmental Impact Assessment Regulations 2010 to ensure that impact assessments take into account the potential impact a proposed project may have on human rights, and provide for a participatory process in their drafting, with full access to information.
12. Amend the landownership law to ensure equality of women, particularly concerning inheritance and ownership of land and in relation to girls and children born to unmarried parents (CRC Committee 2019).
13. Introduce legislation fully protecting access and ensuring secure tenure to these natural resources with clear access to justice. This includes people outside the community who rely on access for subsistence and/or small-scale fishing.

<sup>54</sup> "Any other person not listed on the Register of Fishers may apply for a subsistence fishing permit from the Committee for a single fishing trip for subsistence fishing purposes only within the Special Management Area but not within the Fish Habitat Reserve" (Fisheries (Coastal Communities) Regulations 2009, Regulation 18(3)).

14. Adopt without delay the Employment Relations Bill which explicitly prohibits the worst forms of child labour and establishes the minimum age for hazardous and non-hazardous work (CRC Committee 2019).

#### Long-term constitutional changes

15. Amend the Constitution to specifically prohibit both direct and indirect gender discrimination and recognise and protect the right to life, participation, and economic, social and cultural rights, especially the rights to an adequate standard of living, health and social security.



Photo: Watisoni Lalavanua, 2020, SPC





## 5.6

# VANUATU

Most of Vanuatu's population is indigenous, live in coastal areas, and rely on coastal fishing for both subsistence and a small source of cash, particularly around urban areas (Pacific Islands Report 2017). They fish using hand line and net fishing, as well as reef gleaning and collection of shellfish and other invertebrates, although inshore marine areas are not extensive in Vanuatu (FAO 2017e). Like other small island states, factors threatening their livelihoods include numerous and increasingly severe cyclones; deforestation; and air, land and marine pollution, as well as rising sea levels (Vanuatu MSI-NAR 2010). Moreover, many inshore fishery resources, especially those close to the urban markets, are being fully or over-exploited, and small-scale fishers cannot access the relatively abundant offshore fishery resources (Gillett and Tauati 2018). Those located in remote areas have difficulties selling fishery products due to a lack of access to markets (Gillett and Tauati 2018).

### 5.6.1 Human rights obligations

Vanuatu has ratified several human rights treaties, including the ICCPR (2008), CRC (1993), CPRD (2008) and CEDAW (1995), but is still to ratify the ICESCR and CERD, amongst others. As Vanuatu is a member of the United Nations, it is implicitly bound by the Charter of the United Nations, and the Universal Declaration of Human Rights, which is also considered by many as customary law.

### 5.6.2 Human rights and the legal and policy framework

Under IHRL, Vanuatu is obligated to create a legal system that guarantees human rights. Its Constitution recognises the rights to: life; liberty; security of the person; protection of the law; freedom from inhuman treatment and forced labour; freedom of conscience and worship; freedom of expression; freedom of assembly and association; freedom of movement; protection for the privacy of the home and other property and from unjust deprivation of property; and equal treatment under the law or administrative action. No reference is made to economic, social and cultural rights. A further issue of concern is that the Constitution specifies that the enjoyment of the recognised rights is subject to a number of conditions, including “respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health” (Part 1: Article 5(1)).

Article 5(1) of the Constitution establishes the right to non-discrimination only for Ni-Vanuatu. It “recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex”. Article 5(1)(k) also allows for possible affirmative action measures for particular vulnerable and disadvantaged groups. It states that, while everyone is entitled to “equal treatment under the law” no law shall be inconsistent with this (right) insofar as it “makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas”.

Vanuatu has a plural legal system which can complicate the enjoyment of human rights as covered in the Constitution. The Constitution acknowledges custom as a source of law, with Article 47(1) stating “[i]f there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom”. It is not clear if this is to apply to all legal matters, or only where there is no applicable law, or only to certain areas of law (Farran 2006). It may thus not be possible to challenge





Photo: Aymeric Desurmont, 2014, SPC



discriminatory customary practices. In fact, some commentators have observed that “[s]trong adherence to custom and lack of clarity as to priorities has given rise to a number of cases in Vanuatu involving human rights issues which illustrate the difficulties faced in this complex legal system” (Farran 2006: 88). Some guidance could come from the Island Courts Act of 1983, which allows island courts to apply custom providing that it “is not in conflict with any written law and is not contrary to justice, morality and good order” (Island Courts Act: Section 10).

Under the 1994 Decentralization Act and Local Governments Regions (as amended in 1997, 1998, 2000 and 2013), local governments can make by-laws on fishing licences and conditions, regulations governing the environmental protection zones, and economic development policies and plans. The Municipalities Act of 1980 (as amended) outlines the powers and duties of municipal councils, which include managing land leased from authorities, safeguarding public health, and general management of the municipality. It also allows municipalities to make by-laws governing “(a) the safety of the inhabitants of the municipality; or (b) the maintenance of the health, well-being and good order and government of the municipality; or (c) the prevention and suppression of nuisances in the municipality” (Municipalities Act: Article 36). The by-laws must not contravene any existing act or order (Municipalities Act: Article 38).

### 5.6.3 Overview of fisheries legislation

Under the Constitution, the main piece of legislation concerning fisheries is the Fisheries Act of 2014, which provides for the conservation, management, development and regulation of fisheries within Vanuatu waters, and for the control of fishing vessels entitled to fly the flag of Vanuatu outside of Vanuatu waters in a manner consistent with Vanuatu’s international obligations. It also regulates aquaculture, including the designation of aquaculture areas, and the licensing required. The Fisheries Act also allows the minister responsible to designate a particular fishery if it “(a) is important to the national interest; and (b) requires management and development measures for its effective conservation and optimum utilisation”. In such cases, the director “is to prepare, and review where necessary, a plan for the management and development of each designated fishery” (Fisheries Act: Article 11). When preparing such a plan, the director must consult with fishermen, local authorities or other persons likely to be affected by the plan.

At the local level, the act provides a basis for a CBFM approach:

The Minister or Director, when performing functions or exercising powers under this Act, are to ... (i) take into account the interests of artisanal, subsistence fishers and local communities including ensuring their participation in the management of fisheries; and (j) maintain traditional forms of sustainable fisheries management; and (k) ensure broad participation by Vanuatu nationals in activities related to the sustainable use of fisheries resources (Fisheries Act: Article 4).

In 2004, an FAO study noted that “[t]he combined effect of the recognition of custom as a source of law and the ownership of all lands extending to the seaside of any foreshore reef enables any land-owning individual or group in Vanuatu to undertake management of resources in these areas in the manner deemed appropriate” (Kuemlangan 2004). However, factors such as population growth and increasing pressure on resources means that many people might not respect traditional *tabu* protection of certain areas and species.

Under the Environmental Management and Conservation Act of 2002, local communities can set up Community Conservation Areas, and their community rules can be enforced by provincial governments enacting provincial by-laws. To set one up, the community must demonstrate that the area “possesses unique genetic, cultural, geological or biological resources; or constitutes the habitat of species of wild fauna or flora of unique national or international importance; or merits protection under the Convention Concerning the Protection of World Cultural and Natural Heritage” (Environmental Management and Conservation Act: Article 35). Before registering any area, the director must ensure that all persons having rights and interests in any land that is to be included in the area have consented; and that “an appropriate conservation, protection or management plan is developed” (Environmental Management and Conservation Act: Article 37).

In 2019, this community approach was strengthened by an amendment to the Fisheries Act of 2014 that creates a category of community authorised officers, appointed by the minister. These officers can, without a warrant, examine and seize copies of any licence, logbook, record of a vessel; fish, fishing gear or explosive, electrical device, fishing net, poison or other noxious substance; fish or fish products that he or she believes is held in contravention with this act or its regulation; and seize a local fishing vessel operating without a local fishing licence. This legislation would benefit from more extensive reference to human rights, which is discussed in the sections below.



The various policies regarding coastal fisheries contain much language that echoes key human rights principles. For example, key guiding principles of the Vanuatu National Fisheries Sector Policy 2016 to 2031 are “[p]romot[ing] ... visibility, transparency, participatory and inclusivity, which includes relevant stakeholders in decision making processes on fisheries and aquaculture management and development” and “[s]afeguard[ing] the welfare of the future generations, recognising gender equity and vulnerable groups, and protecting the country’s sovereignty and jurisdiction” (Fisheries Sector Policy: 7). This would, however, benefit from more explicit human rights language, such as ensuring or guaranteeing meaningful participation in decision-making, and the right to an adequate standard of living. While one of the guiding principles is to “[p]romote the use of rights-based management supported by best science and practices in all fisheries and aquaculture” (Fisheries Sector Policy: 7), this is not human rights but property rights. As noted earlier, strictly speaking, rights-based management is about licensing and quotas, which do not correspond to human rights, and traditional access.

#### 5.6.4 Specific issues

##### **Non-discrimination and gender equality**

Vanuatu’s National Gender Equality Policy 2015–2019 recognises that “[d]iscrimination against women is reinforced through legislation as well as through wider cultural and religious beliefs and practices” (Gender Equality Policy: 9).

While Article 5(1) of the Constitution recognises the right to equal treatment under the law or administrative action, unless providing for the “special benefit, welfare, protection or advancement of females, children and young persons, members of underprivileged groups or inhabitants of less developed areas”, it does not include the principle of equality of women and men. It also fails to define and prohibit all forms of sex- and gender-based discrimination, including direct and indirect discrimination by private or public actors. CEDAW has therefore recommended that Vanuatu amend its constitution and other appropriate legislation to incorporate fully these issues (CEDAW Committee 2016b).

The plurality of Vanuatu’s legal system may also present challenges for women, since customary practices have constitutional protection, despite concerns about their discriminatory nature (CEDAW Committee 2016b). Amnesty International noted “[t]here is also no clear provision in the Constitution that states that when customary law and domestic legislation law are in conflict, the equality provisions of the Constitution must prevail” (Amnesty International 2008: para 4).

Some interesting court decisions have suggested that custom must be in accordance with the Constitution’s code of fundamental rights and CEDAW. In *Noel v Toto*, the Supreme Court ruled as unconstitutional “any precept or principle of custom that discriminated in its effect” (Brown 2017). This ruling was based on Article 5 of the Vanuatu Constitution which establishes a code of fundamental rights containing no qualifications or restrictions, including with regard to customary law, despite Article 74 (Brown 2017). In that case, the Supreme Court held that men and women were equally entitled to a share in the proceeds from land, which customary law did not allow<sup>55</sup>. In 2016, in *Lapenmal v Awop*, the Supreme Court upheld a ruling by island courts that the sole female descendant (and her family) of the original owner of custom land be the custom owner.<sup>56</sup> The Supreme Court underscored that customary law must comply with written law and/or CEDAW<sup>57</sup> despite Article 74 of the Constitution, which states that “[t]he rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu”. Since this decision covers a situation where there was no direct male descendant,<sup>58</sup> “it remains to be seen how courts will deal with custom when female litigants seek to challenge their male counterparts on an equal footing” (Yuen 2019: 31).

CEDAW has also noted women’s limited access to justice, particularly in the outer islands, due to their limited knowledge about their rights and limited access to legal assistance. It is also concerned about the difficulties that women face in obtaining effective remedies and redress in both the traditional and formal justice systems, and about the lack of study on this dual legal system (CEDAW Committee 2016b).

The National Gender Equality Policy 2015–2019 looks to address many of these issues with its policy mission being “[t]o promote equal rights, opportunities and responsibilities among men and women and to eliminate all forms of discrimination and violence against women and girls. Two of its four priority areas are of direct relevance to this report, namely: Enhancing women’s economic empowerment (priority area 2) and Promoting women’s leadership and equal political participation (priority area 3). The policy recognises that “[l]egislative changes are also needed to remove discriminatory barriers against women and to ensure equal and fair working conditions for both women and men”; and that “[t]he promotion of women’s leadership and equal political participation

<sup>55</sup> “It would be entirely inconsistent with the Constitution and the attitude of the Parliament to rule that women have less rights with respect to land than men. ... Custom law must provide the basis for determining ownership, but subject to the limitation that any rule of custom which discriminates against women cannot be applied. ... I have no difficulty in ruling that when the Constitution provides for the rules of custom being used as the basis of ownership of land, this must be subject to the fundamental rights recognised in Article 5.” (*Noel v Toto* [1995] VUSC 3; Civil Case 018 of 1994 (19 April 1995). Retrieved from: <http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/1995/3.html>.)

<sup>56</sup> Vanuatu Supreme Court case *Lapenmal v Awop* [2016] VUSC 90 cited in Yuen 2019

<sup>57</sup> “CEDAW is considered to bind the Republic of Vanuatu as written law.

<sup>58</sup> Existing customary law includes an exceptional right of succession of the surviving daughter in the absence of any surviving sons.

requires attitudinal and structural changes in existing political and decision making systems” (National Gender Equality Policy: 14). While it would be useful if these were expanded on, the policy nonetheless provides an important baseline for subsequent strategies. The paragraphs below outline some of the needed legislative and structural change.

### **Security of tenure, access to natural resources and the right to food**

Under IHRL, states are obligated to protect access to livelihoods, which, in the case of coastal fishers, includes guaranteeing secure access to land and the foreshore and its contents. Moreover, both indigenous peoples and peasants have a right to land and other natural resources. In Vanuatu, access and control over both land and the foreshore is critical to coastal fishers. The Vanuatu National Fisheries Sector Policy 2016–2031 notes that “80% of rural fish preservation and market centres have ceased because of land ownership issues” (Fisheries Sector Policy: 3).

In Vanuatu the Constitution stipulates that all land belongs to the indigenous custom owners and their descendants,<sup>59</sup> with the Land Reform Act defining land as “including land extending to the seaside of any offshore reef but no further” (Land Reform Act: Article 1). Article 74 of the Constitution also stipulates that that “[t]he rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu”.

Before 2013, this provision co-existed with state land laws governing leases and strata-title. In fact, several pieces of legislation undermined these customary rights to the extent that it resulted in “the rapid alienation of (customary) land, often to non-indigenous investors through leases and sub-leases” (Farran and Corrin 2017: 7). For instance, the Foreshore Development Act of 1975 (as amended in 2013) allows persons to apply to the minister responsible for permission to develop parts of the foreshore. There is no explicit requirement to gain the consent of the community that has rights to the land under the Constitution.

In 2013 the Constitution was altered to remove the power of the government over customary land, and to provide more powers to customary institutions (McDonnell 2015). This was accompanied by the adoption of the new Customary Land Management Act of 2013 (amended in 2014)<sup>60</sup> which prevented the Minister for Lands from approving land dealings unless the consent of custom owners had been given (Farran and Corrin 2017). There are still, however, some pieces of legislation that suggest the consent of customary land-owners is not needed. The Fisheries Act of 2014, for instance, stipulates that “[t]he Minister may, on the recommendation of the Director after consulting the relevant Departments and customary owners, declare by notice in the Gazette, an area as a designated aquaculture area where, having regard to scientific, social, economic, environmental and other relevant considerations, it is determined that such area (a) is important to the national interest; and (b) requires management measures for ensuring sustainable aquaculture” (Fisheries Act: Article 13(1)). There is no provision for the customary owners to give their consent, as required by IHRL.

According to the government’s Land Sector Framework 2009–2018, the amendment of the Constitution and subsequent adoption of the Customary Land Management Act of 2013 reportedly addressed the historical complexities in determining rights to land, given their dependence “upon oral histories, ‘memory culture’, complex local categories, and varying inheritance practices.” (Land Sector Framework: 13). Increasing migration within Vanuatu and urbanisation have also led to “many customary land-owners and users no longer liv[ing] within their traditional boundaries or even with their own communities.” (Land Sector Framework: 13). This means that they might not have customary rights to the resources that they now depend on for livelihoods. The Land Sector Framework also notes that this lack of formal system “has led to ongoing disputes and a lack of certainty and security over ownership, boundaries and use of the land.” (Land Sector Framework: 13). The new Customary Land Management Act of 2013 (amended in 2014) creates new processes for identifying custom owner groups and managing disputes about custom ownership in accordance with the rules of customary law. Once recorded in writing, final substantive decisions reached by customary institutions or procedures in accordance with Article 74 are binding in law and are not subject to appeal or any other form of review by any court of law.

This is particularly pertinent to the situation of women. According to customary practices in Vanuatu, women usually have only user rights, with the primary rights being held by their father or husband (Bowman et al. 2009). CEDAW has noted with concern that the “State party’s customary land ownership system does not guarantee women equal rights to land ownership and inheritance” (CEDAW Committee 2016b). This can also undermine their access to bank loans to help support small businesses. While there have been some interesting decisions from the Supreme Court on women’s rights, suggesting that custom must be in accordance with the Constitution’s code of fundamental rights and CEDAW, Vanuatu’s courts are still to adjudicate on women’s equal rights to control and inherit land (Farran 2003). Such decisions are of crucial importance to women coastal fishers, who depend on access to land, including foreshore, for their livelihoods. This can also help ensure more security for bank loans to support their small businesses selling marine resources, etc.

<sup>59</sup> Only indigenous citizens of the Republic of Vanuatu who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of their land (Constitution: Article 75).

<sup>60</sup> This replaced the existing Customary Land Tribunals Act.





Photo: Aymeric Desurmont , 2014, SPC

## Right to a healthy and safe environment

The enjoyment of all human rights, especially the right to an adequate standard of living and health, depends on a healthy, safe and sustainable environment. With regard to coastal fishers, this requires the government to, *inter alia*, prevent overfishing and pollution and protect biodiversity.

Vanuatu's Constitution refers to the environment only in Chapter 2 on fundamental duties, where it states that every person has the duty to "safeguard the national wealth, resources and environment in the interests of the present generation and of future generations" (Constitution: Article 7(d)). Such fundamental duties are non-justiciable but all public authorities must "encourage compliance with them so far as it lies within their respective powers" (Constitution: Article 8). This, coupled with the lack of reference to economic, social and cultural rights, falls short of obligating the government to protect the environment. Moreover, the wording suggests that it is each individual that has the specific duty rather than the state.

The government has enacted numerous pieces of legislation that can help protect coastal areas, including the Environmental Management and Conservation Act of 2002, which provides for the conservation, sustainable development and management of the environment of Vanuatu, and the regulation of related activities. It also allows custom landowners to register any site as a Community Conservation Area, providing it possesses unique genetic, cultural, geological or biological resources and merits protection (SPREP and EDO NSW 2018d). It also governs the environmental impact assessment process, which is dealt with in the separate section below.

The Environmental Management and Conservation Act of 2002 would benefit from more human rights safeguards, including the right to participation and access to information in environmental decision-making. The only mention of participation is in relation to EIAs, which are discussed below. There is also no access to remedy for the state's failure to meet its obligations, since the Constitution does not include the right to a healthy environment nor any economic, social and cultural rights. The right to remedy is also not addressed in the Environmental Management and Conservation Act of 2002. This act provides only for the appeal to the Supreme Court of any decision made by the relevant minister or director. There is also no mention of compensation for anyone affected by pollution, contamination, and/or overfishing.

**Environmental impact assessment:** As part of its human rights obligations, especially the obligation to take all reasonable measures to prevent violations, states should require the prior assessment of the possible environmental impacts of proposed projects and policies. This includes their potential effects on the enjoyment of human rights (Human Rights Council 2018a).

In Vanuatu, under the Environmental Management and Conservation Act of 2002, all projects, proposals or development activities that will affect or are likely to affect the environment of Vanuatu are subject to an environmental impact assessment. The need to carry out EIAs is also included in the Vanuatu National Fisheries Sector Policy 2016–2031, which includes the goal of developing a guideline or standard practice for EIA work. While the Environmental Management and Conservation Act lists a number of scenarios under this provision, it does not include projects potentially affecting human rights. This means the scope of the EIA is quite restricted. It does not, for instance, address gender issues and the effect projects would have on women's traditional livelihood activities, such as reef gleaning. It also ignores the possible effect on tenure rights, or the right to health (SPREP and EDO NSW 2018d). While the Environmental Impact Assessments Regulations of 2011 stipulate that the assessments must consider customary rights to the land, this is narrower than, for instance, taking into account the human rights of communities who depend on that land for livelihoods.

The Environmental Impact Assessments (EIA) Regulations would also benefit from stronger requirements regarding participation and consultation. The regulations state: "The project proponent must conduct public consultations on the project, proposal or development activity" (EIA Regulations: Regulation 10 (1)) and that the EIA must include details of those who have an interest in the project and/or have been consulted, as well as a summary of the public consultations, but there is no requirement for this to be taken into account in the decision making. Moreover, once the EIA has been submitted, it is not mandatory for the director to engage further in public consultations. Regulation 14 (1) only states that "the Director *may* require a project proponent to conduct public consultations on the EIA report at a time and place determined by the Director" (emphasis added). It is also not mandatory for the director to make available information on the EIA unless a public consultation is being conducted. There is also no mention of indigenous peoples' right to FPIC.

## Participation and democratic governance

Despite participation being both a key human rights principle and a right, Vanuatu's Constitution is yet to protect the right to participation, including indigenous peoples' right to FPIC. In some statutory legislation, reference to participation could also be strengthened. For example, the legislation regarding environmental impact assessments has only limited reference to participation



that falls short of international standards. The Fisheries Act of 2014 would also benefit from including a right to participation and FPIC for indigenous populations.

Vanuatu allows for the communities to manage their marine resources in line with their customary marine tenure. They can introduce species-specific prohibitions, seasonal closures, food avoidance and closed areas, and marine closures. Since 2019, community officers have also been able to seize fishing gear or explosives, electrical devices, fishing nets, poison or other noxious substances; and local fishing vessels operating without a local fishing licence.

Due to protected customary practices, women are unlikely to have any input into decision-making, which could have direct implications for their livelihoods, for instance, by not considering their dependence on the reef. The FAO has noted that “[a]lthough reefs and lagoons remain predominantly community property, overall control of and decisions on access to them is usually the responsibility of the village council, comprising village chiefs and elders (no women)” (FAO 1996: Chapter 7). At Dravail near Lamap, the women told the consultant that they “don’t eat fish” because half of their nearshore reef was under *tabu* and tinned fish was too expensive at 180 vt/large tin (FAO 1996: Chapter 7). The inclusion of a right to participation in the Fisheries Act would help provide legal redress for women and other communities side-lined in traditional management processes.

It is also unclear what the chain of accountability is for these community officers, and how people can legally challenge their actions if they jeopardise their human rights. This again especially concerns economic and social rights, since they are not protected by the Constitution. Similarly, the legislation allowing for the creation of conservation areas would benefit from human rights provisions requiring that people’s human rights continue to be respected, protected and fulfilled. It is vital that all conservation efforts respect and protect human rights, including the right to an adequate standard of living, which is part of the right to life and is therefore non-derogable.

Techera has made similar observations regarding the Environmental Management and Conservation Act, noting that it “does not contain a detailed mechanism of how to implement the provisions” (Techera 2005: part IV). While, as Techera notes, this is positive as it “encourage(s) traditional landholders and communities to practice resource conservation using practices that have evolved over generations”, it also means that there is no stipulation on how the decision-making processes take place, which can discriminate against women (Techera 2005: part IV). With regard to the creation of conservation areas, the Environmental Management and Conservation Act specifies that the director of the department must ensure that the “consent and approval are obtained from all persons having rights and interests in any land that is to be included in the proposed Community Conservation Area” (Article 37 (2)(c)). While requiring this consent is positive, it would benefit from greater elaboration on how this is to be implemented to ensure compliance with human rights law. For instance, it could include more explicit reference to the situation of women and communities living near or even adjacent to such areas.

### **Rights to and at work**

For the most part, subsistence and coastal fishers are part of the informal labour market and are therefore unregulated. Under IHRL, governments are obligated to ensure safe working conditions, including for the informal sector, but it is unclear to what extent legislation on safety at sea covers small-scale coastal fishers.

The Vanuatu Maritime Act 1981 establishes standards of documentation, identification, merchant use, and seaworthiness of vessels generally. While not referring to small boats specifically, it does mention “vessels under oars ... [which] shall be interpreted to include canoes and various nondescript local craft” (Maritime Act 1981: Article 87). The Vanuatu Shipping Act of 1968 (revised in 1988) sets standards for certificates of competency, crew requirements, and safety certificates for all motorised boats (vessels not exceeding 500 gross tons, excluding life boats, rafts, work boats, boats that are equipment of a larger vessel and that are used as such, punts, barges, or any other boat solely powered by man or tow, and native-designed canoes not propelled by motor). The act also stipulates penalties operating or attempting to operate or commission use of unworthy vessels.

Moreover, coastal fishers may lack the resources to comply with such legislation, which may undermine their access to livelihoods. In this regard, the government should assist them in making their vessels seaworthy in order to ensure their right to safety at work and preserve their livelihoods. While the Vanuatu National Fisheries Sector Policy 2016–2031 pledges to improve sea safety, it is not clear if it addresses the specific situation of coastal fishers.

As most coastal fishers are self-employed, they are not subject to minimum wage legislation. Many face inadequate livelihoods due to low prices and difficulty in accessing markets. The Vanuatu National Fisheries Sector Policy 2016–2031 has observed that “[i]t is too expensive for fishers in rural areas to export their fish to urban markets because of a lack of infrastructure, such as a fishing boat and gear, preservation and market facilities, and transportation costs to urban markets” (Fisheries Sector Policy: 7). Under

IHRL, governments are obligated to “take appropriate measures to strengthen and support local, national and regional markets and ensure that peasants can equitably access these markets to sell their products at prices that allow them and their families to attain an adequate standard of living” (UNDROP: Article 16 (3)). The Vanuatu National Fisheries Sector Policy 2016–2031 pledges to: (i) ensure markets in rural areas, towns and villages; (ii) establish a marketing system to rural areas to support fish production and fish markets in towns, provinces and villages; and (iii) and protect the interests of small-scale fishermen by controlling fish supply and prices. This is not, however, accompanied by any legal imperatives, especially since the right to an adequate standard of living is not entrenched in any legal or policy document. Moreover, the policy is not broken down into clear objectives with clear lines of accountability and responsibilities.

Vanuatu is still to “[d]evelop and adopt a policy on child labour and a list of hazardous child labour” and “determine the conditions in which light work, such as in agriculture, may be permitted and the number of hours children may be engaged in such employment” (CRC Committee 2019: para 49).

Coastal fishers may also lack access to social security. The right to social security is not enshrined in the Constitution. Moreover, under the Vanuatu National Provident Fund Act of 1986, the government has adopted a social insurance model only for formal employees (SSA 2010), which does not include social assistance (non-contributory) as required by human rights law. Although it is possible to make voluntary contributions from 1,000 vatu to 10,000 vatu a month, this is most likely beyond the income of most coastal fishers (SSA 2010). Commentators have noted that coverage is low, “only cover[ing] people in formal employment, both civil servants and those employed in the private sector” (Prasad and Kausimae 2018: 54). They observe that “[m]ost people are not covered by any social protection policies” (Prasad and Kausimae 2018: 54). Furthermore, until the Constitution recognises the right to social security, coastal fishers cannot challenge their lack of access to social assistance.

#### 5.6.5 Looking forward: conclusions and recommendations

Vanuatu has taken many important steps within the Constitution and in statutory law to protect the human rights of coastal fishers. The Constitution, for instance, recognises the rights to: life; liberty; security of the person; protection of the law; freedom from inhuman treatment and forced labour; freedom of conscience and worship; freedom of expression; freedom of assembly and association; freedom of movement; protection for the privacy of the home and other property and from unjust deprivation of property; and equal treatment under the law or administrative action. While it recognises the right to non-discrimination on the grounds of sex, this is only for Ni-Vanuatu. There is also statutory legislation protecting the environment, and creating mechanisms for participation, such as CBFM but there are still gaps relating to ESCR and the right to participation. This means that it can be difficult to legally challenge actions that undermine people’s livelihoods and health, which is particularly relevant to small-scale fishers when it concerns access to, and the health of, coastal areas and adjacent land.

A further challenge is the plural legal system, where customary practices have constitutional protection and it is unclear whether this or formal law should take precedence. It would therefore be beneficial for the Constitution and statutory legislation to clarify that customary law must comply with the rights contained in the Constitution and IHRL, including ICESCR. Already, courts have suggested that custom must be in accordance with the Constitution’s code of fundamental rights and CEDAW. This would help prevent customary practices that might exclude women from participating in decision-making regarding the management of resources on which they depend for livelihoods.

Based on the above analysis of the current framework, the following **legal and policy recommendations** are made for Vanuatu

#### Short-term policy and programme actions

1. Organise discussions with customary groups about how human rights principles and standards can be integrated into custom as suggested by the courts.
2. Train the judiciary on human rights law, in particular economic and social rights, such as the right to food.
3. Ask academics and legal practitioners to clarify how the right to life under the Constitution can be used to protect economic and social rights, especially the rights to adequate food and a healthy environment.
4. Map coastal fishers’ access to social security and ability to contribute to the Vanuatu National Provident Fund.
5. Develop a hazardous child labour list, and determine the conditions in which light work, such as in agriculture, may be



permitted and the number of hours during which such employment of children may be undertaken so that it does not threaten access to education (CRC Committee 2019).

6. Implement the provisions on coastal vessels and voyages from the Shipping Act and require specific safety equipment adapted for small boats. Licensing, registration, and renewal should be free or at least affordable, and include assistance with purchasing mandatory safety kits or components to effectively encourage compliance.

### Medium-term legislative changes

Develop and amend statutory legislation to better protect the human rights of coastal fishers, as listed below.

7. Amend the Fisheries Act of 2014 to recognise everyone's rights to an adequate standard of living, health and participation. This includes the right to food and access to resources for their livelihoods and promotes co-management and CBFM.
8. Amend the Foreshore Development Act of 1975 to include the right to participation and FPIC for indigenous communities.
9. Amend the Environmental Management and Conservation Act of 2002 to include more human rights safeguards, including the right to participation and access to information in environmental decision-making. Also explicitly recognise the right to a safe and healthy environment and access to remedy for any breach.
10. Amend the Environmental Impact Assessments Regulations of 2011 to require impact assessments of proposed projects to consider the potential human rights impact.
11. Establish effective remedies in both the formal and traditional justice systems to enable women to obtain redress for violations of their rights; provide capacity-building to judges, lawyers and law enforcement officers on women's rights; and undertake research on the impact of the dual justice system on women's access to justice (CEDAW Committee 2016b).



Photo: Aymeric Desurmont, 2014, SPC



12. Ensure that women have equal rights to land ownership and land inheritance and eliminate discriminatory customs and traditional practices that affect the full enjoyment of those rights, including by ensuring that local customary leaders and magistrates in the Lands Court are trained to uphold women's land rights at the community level (CEDAW Committee 2016b).

#### **Long-term constitutional changes**

13. Amend the Constitution to incorporate the principle of equality of women and men and defining and prohibiting all forms of sex- and gender-based discrimination; and stipulate that customary law must comply with all rights in the Constitution and IHRL, including ESCR, and the right to participation, and the right to FPIC of indigenous communities.

# 6. FINAL REMARKS

## 6.1 CONCLUSIONS

Under IHRL, governments are obligated to respect, protect and guarantee human rights through all policy and legislation. It is not a matter of conservation or economic development versus human rights but a question of how to secure human rights when ensuring conservation and economic development. In the Pacific region, many communities rely on coastal fishing for livelihoods, often due to limited employment and poor soil that limits agriculture, as in Kiribati. Governments are, however, facing many challenges in ensuring the rights of such communities. These challenges are, to a large degree, similar throughout the region and include: (i) climate change reducing available land; (ii) changing demographics with increasing migration to the main islands and people living outside of their traditional areas; (iii) overfishing; and (iv) pollution and environmental damage.

In the Pacific region, most governments combine customary and formal legal systems to ensure both protection of indigenous culture and the human rights of every individual as required under human rights law. Positively, most constitutions to some degree recognise and protect human rights, although this is mostly limited to CPR with the exception of Fiji, whose constitution also includes ESCR. However, without a formal requirement that customary law must respect the rights contained in the constitution, the protection of customary practices means these practices can often breach human rights without those affected having access to remedy. For instance, women may be prevented from participating in decision-making about the resources on which they also depend for livelihoods.

Even if the constitution is clear that customary law must respect human rights, since most only include CPR, it is foreseeable that customary practices could still jeopardise ESCR without being legally challenged. One example could be tribal elders banishing members of a tribe from their traditional areas and therefore means of subsistence. The inclusion of ESCR in the constitution would also help ensure better human rights safeguards with regard to land acquisition by the government, development of the foreshore for tourism, and protection against the acts of third parties, such as pollution by large scale fishing, that can have a detrimental effect on health and livelihoods.

Most countries in the region have recognised and formalised indigenous rights to land, but access to and control of the foreshore varies from country to country. While in some cases, customary groups have control and access rights to both land and water in the foreshore (such as in Vanuatu), elsewhere customary rights holders have only access or user rights. To help ensure secure access and the conservation of coastal areas, all countries, albeit to different degrees, have set up a CBFM system through either the Fisheries Act or subsidiary regulations. While this can strengthen control over the resources on which they depend, without the clear recognition and protection of ESCR for all, there are still a number of human rights concerns. A community approach to managing resources clearly helps mitigate the pressure on fish stocks and strengthens conservation efforts but excluded communities may still need access to coastal resources for their livelihoods. This can include nationals who are non-indigenous to that particular place<sup>61</sup> or nearby land-locked communities. In some cases, states have allowed for this by specifying that subsistence fishers from outside the community do not need a permit. With the increasing monetisation of local economies, however, the definition of subsistence fisher may need some attention to prevent some from being excluded. In other countries, small-scale fishers can apply for a permit, but under human rights law, this cannot be a cumbersome process and there must be access to remedy for any breach of the right to an adequate standard of living.

In addition to helping conservation, a CBFM approach also, to some degree, operationalises the right to participation. In practice, however, the decision-making process may follow customary norms, and women could be side-lined, since such processes are mainly managed by men. People from outside the community, who may also depend on these resources for livelihoods, might also be excluded. Inclusion of the right to participation and ESCRs in the Constitution, and stipulating that customary practices must comply with IHRL, can help address these concerns. There can also be more detailed regulations about how these rights are going to be practically recognised and implemented within the CBFM approach.

Pacific countries are clearly making great progress, especially regarding indigenous communities' control over and access to resources. With the challenges they face, it is imperative that their respective constitutions recognise and protect all human rights, especially ESCR and key human rights principles, including the right to participation and access to remedy. Human rights standards can help provide guidance about how legislation and policy can be improved to address the specific situation of coastal fishers, including the access and management rights of both indigenous and non-indigenous communities to marine resources.

<sup>61</sup> This could increase due to climate change, causing people to migrate from their place of origin to higher ground.

## 6.2 RECOMMENDATIONS

1. Enshrine economic and social rights in the constitution to ensure better human rights safeguards regarding land acquisition by the government and development of the foreshore and coastal areas. This would also help ensure that excluded communities can challenge any practices that undermine their access to the resources they depend on for livelihoods.
2. Formally require customary law to respect the rights contained in the constitution. Currently, in many countries, the protection of customary practices means they can often breach human rights without those affected having access to remedy. Some national courts are already pushing for this conversation, recognising that “[u]nderlying custom needs to recognise these principles of rights if in fact there is a risk” (Yuen 2019: 28).<sup>62</sup> Other countries (e.g. Samoa) have recognised that customary law must respect the rights in the constitution, but this does not include economic and social rights.
3. Include an explicit right to FPIC for indigenous communities and a right to participation for all, including non-indigenous communities and women. While a CBFM approach, to some degree, operationalises the right to participation, in practice, the decision-making process may follow customary norms and, in some societies, women may be side-lined. People from outside the community, who also depend on these resources for livelihoods, can also be excluded from these processes.
4. Prohibit all discrimination against women by developing a comprehensive definition of discrimination against women that covers all prohibited grounds and encompasses direct and indirect discrimination in the public and private spheres, in line with Article 1 of CEDAW. Pacific countries must also ensure that women have equal rights to land ownership and land inheritance and eliminate discriminatory customs and traditional practices that affect the full enjoyment of those rights. When drafting fisheries and aquaculture legislation, states should also make sure they use gender-neutral language and ensure non-discrimination (both direct and indirect) in situations such as eligibility criteria for any authorisation or appointment procedure. Carefully consider the suitability of positive discrimination measures in each context.
5. Introduce legislation that requires the environment impact assessment process to cover possible and potential impacts of development projects on the enjoyment of human rights in accordance with the Guidelines on Businesses and Human Rights.
6. Introduce legislation requiring customary management processes to take a human rights approach, and comply with relevant standards and principles, such as gender equality and non-discrimination, and the right of everyone to an adequate standard of living, including those living in landlocked villages.
7. For strong community-based fisheries management, enact a legal basis that enables transparent and inclusive decision-making. Legislation should enable local communities to manage their resources and participate in enforcing their management measures.
8. When regulating access to a fisheries resource for conservation purposes, states must ensure that subsistence fishers are not subject to unnecessary restrictions, thus safeguarding their right to food and sustainable livelihoods. When sanctioning behaviours, ensure that any fines are not unjustifiably high for small-scale fishers, and do not undermine their human rights, including the right to food.
9. Regulate safety at sea for small fishing boats, and help small-scale coastal fishers to comply. Licensing, registration, and renewal should be free or at least affordable for coastal fishers, and states should help them obtain the necessary safety equipment.
10. Ensure access to social security for all small-scale coastal fishers and fish workers that includes non-contributory social assistance.

<sup>62</sup> Solomon Island's High Court case *Ambrose v Keioi* [2016] SBHC172 cited in Yuen 2019.

# APPENDIX 1: INTERNATIONAL DOCUMENTS

All documents can be downloaded from the UN Official Documents System that can be accessed from <https://www.un.org/en/databases/>, unless another link is provided.

## *A: Treaties and conventions*

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted by the United Nations General Assembly on 10 December 1984, and entered into force 26 June 1987.

Convention on the Elimination of Discrimination against Women. Adopted by the United Nations General Assembly on 18 December 1979, and entered into force as an international treaty on 3 September 1981.

Convention on the Elimination of Racial Discrimination. Adopted by the United Nations General Assembly on 21 December 1965 and entered into force on 4 January 1969.

Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Adopted by the United Nations General Assembly on 18 December 1990, and entered into force on 1 July 2003.

Convention on the Rights of the Child. Adopted by the United Nations General Assembly on 20 November 1989, and entered into force on 2 September 1990.

Convention on the Rights of Persons with Disabilities. Adopted by the United Nations General Assembly on 13 December 2006, and entered into force on 3 May 2008.

Convention for the Protection of All Persons from Enforced Disappearance. Adopted by the United Nations General Assembly on 20 December 2006, and entered into force on 23 December 2010.

International Covenant on Economic, Social and Cultural Rights. Adopted by the General Assembly on 16 December 1966 and entered into force on 3 January 1976.

International Covenant on Civil and Political Rights. Adopted by the General Assembly on 16 December 1966 and entered into force on 23 March 1976.

UN Fish Stocks Agreement 1995. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Adopted on 4 August 1995 and entered into force on 11 December 2001.

## *B. Declarations, guidelines and recommendations*

FAO Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication. Endorsed by the FAO Committee on Fisheries (COFI) in 2014 and published in 2015. Retrieved from: <http://www.fao.org/cofi/42011-0d2bdfc444f14130c4c13ecb44218c4d6.pdf>

FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security. Endorsed by the FAO Committee on Food Security in 2012. Retrieved from: <http://www.fao.org/tenure/voluntary-guidelines/en/>

FAO Code of Conduct for Responsible Fisheries. Adopted by the FAO Conference in 1995. Retrieved from: <http://www.fao.org/3/v9878e/v9878e00.htm>

ILO Recommendation 202 on Social Protection Floors. Adopted by the International Labour Conference in 2012. Retrieved from: [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:3065524](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:3065524)

ILO Recommendation 204 on Transition from the Informal to the Formal Economy Recommendation. Adopted by the International Labour Conference in 2015. Retrieved from: [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:R204](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R204)

OHCHR Guiding Principles on Human Rights and Extreme Poverty. Adopted by the Human Rights Council in 2012. Retrieved from: [https://www.ohchr.org/Documents/Publications/OHCHR\\_ExtremePovertyandHumanRights\\_EN.pdf](https://www.ohchr.org/Documents/Publications/OHCHR_ExtremePovertyandHumanRights_EN.pdf)

OHCHR Guidelines for states on the effective implementation of the right to participate in public affairs. Adopted by the Human Rights Council in 2018. Retrieved from: [https://www.ohchr.org/Documents/Issues/PublicAffairs/GuidelinesRightParticipatePublicAffairs\\_web.pdf](https://www.ohchr.org/Documents/Issues/PublicAffairs/GuidelinesRightParticipatePublicAffairs_web.pdf)

UN Declaration on the Rights of Indigenous Peoples. Adopted by the United Nations General Assembly in 2007. UN Doc. A/RES/61/295. Retrieved from: <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>

UN Declaration on the Rights of Peasants and Other People Working in Rural Areas. Adopted by the United Nations General Assembly in 2018. UN Doc. A/RES/73/165. Retrieved from: <https://www.ohchr.org/EN/HRBodies/HRC/RuralAreas/Pages/WGRuralAreasIndex.aspx>

### ***C. Other UN Official Documents***

CEDAW Committee 2014. Concluding Observations on the Solomon Islands. UN Doc. CEDAW/C/SLB/CO/1-3.

CEDAW Committee 2016a. General Recommendation No. 34 on the rights of rural women. UN Doc. CEDAW/C/GC/34.

CEDAW Committee 2016b. Concluding Observations on Vanuatu. UN Doc. CEDAW/C/VUT/CO/4-5.

CEDAW Committee 2018a. Concluding Observations on Fiji. UN Doc. CEDAW/C/FJI/CO/5.

CEDAW Committee 2018b. List of issues and questions on Fiji. UN Doc. CEDAW/C/FJI/Q/5.

CEDAW Committee 2018c. Concluding Observations on Samoa. UN Doc. CEDAW/C/WSM/CO/6.

CEDAW Committee 2020. Concluding observations on Kiribati. UN Doc. CEDAW/C/KIR/CO/1-3.

CESCR 1999. General Comment No. 12: The Right to Adequate Food (Art. 11). UN Doc. E/C.12/1999/5.

CESCR 2002. Concluding Observations on the Solomon Islands. UN Doc. E/C.12/1/Add. 84.

CRC Committee 2014. Concluding Observations on Fiji. UN Doc. CRC/C/FJI/CO/2-4.

CRC Committee 2016. Concluding Observations on Samoa. UN Doc. CRC/C/WSM/CO/2-4.

CRC Committee 2018. Concluding Observations on the Solomon Islands. UN Doc. CRC/C/SLB/CO/2-3.

CRC Committee 2019. Concluding Observations on Vanuatu. UN Doc. CRC/C/VUT/CO/2-4.

Human Rights Committee 2019. General Comment on the Right to Life. UN Doc. CCPR/C/GC/36.

Human Rights Council 2013. Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque, Mission to Kiribati (23-26 July 2012). UN doc. A/HRC/24/44/Add.1.

Human Rights Council 2016a. Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21 – Samoa. UN Doc. A/HRC/WG.6/25/WSM/3.

Human Rights Council 2016b. Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15(c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21. UN doc. A/HRC/WG.6/24/SLB/3.

Human Rights Council 2018a. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of safe, clean, healthy and sustainable environment on the expert seminar on best practices, lessons learned and the way forward with regards to human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. UN Doc. A/HRC/37/59.

Human Rights Council 2018b. Report of the Working Group on the issue of discrimination against women in law and practice on its mission to Samoa. UN Doc. A/HRC/38/46/Add.1.

Human Rights Council 2019. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, visit to Fiji. UN Doc. A/HRC/43/53/Add.1.

UNGA 2012. Report of the Special Rapporteur on the right to adequate food. UN Doc. A/67/268.

UNGA 2018. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. UN Doc. A/73/188.

# APPENDIX 2: NATIONAL DOCUMENTS

## *A. National legislation*

Most of this legislation especially concerning fisheries can be found on SPC's legal database REEFLEX, available at: <https://www.spc.int/CoastalFisheries/Legislation/>. The list below reports the year of adoption of each piece of legislation and refers to the most recently amended version known to be in force in each country at the time of writing.

### **Fiji**

Constitution 2013

Agricultural Landlord and Tenants Act 1978  
Environment Management Act 2005  
Environment Management (EIA Process) Regulations 2007  
Fiji Marine Act 1986  
Fisheries Act 1942  
Local Government Act 1972  
Maritime (Pleasure Craft) Regulations 2014  
The Maritime (Fiji Small Craft Code) Regulations 2014  
Maritime Transport Decree 2013  
Mining Act of 1978  
Native Land Trust Act 1940 (revised in 1985 and renamed i-Taukei Lands Act)  
Seaport Management Act 2005  
State Lands Act 1978

### **Kiribati**

Constitution 1979

Environment Act 1999  
Fisheries Act 2010  
Fisheries (Conservation and Management of Coastal Marine Resources) Regulations 2019  
Fisheries Conservation and Protection (Rock Lobster - *Panulirus* species) Regulations 1979  
Fisheries Ordinance 1977  
Fisheries (Processing and Export) Regulations 1981  
Fisheries (Vessel Licences) Regulations 1981  
Foreshore and Land Reclamation Ordinance 1969  
Incorporated Societies Act 2002  
Land Planning Ordinance 1972  
Laws of Kiribati Act 1989  
Magistrates' Courts Act 1980  
Marine Zones (Declaration) Act 1983  
Native Lands Ordinance 1956  
Prohibited Fishing Areas (Designation) Regulations 1978

## **Samoa**

Constitution 1960 with amendments through 2016

Alienation of Customary Land Act 1965

Education Act 2009

Fisheries Amendment Act 1999

Fisheries Management Act 2016

Labour and Employment Relations Act 2013

Land and Titles Act 1981

Land for Foreign Purposes Act 1993

Land Surveys and Environment Act 1989

Marine Pollution Prevention Act 2008

National Parks and Reserves Act 1974

Shipping Act 1998

Shipping (Small Vessels) Regulations 1999

Tourism Development Act 2012

Village Fono Act 1990

Village Fono Amendment Act 2017

## **Solomon Islands**

Constitution 1978

Choiseul Province Fisheries and Marine Environment Ordinance 2011

Environment Management Act 1998

Environment Regulations 2008

Guadalcanal Fisheries Ordinance 2009

Isabel Province Resource Management and Environmental Protection Ordinance 2005

Fisheries Management Act 2015

Fisheries Management Regulations 2017

Fisheries Management (Prohibited Activities) Regulations 2018

Forestry Act 1999

Land and Titles Act 1968

Maritime Authority Act 2018

Maritime Safety Administration Act 2009

National Provident Fund Act 1973

Provincial Government Act 1997

Protected Areas Act 2010

Shipping Act 1998

Shipping (STCW Convention) Regulations 2010

Western Province Fisheries Ordinance 2011



## **Tonga**

Constitution 1875 with amendments through 2010

Aquaculture Management Act 2003

Aquaculture Management Regulations 2008

Environment Management Act 2010

Environmental Impact Assessment Act 2003

Environmental Impact Assessment Regulations 2010

Government Act 1903

Fisheries (Limu Tanga'u) Regulations 2010

Fisheries (Local Fishing) Regulations 1995

Fisheries Management Act 2002

Fisheries Management (Coastal Communities) Regulations 2009

Fisheries Management (Conservation) Regulations 2008

Fisheries (Vessel Monitoring System) Regulations 2010

## **Vanuatu**

Constitution 1979 as amended in 1983

Customary Land Management Act 2013

Decentralization Act and Local Governments Regions 1994

Environmental Management and Conservation Act 2002

Environmental Impact Assessments Regulations 2011

Fisheries Act 2014

Foreshore Development Act 1975

Island Courts Act 1983

Land Reform Act 1980 (revised 2014)

Maritime Act 1981

Municipalities Act 1980

National Provident Fund Act 1986

Shipping Act 1968 (revised 1988)

## ***B. Jurisprudence***

### **Fiji**

NK and ZMR [2009] FJHC 95; Case No. 0089.2009 (2 April 2009)

FJN and MRK [2009] FJHC 94; HBM004.2009L (1 April 2009)

TZS v FSB [2009] FJHC 97; File No 0163.2009 (3 April 2009)

### **India**

People's Union for Civil Liberties v. Union of India & Ors [2001] 1 SCC 39 (Supreme Court of India) Writ petition (Civil) No.196

## Solomon Islands

Ambrose v Keioi [2016] SBHC 172 (High Court); HCSI-CC 213 of 2014 (5 October 2016)

## Vanuatu

Lapenmal v Awop [2016] VUSC 90 (Supreme Court)

Noel v Toto [1995] VUSC 3; Civil Case 018 of 1994 (19 April 1995)

### *C. National policies and other official documents*

## Fiji

Aquaculture Bill No. 9 of 2016. A Bill for an Act to regulate fresh water, brackish water and marine aquaculture and for related matters. Suva, Fiji: Parliament of Fiji. Retrieved from: <http://www.parliament.gov.fj/wp-content/uploads/2017/03/Bill-No-9-Aquaculture.pdf>

Ministry of Economy 2017. 5-Year and 20-Year National Development Plan. Suva, Fiji: Government of Fiji. Retrieved from: <https://www.reinfofiji.com.fj/wp-content/uploads/2017/11/5-year-and-20-year-development-Fiji-NDP.pdf>

Ministry of iTaukei Affairs 2017. iTaukei Lands & Fisheries Commission. Retrieved from: <http://www.itaukeiaffairs.gov.fj/> (accessed 25 November 2020).

## Kiribati

Ministry of Fisheries and Marine Resources Development 2013. Kiribati National Fisheries Policy 2013-2025. Tarawa, Kiribati: Government of Kiribati; AusAid. Retrieved from: [http://www.spc.int/CoastalFisheries/CFM/Document/Get/2b64b339-d21a-4a22-b809-8a4ee2f9900f/KI\\_National%20Fisheries%20Policy%202013%20-%202025.pdf](http://www.spc.int/CoastalFisheries/CFM/Document/Get/2b64b339-d21a-4a22-b809-8a4ee2f9900f/KI_National%20Fisheries%20Policy%202013%20-%202025.pdf)

## Solomon Islands

Ministry for Women, Youth, Children and Family Affairs. National Gender Equality and Women's Development Policy 2016–2020. Honiara, Solomon Islands:

Solomon Islands Government. Retrieved from: [https://www.pacificclimatechange.net/sites/default/files/documents/\\_national\\_gender\\_equality\\_and\\_womens\\_development\\_policy\\_2016-....pdf](https://www.pacificclimatechange.net/sites/default/files/documents/_national_gender_equality_and_womens_development_policy_2016-....pdf)

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